

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HPP 137** of **2022**

BETWEEN : **SHANAAZ NISHA** of 1/87 Sladen Street, Cranbourne,
Victoria 3977, Australia, NDIS Support Coordinator.

APPLICANT

AND : **SHANEEZ SUSHMITA KUMAR** of 1/87 Sladen Street,
Cranbourne, Victoria, Australia, Student.

1st RESPONDENT

AND : **FIJI PUBLIC TRUSTEE CORPORATION LIMITED** a
Public Enterprise Corporation company having its registered
office at 83-85 Amy Street, Toorak, Suva.

2nd RESPONDENT

BEFORE : Banuve, J

COUNSEL : Gavin O'Driscoll for the Applicant
Esiteri Radrole and Lavenia Silatolu for the Second
Respondent

Date of Hearing : **6th February, 2024**

Date of Ruling : **28th February, 2024**

RULING

A. Introduction

1. A Summons was filed by the Plaintiff on 22nd November 2022 pursuant to sections 30 and 35 of the *Succession, Probate and Administration Act* [Cap 60] and the Inherent Jurisdiction of the Court.
2. The Summons initially was set to be heard before Liyanage J on 8th September 2023 , but this did not eventuate due to the departure of His Lordship from the Bench. The matter was re-assigned to me and the matter was heard on 6th February 2024.
3. The following orders were sought in the Summons;
 - (i) **That the 2nd Respondent be renounced as the Executor of the estate of Mohammed Muneer, late of Lot 10 Holmes Street, Flagstaff, Suva, deceased, Testate as per Will dated 15th August 2017.**
 - (ii) **That Letters of Administration with Will annexed be granted to Shanaaz Nisha as the Administratrix of the Estate of Mohammed Munner.**
 - (iii) **That sureties be dispensed with; and**
 - (iv) **That there be no costs of this application.**
4. The following affidavits were filed.
 - (a) **Affidavit in Support of Shanaaz Nisha filed on 22nd November 2022.**
 - (b) **Supplementary Affidavit of Shaneez Sushmita Kumar filed on 22nd November 2022.**
 - (c) **Affidavit in Opposition of Salaseini Drekeni filed on 21st February 2022.**

B. Background

Applicant's Position.

5. The Applicant's father, Mohammed Muneer, (Testator) late of 10 Holmes Street, Flagstaff, Suva, deceased, Testate is the registered proprietor of the property, comprised and described in Agreement for Lease Nairairaikikalabu Sub-Division Lots 10 and 12.
6. The Testator died on 28th October 2022 at CWM Hospital, leaving a Will dated 15th August 2017 and filed on 24th August 2017.
7. The Applicant and her daughter the First Respondent are the beneficiaries of the said Will.
8. The Second Respondent, the Fiji Public Trustee Corporation Ltd was named as the Executor and the Will was drafted and filed by it.
9. The Applicant deposes that she has been informed by her solicitors that the Second Respondent, as Executor charges 3% of the total value of the property under an estate as their administration fees to obtain a Probate Grant and to transfer title on property which is vastly more than the charges her solicitors would charge for the same process of which she would be responsible for signing transmission and transfer documents. This was the basis that she alleges the Second Respondent ought to be removed as the Executor of her late father's Will and that she be appointed in its place as Administratrix with the Will annexed.
10. The First Respondent supports the Applicant's (her mother) request to be appointed Administratrix to replace the Second Respondent as the Executor of Mohammed Muneer's Estate.

The Second Respondent's Position

11. It does not dispute that the Applicant and the First Respondent were the beneficiaries under the Will of the Testator.
12. It disputes the Applicant's contention that it be removed as the Executor of the Testator's Estate given;
 - (i) Its fees are legislated pursuant to section 29 of the *Fiji Public Trustee Corporation Act 2006* and its Fee Schedule 2008.
 - (ii) The testator's final wish as indicated in his Will, that the Second Respondent, administer his Estate has to be respected.
 - (iii) It is ready to administer the Estate however it is awaiting instructions from the beneficiaries.

