



## **JUDGMENT**

*(Application for Removal of Executor and Trustee of Estate)*

### **PART A – BACKGROUND AND AFFIDAVITS**

1. The Plaintiff filed an Originating Summons seeking Orders for:
  - (a) Removal of the Defendants as Executor and Trustees of the Estate of Shayam Kaur aka Samkua aka Sam Kuar of Lot 40 Rarama Place, Makoi, Nasinu;
  - (b) The Defendant to deliver the accounts of the Estate of Shayam Kaur aka Samkua aka Sam Kuar to show income received and expenses incurred;
  - (c) Plaintiff appointed as Administratrix in the Estate of Shayam Kuar aka Samkua aka Sam Kuar.

#### ***Plaintiff's Affidavit***

2. The supporting Affidavit was deposed by the Plaintiff, the daughter in law of the deceased, Shayam Kuar aka Samkua aka Sam Kuar who died testate on 5<sup>th</sup> May 2005.
3. She deposed that at the time of her death, the late Shayam Kuar aka Samkua aka Sam Kuar was the registered proprietor of the Housing Authority Lease 194662 being Lot 40 on DP 5209 in the Province of Naitasiri.
4. She deposed that the Deceased had a last Will and Testament dated 28<sup>th</sup> February 1997 that appointed the late Jamuna Prasad as the Executor and Trustee of her Estate.
5. She deposed that in clause 2 of the Will, the late Shayam Kuar bequeathed the property in equal shares to the Defendant, her late son Jamuna Prasad and her late husband, Suruj Prasad.
6. She deposed that on 1<sup>st</sup> June 2009 the Defendant and the late Jamuna Prasad were issued with a Probate Grant No 48645 for the Estate of Shayam Kuar aka Samkua aka Sam Kuar.

7. She deposed that on 24<sup>th</sup> June 2009 the Defendant and the late Jamuna Prasad registered their interest by way of Transmission of Death on Housing Authority Lease No 194662.
8. She deposed that she was granted Letters of Administration for the Estate of her late husband registered as No 56934.
9. Despite her request to the late Jamuna Prasad to transfer her late husband's shares to her from the property, he had refused to do so. She opines it is because the Defendant resided in the Estate.

***Defendant's affidavit***

10. He deposed that the Plaintiffs husband died on 19 July 2006 when both her and her daughter were in residence of the property.
11. He also deposed that the Plaintiff and her daughter were all resident on the property together with the late Jamuna Prasad, their mother Shayam Kuar and Ajodhaya Prasad, who was unwed.
12. He deposed that the Plaintiffs husband passed away a year after his late mother, Shayam Kuar passed away and that the Plaintiff moved out of the property to stay with her parents and returned one and half years later for the rituals to the property and never returned.
13. He deposed that whilst in residence, all of the brothers that were alive did not raise issues regarding the distribution of property for the three of them, Ajodhaya residing with him due to medical reasons. He passed away on 14 April 2023.
14. He deposed the Plaintiff had moved out of residence after the death of her husband and resettled elsewhere for 10 years when she then applied for her late husband's probate.
15. On 14 April 2023, the Defendant deposed that the property was razed by fire burning the concrete home and also cause the demise of the late Ajodhaya Prasad.
16. He deposed that a family meeting together with Plaintiff's daughter was organized at Rajendra Prasad's home where they were staying after the fire razed the building they occupied. At the meeting it was agreed to re build the premises. They had also agreed to settle the shares of the Plaintiff by paying her \$15,000 despite the difficulty in obtaining it.

17. He deposed Rajendra Prasad is the son of their late brother, Ganga Prasad who passed prior to the demise of their father.
18. He deposed that Shayal, the daughter of the Plaintiff was verbally informed that they were going to come back to her once the monies were organized, as there were delays in re-building the dwelling house.
19. He deposed the Plaintiff had not recovered his shares nor made attempts to claim her share.
20. The Defendant deposed he had maintained the property form his personal contributions including the ground rent, town rates and so on.
21. He also deposed that the property had never been rented out and all payments stemmed from his own contributions.

