IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0016 of 2017
[Suva HPP Case No. 016 of 2017]

BETWEEN : **KRISHNA KUMARI**

Appellant

AND : **TIGER CHANDRA NARAYAN**

Respondent

Coram : **Dr Almeida Guneratne, P**
Jitoko, VP
Dayaratne, JA

Counsel : **Mr N. Vakacakau for the Appellant**
Mr A. J. Singh and Ms P. D. Prasad for the Respondent

Date of Hearing : **14 July 2023**

Date of Judgment : **28 July 2023**

JUDGMENT

Almeida Guneratne, P

[1] I agree with the judgment of His Lordship Justice Jitoko together with the attendant reasons contained therein.

Jitoko VP

A Colorful Background

[2] These proceedings which began by way of a writ of summons of 16 March 2007, are over the Estate of one Deo Narayan f/n Ramadbin of Mulomulo, Nadi. He was born on 5 June 1930
and died on 4 October 2006 at the ripe old age of 76. At the age of 17, Deo Narayan married one Shiu Pati f/n Ram Bihari aged 13, of Savusavu, Nadi on 21 April, 1948 and they remained married until he died. This did not discourage Mr Narayan from taking in two (2) concubines, Lavenia Masi (a i Taukei) of Mulomulo, Nadi, and Krishna Kumar, (the appellant) of Namaka, Nadi. It is enough to know, that as between Deo Narayan, his legal wife, and his 2 common law wives, together, produced 24 children or dependants. Both the legal wife Shiu Pati and common law wife Lavenia Masi who had resided together, under one roof, are now deceased. Shiu Pati died on 10 December 2006 and Lavenia Masi in 2008.

[3] The respondent is the son of Deo Narayan and Lavenia Masi and in these proceedings, is the intending administrator of the estate of Shiu Pati, his step mother.

[4] Mr Deo Narayan's active lifestyle even extended to his predisposition for making wills. As far as the Court can establish from the record, he had made five (5) Wills together, the first on 20 October 1986, the second on 10 November, 1989, third on 23 August 1997, fourth on 30 September 2002, and finally the fifth on 2 April, 2004. These proceedings is in respect of the 2002 and 2004 Wills only.

[5] On 20 November 2006, the 2004 Will was filed into the Probate Registry of the High Court by Shiu Pati and the respondent. The Will having been proven, both applicants Shiu Pati and Tiger Chandra Narayan, were duly appointed as executors and trustees of Deo Narayan's estate (Probate No. 45645).

[6] The 2002 Will which the appellant claims is the last and valid Will of Deo Narayan, appoints the appellant as the sole trustee and under it, all the properties both real and personal, are bequeathed to their two sons, Abhinesh Chandra Narayan and Ravinesh Chandra Narayan.

The Challenge to the 2004 Will

[7] On 16 March 2007, the appellant, filed her Writ of Summons in which she alleged:

> *"[10]…that the purported signature of the deceased in the purported Will is fraudulent and the signature is a forgery and in the alternative that at the time when the purported Will is alleged to have been executed the deceased was not of sound mind, memory and understanding and further in the second alternative that the deceased signature was obtained by undue influence.*
>
> *Particulars of Fraud*
>
> *(a) Signature of the deceased has been forged.*
>
> *(b) The Deceased was not of sound mind, memory and understanding when the Purported Will was executed.*
>
> *(c) The Purported Will was not read over or explained to the deceased nor did he read it himself before it was executed and he was unaware of its nature and effect.*
>
> *(d) The purported signature or mark of the deceased on the Purported Will was not made by the testator himself nor by anyone for at his directions.*
>
> *(e) The First Defendants have fraudulently forged and or caused to be forged the Purported Will to fraudulently deprive the Plaintiff and her children of their inheritance.*
>
> *(f) The execution of the Purported Will was obtained by undue influence.*

[8] The appellant further contended that the signature on the purported Will was not the testator's and in any case, the purported Will was not duly executed in accordance with the Will's Act.