C. The Jurisdiction of the Court

Statutory Jurisdiction

13. The statutory basis of the Court in probate matters is set out in section 3(1) of the Act which clarifies that the jurisdiction that the Court shall have in contentious and non-contentious probate matters are vested on it under the Act and any rules made thereunder.
14. Sections 30 and 35 of the Act are cited by the Applicant to be the basis for the Summons filed;

Administration with the will annexed

30 Where a person dies leaving a will but without having appointed an executor, or leaving a will an executor who is not willing and competent to take probate, the court may appoint an administrator of the estate of the deceased, or of any

part thereof, upon his or her giving security as aforesaid, and such administration may be limited as the court thinks fit.

Court may remove executor

35 The Court may for any reason which appears to it to be sufficient , either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after the grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as such executor and revoking any grant of probate already made to him or her;*
- (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate;*
- (c) make such orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and*
- (d) make further or consequential orders as it may consider necessary in the circumstances.*

Inherent Jurisdiction

- 15. The discussion undertaken by the Court in *Nizam v. Jamal Shah – Civil Action No HBC of 2009 (per Tuilevuka J)* is useful in tracing both the statutory and the inherent basis of the Court’s jurisdiction to remove an executor pursuant to section 35 of the *Succession, Probate and Administration Act* [Cap 60].
- 16. As summarized by the Court in the *Jamal Shah* case (citing *Georgina Kain & Ors v. Hutton & Ors-CA 246/01-New Zealand*);

“The jurisdiction to appoint and remove trustees is both inherent and statutory, the legislative authority being s 51(1) of the Trustee Act 1956 which provides as follows;
.....

The inherent jurisdiction is derived from the court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries. The relevance of that objective is recognized in well known cases such as Letterstedt v Broers (1884) 9 App Cas 371 and Hunter v Hunter [1938] NZLR 520"

17. The principle laid down by Blackburn LJ in *Letterstedt* cited in *Jamal Shah* remains the seminal guide on the nature of the powers vested on the Court to remove trustees as derived from Equity and described as *ancillary to its proper duty to see that the trusts are properly executed*, with the qualification;

*" In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above, enunciated, that **their main guide must be the welfare of the beneficiaries**. Probably, it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case"*

D. Originating Summons

Preliminary Issue

18. Given the "*delicate jurisdiction*"¹ exercised by the Court in removing a trustee the basis for the application has to be carefully appraised by the Court to elicit the rationale for the application for removal, '*specifically whether the trustee has not carried out its duties in the interest or welfare of the beneficiaries*'.
19. The primary order sought in the Summons filed by the Applicant on 22nd November 2022, states;
- (i) *That the 2nd Respondent be **renounced** as the Executor of the Estate of Mohammed Muneer, late of Lot 10, Holmes Street, Flagstaff, Suva, deceased, Testate as per Will dated 15th August 2015.*

¹ *Letterstedt* per Blackburn J

20. This order seats awkwardly with sections 30 and 35 of the *Succession, Probate and Administration Act*, pursuant to which it is filed. Neither provision support a power to *renounce* such as conferred under section 9 (1) of the *Trustee Act* [Cap 65]², for example.
21. The Court will overlook the discrepancy and treat the Summons as one in which it is being asked to exercise its statutory jurisdiction over. An inexact citation does not assist the Court in its task of determining whether the Applicant's complaint that the Second Respondent is not discharging its duties properly, in their interest, as beneficiaries, has merit.

E. Discharge of Duty as Executor

22. The primary complaint of the Applicant is contained in paragraph 9 of the Affidavit filed on 22nd November 2022;

9. I am informed by my solicitors and believe that the 2nd Respondent charges 3% of the total value of the property under an estate as their administration fees to proceed with obtaining a Probate grant and transfer of title on the property. This is vastly more than the charges my solicitors is giving to do the same processing with myself to do processing and transfer documentation prepared by them. On that basis I apprehend that the 2nd Respondent can be removed as executor and myself appointed as Administratrix with the Will attached.