### ***Plaintiffs Affidavit in Reply***

22. The Plaintiff deposed that she was residing on the property until the demise of her husband in 2006 whence they moved out in 2007. She deposed that prior to her late husbands' death, they had extended the property with a kitchen, bathroom, and toilet and sitting room. They were removed when Housing Authority had not approved the extension.
23. She denied in her Affidavit that despite her requests for the transfer of the share of the property to her on behalf of her husband when Jamuna Prasad was alive, it was not adhered to.
24. She deposed that there was partial settlement for \$15,000 towards their share of the property but it was never finalized or agreed by the Defendant nor has the Defendant given her shares.

### **PART B: LAW AND ANALYSIS**

25. Section 35 of the Succession, Probate and Administration Act empowers the Court, on any reason it deems sufficient, remove an Executor or Trustee by a person interested in the Estate to remove the Executor appointed to that Estate and

revoking the grant of probate already made to him and thereafter appoint an administrator with the Will annexed to the Estate.

26. Counsels referred to the cases of Nizam -v- Shah [2014] FJHC 218; HBC 47.2009 and Chand -v- Fiji Public Trustee Corporation Limited [2024] FJHC 678; HPP 105.2023 (14 November 2024) where the test to determine or not the removal of the executor stemmed from the case of Letterstedt -v- Broers [1884] 9 App Cas 371 at 385 to 38 which stated:

“In exercising so delicate a jurisdiction so 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 variety, but they proceed to look carefully into the circumstances of the case.’

27. It was argued by the Plaintiff that despite the 16 years as Executor and Trustee, the Defendant had failed to properly administer the Estate and properly distribute the shares. From when Jamuna Prasad, the Plaintiffs brother in law and the brother of the Executor and Trustee was alive, the Plaintiff had requested for the shares of her late husband to be distributed to her. Despite her request, the late Jamuna Prasad and now the Defendant has failed to distribute her shares.
28. The Plaintiff has referred to the case of Korodrau -v- Fiji Public Trustee Corporation Pte Ltd [2024] 460; HPP 78.2023 (17 June 2024) and Nita -v- Lal [[2023] 523; HPP 12.2022 (21 July 2023) where it was held that the court would remove the Executor as there was a delay from when the probate was granted for which the Executor failed to take an active part in as the appointed Executor/Trustee,.
29. The Plaintiff submitted that the Defendants failed to undertake any active duty, there was no cordial relationship between the family members.
30. The Defendants argue that the Defendants has not misconducted itself as Executor of the Estate.
31. Therefore the court has powers under Order 85 rule 5 of the High Court Rules to stay the judgement and order for the accounts to be prepared and if need be, sale of the property.
32. The Defendant had offered to settle the shares of the Plaintiff to 1/3 the Estate of late Shayam Kaur as well.

33. The Defendant offers alternatively that the Plaintiff be appointed a joint Executor for the Estate of Shayam Kaur.
34. When considering the submissions by the parties the court determined the law and case precedence's. There are diverging judicial views on what constitutes the exercise of discretion to remove the Executor or Trustee of the Estate on the basis of the inaction of the Executor. Both the decisions of Sharma VD J and Lakshman C J were arrived at after considering the basis for which the beneficiaries entitlements would be jeopardized and the failure by the Executor and Trustee to act upon these issues to ensure the welfare of the beneficiaries is taken into consideration.
35. In this instance, the Defendant, although had obtained probate on 5<sup>th</sup> May 2005, was registered on transmission by death in 2009 together with the late Jamuna Prasad as the Executors and Trustee of the Estate of Shayam Kuar.
36. Ever since her husband passed away in 2006, the Plaintiff had requested from the late Jamuna Prasad her late husbands' shares.
37. The late Jamuna Prasad passed away in 2013.
38. It was when the Plaintiff moved and resettled elsewhere that she sort for and was granted, in 2015, the probate of her late husband. The distribution of shares by the Defendant as the sole Executor could not be legally possible until after 2015 when probate was obtained by the Plaintiff.
39. The Defendant denies any knowledge of the arrangement with the late Jamuna Prasad and was only actively when the dwelling house was burned down in 2023 where he then arranged for settlement of her shares.
40. He admitted he was also actively involved by paying for the bills and town rates, however there was no evidence of this tendered by him to confirm the same. It is not denied from the Affidavits that the residential dwelling was burnt, however there is no evidences tendered of there being any re-building of the residential dwelling.
41. The Defendants have sentimental value to the property as it has been with their family ever since birth. Their concern is that the property, if administered by another, would be sold and proceeds not recovered for their share of the Estate.
42. The Defendant seeks for Court orders for the accounts to be prepared, that there be directions for sale of the property and that the current Executors pay off all

expenses as well as distribute the proceeds of sales according to the shares allocated to the beneficiaries.

