

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Jurisdiction HPP No 91 of 2019

IN THE MATTER of Estate of **SASHI**
DHAR MAHARAJ late of New Zealand,
Deceased, Testate.

BETWEEN : **KIRTI SAGAR LAL** of 7 Alcove Place, Totara Heights,
Auckland, 2105, New Zealand, Secondary School Teacher.

PLAINTIFF

AND : **SHALINI SAGAR CHAND** of 2026 Ocean Park Blvd, Santa
Monica, California 90405-45914, USA, Nurse, the Trustee of
the Estate of Shashi Dhar Maharaj.

DEFENDANT

Coram : **Banuve, J**

Counsels : **Sherani & Co for the Plaintiff**
NKA Barristers & Solicitors for the Defendant.

Date of Hearing : **4 March 2025**

Date of Ruling : **9 October 2025**

RULING

A. Introduction

1. A *Summons (For Leave to Amend Statement of Claim)* with an Affidavit in Support deposited by the Plaintiff was filed on 26 September 2024.
2. The orders sought in the Plaintiff's Summons were;
 - (a) *That the Plaintiff be granted leave to amend the Statement of Claim in the manner shown and marked in read as annexed to the supporting affidavit filed herewith;*
 - (b) *That the costs of the application be in the cause.*
3. The Summons were issued pursuant to Order 20, Rule 5 of the *High Court Rules* 1988.
4. A Summons was filed by the Defendant on 4 October 2024. The Summons was filed pursuant to O.18, r. 18(1)(a)-(d) and 35, r.(3) and 62,r.3 of the *High Court Rules* 1988.
5. A separate *Affidavit of Shalini Sagar Chand (Opposing the Affidavit in Support to Amend Statement of Claim deposited by the Plaintiff Kirti Sagar Lal on 12 September 2024 filed on 26 September 2024)* was filed by the Defendant on 4 October 2024
6. The orders sought in the Defendant's Summons were;
 - (1) *An Order that the Plaintiff's within action be struck out and dismissed with costs on an indemnity basis as is discloses no reasonable cause of action, is frivolous and vexatious, embarrassing and or it is otherwise an abuse of the process of the Court.*
 - (2) *If the within action and the proposed amendment to the Plaintiff's claim is permitted then an order be granted that the Plaintiff give security for costs for the Defendant's costs in this action to the satisfaction of the Honorable Court on the ground that the Plaintiff is ordinarily resident and that in the meantime all further proceedings be stayed, and that such security for costs be paid within 14 days of grant of Order.*

failing which, ipso facto the action is deemed to be dismissed with costs to be dismissed on an indemnity basis.

- (3) *An order that the Plaintiff does pay the costs incurred by the Defendant as assessed by the Honorable Court at the trial of the action for 1st, 2nd and 3rd day of October 2024 being vacated as a consequence of the Plaintiff seeking to amend her claim.*
- (4) *Such further or other order as this Honorable Court deems appropriate in the circumstances*

7. The primary relief sought in the Defendant's Summons of 4 October 2024 is to have the Writ of Summons with indorsed Statement of Claim filed on 22 November 2019 struck off. No affidavit was filed in support of this Summons in accord with O.18, r.18 (2) of the *High Court Rules 1988*. (The affidavit filed by the Defendant on 4 October 2024 was filed in response to the Plaintiff's application to Amend the Writ of Summons and Statement of Claim of 26 September 2024)

8. Paragraphs 7-13 of the *Affidavit in Support (To Amend the Statement of Claim)* filed by the Plaintiff on 26 September 2024 are relevant;

7- *The High Court Probate Registry then wrote to my son's Firm Lyttelton's Lawyers and stated that an application for revocation of grant needs to be made to the High Court pursuant to Order 76 of the High Court Rules. This is stated at paragraph 10 of the claim.*

8- *I am of the view that the High Court Registry overlooking the lodgment of my caveat is the core issue to be determined by the High Court with regards to the grant of revocation of the probate.*

9- *I have been informed by my solicitors and verily believe that section 46 of the Fijian Succession, Probate and Administration Act [Cap 60] allows me to lodge a caveat against the grant of probate without the involvement of the High Court. The High Court Probate Registry in overlooking the registration of the caveat has affected my legal right.*

10- *I am foregoing orders C and D of the Statement of Claim as there were urgent matters when the Claim was filed in 2019. That urgency and requirement has now passed.*

Further, as the land is the only real asset in the estate and the land is relatively secure at this stage, through our good relationship with the neighbors and school in the area, the issue need not be ventilated (and ruled on) by the court.

