

IN THE HIGH COURT OF FIJI
PROBATE JURISDICTION
AT SUVA

HPP Action No: 12 of 2024

**IN THE MATTER of the ESTATE OF
HABIBULLAH late of Meigunyah, Nadi
Farmer, Deceased, Testate.**

**BETWEEN: MOHAMMED NASIR of Meigunyah, Nadi, Taxi Driver as the
TRUSTEE of the ESTATE OF MOHAMMED SULEMAN aka
AZIZ late of Meigunyah, Nadi, Farmer, Deceased, Testate.**

Plaintiff

**AND: MAKSHUD AHMAD aka MAKSUD AHMAD of Auckland,
New Zealand as the ADMINISTRATOR of the ESTATE OF
HABIBULLAH.**

Defendant

Coram: Banuve, J

**Counsels: K. Law Barristers & Solicitors for the Plaintiff
Jackson Bale Lawyers for the Defendant**

Date of Hearing: 21 January 2025

Date of Judgment: 10 March 2025

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed an Originating Summons pursuant to section 35 of the *Succession, Probate and Administration Act* [Cap 60], section 4 of the *Trustees Act* [Cap 65] and Order 85 Rules 2 and 4 of the *High Court Rules 1988* on 16 February 2025 seeking the following orders;

1. THAT the Defendant, MAKSUD AHMAD aka MAKSUD AHMAD be removed as Administrator of the ESTATE of HABIBULLAH late of Meigunyah, Nadi, Farmer, Deceased, Intestate;
2. THAT the Plaintiff, MOHAMMED NASIR of Meigunyah, Nadi, Taxi Driver be appointed as the Administrator and grant be issued to him in the ESTATE of HABIBULLAH late of Meigunyah, Nadi, Farmer, Deceased, Intestate.
3. THAT the Defendant to deposit the original grant issued to him in the ESTATE of HABIBULLAH late of Meigunyah, Nadi, Farmer, Deceased Intestate by this Honorable Court to the Probate Registry.
4. THAT the Defendant to pay the costs of this application on solicitor client indemnity basis.
5. A declaration that Lot 2, as per the registered plan made pursuant to the Consent Order entered before Honorable Justice Mutunayagam on 14th October 2011, in Civil Action 195 of 2009 is the share of the ESTATE of MOHAMMED SULEMAN aka AZIZ late of Meigunyah, Nadi, Farmer, Deceased, Testate AND to be transferred to the ESTATE of MOHAMMED SULEMAN aka AZIZ late of Meigunyah, Nadi, Farmer, Deceased, Testate.

2. An Affidavit in Opposition was deposed and filed by the Defendant on 5 July 2024 the material depositions being;

1. The Defendant's mother, Batulan, was initially granted Probate over the Estate of Habibullah on 4 May 1982 but she died on 2 July 1994, without finalizing the administration of the Estate. On 21 April 1995, the Plaintiff applied for and was granted Letters of Administration De Bonis Non in respect of the Estate of Habibullah.
2. A civil proceeding, Civil Action No. 195 of 2009 was instituted by the Defendant and a sister-in-law, Mazmun Bibi (as Administratrix of the Estate of Mohammed Azim) against the Plaintiff, Mohammed Suleman, as Administrator De Bonis Non of the Estate of Habibullah.

