



and Trustee of the Estate of Kewalpati or Keola Pati and to be replaced with the Plaintiff.

2. The application is made pursuant to Order 85 Rule (2) and (4) of the High Court Rules.
3. The Hearing commenced and concluded by formal proof or undefended hearing.

## **AFFIDAVITS**

### *Plaintiff's Affidavit*

4. The Plaintiff deposed that as the Sole Executor and Trustee, was appointed by the last will of Kewalapati made on 8 May 2001 and who died on 13 March 2002.
5. On 10 June 2011 Probate was granted to the Defendant appointing the Respondent as the sole Executor and Trustee.
6. The Plaintiff deposed, that by virtue of the Will, the Defendant and his late brother Chandra Deo, the father of the Plaintiff, were equally entitled to the property comprised of Certificate of Title No 9211 being Lot 38 on DP 2196. The property is commercial and sits on the main road in Savusavu Town with a shop in front and residence at the back. Since being granted Probate, the Respondent has collected income from the Estate but has failed to provide an account of the income collected nor distribute the income of the Estate since 13 years ago.
7. The Plaintiff deposed that his father passed away on 29 November 2023 and the Probate was granted to him on 27 January 2025 and is now seeking his father's share.
8. The Plaintiff finally deposes that the Respondent resides in United States of America and has not visited Fiji since the past 8 years.

### *Plaintiff's Supplementary Affidavit*

9. The Supplementary Affidavit was deposed by the Plaintiff's sister.
10. She deposed that received a copy of the application by the Plaintiff and then attempted to serve the Respondent last the known address in California. Unfortunately, he no longer resides there. Numerous calls were also made to

friends and relatives who knew his uncle's present address and informed the lawyers.

### *Evidence given on Oath*

11. The Plaintiff also gave evidence to confirm the Affidavit he had deposed and the facts thereof. He also confirmed that the Plaintiff's sister who resides in California attempted to serve the Originating Summons personally, however he no longer resided at the address.
12. The Originating Summons was thereafter advertised in the local public newspaper in the Country of his address, and an Affidavit of Service was filed.
13. The Plaintiff also gave evidence that his father is the older brother and one of the beneficiaries of the Estate. Since his father has passed away, he has not seen any full account of the property and its proceeds given that the shop is required to gain rent monies. He has never seen the sole Executor and Trustee since 8 years ago and found the property required repairs and renovations.
14. He now seeks for the property in the Estate to be distributed so he can properly administer the Estate of his father, the beneficiary of the Estate.
15. He relied upon the Affidavit in Support of his application which contained annexures tendered as evidence of the Probate granted from the Will of his late paternal grandfather, the Certificate of Title.

### **Law, Submissions and Analysis**

16. The Application before this Court seeks orders for removal of the Executor and Trustee on the basis that he has failed to provide proper accounts of the proceeds of the property to the beneficiaries, He has failed to distribute shares from the property as well and has not returned to the property since 8 years ago.
17. Order 85(2) and (4) of the High Court Rules provides that:
  - 2.-(1) An action may be brought for the determination of any question or for any relief which would be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration

or execution under the direction of the Court of the estate or trust in connection with the question arising or the relief sort;

(2) without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:-

(a) Any question arising in the administration of the Estate of the deceased person or in the execution of the trust;

(b) Any question as to the composition of any class of persons having a claim against the Estate of such a person or in any property subject to trust;

(c) Any question as to the rights or interest of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust

18. Under paragraph (3) of Rule (2) of Order 85 of the High Court Rules the Court may order for the necessary verifying of accounts, order for the payment into court of monies held by a person in their capacity as Executor, administrator or trustee; an order approving the sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee or an order directing any action to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

19. Order 85 Rule (4) of the High Court Rules empowers the Court to make:

‘order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the forgoing provision is without prejudice to the power of the Court under Order 28 Rule 9.’

20. Mindful of the discretionary powers of the Court under Order 85 the Court considered the application sort by the Plaintiff seeking for removal of the Executor and Trustee.