[9] The appellant's prayers were:

> 1. *That the Court do pronounce against the Purported Will propounded by the Defendant namely the Will purported executed on or about the 2nd day of April 2004.*
>
> 2. *An Order that the Probate No. 45645 granted on the 20th day of November 2006 be declared as invalid and/or revoked.*
>
> 3. *An Order that Probate be granted in accordance with the Will dated the 30th day of September 2002.*
>
> 4. *An Order that the First Defendant pay the Estate of Deo Narayan all money that he has withdrawn from the bank accounts of the Estate of Deo Narayan together with interest thereon at the bank's current interest rate.*

Proceedings

[10] At the hearing in the High Court on 14th and 15th November and 7th December, 2016, the appellant/plaintiff was represented by Counsel while the respondent/defendant appeared In Person.

[11] This court notes that at the conclusion of the hearing, on 7 December 2016 the parties were ordered to file written submissions by 17 January 2017. None of the them did. They were also informed that the judgment was going to be handed down on 28 February, 2017 at 9.30am. When the matter was called on 28 February, neither the plaintiff nor her Counsel or the defendant appeared, so the judgement was delivered in their absence.

[12] On 28 February 2017, the High Court dismissed the appellant's action and awarded $3,000.00 costs to the respondent. The Court further dismissed addition reliefs sought including that the respondent be prohibited from withdrawing funds from the estate's bank account.

Stay Pending Appeal

[13] The appellant filed her appeal against the judgment on 17 March 2017 to the High Court. Her application of stay pending appeal was refused on 11 August 2017.

[14] The appellant then sought the intervention of a single judge of appeal for a stay order on the execution of the judgment pursuant to section 20 (1) (e) of the Court of Appeal Act 1949, which order was granted by Calanchini P, on 24 August 2017. There was further Order that the respondent be restrained from releasing and distributing the estate pending appeal.

Grounds of Appeal

[15] The appellant sets out a total of 15 grounds of appeal but at the date of the hearing, counsel abandoned 5 grounds and the remaining 10 grounds are as follows:

1. *The learned trial judge erred in law and in fact in not making a finding based on the merits of the case (and the evidence and the weight of evidence)*

2. *The learned trial judge erred in law and in fact in failing to consider or put adequate weight on the evidence that by the time of the purported will, the testator was using his thumbprint as his signature.*

3. *The learned trial judge erred in law and in fact in failing to consider or put adequate weight on the evidence that had the Testator actually executed the purported will he would have placed his thumbprint instead of a signature.*

4. *The learned trial judge erred in law and in fact in failing to consider or put adequate weight on the evidence that the signature of the Testator on the purported will was substantially different from all his other signatures during the last few years of his life.*

5. *The learned trial judge erred in law and in fact in not placing any importance on the fact that during the time of the purported will, the Testator had been using his thumbprint as a signature.*

6. *The learned trial judge erred in law and in fact in failing to consider or put adequate weight on the evidence that at the time of the purported will*

the Testator did not own the Tractor contained in clause 6 of such will and that the same had already been sold and transferred to Sushil Chandra.

7. *The learned trial judge erred in law and in fact in accepting evidence that the purported will was read over and interpreted to the Testator in the Hindustani Language, and he appeared fully to understand the meaning and effect thereof, when if it was, the Testator would have known had he been of sound mind, that the Tractor in clause 5 is no longer his to give.*

8. *The learned trial judge erred in law and in fact in accepting the purported will was duly executed taking into account the vagueness of clause 9.*

9. *The learned trial judge erred in law and in fact in failing to consider or put adequate weight on the evidence that the evidence of Siteri Celua that between the years 2004 and 2006 the Testator could not recognize her.*

10. *The learned trial judge erred in law and in fact in deciding that the Plaintiff has not been successful in establishing the grounds upon which she challenged the purported will.*

<u>Application for Leave to Adduce Fresh Evidence</u>

[16] As earlier noted, the appellant had filed its Notice of Appeal on 17 March 2017 setting down 15 grounds of appeal.