3. Civil Action No. 195 of 2009 was initiated because Mohammed Suleman was not distributing the assets of the Estate of Habibullah as intended in the testator's last will and testament dated 27 February 1970, and was meant for Mohammed Suleman to distribute the assets in accordance with the Will or alternatively to relinquish the role of Administrator De Bonis Non in the Estate of Habibullah to the Defendant, as the sole Administrator or jointly with Mazmun Bibi.
4. The ultimate beneficiaries in the Estate of Habibullah were the Defendant, his 3 siblings, Mohammed Suleman, Mohammed Saleem, Mohammed Azim and Batulan, their mother who had a life interest, under the last Will and Testament dated 27 February 1970.
5. Mohammed Suleman did not distribute the Estate of Habibullah amongst the 4 beneficiaries in equal share and share alike absolutely as was directed by Habibullah in his last Will and Testament dated 27 February 1970.
6. The Consent Orders made on 14 October 2011 and sealed on 7 November 2011 in Civil Action No. 195 of 2009;
 - (a) contemplated that the final subdivision plans to be drawn by the surveyor, Macanawai & Associates under Order 1 was to be based on the approved scheme plan annexed to the Affidavit in Support of the Originating Summons sworn on 24 September 2009.
 - (b) after the Consent Order was sealed on 7 November 2011, Mohammed Suleman registered a subdivision plan agreed to between the parties to Civil Action No. 195 of 2009 and wholly inconsistent with the directions of their father, the late Habibullah as per his Last Will and Testament dated 27 February 1970.
7. There was an agreement between the parties that the Defendant was to take over the administration of the Estate of Habibullah.
8. The Defendant made submissions to the Lands Department to amend the registered subdivision plan done by the late Mohammed Suleman but that the purpose of the amendment was to give effect and force to;
 - (a) The Consent Orders of 14 October 2011 and 7 November 2011 in Civil Action No.195 of 2009; and
 - (b) The late Habibullah's directions in his Last Will and Testament dated 27 February 1970 to distribute the Estate of Habibullah amongst the 4 beneficiaries in equal shares and share alike, absolutely.

9. Nowhere in the Consent Orders does it state that Lot 2 in the registered subdivision plan filed by Mohammed Suleman comprising of the balance area of our late father's Estate, be transferred to the Plaintiff.
10. The Defendant still maintains his Fiji citizenship and deep roots and connection to the home country.
11. In general response to the affidavit filed by the Plaintiff, the Defendant states;
 - (a) The Last Will and Testament of Habibullah dated 27 February 1970 states that after the death of Batulan the Defendant and his 3 brothers would inherit their father's land in equal share and share alike, absolutely.
 - (b) Batulan arranged for the 4 brothers to build a mosque on the Estate land with the help of the local Muslim community and to allow them to use the mosque as a place of worship.
 - (c) On Batulan's death, Mohammed Suleman registered a subdivision plan for Estate land wholly inconsistent with the agreed scheme plan and not carried out in accordance with the Consent Orders made on 14 October 2011, and sealed on 7 November 2011 in Civil Action No.195 of 2009, nor was in accordance with Habibullah's directions and under his Last Will and Testament dated 27 February 1970.
 - (d) The State issued leases over lots 1,2 and 3 based on the registered subdivision plan drawn up by the late Mohammed Suleman, as follows-
 - (i) State Lease No 24188 being Lot 1 on Plan No. SO 7084, having an area of 800 sqm which was transferred to the late Mohammed Azim and is now owned by his widow, Mazmun Bibi.
 - (ii) State Lease No 24186 being Lot 2 on Plan No. SO 7064 having an area of 5442 sqm is currently in the name of Habibullah and was intended by Mohammed Suleman to be transferred to himself.
 - (iii) State Lease No. 24187 being Lot 3 on Plan No. SO 7084 having an area of 800 sqm was transferred to Maksud Ahmad who has then sold and transferred the same to Mohammed Faheem and Aadila Aaraa.
 - (e) The subdivision plans registered by the late Mohammed Suleman gave his brothers approximately 800 sqm each, whilst allocating to himself 5442 sqm, almost seven (7) times each of the remaining brothers received. This was not what the late Habibullah intended in his last Will and Testament dated 27 February 1970.
 - (f) The Defendant intends as Administrator De Bonis Non in the Estate of Habibullah to;

- (i) correct the unfair distribution of the Estate land done by the late Mohammed Suleman and to subdivide State Lease 24186 being Lot 2 on Plan No. SO 7084 and give Mohammed Suleman a portion of land therefrom containing his dwelling and having an area approximately 1146 sqm;
- (ii) carve out from State Lease No. 24186 being Lot 2 on Plan No. SO 7084 a portion of the land upon which the Mosque is constructed comprising an area of approximately 1507 sqm and have the land registered in the name of a family trust to be administered by representatives of all of the four beneficiaries of the Estate of Habibullah;
- (iii) the balance of the area of 2,787 sqm to either be subdivided equally amongst all four brothers or sold and the proceeds thereof to be divided in equal shares and share alike absolutely in accordance with Habibullah's last Will and Testament of 27 February 1970.

