IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0029 of 2018
(High Court No. HPP 39 of 2017)

BETWEEN : **KEOLA PATI**

Appellant

AND : **OM WATI**

Respondent

Coram : **Basnayake, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Mr N Sharma for the Appellant**
Mr N Lajendra for the Respondent

Date of Hearing : **12 September, 2019**

Date of Judgment : **4 October, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Almeida Guneratne JA.

Almeida Guneratne, JA

Relevant undisputed background facts

[2] One Ram Lagan died on 19th August, 2014 leaving a last will dated 8th July, 2014. The said last will contained the following clause:

> *"Clause 3 : I give devise and bequeath after payments of all my just debts, funeral, testamentary and administration expenses and all the probate, estate and other duties payable on my Estate, my property located at Waila, Nausori comprised in Certificate of Title No. 36280 to Om Wati (That is, the Respondent to the present Appeal – the Parenthetical interpolation is mine) ... ... for her own use and benefit absolutely."*

[3] During his lifetime the deceased testator had entered into two sale-purchase agreements with two different parties. That is presently the subject of litigation in HBC 352/2015 and the Appellant as Administratrix of the estate of the deceased is defending that action.

[4] Apart from the afore-recounted undisputed facts, as the pleadings and evidence reveal, the testator had had a joint bank account with the Respondent.

[5] It is in that background of undisputed facts that the Respondent to this Appeal (as Plaintiff in the High Court) sought an order by originating summons that the Appellant (as Administratrix of the deceased testator's estate) be ordered to transfer to her the said land contained in the Certificate of Title (CT) No. 36280. (Affidavit in support of the originating summons is at pages 16 – 19 of the Copy Record).

[6] The Appellant's affidavit in reply is at pages 64 – 68 of the Copy Record. The position taken by the Appellant may be summarized as follows:-

(a) That she has not refused to transfer the land in CT No. 36280 and has postponed it only because she is awaiting the release by the Respondent of

(i) Monies (income) belonging to the Estate of the deceased emanating from milk proceeds from "a dairy farm" deposited by FCDCL (evidenced at pages 44 – 47 of the Copy Record)

(ii) Monies which the Respondent had taken from the joint-account the deceased testator had had with the Respondent without the authority of the deceased's Estate

(iii) Rental income the Respondent has been getting from two of the three dwelling houses situated on the land in CT 36280.

[7] Apart from what I have referred to in paragraph [6] above the Appellant in her Affidavit in reply (at paragraph 23 thereof) averred thus:

> *"Further to the above ... the Estate has incurred costs which is ongoing in Suva High Court Civil Action No. HBC 352 of 2015 by defending the interests of the Estate against certain persons trying to defraud the Estate and obtain an undivided one half share in Native Lease No. 29608 and an undivided two third (2/3) share in Certificate of Title No. 3580 ... belonging to the late Ram Lagan."* (vide: at page 67 of the Copy Record)

[8] While joining issue with the averments in the Appellant's Affidavit in Reply the Respondent in her Affidavit in response (in essence) averred, *interalia* as follows:

(i) That, she was prepared and she has been always prepared to pay half of the amount that was held in the joint account as at the date of death of the deceased, whereas the Appellant has been demanding the entire amount held in the said joint-account;

(ii) That, after the death of the testator she has had no other support and has had to rely exclusively on the rental income derived from the two of the three dwelling houses situated on the land in CT 36280.

[9] In so far as the income generated from the dairy farm is concerned (vide: paragraphs 8 and 15 of the Appellant's Affidavit in Reply at page 65 of the Copy Record), the Respondent has taken the position that, those proceeds were put into the said join-account. (vide:

paragraphs 8, 9 and 17 of the Respondent's Affidavit in Response at pages 73 and 74 of the Copy Record).

[10] With regard to the High Court Action in HBC 352 of 2015 which the Appellant has averred in her Affidavit in Reply which I have re-capped in paragraph [7] of this Judgment, the Respondent has not urged a specific rejoinder.

[11] I might say at this point that what has been averred by the respective parties in their Affidavits are all matters their lawyers had negotiated on (vide: pages 33 – 43 of the Copy Record) which had failed to bring about a viable resolution to the dispute. That had resulted in the Respondent invoking the jurisdiction of the High Court by originating summons.

The Judgment of the High Court

(vide: pages 8 to 12 of the Copy Record)

[12] The relevant aspects for the purposes of this appeal are contained in paragraphs [10] to [12] of the said judgment which I shall now advert to *seriatim*.

Re : the Order of the learned High Court Judge in regard to the transfer of the land contained in the said Certificate of Title No. 36280 to the Respondent which the Appellant has delayed on account of HBC 352/2015

[13] The learned High Court Judge reasoned thus:

> *"The ... ...ground urged by the defendant (Appellant) for not transferring the (said) land ... is that there is a Court case pending in respect of ..."*

(I interpolate re: the aforementioned sale-purchase agreements) which the learned Judge held as not forming part of the deceased's estate. The Judge accepted the stand taken by the Respondent that, the deceased testator before his death had executed transfers in respect of those properties.

