

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Probate Action No. HPP 04 of 2023**

**IN THE ESTATE OF MUTHUSAMY**  
**PADIYACHI aka MUTHU SWAMMY**  
late of Nadi Back Road, Nadi in the  
Republic of Fiji Retired, Deceased,  
Testate.

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**BETWEEN:**                   **PUSPHA RENU aka PUSPHA RENU SINGH** of Auckland, New  
Zealand, Retired as Administratrix of the **ESTATE OF**  
**MUTHUSAMY PADIYACHI aka MUTHU SWAMMY**  
**PLAINTIFF**

**AND:**                           **LALIT ROSS NAICKER** of Korociri, Nadi Back Road, Nadi,  
Fiji and as a beneficiary in the **ESTATE OF MUTHUSAMY**  
**PADIYACHI aka MUTHU SWAMMY**  
**DEFENDANT**

**Appearances:**           **Messrs Siddiq Koya Lawyers for the Plaintiff**  
**Messrs Falcon Chambers for the Defendant**

**RULING**

**Introduction**

1. The Plaintiff in this matter filed an Originating Summons on 20 January 2023 seeking against the Defendant Lalit Naicker the following declaration and orders:
  - 1) A declaration that the Defendant is entitled to one quarter (1/4) share in the Estate of Muthusamy Padiyachi aka Muthu Swammy.
  - 2) A declaration that the Deed of Renunciation signed by Kasi Jan Mala is unenforceable on the following grounds:-
    - a) The Deed is not sign, sealed and delivered in accordance to the requirements of the Probate Jurisdiction.

- b) The Deed is not witnessed by a Commissioner for Oaths or Notary Public in accordance to the requirements of the Probate Jurisdiction.
- 3) A declaration that the document titled "To Whom It May Concern" dated the 3<sup>rd</sup> of January 2003 by Nerula Rita is invalid and does not constitute a renunciation by Nerula Rita in accordance to the requirements of the Probate Jurisdiction.
- 4) An Order that the Administratrix of the Estate of Muthusamy Padiyachi aka Muthu Swammy, the Plaintiff herein, distribute the Estate in equal shares to its lawful beneficiaries as follows: -
- a) The Estate of Kashi Padayachi aka Kashi Naidu to its beneficiaries namely Sanjeev Parakash Naidu and Raajiv Prakash Naidu.
  - b) The Estate of Nerula Rita Chandra aka Nerula Rita to its beneficiaries namely Prem Chandra.
  - c) The Estate of Vijayanti Mala Saroj to its beneficiary Lalit Kumar
  - d) Pushpa Renu aka Pushpa Renu Singh
- 5) An Order that the Administratrix be allowed to carry out a valuation of the property situated on No. 256614 Crown Lease No. 21237, land known as Nacaqara/Navo (part of) formerly Lot 13 ND 5184.
- 6) An Order that the beneficiary(ries) have the first opportunity to purchase Crown Lease No 21237 the current market value and the proceeds be distributed among the remaining beneficiaries.
- 7) An Order that the property be sold at the current market value and the proceeds of sale after deduction of all expenses incurred for the sale be equally distributed among the beneficiaries of the Estate of Muthusamy Padiyachi aka Muthu Swammy.

### **Affidavit of Plaintiff**

2. The affidavit of the Plaintiff sworn on 16 November 2022 was filed in support of the application. What she deposed is briefly summarized below and as follows:

- She was appointed by the High Court as administratrix of the Estate of Muthusamy Padiyachi aka Muthu Swammy on 30<sup>th</sup> March 2017.
- That the deceased estate has property known as Crown Lease No. 256614, known as Lot 3 on DP 5827 (Subdivision of Part of CT 3403), in the Island of Viti Levu and in the District of Nadi, having an area of 2241m<sup>2</sup>.
- On 9<sup>th</sup> October 2017, by transmission by death she registered her name on the title Crown Lease No. 256614 and this is endorsed as No. 852920.
- The beneficiaries of the deceased estate according to the last will & testament of deceased dated 7<sup>th</sup> November 2001 were daughters namely Puspha Renu, Vijanyanti Mala Saroj, Nerula Rita and Kasi Jan Mala. The beneficiaries were given equal shares being one quarter ( ¼ ) share each.
- Vijanyanti Mala Saroj, Nerula Rita and Kasi Jan Mala have all passed and Puspha Renu is the only surviving beneficiary from the deceased will.
- After Vijanyanti's death, her husband Sada Siwan became entitled to an equal share in deceased's estate, and after his passing, their children Dinesh Naicker and Lalit Ross Naicker became entitled to one quarter (¼ ) share.
- Nerula Rita died on 13<sup>th</sup> March 2003 and the beneficiaries of her estate were her husband Prem Chandra and son Agnelo Ashish Chandra. They are entitled to one quarter (¼ ) share.
- Kasi Jan Mala died on 13<sup>th</sup> July 2009 and the beneficiaries of her estate were sons Sanjeev Prakash Naidu and Raajiv Prakash Naidu, who are entitled to one quarter (¼ ) share.
- The deed of renunciation signed by Kasi Jan Mala in favour of her late sister Vijayanti Mala was not witnessed by a Solicitor or Notary Public as she was resident abroad. The said deed was undated, unwitnessed and unregistered therefore it cannot have effect.
- The letter "To Whom It May Concern" dated 3<sup>rd</sup> January 2003 signed by Nerula Rita where she is giving her share in deceased estate to Dhinish Varan Naicker and Lalit Ross Naicker doesn't constitute a deed of renunciation as its not in a true and proper form.
- As administratrix she's been trying to distribute the shares in the estate of Muthusamy Padiyachi to the beneficiaries and had received correspondence from beneficiaries of the estates of Nerula and Kashi for their entitlements in deceased's estate.
- The property is currently occupied by the Defendant (Lalit Ross Naicker) who is claiming 66.6% share in deceased's estate. Defendant's view is that he's entitled to the shares based on the deed of renunciation signed by Kasi and "To Whom It May Concern" document from Nerula.

- The Defendant is claiming three quarter ( $\frac{3}{4}$ ) shares in deceased's estate which meant that the lawful beneficiaries of Kasi and Nerula's estate would not get any shares in deceased's estate.
- She believes that Defendant is only entitled to the late Vijayanti's share in deceased's estate. If the Defendant is still willing to purchase the property then he has to pay the remaining beneficiaries their shares and for that a valuation is required.
- If Defendant doesn't wish to purchase the property, then it should be sold at current market value and proceeds of sale be distributed to the beneficiaries equally.

### **Affidavit of Defendant**

3. The Defendant on the other hand deposed an affidavit in opposition on 8<sup>th</sup> August 2023. The contents of he's affidavit is also summarized as follows:
  - He denied that upon the passing of her aunts Vijayanti, Kasi and Nerula, their shares in deceased's estate were to be passed to the beneficiaries of their respective estates.
  - Her late aunt Kasi Jan Mala renounced her shares in the estate of deceased to his mother Vijayanti Mala and for her late aunt Nerula Rita, she renounced rights in her shares in deceased's estate in favour of his late brother Dhinish Varan Naicker and him.
  - He denied the contents of Plaintiff's affidavit at paragraph 11 and says that he is a beneficiary of deceased's estate by virtue of his mother's (Vijayanti) interests as well as of his two late aunts (Kasi & Nerula).
  - He denied that Prem Chandra and Agnelo Ashish Chandra are entitled to late Nerula's one quarter ( $\frac{1}{4}$ ) share in deceased's estate because their claims to her shares were renounced before her death.
  - He also denied that Sanjeev Prakash Naidu and Raajiv Prakash Naidu are entitled to late Kasi's one quarter ( $\frac{1}{4}$ ) share in deceased's estate as their claims to her shares were renounced before her death.
  - He denied that the deed of renunciations signed by his aunts Kasi and Nerula cannot have effect.
  - He believes that the legal issues sought in this matter had already been death with by Justice Tuilevuka in Lautoka Civil Action 108 of 2009 – Puspaha Renu v Sada Siwan. The same declaratory orders sought in this matter were already dealt with and denied. This application is an abuse of process.

- The Plaintiff has taken more than 20 years to dissolve his grandfather's estate.
- The correspondence by beneficiaries of her aunts Kasi and Nerula's estate with regard to their claims to deceased's estate are not genuine and the same was fabricated or motivated by Plaintiff to support her claim in this matter.
- He denied benefitting alone from the property as he had pursuing the distribution of his grandfather's estate.
- His family had moved into the property to look after his late grandfather as all three sisters of his late mother had moved overseas including the Plaintiff. His grandfather's health had deteriorated towards the end of his life and they were looking after him. His two late aunts made the gifts to them as a token of appreciation.
- His entitled to 66.6% of the shares and not only to Vijayanti's share in deceased's estate. His always ready and willing to proceed to purchase the share of the Plaintiff and the other beneficiary.