B. THE LAW

3. The application is made by way of Originating Summons pursuant to section 35 of the *Succession, Probate and Administration Act* [Cap 60]; section 4 of the *Trustee Act* [Cap 65] and Order 85, Rules 2 and 4 of the *High Court Rules* 1988.
4. Section 35 of the *Succession, Probate and Administration Act* [Cap 60] states;

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 its motion on the motion on the report of the Registrar and either before or after a 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; and
 - (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
 - (c) make such other 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 such further or consequential orders as it may consider necessary in the circumstances."

5. Section 4(1) of the *Trustee Act* [Cap 65] states;

Power of appointing new trustees

“4-(1) Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise—
(a) is dead; or
(b) remains out of Fiji for more than one year without having properly delegated the execution of the trust; or
(c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
(d) refuses to act therein; or
(e) is unfit to act therein; or
(f) is incapable of acting therein; or
(g) is a infant; or
(h) is bankrupt; or
(i) being a corporation, has ceased to carry on business, is in liquidation or is dissolved,
then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person able and willing to act, then the surviving or continuing trustee or trustee for the time being, or the personal representative of the least surviving or continuing trustee, may by writing appoint a person or persons, whether or not being the person or persons exercising the power, to be a trustee or trustees in the place of the trustee first in this sub-section mentioned.”

C. ANALYSIS

6. Both parties have filed written submissions in support of their respective positions, which the Court has found useful in its deliberations.
7. The Court has both statutory¹ and inherent jurisdiction in contentious and non-contentious probate matters and the Plaintiff seeks the intervention of the Court pursuant to these powers. As summarized by the Court in *Nizam v Jamal Shah* – Civil Action HBC 47 of 2009;²

“ 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 Case 371 and Hunter v Hunter [1938] NZLR 520”

¹ Section 3(1) clarifies that the jurisdiction of the Court in contentious and non-contentious probate matters are vested on it under the *Succession, Probate and Administration Act* [Cap 60] and any Rules made under it.- *Nisha v Kumar & FPTCL* –Civil Action HPP 137 of 2022

² citing *Georgina Kain & Others v Hutton & Others* –CA 246/01 (NZ)

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“ 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 be the welfare of the beneficiaries ”³

8. Given the delicate jurisdiction vested on the Court the basis of the Plaintiff’s application has to be appraised to elicit the rationale for removing the Defendant, as trustee, specifically, whether the Defendant has not been carrying out its duties as Administrator *De Bonis Non*, in the interest or welfare of the beneficiaries.
9. Apart from seeking the removal of the Defendant as Administrator *De Bonis Non* of the Estate of Habibullah, the Plaintiff seeks a declaration also that Lot 2 in the Registered Plan made pursuant to the Consent Orders entered before the Court, in Civil Action 195 of 2009, on 14th October 2009 is the share of the Estate of Mohammed Suleman, late of Meigunyah, Testate.
10. In order to understand the basis of the Plaintiff’s complaint, an appreciation of the background to the initiation of Civil Action 195 of 2009, and the consent orders entered into in that matter, needs to be considered. The Court adopts the Defendant’s submissions in this regard;
 - i. Civil Action 195 of 2009 was instituted by the Defendant and Mazmun Bibi (as Administratrix of the Estate of Mohammed Azim), against Mohammed Suleman, who was then the Administrator *De Bonis Non*, of the Estate of Habibullah to distribute the assets of the said Estate in accordance with the will of the testator, dated 27 February 1970, or alternatively to relinquish the role of Administrator *De Bonis Non*, to Maksud Ahmad.
 - ii. The Consent Orders made in Civil Action 195 of 2009 on 14 October 2011 and sealed on 7 November 2011, prescribed that the final subdivision plans be drawn by the surveyor, Macanawai & Associates, under Order 1 to be based on the Approved Scheme Plan annexed to the Affidavit in Support of the Originating Summons, sworn on 24 September 2009.