[17] On 17 May 2017, the appellant filed an Amended Notice of Appeal which in addition to the original 15 grounds of appeal, added the following:

> *"16. Subject to leave granted to adduce further evidence, that fresh evidence by Forensic Document Examination and Handwriting Expert, Linda Morell of Handwriting Experts, Wellington New Zealand is sufficient evidence for this Honourable Court to pronounce against the Purported Will pronounced by the Respondent namely the Will purportedly executed on or about 2nd day of April, 2004 accordingly.*
>
> *17. Subject to leave being granted to adduce further evidence that there has been a miscarriage of justice to the Appellant in the circumstances pertaining to the trial of the proceedings in the High Court and accordingly that judgment dated 28 February, 2017 be set aside and orders granted in terms of prayers sought in the Statement of Claim."*

[18] The powers vested in the Court of Appeal to grant leave to adduce fresh evidence in appeal proceedings are set down under Rule 22 (2) of Court of Appeal Rules under the general powers of the court. It states:

> *"(2) The Court of Appeal shall have full discretionary powers to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.*
>
> *Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."*

[19] There is no affidavit in support of the application, but in his submission handed to court at the day of hearing, the Counsel for the appellant referred to an application for fresh evidence which was filed on 28 July 2017 and supported by the affidavit of the appellant, accompanied by supplementary affidavit of one Linda Morrell, the handwriting expert. The respondent's counsel had filed affidavit in opposition on 23 August, 2017.

[20] The fresh evidence to be adduced is through the testimony of a handwriting expert from New Zealand. According to the appellant, another handwriting expert who was to appear as expert witness in the original hearing from Australia, could not be located on the day of the hearing, so the appellant decided to proceed without her, together with her initial expert opinion that could not be tendered, in her absence.

[21] The particulars as to prayers sought for adducing fresh evidence are;

> *"b. The fresh evidence be adduced in Court by way of oral examination of Forensic Document Examination and Handwriting Expert, Linda Morrell of Handwriting Experts, Wellington, New Zealand;*
>
> *c. That the Forensic Expert Linda Morrell be granted leave to peruse, study and analyse original copies of all documentary evidence*

containing signatures of the late Deo Narayan contained in the court records one (1) day before her oral examination;

d. *That a date for oral examination and/or hearing of Forensic Expert Linda Morrell be fixed before this Honourable Court."*

Applicable Principles

[22] Denning LJ in **Ladd v Marshall**, [1954] 3 All ER 745 at page 748 emphasised the three (3) conditions to be fulfilled before fresh evidence can be adduced, as follows:

> *"….first, it must be shown that the evidence could not have been obtained with reasonable diligence to be used at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible."*

[23] The Court notes that the Marshall principles have been applied locally in **Stephens v Attorney-General** [1998] FJSC 6 CBV0002U.1996S (12 March 1998), **Pillai v Chand** [1998] FJCA 35.ABU0064U.96S (28 August 1998); and **Western Marine Limited v Kelera Levakarua and South Seas Engineering Ltd** [2013] FCA 52.

Evidence Could Not Be Obtained With Reasonable Diligence

[24] According to the appellant it had taken all reasonable steps to obtain the relevant evidence and that the failure to do so *"was beyond her control",* and *"there was no other way that the Appellant could have located the Initial Expert."* Counsel then asked what seems to be a self-incriminating question: *"Why didn't the Appellant find another expert or apply to vacate trial to find another expert?"* It is exactly the same question that he should have directed at his predecessor counsel.

[25] Given that the most important issue on the validity or otherwise of the Will which is central to these proceedings, is whether the testator's signature was a forgery and therefore the

expert evidence of a handwriting expert was an absolute necessity, this court cannot possibly imagine a more convincing reason why the trial court would have not deferred to an application for an adjournment to allow the appellant to find an alternative expert. Reasonable diligence means due care and attention in the performance of a duty. Counsel would have known in advance, be it only a day or less, of the non-availability of her expert witness and should have considered other available options bearing the interest of her client in mind.

[26] Reasonable or due diligence in the court's view, was not observed nor pursued in this instance.

<u>If evidence given it probably would have an important influence on the result</u>

[27] As the original handwriting expert, Adrian Lacroix of Australia could not be produced in court to testify, her initial assessment of the testator's signature to the 2004 Will; could not be admitted in evidence. There is therefore no legal basis for the claim by the appellant that *"had the Initial Expert Report been available at the time of the trial, the decision would have been different considering every other evidence tendered."*

[28] All the Court had before it was the evidence adduced through witnesses on the physical and mental capacity and capability of the testator especially in and around the later part of 2004 when the challenged Will was made.