43. On perusing the Affidavits and case precedents, there is nothing to show that the Defendant had misconducted itself as Executor of the Estate of Shayam Kuar at the detriment of the beneficiaries.
44. From 2009 to 2023 he had not actively undertaken any work on the property, even after the demise of the late Jamuna Prasad. By then, the property was registered to him and the late Jamuna Prasad as Executors and Trustees.
45. Although he has admitted paying the rates and bills for the property, there was no evidence tendered to this effect.
46. The 2023 burning of the residential dwelling coupled with the re-building of the premises had caused immense financial constraints on his role as the Executor. These constraints have caused financial burdens to the Executor which he may have not envisioned.
47. The Court finds it would be appropriate that Orders and Directions be given for proper Accounts to be prepared and filed, property be valued by an independent valuer and that the property be sold via a Real Estate Agent.
48. Finally that all proceeds obtained be used to deduct expenses for the Estate and the balance be equally divided between the beneficiaries or their Estates, i.e. to the Defendant, the Estate of Jamuna Prasad and the Estate of Narendra Prasad.
49. The Court therefore finds that his inactivity as Executor was prejudicial to the benefit of the welfare of the beneficiaries over the Estate. Although he benefitted by residing on the premises together with the late Jamuna Prasad for 4 years and the Plaintiff for 6 years, he was inactive at all.
50. The Court had enquired as to whether the Plaintiff was will willing to work as Co-Executor together with the Defendant. Her counsel had refused stating that the parties were not in good terms ever since the demise of her husband, their late brother.
51. On the other hand, the Defendant has offered through Counsel, to continue his work as Executor and to join the Plaintiff as Co-Executor in order to ensure conditions of the Will of his mother is fulfilled.

52. It has taken the Defendant 7 years from when the Plaintiff obtained probate of her late husband and for her to make it known to him her shares, that the Defendant then considered the appropriate shares to be granted to her. The sum offered was \$15,000 which may not be the true value of her entitled shares.
53. The Court finds that the Defendant has not been unkind, he has acted for the benefit of the beneficiary whilst considering the welfare of the other beneficiaries.
54. Despite their inability work together between the family members, the Court will order that the Plaintiff be appointed as a Co-Executor of the Estate of Shayam Kuar and that the Defendant remain as the Executor on the basis that the following Court directions be complied with.
55. If the Defendant fails to ensure that the directions of the court is complied within the requisite timeline, the court will have no other option but to discharge him of his duties
56. The Court will order that costs of \$500 be awarded to the Plaintiff.

**Orders of the Court:**


57. **The Court Orders as follows:**

- (a) That the Plaintiff be appointed as Co-Executor and Co-Trustee together with the Defendant to the Estate of Shayam Kuar;***
- (b) That an independent valuer be appointed within 4 months and a Valuation Report be provided to both Executors;***
- (c) That within 6 months of the Valuation Report, that the Executors arrange for the sale of the property or alternatively arrange through a registered Real Estate Agent;***
- (d) That all taxes, rates and expenses arising from the sale of the property be equally borne by the Executors to be refunded from proceeds of sale;***
- (e) That on settlement of sale and on payment of all expenses, rates and taxes, the proceeds of sale, the Executors obtain 1/3 shares each of the sale proceeds;***

***(f) That the final 1/3 of sale proceeds for the late Jamuna Prasad be deposited in the High Court interest bearing Trust Account until the probate or Letters of Administration of the Estate of the late Jamuna Prasad is granted.***

***(g) Costs of \$500 be awarded to the Plaintiff by the Defendants.***



  
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Ms Senileba LTT Waqainabete-Levaci  
Puisne Judge