³ Per Blackburn LJ - *Letterstedt*

- iii. After the Consent Order was sealed on 7 November 2011, Mohammed Suleman registered a subdivision plan which was wholly inconsistent with the agreed scheme plans and not carried out in accordance with the Consent Order made on 14 October 2011 and sealed on 7 November 2011 in Civil Action 195 of 2009 and inconsistent with the directions of the late Habibullah, as per his Last Will and Testament, dated 27 February 1970, to distribute his Estate amongst four beneficiaries “in equal shares share and share alike absolutely.”
- iv. The State subsequently issued leases over Lots 1,2 and 3 based on the registered subdivision plan drawn up by Mohammed Suleman as follows-
- (a) *State Lease No.24188 being Lot 1 on Plan No. SO 7084 having an area of 800 sqm be transferred to the late Mohammed Azim and now owned by his widow Mazmun Bibi*
 - (b) *State Lease No.24186 being Lot 2 on Plan No. SO 7084 having an area of 5442 sqm is currently in the name of the Estate of Habibullah and was intended to be transferred to Mohammed Suleman.*
 - (c) *State Lease No 24187 being Lot 3 on Plan No. SO 7084 having an area of 800 sqm be transferred to Maksud Ahmad, who has since sold the same to third parties.*
- v. The subdivision plan registered by the late Mohammed Suleman gave his brothers 800 sqm each whilst Mohammed Suleman gave himself 5,442 sqm, some seven (7) times what each of his brothers received.
- vi. Mohammed Suleman passed away without having Lot 2 transferred to him, leaving it in the name of the Estate of Habibullah.
- vii. Maksud Ahmad took over as Administrator *De Bonis Non* of the Estate of Habibullah in 2017, and has set out to correct the unfair distribution of the Estate of Habibullah which had partly been carried out by the late Mohammed Suleman, as follows;

- (a) Subdivide State Lease No 24186 being Lot 2 on Plan No SO 7084 and give the Estate of Mohammed Suleman a portion of land containing his dwelling and having an area of approximately 1146 sqm (instead of an area of 5442 sqm).
 - (b) Carve out of State Lease No 24186 being Lot 2 on Plan No SO 7084, a portion of the land upon which the Mosque is constructed comprising of an area of approximately 1507 sqm and have the land registered in the name of a family trust to be administered by representatives of all four beneficiaries of the Estate of Habibullah.
 - (c) The balance of 2.787 sqm to be subdivided equally amongst all four brothers or sold and the proceeds to be divided in equal share and share alike absolutely between the beneficiaries of the Estate of Habibullah in accordance with the last Will and Testament dated 27 February 1970.
11. The Defendant seeks to correct the distribution of land in accord with a plan he asserts was placed before the Court in Civil Action 195 of 2009, and was the basis of the Consent Orders entered into in that matter on 14 October 2011, and sealed on 7 November 2011. The Plan is adduced by the Defendant as part of Annexure "MA 3" to the Affidavit in Opposition of Maksud Ahmad, filed in this proceeding, on 5 July 2024.⁴
12. The Plaintiff, Mohammed Nasir, as Trustee of the Estate of Suleman, disputes the actions undertaken by the Defendant, Maksud Ahmad, and seeks a declaration that Lot 2 be allocated to the Estate of Suleman, in accordance with the registered subdivision plan drawn up by the late Mohammed Suleman, which he asserts was also adduced in Civil Action 195 of 2009.
13. The Court notes that the primary dispute between the parties relates to which registered plan correctly addresses the description and allocation of Lot 2, that was sanctioned in the Consent Orders entered in Civil Action 195 of 2009, on 14 October 2011, and sealed on 7 November 2011.