23. The Supplementary Affidavit filed by the First Respondent simply supports the ground asserted by the Applicant, (her mother), for the removal of the Second Respondent, as executor of the Estate.
24. The Second Respondent's response is that there is no basis for its removal on the basis of the charges it levies , as that is mandated by statute and further it is the wish of the testator, the late Mohammed Muneer, that the Second Respondent be the Executor of his Estate.

² 9-(1) Where a person appointed by will to be both executor and trustee thereof, renounces probate....etc

Preliminary Findings

25. The Court notes the following from the pleadings filed by the parties;
- (i) The Last Will and Testament of Mohammed Muneer was executed on 15th August 2017. It was prepared by the Fiji Public Trustee Corporation Ltd.
 - (ii) Pursuant to paragraph 4 of the Will, the testator appointed the Fiji Public Trustee Corporation Ltd (Second Respondent), as Executor.
 - (iii) The Testator passed away on 28th October 2021.
 - (iv) The Summons initiating this proceeding, HPP No 137 of 2022 for the removal of the Second Respondent as Executor of the late Mohammed Muneer's will, was filed by the Applicant on 22nd November 2022.
 - (v) The pleadings do not indicate that there were any meetings or correspondence between the Applicant and the Second Respondent regarding the grant of probate and the administration of the Estate of Mohammed Muneer.
 - (vi) The Applicant and the First Respondent both reside in Cranbourne, Victoria, Australia.
 - (vii) The Second Respondent, in its affidavit, states that it is ready to administer the Estate of Mohammed Muneer, however it awaits instructions from the beneficiaries of the Estate.
26. The findings affirm there are no allegations of misconduct raised by the Applicant against the Second Respondent. This does not necessarily mean that a trustee and executor cannot be removed pursuant to section 35 of the Act, if considering the whole circumstance of the case, the Court is of the view that the executor and trustee be removed, for the welfare of the beneficiaries.³

³ Letterstedt , per Blackburn LJ

Whether the factual findings provide a sufficient basis for the removal of the Second Respondent as the Executor of the Will of Mohammed Muneer?

27. There is no general rule to follow on the removal of trustees beyond the broad principle that the Court must bear in mind the welfare of the beneficiaries, even if the trustees have not been guilty of misconduct.
28. The facts of *Letterstedt* lend some assistance. It involved the levying of charges by the executors of a large, complicated Estate, who the Plaintiff (as beneficiary) alleged had been guilty of misconduct including the improper, illegal, and unlawful charge of a commission of 10 per cent, upon its transactions whereas it was only entitled to a commission of not more than 5 per cent, the amount in excess having to be refunded.
29. In his ruling, Lord Blackburn noted that whilst the burden of carrying out the trust were imposed upon the Executors/Trustees, which they had long discharged and could neither be challenged, on the basis of misconduct or the friction and hostility between the parties *but when looking at the whole circumstance, the change of position and the unfortunate hostility that has arisen, and the difficult and delicate duties which may yet to be performed*, their Lordships can come to no other conclusion that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.⁴
30. In contrast, the distinctive features of this case are summarized;
 - (i) The beneficiaries, who reside in Victoria, Australia have had no direct contact with the Second Respondent, other than through this proceeding, initiated a year after the death of the testator.
 - (ii) An application for removal of the executor of the Will may be made either before or after a grant of probate has been made. In this instance, the Applicant makes the application before the grant of probate to the Second Defendant.