[14] In that regard, the learned High Court Judge observed and reasoned thus:

> *"The learned counsel for the plaintiff that the deceased before his death has executed transfers in respect of these properties but has not yet been registered. The testator died on 19th August, 2014 and the last will of the testator has been executed on 08th July, 2014. The defendant for reasons unknown to the court has not given the date of the execution of the transfers which are being challenged in court. If the testator wished to make the properties which are the subject matter of the action no. HBC 352 of 2015 there had been no reason for him not to include it in his last will. This is not an attempt to decide the matter pending before another court but to decide whether the reasons given by the defendant are reasonable to deprive the plaintiff from enjoying the benefits conferred upon her by the last will."*

[15] I respectfully agree with that reasoning. If the Appellant wished to put in issue the said two sale-purchase agreements as forming part of the estate of the testator then, the dates of execution of the said agreements and their registration became crucial. The burden was clearly on the Appellant to produce that evidence, which Devlin J. might have characterized as "the lighter burden of producing evidence" as distinguished from the overall burden of proof in a case. **Hill v Baxter** [1958] 1 QB 277 at 284.

[16] Consequently, could it be said that, those proceedings fell within the qualifying provision to Clause 3 of the testator's last will? I think not.

Construction of the terms of the Will

[17] The object of a Court is to ascertain the intention of the testator as expressed in his will when it is read as a whole in the light of any extrinsic evidence for the purpose of its construction. As was explained in **Re: Knight** [1957] Ch 441 at 453;

> *"Matters of construction must in the end of all depend upon the impression made upon the reader's mind by the words that have been used."*

[18] Then again, as Viscount Simon L.C. put it in **Perrin v Morgan** [1943] AC 399;

> *"The fundamental rule in construing the language of a Will is to put on the words used the meaning which, having regard to the terms of the Will, the testator intended. The question is not, of course, what the testator meant to do when he made the Will, but what the written words he uses mean in the particular case...."*

Application of the said judicially enunciated principles to the instant case

[19] The written words used in the Will are:

(a) Devising and bequeathing the land in CT No. 36280 to the Respondent for her own use and benefit absolutely. (which I term as the dominant clause)

(b) After payments of all my just debts, funeral, testamentary and administration expenses (etc). ...(which I term as the qualifying provision).

[20] The extrinsic evidence as urged in an attempt to come within that qualifying provision are:

(a) the pending proceedings in HBC 352 of 2015,

(b) there being three dwelling houses on the land contained in CT 36280, one of which the Respondent is occupying and the other two, given on rent by the Respondent, the Respondent has been appropriating rentals thereupon,

(c) transactions the testator had entered into during his lifetime, (vide: bank statements of the testator at pages 44 to 46 of the Copy Record).

(d) income generated from certain undivided shares in an allotment of land through a dairy milk farm and;

(e) funds lying in a joint bank-bank account which the testator had held with the Respondent in his lifetime.

Did those matters form part of the Estate of the testator justifying the Appellant in postponing the execution of CT 36280

[21] I shall now proceed to deal with those matters *seriatim*.

[22] In so far as (a) in paragraph [20] above is concerned (that is the proceedings in 352 of 2015) I hark back to what I have articulated at paragraphs [15] to [16] of this judgment which I re-iterate here.

[23] In regard to (b) to (d) in paragraph [21] above are concerned, although learned counsel for the Appellant addressed this Court at length, when asked by Court as to whether the

Respondent had been put on notice as to any statement of Account and basis for the same to show that the said moneys envisaged therein formed part of the testator's estate from which the expenses were liable to be recovered on account of the Administration of the said Estate, learned Counsel conceded that it had not been done. So, admittedly there was no quantification.

Re : The Joint Bank Account

[24] What remains to be addressed is the matter envisaged at [paragraph 20(e)] above.

[25] It may well be that, the funds lying in the said joint account had come through income earned by the testator. Even if I would go to the extent of assuming it to be so, and may I say, as to why learned Counsel was heard to submit that, the funds lying in the said Joint-Account must be regarded as being funds held in trust for the Estate of the testator, nevertheless an established principle of law stands in the way of that contention and that is, the principle of survivorship.

The Principle of Survivorship

[26] The legal issue arising in that regard and it is established law that, upon the death of a testator who held a joint bank account with another, the funds lying in that account stands transmitted to or devolves on the survivor.

[27] On that, having perused authoritative precedents I found that the learned High Court Judge was right on the mark.

[28] No matter from what sources or when funds had come to the said Account (whether before or after the Joint Account holder's death) the funds lying in such joint account will accrue to the surviving joint account holder and will not form part of the testator's estate and consequently, the survivor of the joint account could not be said to have held the funds in Trust on behalf of the Testator's Estate.