### **Discussion**

4. I must emphasise from the outset that the Plaintiff's requested orders in paragraphs 5, 6 and 7 of its Originating Summons are difficult to understand. Establishing a correlation between the aforementioned property (Crown Lease No. 21237, formerly Lot 13 ND 5184; land designated as Nacaqara/Navo (part of)) and the estate property of the deceased (Crown Lease No. 256614) is challenging. This is in reference to the orders requested in paragraphs 5, 6 and 7. Regarding the subject of this dispute, Plaintiff's affidavit designates Crown Lease No. 256614 as the property belonging to the estate of the deceased. In this regard, neither the Plaintiff nor the Defendant's counsel could assist the court. The sole consensus reached by counsels regarding the orders requested in paragraphs 5, 6 and 7 was that they would not contest the court's granting of those orders.
5. The information submitted to the court in support of this application pertains to the subject property Crown Lease No. 256614, which is the property of the estate of the deceased. There is no information pertaining to Crown Lease No. 21237, and its registered owner cannot be substantiated. It is beyond my comprehension to determine whether or not this was an error. Counsels ought to have identified this and, if applicable at the time, requested the required amendments.

Nevertheless, despite the implementation of no corrective measures, the court remains uncertain and hesitant to issue the orders.

6. Despite the fact that both counsels had consented to the issuance of the orders requested in paragraphs 5, 6 and 7, I am unable to grant them for the aforementioned reasons.
7. Additionally, Defence counsel brought forth a preliminary matter that I shall now examine. Counsel for the Defendant contended that the declaratory orders requested in this case were identical to those requested in Puspha Renu v Sada Siwan, Civil Action No. 108 of 2009 before Justice Tuilevuka, in which His Lordship declined to issue the requested orders and dismissed the application. The matter is res judicata according to the Defence counsel and that Plaintiff's application is merely an abuse of process.
8. In contrast, the counsel for the Plaintiff argued that since Justice Tuilevuka did not reach a finding of fact, it was within the purview of this court to determine the orders requested in this application.
9. I concur that his Lordship did not reach a substantial, conclusive finding of fact regarding the application in that matter in Puspha Renu v Sada Siwan (supra). This is specified in detail in paragraph 12 of the impugned decision. Nevertheless, the court didn't make a definitive verdict, as the matters presented were subject to trial and necessitated resolution thereon.
10. The Defendant, to whom his affidavit made only a passing reference, denied nearly everything and rejected the Plaintiffs' contention that the deed of renunciation is legally ineffective. As I see it, the issue on the validity or otherwise of the deed of renunciation raised by the Plaintiff on the account of fact as asserted to be, is a triable issue.
11. At paragraph 10 of Puspha Renu v Sada Siwan (supra), Justice Tuilevuka appears to have held that the matter remained triable despite the absence of any mention of a last will and testament in the deed of renunciation.
12. I hold a differing opinion with the Defence counsel regarding the assertion that His Lordship determined the validity or invalidity of the deed of

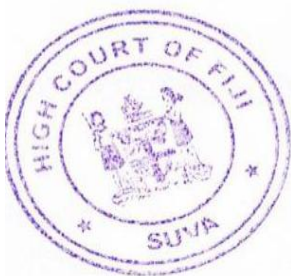
renunciation, rendering it res judicata. In paragraph 12 of the ruling, the court merely expressed the view that the Plaintiff might encounter a challenge in establishing that the deed of renunciation lacks legal force in the absence of a substantive claim based on an allegation of duress, undue influence, error, fraud, or the like. As far as I am informed, that issue is still unresolved before His Lordship and will be resolved at trial; thus, the postponement was for the purpose of mentioning it.

13. The matter presented in this current application is comparable to the one presented in Puspha Renu v Sada Siwan (supra) and subject to determination at trial.
14. The declaration and orders requested in the Plaintiff's application are declined for the aforementioned reasons.

### **Orders**

15. The Court orders as follows:

1. The application by the Plaintiff is dismissed.
2. The Plaintiff to pay summarily assessed costs of \$1000.00 to the Defendant within 21 days from date of this ruling.



  
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**Samuela D Qica**  
**Acting Judge**

**High Court – Suva**

**Tuesday, 23<sup>rd</sup> January, 2024**