⁴ *Letterstedt*, per Blackburn LJ

- (iii) There are no allegations of misconduct raised against the Second Respondent, a statutory trustee, rather what is raised as a concern is the 'purported' exorbitant fees the Second Respondent will levy under the *Fiji Public Trust Corporation Limited Act 2006*.
- (iv) The Second Respondent is established pursuant to the Act and is deemed a trustee corporation under the *Trustee Corporations Act* [Cap 66].⁵ In relation to its services as a trustee and the management of trusts, it may do anything in accordance also with the Act, the *Trustee Act* [Cap 65] and the *Trustee Corporations Act* [Cap 66].⁶
- (v) The Corporation, under the Act, shall act as *executor and administrator* of the estate of any deceased person⁷, if the Corporation is named as executor in any will and the Corporation has obtained a grant of probate or is otherwise lawfully entitled to act in that capacity.
- (vi) The Corporation may, pursuant to section 29 of the Act, charge fees for its services and this may be recovered from the monies held by the Corporation under the Act. Trustee Corporations are entitled to charge fees⁸ as set by the Public Trustee and now prescribed under the *Fiji Public Trustee Corporations Act* [2006]. The fees set under this Act are not only applicable to the Second Respondent, but to registered trustee corporations in Fiji.

E. Finding

- 31.** A testator has a number of options in Fiji in preparing a will and appointing a person as Executor, he may do this personally, engage the service of a legal practitioner or appoint a trustee corporation to carry out these duties. In the latter instance, the testator and/or his Estate will be charged a fee for the service

⁵ s 6(1) –FPCL Act

⁶ The Applicant's counsel cast doubt on the rationale for establishing FPTCL as a corporate entity with profit its primary objective.

⁷ section 18-FPCL Act

⁸ s 17 *Trustee Corporations Act* [Cap 66]

provided. This is established practice. The Second Respondent is a trustee corporation, but is not the only corporation that offers executor and trust services in Fiji.

32. Pursuant to section 4(d) of the *Fiji Public Corporation Act 2006*, the Second Respondent as a trustee corporation, must ensure that the services it provides are undertaken with the highest degree of professional competence and integrity with a commitment to the rights of the Corporation's clients.
33. The testator chose to engage the services of the Second Respondent in 2017 to draw up his will and appoint it as his Executor. The wish of the testator, evidenced by the particular appointment of the Second Respondent, as opposed to other options available, are to be given considerable weight.⁹At the end of the day the interest of the beneficiaries are paramount.

F. Conclusion

34. I note that the both beneficiaries of the Estate of Mohammed Muneer live in Australia. Any delay in obtaining probate and administering the Estate must be viewed in light of this. It is noted that this proceeding was initiated on 20th November 2022, a little over a year after the testator passed away. Any further delay in the administration of this Estate is attributable to the filing of this proceeding by the Applicant. An option, that ought to have been followed, and encouraged, even at this stage, is that the Applicant and her counsel approach the Second Respondent to clarify the process that needs to be followed to obtain probate and to assist in the administration of the Estate, without delay. The testator chose the Second Respondent, a trustee corporation, as his Executor, over other options available. The appointment of the Second Respondent, a trustee corporation, to render service as an executor/trustee is not novel in Fiji. The peculiar mode of levying fees vested on the Second Respondent, under the Act, is designed to encourage members of the public who otherwise would have difficulty accessing or affording executor/trustee and probate services, from obtaining it.

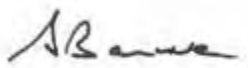
⁹ *Harsant v Menzies*[2012] NZHC 3390

The Court is not oblivious to the potential difficulty that may occur in a relationship between the executor and beneficiaries that has involved litigation, early, however the Court, is not prepared at this stage, without any clear evidence of a threat to or compromise of the interest of the beneficiaries to rule that the Second Respondent be removed pursuant to section 35 of the *Succession, Probate and Administration Act*.

ORDERS

1. **The Applicant's Originating Summons filed on 22nd November 2022 seeking the removal of the Second Respondent as Executor of the Estate of Mohammed Muneer is dismissed.**
2. **Parties to bear their own costs.**




Savenaca Banuve
Judge

At Suva
February 28, 2024