11- *I am informed by my solicitors and verily believe that Order (E) is an outcome among other alternatives which I can pursue on the outcome of whether the caveat I had lodged against the grant of probate is reinstated or not.*

12- *That to save the Honorable Court and both parties time and resource from conducting a lengthy trial of broader issues, for the purpose of avoiding due delay and expense on the parties and in the administration of justice, I wish to amend my claim by striking out all other broader issues and confining the Claim to the issue of the caveat being overlooked by the High Court Probate Registry. The reliefs in the Claim will also be confined to the reinstatement of the caveat and the revocation of the grant of probate.*

13- *That I now annex a copy of the proposed amendments to the claim as annexure 'B'.*

9. The relevant amendments sought in paragraphs 12 and 13 of the proposed Amended Statement of Claim are laid out;

12. *Section 46 of the Succession, Probate and Administration Act [Cap 60] allows the Plaintiff to lodge a caveat against the grant of probate to the Defendant.*

13 *The High Court Probate Registry overlooked the lodgment of the caveat without any legal basis and such actions ought to be declared unlawful.*

WHEREFOR THE PLAINTIFF CLAIMS

A. A DECLARATION *that the High Court Probate Registry in overlooking the lodgment of Caveat 12/09 acted unlawfully in breach of section 46 of the Succession, Probate and Administration Act [Cap 60].*

B. AN ORDER *that Caveat 12/09 filed by the Plaintiff on 17 June 2009 be reinstated.*

C. AN ORDER *that the grant of Probate No. 48891 (with Will dated 6 December 2005) be revoked on the grounds that;*

- (i) *The Plaintiff has lodged a caveat against the grant of probate which was overlooked by the High Court Probate Registry.*
 - (ii) *An order for the reinstatement of Caveat 12/09 gives effect to the revocation of the Probate.*
 - D. *AN ORDER that the High Court Probate Registry do all such things and execute all such documents to effect the revocation of the Probate.*
 - E. *ALTERNATIVELY, that the Chief Registrar attend to all requirements to affect the revocation of Probate*
 - F. *AN ORDER as to costs.*
 - G. *SUCH further or other orders as this Honorable Court thinks just and equitable.*
10. In comprehensive written submissions the Plaintiff sets out her rationale for seeking leave to amend the Statement of Claim filed on 26 September 2024 (**‘Summons to Amend’**);
- (i) The Summons to Amend seeks to narrow the Trial issues and as stated at paragraph 11 of the Affidavit in Support of Kirti Lal sworn on 12 September 2024 (Kirti’s Affidavit) the Plaintiff will pursue other claims (on propounding the Will and failure of the Defendant to properly administer the Estate) depending on the outcome of whether or not the caveat lodged against the grant of probate is reinstated.
 - (ii) The amendment sought is minor and does not add a new cause of action, it only seeks to amplify the order sought against the grant of probate to the Defendant which the Plaintiff seeks to revoke. The main issue on hand is that the High Court Probate Registry overlooked the lodgment of the Caveat lodged by the Plaintiff against the Probate granted to the Defendant. The Plaintiff will refer to and relies on Annexure B of Kirti’s Affidavit.

- (iii) The main issue in contention is that the High Court Probate Registry overlooked the filed caveat and granted Probate to the Defendant. In doing so it has acted unlawfully and contrary to section 46¹ of the *Succession, Probate and Administration Act*. [Cap 60]
- (iv) It has met the legal threshold to be granted an amendment according to Order 20 Rule 5 of the High Court Rules and the Court of Appeal authority of *Sundar v Prasad* [1998] FJCA 19;

“The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v Marr [1987] NZCA 18; (1987) 2 PRNZ 383 (CA). However the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it”

- (v) It is a guiding principle of cardinal importance on the question of amendment, that generally speaking, all such amendments ought to be made for the purpose of determining the real question of controversy between the parties to any proceedings or of correcting any defects or errors in any proceeding. (*R.L Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLP 1216 p 1231 [1958] 3 All ER 540, p 546]

¹ 46-(1) Any person may lodge with the Registrar a caveat against any application of probate or administration, or for the sealing of any probate or letters of administration, or for dealing of any probate or letters of administration under the provisions of this Act, at any time previous to such probate or administration being granted or sealed

(2) Every such caveat shall set forth the name of the person lodging the same and an address within the city of Suva at which notices may be served on him.

47-(1) In every case in which a caveat is lodged, the court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be, remove the same.

(2) Every such application may be heard and order made upon affidavit or oral evidence, or as the court may direct.