[29] There is evidence that while the testator was growing frail and his eyesight was failing, he was still moving around albeit with the aid of a walking stick. The witnesses to the testator's signing of the 2004 Will, were credible attesting to the mental wellness of the testator.

[30] The most important evidence however is that given by his doctor. Dr Low testified that the testator was very strong mentally and in high spirit with his loud booming voice, although

his physical being was not in the best of shape. When asked by the trial judge if his physical disabilities affected *"his soundness of mind"* he replied:

> *"Dr Low: Well his mind was sound means like his healthy mind. He is actually aware of what is happening. And at the same time that like I say you know you could hear when he talks he is just like thunder his voice is so loud. So I say spiritually he is very good but I say he is physically he is not in the best of health."*

[31] By all accounts there is no evidence before the court to support the contention that the testator was of unsound mind or that he was so physically impaired of signing his name even with his deteriorating eyesight. This court therefore shares the trial judge, Seneveratne J's conclusion at paragraph 19 that:

> *"There is absolutely no evidence before the court to arrive at the conclusion that the signature of the testator had been forged…"*

[32] The appellant relied on **Kumari v Narayan** [2018] FJCA 126 in support of its leave application to adduce fresh evidence. However, the case dealt mainly with the function of handwriting experts and the limitations and dangers they pose should complete reliance be placed on them.

[33] In all the circumstances, I believe that the new evidence of a handwriting expert on the signature of the testator to the 2004 Will, if leave is granted for it to be adduced, would not have an influence on the outcome of the case.

The Evidence must be apparently credible

[34] The appellant's Counsel in his submission under this head, referred to the *"Examination Methodology"* of the handwriting expert that the appellant wished to give evidence on the signature of the testator in the 2004 Will. She has pointed out what she believed are a number of differences in the signatures in the pre-2004 document from the 2004 Will.

[35] While the Court believes that the growing physical incapacity of the testator from 2002 to 2004, would certainly have contributed to the slight variations and/or differences, in an individual's writing, including signature, it is only credible evidence to the extent, in this particular case, to emphasise the extent of the deterioration of the testator's ability to write and sign his name from 2002 to 2 April 2004, the date of the Will. It does not prove of itself, that the signature was a forgery.

[36] For all the reasons above the appellant's application for leave to adduce fresh evidence, is refused.

The Appeal Proper

Grounds 1 and 2: On whether the testator was capable of signing his name or affirming his Thumbprint to the 2004 Will

[37] The appellant argued that in 2004, the testator's physical conditions and especially his shaky hands and *"engorged"* fingers were at such a state that he could only affix his thumbprints onto documents that needed his signature. Counsel pointed to a Tenancy Agreement entered into between the testator as landlord and a tenant, dated October, 2004 to which the testator had only been able to affix his thumbprint to the attestation clause.

[38] The appellant also referred to the evidence of witnesses including Hari Ram's law clerk, Janardan Naiker, who gave evidence that the testator's hands were shaky, even back when he came to sign his 2002 Will.

[39] What is clear from all the evidence before the court is that the testator was an active person of bigger than average built and with a commanding booming voice. He was a strong-willed individual who despite his physical infirmities, continued to test his endurance limit. His mental state and alertness remained exceptional, until to the very end.

[40] The court, as far as the transition from signing to affixing of thumbprint is concerned, takes cognisance of the fact that the 2004 Will was executed and signed by the testator on 2 April 2004, while the Tenancy Agreement which bears the testator's thumbprint, is dated in October, 2004. There is a gap of six (6) months between the 2004 Will execution and the Tenancy Agreement and much could have changed, given the growing frailty of the testator, from being able to sign his name in April to affixing his thumbprint later in the year, in October.

[41] I do not see any merit under these grounds.

<u>Grounds 3 and 5:</u> **<u>Thumbprint or Signatures</u>**

[42] The appellant's contention is that the trial court had not put adequate emphasis on the evidence that the testator was taking to affixing or placing his thumbprint to any document requiring his signature, around 2004 when the 2004 Will was signed by him.