[29] Notwithstanding the authority cited by learned counsel for the Appellant (vide: **Walters v Woodbridge** [1878] 7 Ch D 504), that is the conclusion I arrived at deriving assistance from the thinking of Jessel MR in **Marshall v Cruttwell** [1875] LR 20 Eq. 328 and the more recent case in **Drakeford v Cotton** [2012] EWHC 1414 (Ch).

Some Final Reflections

[30] The Appellant (the wife of the testator) no doubt could be seen as having had a grievance. As her Counsel submitted, there being nothing to recover from the testator's estate, (if the land in CT 36280 istransferred to the Respondent) what would remain to give effect to Clauses 4 of the Will which stated that:

> *"I give and bequeath after payments of all my debts ... the residual of all my assets ... to my wife Keola Pati ... etc...."*

[31] That is why I found it not only relevant but also necessary to deal and answer the aspects I articulated earlier in this judgment in the background of the legal principles in regard to the construction of a Will.

[32] That is, drawing a distinction between the written words (Clause 3) and what the testator meant to do (Clause 4).

The Alchemy of Life and the Law

[33] A phrase I borrowed from the celebrated South African Jurist Albei Sachs.

[34] His Lordship called it "strange" but I do not find it to be so in the circumstances of the instant case.

[35] It is not disputed that the testator had been living with the Respondent for twenty years. On falling ill it is the Respondent who had been with him. It does not require an exercise

in semantics to ponder as to why the testator may have been prompted to open a joint-account with the Respondent and willed what is stated in his last will in Clause 3.

[36] Like Rip Van Winkle waking up from slumber, the Appellant comes on her duty to administer the testator's estate as Administratrix (the named Executor of Estate in the Will having refused to respond to the testator's wishes for reasons unknown), to deprive the Respondent from claiming her benefit in terms of Clause 3 of the said Will.

[37] Those are the aspects in the case which I feel, the learned High Court Judge appears to have intuitively taken into consideration though not expressly stated in his judgment but as to why his Lordship cast the Appellant in costs in a sum of $3,000.00

[38] Although I have not specifically referred to the Grounds of Appeal contained at pages 4 to 7 of the Copy Record I feel fortified that in their collective essence I have dealt with the same.

[39] In the result, the Appellant's lament that, there is no other way to defray the testamentary expenses other than to stay the testamentary disposition contained in Clause 3 of the Last Will is not, in my view, a problem that visits the Respondent. In fact, the Respondent had been willing to part with half the funds lying in the said Joint Bank Account, (though not legally liable, to do so) responding to the Appellant's lament that the Respondent should share half of the expenses arising from the administration of the testator's estate.

[40] Before I part with this judgment, I would like to make a few observations.

[41] (a) There is no finding by the High Court Judge as to whether the said income from the Dairy farm had got into the joint account the deceased testator held with the Respondent.

(b) The dwelling houses rentals which the Respondent had been appropriating for her sustenance on the basis that, she had got a bequest under the last will in question, nevertheless, the Appellant had not effected a transfer and therefore the Respondent

was not yet, in the eyes of the law, the absolute owner of the said land contained in CT 36280.

(c) From the Appellant's perspective (the wife of the testator) who is saddled with the duty of administering the deceased testator's estate, is in a quandary as to how she is to find funds to administer the said estate. This Court is conscious of the fact that she is named as a beneficiary in terms of Clause 4 of the last will in question. (I pause here to say that there is no conflict of interest in that regard).

(d) Be all that as they may, taking the Respondent's position as well into consideration, the Respondent's continuing willingness to part with half of the funds lying in the joint account strikes me as a bona fide act on her part.

(e) There is some merit in the Appellant's contention that, given the contentious nature of some of the issues involved, the matter at hand ought not have been decided on the basis of originating summons (vide: Appellant's written submissions dated 7th July, 2019 at paragraph 6.8 read with paragraph 7 therein).

(f) As against that, there was the impassionate plea in the Respondent's Affidavit in Response at paragraph (29) thereof (page 77 of the Copy Record) using her advanced years (70 years) (now 72 years) that, a re-hearing on evidence (by writ) will frustrate her life's expectations in gaining the benefit of the bequest in the last will why I am not inclined to accept the Appellant's contention.

Conclusion

[42] For the aforesaid reasons I proceed to dismiss the Appeal.

Jameel, JA

[43] I have read in draft the judgment of Guneratne JA and agree with the reasons and orders proposed therein.

Orders of Court:

1. *The Appeal is dismissed.*

2. *The Appellant shall pay as costs of this Appeal a sum of $5,000.00 to the Respondent within 21 days of the judgment which shall be in addition to the costs ordered by the High Court.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice F. Jameel
JUSTICE OF APPEAL