21. In The Supreme Court Practice (1988, Sweet and Maxwell, London) page 1244 - 1245 in para 85/1/1 states:

“Scope of the Order – This Order deals with actions of r the administration of the estate of the deceased person, for the execution of a trust, for the determination of any question arising in the course of administration or in connection with a trust and cognate matters. The Order emphasizes that the lists of questions and orders set out therein are not intended to be comprehensive. The Order does not deal with steps which follow a judgement, as to which see “procedure for judgement’ para 85/3-6/10.

The originating summons has a life of its own under O5 r.1 and can be used for any appropriate purpose. Unless the plaintiff claim is based on an allegation of fraud an originating summons will normally be the correct document for initiating proceedings with regard to the domestic affairs of an estate or trust. If however the proceedings relate to breach of trust or wilful default on the part of a trustee which can be specified with some precision and there is likely to be a substantive dispute of facts, the proceedings should be commenced by writ so that the trustee shall have available to him the full machinery for discovering precisely the charges against him (Re Sir Lindsay Parkman & Co Ltd. Settlement of Trusts [1965] ! WLR 372; [1965] 1 ALLER 609n.”

22. The basis of the application by the Plaintiff stems from the allegations of failure by the Defendant to provide proper accounts as to the Estates funds, failure to distribute shares in the property given that the Defendant was receiving monies from the renting of the property.
23. The power to remove a Trustee is a power provided both in equity as well as in Statute. In section 35 of the Trustees Act empowers the Court to remove a Trustee or Executor. The inherent power of the court to remove a trustee arises from equity explained in detail by Justice Tuilevuka in the case of Mala -v- Devi [2019] FJHC 689; HBC 123.2014 (12 July 2019) in which it was stated:

“9. Equity gives this court a general supervisory power over trusts for the welfare of beneficiaries (see Letterstedt v Broers(18i4) 9 A) 9 App Cas 371, Hunter v Hunter [193>[1938] NZLR 520; Nizam v Shah [2014] FJHC 218; HBC47.2C47.2009 (28 March 2014)). This is the jurisdiction to see that a trust or an estate is properly

administered. Ancillary to this is the power to remove an executor and appoint a new one.

10. In deciding whether or not to remove an executor and appoint a new one, the primary consideration is the welfare of the beneficiaries. This applies whether the Court is exercising its jurisdiction under section 35 or its supervisory powers in equity.

11. In Letterstedt, Blackburn LJ said as follows at page 386:

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases.....

At page 387:


“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 dependant on details often of great variety. But they proceed to look carefully into the circumstances of the case.”

24. Having considered the application before this Court, considering the Affidavit evidence as well as the evidence by the Plaintiff as witness, the Court is mindful and cautioned that the Executor and Trustee was appointed by the Testator with the intention and faith that the nominated would administer his Estate with good intentions in accordance as his role as Executor and Trustee.
25. It is apparent that the Trustee has failed to properly administer the property as well as provide full account of the proceeds arising from the property in relation to the welfare of the Plaintiff.
26. There is no evidence to show that he has an active interest in continuing as the Executor and Trustee. He has failed to provide accounts, or to update the beneficiaries on his role as the Executor.

27. He has failed to distribute the benefits from the Estate for the benefit and to provide for the welfare of the beneficiaries.
28. Given that he is no longer residing at the said address in overseas nor respondent to these proceedings when this case was advertised in the local newspaper, having not return to Fiji for the past 8 years, indicates to this court his inability to look after the welfare of the beneficiaries.
29. It would be in the interest of the Estate for the benefit of the beneficiaries for the Defendant to be removed as trustee and Executor given his wilful neglect of his responsibilities.
30. That a full account of the property proceeds is obtained from the Defendant or from his accounts in the post office or from the bank;
31. That the costs of \$1000 be awarded to the Plaintiff.

## **ORDERS**

32. The Court orders as follows:
  - (i) **The Defendant be removed as the Sole Executor and Trustee of the Probate granted;**
  - (ii) **The Defendant file a full account of the Estate of expenses and income received and paid for administering the Estate within 6 months from the date of sealing of this Order;**
  - (iii) **The Plaintiff be appointed as the Executor and Trustee of the Estate;**
  - (iv) **Costs of \$1000 awarded to the Plaintiffs.**

  
.....  
**Ms Senileba LTT Waqainabete-Levaci**  
**Puisne Judge, High Court of Fiji**