[43] This Court however notes that in many of the invoices and receipts of commercial transactions produced and tended into court to show the deterioration of the testator's style of execution of documents, 2004 to 2006, do in fact show that the testator was either signing or entering his initials in the documents. It goes to prove that the testator was still capable of writing up to 2006 albeit, entering his initials in documents.

[44] As the court had already observed, the date of the Tenancy Agreement on which the testator had placed his thumbprint was in October 2004, six (6) months after he had signed the Will in April 2004.

[45] The Court can only assume that the testator was using all the three (3) options of signature, thumbprint and initials in the last four (4) years of his life.

[46] Then there is the undisputed evidence of Sevika Nand Reddy, school teacher, who was one of the two witnesses to the testator signing the 2004 Will. He testified to the health and

capability of Deo Narayan at his signing his name on the document. Counsel for the respondent has referred to **Brown v Skirrow** [1902] P.3 and **In the Goods of Martha Davies** [1850] 2 Rob. Eccl 337, in support.

[47] Grounds 3 and 5 are equally without merit

Ground 4: Variation in the testator's Signature

[48] The court's analysis and conclusion under grounds 1 and 2 above equally apply as to this ground also and is therefore without merit and must fail.

Grounds 6 and 7: Soundness of the testator's mind

[49] These grounds relate to the mental state of the testator to make logical judgment as illustrated in his bequest of the tractor which he no longer possessed or owned.

[50] There is evidence that the transfer in the ownership of the tractor occurred after the execution of the 2004 Will but this issue would not of itself invalidate a Will. In any case, these grounds should also have been abandoned by the appellant's counsel as they had withdrawn the original ground 4 of the appeal to wit *"that the testator was not of sound mind at the time of the purported Will."*

[51] Grounds 6 and 7 have no merit.

Ground 8: Vagueness of Clause 9 of the Will

[52] Mere vagueness of a provision of a Will does not of itself invalidate the instrument.

[53] This ground fails

Ground 9: Evidence of failing eyesight not being given adequate weight

[54] Specifically, the appellant, argued that witness Siteri Celua, a tenant and neighbour of the testator, and who often shared evenings of *"kava"* bowls, with him and the appellant, testified that due to the testators failing eyesight, he no longer could recognise her, between 2004 and 2006.

[55] As Counsel for the respondent correctly pointed out the Will was executed in early months of 2004 and failing sight does not mean that the testator was at the same time, unable to sign his own name.

[56] This ground also fails.

Ground 10: The trial judge had erred in law and fact in finding that the appellant had not proven her case.

[57] The underlying theme of the appellant's ground 10 of appeal, and pervades all the other nine grounds, is that the 2004 Will is a forgery and/or that there was undue influence imposed on the testator and he did not *"fully adopt and consent to its [the Will] contents",* although Counsel abandoned the specific grounds inferring undue influence on the day of hearing.

[58] The claim of forgery was to be supported by a forensic document examiner, a handwriting expert from overseas, who had provided an initial report to the extent that the signature of the testator in the 2004 Will was not his genuine signature.

[59] The writing expert could not be found at the beginning of the hearing, as explained by the appellant as follows (at paragraph 11 of her submission):

> *"11. However, when the time came for trial the Appellant's previous solicitors discovered that the initial expert could no longer be contacted. All the attempts to contact the initial expert were proven futile, this being the case, the Expert's, Report has not tendered as evidence during the trial. The applicant ran her case without the essential initial Expert's Report."*

[60] Without the expert witness, the counsel who had the carriage of the case at the hearing could not tender and rely on the expert's preliminary assessment and therefore relied on other witnesses to prove or lend substance to allegations of fraud and/or undue influence.

[61] The appellant in her examination in chief, said that by 2002, the testator, was *"getting sick and he was having high blood pressure."* He also had a cataract in his left eye that impaired his vision. He had a swollen leg and his *"hand was very shaky too can't write."* While he was still able to sign documents in 2002 and 2003, his signature deteriorated after that and he completely stopped signing documents including bank slips in late 2003. In some later documents, the testator merely used his *"RDN"* initials to sign them off, the latest was a delivery Carpenter's Hardware invoice dated 18 August 2006. According to the appellant, the testator finally resorted to using his thumbprints before he died.