⁴ The Plan was **Annexure G** to the Affidavit of Maksud Ahmad filed in Civil Action 195 of 2009 on 20 October 2009

14. The Court is of the view, on the balance of probabilities that the Defendant's position is to be preferred over that of the Plaintiff, for the following reasons;

- i. The Plan relied on by the Defendant is an annexure to an affidavit deposed by the Defendant and filed on 9 October 2009, in Civil Action 195 of 2009. It is part of Court Record, which lends credence to the Defendant's assertion that it was the basis of the Consent Orders entered on 14 October 2011, in that proceeding.
- ii. The Plaintiff, on the other hand, relies on a Sub-Division Plan, approved by the Director of Town and Country Planning on 4 March 2016 and attached as Annexure "MN6" to the Affidavit in Support of Originating Summons, filed in this proceeding, on 16 February 2024. There is no explanation from the Plaintiff how this Plan, or an antecedent, would have been part of the Court Record in Civil Action 195 of 2009, indeed the Plan would not have been registered when the Consent Orders in the earlier proceeding had been entered into.

Statutory Jurisdiction

15. Given that the Plaintiff seeks to invoke the statutory jurisdiction of the Court, it is necessary to review the provisions they rely on. The Court finds the Defendant's submissions useful that the statutory provisions relied on by the Plaintiff does not assist its cause in obtaining relief by way of Originating Summons;

- i. Section 35- *Succession, Probate and Administration Act [Cap 60]*

This provision does not confer jurisdiction on the Court to remove an Administrator *De Bonis Non*. It confers rather, a jurisdiction to remove an Executor, which is not what is being sought in this proceeding.

- ii. Section 4-*Trustees Act [Cap 65]*

This provision does not confer jurisdiction on this Court to remove the Defendant as Administrator *De Bonis Non*, on the basis asserted by the Plaintiff.

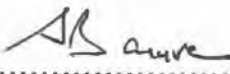
Inherent Jurisdiction

16. The Court has inherent powers to remove trustees derived from its general supervisory powers in equity, relating to the supervision of trusts and the Courts main guide for the exercise of this jurisdiction, is the broad principle of the welfare of the beneficiaries.
17. The Court has assessed the case presented by both parties and finds little, assistance, in the case presented by the Plaintiff, to justify it being granted the relief that the Defendant be removed as the Administrator *De Bonis Non* of the Estate of Habibullah for the following reasons;
 1. On the balance of probabilities, the plan adduced by the Defendant Maksud Ahmad, Annexure "MA 3" in the Affidavit in Opposition filed on 5 July 2024, represents the distribution of land from the Estate of Habibullah, sanctioned by the Consent Orders entered into by the parties in Civil Action 195 of 2009, on 14 October 2011, and sealed on 7 November 2011. It provides for an equitable distribution of the land, in accordance with the prescription in the Last Will and Testament of Habibullah, dated 27 February 1970, that the proceeds from his Estate be '*distributed amongst the 4 beneficiaries in equal share and share alike absolutely.*'
Conversely, the plan preferred by the Plaintiff, for which specific findings have been made by the Court, would perpetuate the unequal distribution of land in the Estate of Habibullah, which the late, Mohammed Suleman had sought to implement.
 2. The Court does not have statutory jurisdiction, pursuant to section 35 of the *Succession, Probate and Administration Act* [Cap 60] or section 4 of the *Trustee Act* [Cap 65], to grant relief to the Plaintiff, as sought in the Originating Summons filed on 16 February 2024.
 3. The Court finds no basis to exercise its inherent jurisdiction to grant relief, as sought in the Originating Summons filed on 16 February 2024, herein and finds rather that the Defendant's appointment as Administrator *De Bonis Non*, needs to be maintained, for the general welfare of the beneficiaries

ORDERS:

1. The Plaintiff's Originating Summons filed on 16 February 2024 and the orders sought therein are refused and dismissed;
2. Costs to the Defendant, summarily assessed at \$1000.00 to be paid within 14 days of this Judgment.




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Savenaca Banuve
Judge

At Suva
10 March 2025