(vi) The Plaintiff had already sought orders for the reinstatement of its caveat and revocation of the grant of its probate in its relief as stated in the initial Statement of Claim. By way of amendment, the Plaintiff is seeking to ensure that steps are taken by the High Court Registry to revoke the grant of probate and reinstate the caveat lodged by the Plaintiff. The Plaintiff will refer to and rely on Annexure B of Kirti's Affidavit to this effect.

11. The Defendant has filed concise written submissions setting out her grounds for striking out the Statement of Claim as a consequence of the Plaintiff's Application to Amend the Statement of Claim, pursuant to Order 20 Rule 5 of the *High Court Rules* 1988 these being,

(i) The amendment sought raises no cause of action against the Defendant and rather it raises a totally new cause of action against the High Court Registry and is statute barred²

(ii) On examination of the caveat it is self evident that it is wholly defective as being non-compliant with section 46(2) of the *Succession, Probate and Administration Act* [Cap 60], in that the person lodging the caveat does not have an address within the city of Suva. The proposed amendment therefore ought to be dismissed in its entirety

(iii) A caveat is just a notice to the Registrar and the caveator ought to make any real objection to the issue of the grant of probate. *When a caveat has been entered the person who wishes to prove the will has to warn the person who entered the caveat, and if such person i.e the caveator intends to make any real objection, he enters an appearance. Then if the litigation goes on, the person who wants to prove the will issues a writ and serves it on the caveator-In re the Estate of Chinnaiya Goundar [1994] FJHC 112, per Fatiaki J.*

(iv) In the event the amendment is not allowed then the Statement of Claim remains in the original form and the same also discloses no reasonable cause of action based on the Plaintiff's own admissions in her affidavit of 26 September 2024

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B. Analysis

Proposed Amended Writ of Summons

12. After a review of the scope of the amendment sought by the Plaintiff by way of Summons filed on 26 September 2024, the Court refuses to grant leave to amend the Statement of Claim in the manner set out in paragraph 9 of this Ruling, for the following reasons;

(i) The Plaintiff seeks to amend the Statement of Claim by confining it to the reinstatement of the caveat overlooked by the High Court Probate Registry, and discard broader relief sought in the original Statement of Claim. As deposed by the Plaintiff in paragraphs 12 of the *Affidavit in Support (To Amend the Statement of Claim)*, filed on 26 September 2024;

12.- *THAT to save the Honorable Court's and both parties time and resources from conducting a lengthy trial of broader issues for the purposes of avoiding undue delay and expense on the parties and in the administration of justice, I wish to amend my claim by striking out all other broader issues and confining the Claim to the issue of the caveat being overlooked by the High Court Probate Registry. The reliefs in the Claim will also be confined to the reinstatement of the caveat and revocation of the grant of probate. (underlining for emphasis)*

13. In seeking to amend the Statement of Claim, and confining it to the reinstatement of the caveat the Plaintiff overlooks the caution articulated by this Court in *In re Estate of Chinnaiya Goundar* [1994] FJHC 112 , (as applied in *In re Estate of Narend Chand* [2011] FJHC 424; Caveat 36.2009 (8 August 2011)), although there dealing with the “removal” of a caveat;

“...the present summons for the removal of a caveat is NOT a ‘probate action’ under the High Court Rules but the invocation of a specific statutory provision. Further the applicant has no cause whatsoever to dispute the testator’s will and indeed has no intention of instituting any ‘probate action’ and ought not be forced to do so by the mere lodgment of a caveat by a person who has neither entered an appearance to a warning or issued a summons for Directions nor filed an affidavit disclosing the nature of any contrary interest she may have in the estate”

The lodgment of a caveat cannot be equated with the commencement of litigation, *rather*, if the Plaintiff wanted to make a real objection about the Grant of Probate No 48891, it ought to be substantiated by the initiation (and maintenance) of probate proceedings, in this instance, the filing of the original Writ of Summons and Statement of Claim, endorsed by the Registrar and filed on 26 November 2019. In seeking to amend the Statement of Claim and confining it to the issue of the lodgment of Caveat No 12 of 2009, as highlighted, the Court is concerned that the Plaintiff may fall afoul the caution articulated by the Court in *Chinnaiya Goundar* and detracting from the maintenance of a cogent objection to the grant of probate.

- (ii) The test to be applied on whether an amendment to pleadings is to be allowed under Order Rule 5 of the *High Court Rules* 1988 is whether the amendment is necessary to determine the real controversy between the parties- *Sundar v Prasad* [1995] FJCA 19. Rather than narrowing the issue of controversy (the grant of Probate No 48891 to the Defendant over the Estate of Sashi Dhar Maharaj on 4 September 2009) the proposed amendment to pleadings may detract the Court from dealing with the matter under Order 76 Rule 2 as a “probate action”³ in that the interest of another Defendant, the Chief Registrar would have to be accounted for too, but which the Plaintiff appears to have not considered properly..

- (iii) Caveat No 12 of 2009 was registered on 9 June 2009. Despite written communication from the Registrar on 13 June 2014⁴ that no action had been taken since 2009 (when the caveat and grant were issued) , the current proceeding were not initiated by the Plaintiff until 22 November 2019, for which an amendment is now being sought by way of Summons filed on 26 September 2024. Given the considerable lapse of time in the initiation of proceeding and the width of the proposed amendment the objective in the maintenance of this proceeding is an issue;

³ As defined by O.76, r.1(2)

⁴ Annexure **D3** to the **Affidavit of Shalini Sagar** Chand filed on 4 October 2024

*“ The court will not revoke a grant limited to taking proceedings ...merely to preserve the right to sue of a person who has been guilty of laches”*⁵

C. Strike Out

14. Whilst relief sought by the Plaintiff in the Summons for Leave to Amend the Statement of Claim filed on 26 September 2024 is refused it does not follow that the Summons to Strike Out filed by the Defendant on 4 October 2024 is allowed.
15. The Summons filed pursuant to O.18, r.18 (1)(a)-(d) of the High Court Rules 1988⁶ is refused, for the following reasons;
 - (i) Given the amendment to the Statement of Claim have been refused the pleadings revert to its original form as filed in this Court on 22 November 2019.
 - (ii) The power given to strike out any pleading is not mandatory, but permissive, and confers a discretionary jurisdiction to be exercised having regard to all the circumstances relating to the offending pleading. It should only be exercised in plain and obvious cases – *Drummond-Jackson v British Medical Association* [1970] 1 W.L.R 888; [1970] 4 All ER 1084. Whilst the Defendant makes forceful submissions on the futility of reverting to the original proceedings, now that the amendment have been refused (and that it be struck off also), the Court is mindful that what it can consider for the moment is limited to affidavit evidence. Given the narrowness of the test for striking out’ pleadings, the Court cannot be satisfied on, the limited affidavit evidence available before it, to exercise its powers under Order 18. Rule 18(1)(a)-(d) .

⁵ Williams, Mortimer & Sunnucks “ **Executors, Administrators and Probate**”(2000) (18th (ed) of Williams on Executors and the 16th (ed) of Mortimer on Probate, p 373, paragraph 27-31.

⁶ The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in indorsement on the ground that:-

- (a) It discloses no reasonable cause of action or defence as the case may be; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the court;

and may order the action be stayed or dismissed or judgment to be entered accordingly, as the case may be.

D. Security for Costs

16. The Defendant cross claims against the Plaintiff for security for costs and seek the sum of \$20,000.00 be paid into Court for that purpose, pursuant to Order 23 Rule 1 (1)(a) of the *High Court Rules* 1988.
17. The Courts are concerned that a litigant residing abroad was not within the jurisdiction so as to be amenable to process for costs. Security would be refused where the Plaintiff had valuable assets within the jurisdiction. In looking at assets that are available the Court traditionally took into account only assets of a fixed and permanent nature. It is clear in this instance that whilst the Plaintiff is resident in New Zealand, the assets in Fiji, the subject of probate proceeding involving the parties is a substantial land holding owned by the Estate of Shashi Dhar Maharaj, worth about \$15million. Whatever the ultimate division between the parties will be, it would be more than sufficient to satisfy the Defendant's costs, so security for costs will be refused on that basis.

E. Costs

18. The Defendant also seeks costs as set out in the affidavit filed on 4 October 2024, After taking into account the lateness in the adjournment of trial, the abortive travel by the Defendant from the US to attend trial and other relevant circumstance such as the nature and timing of the amendment sought and refused, the Court awards costs to the Defendant summarily assessed at \$8,000.00 (Eight Thousand Dollars) to be paid within 14 days of this Ruling.

ORDERS:

1. **The Summons (For Leave to Amend Statement of Claim) filed by the Plaintiff on 26 September 2024 is refused and dismissed;**
2. **The Cross Claim for Security of Costs sought by the Defendant is refused and dismissed**
3. **The Summons filed by the Defendant pursuant to Order 18 Rule 18(1)(a)-(d), Order 35 Rule 3 and Order 62 Rule 3 on 4 October 2024 is refused and dismissed.**

4. Costs summarily assessed at \$8,000.00 (Eight Thousand Dollars) to be paid to the Defendant by the Plaintiff within 14 days of this Ruling.



Savenaca Banuve
Savenaca Banuve
Judge

Dated on the 09th of October, 2025.