[62] The appellant's second witness was Janardan Naiker, the senior conveyancing clerk for the law firm Ram's Law of Nadi, solicitors to the appellant. He prepared the testator Deo Narayan's 2002 Will. He merely added the observation that his hands were shaky when signing his name.

[63] Dr Zen Min Low, in private practice in Nadi, is a family GP and been in practice since 1999. The testator first visited him in January 2001 for some *"cardiac problem"* and remained his patient until his death in 2006. The doctor's general assessment of the testator's condition, that is, diagnosis, at page 88 of the court record:

> *"Congestive heart failure, hypertension which is usually uncontrolled and also insulin required…"*

[64] When questioned by Counsel for the appellant about the testator's general health in 2002, Dr Low answered:

> *"I would say mentally he is very strong person spiritually not spiritually in terms of his spirit, but his physical body is not the best of physical health. So, if I can recall like I say that he is actually one eye is blind the other eye is not the best condition he needs actually be guided into the clinic and often and that is where I think the Ms Khan around most of the time he is actually brought by the Miss. And in terms of mobility he is very slow because you know it takes him time just to walk into my room…"*

[65] A bit further on in the doctor's evidence, upon being asked of the testator's psychological well-being even in 2006, the year he died, he affirmed:

> *"A: From the time he came, to on the last visit I visit him at home which probably that was the last time I saw him. Until then he is actually mentally quite well. He is mentally sound he is actually in good spirits even though his physical status is not good but on the last visit I met him hi is actually not in the best mind which is somewhere in 2006, yes that is what I can recall.*
>
> *Q: And did his condition improve with treatment doctor?*
>
> *A: Yes he actually improved since I started seeing him but because of his cardiac conditions as it is you know he is actually having a more like in stage heart failure has it went by so, there is not much we can actually do for him on the last stages."*

[66] As to the testator's physical movements, the doctor testified that he used a walking stick/aid and with his swollen joints, he often needed someone to help him walk. On the testator's sight and hearing, the doctor stated:

> *"A: In terms of hearing I think I had to speak louder those days if I can remember because why I remember so much because he is the famous man because he had three wives back and recalled. And also he is a very nice man because he likes us so much that he even brings the wild pork that he hunt with you know the children hunted. So there is a bit of memories of him."*

[67] Another witness Celua, for the appellant and a friend and who used to share *"kava"* with the appellant and the testator, in her evidence, stated that, because of the latter's poor eyesight, he was failing to recognise her between 2004 to his death in 2006.

[68] Finally, the appellant relied on her son, Abhinesh Chandra Narayan to testify on the testator's failing health from 2003 to his death. In 2003, Abhinesh was only 6 years old and in his evidence, he stated that his father's health began to deteriorate from 2003 and he was mostly housebound. He had accompanied his father in 2002 when he went to Hari Ram's lawyers to make his Will, although he was not physically present during the making of the Will.

[69] For the respondent, he confirmed that he was not present or a witness to his father, the testator's preparation and execution of the Will of 2004, but he had been informed by him, that he had made a Will and he has left it with his mother. A copy of the 2004 Will was handed to him by his mother after his father died in 4 October, 2006.

[70] The Respondent, confirmed, on being asked by Counsel for the appellant on the state of health of the testator before his death, as follows: (page 158 of the record):

> *"Mr Narayan: He did have diabetes and pressure and a hit of leg because he did not drive because when he drives like blisters come on his legs. But otherwise, mentally, physically, he was really fit.*
>
> *Q: Was he really fit?*
>
> *A: Yes I would say he knows what he was doing.*
>
> *Q: What about his movement?*
>
> *A: He used to walk. In 2005, before his death we the one who made him the walking stick for him the "sirisau walking stick."*

[71] All in all there is sufficient evidence from witnesses of both parties to support the conclusion reached by the trial judge that Deo Narayan was mentally and physically

capable at the time of the execution of the 2004 Will and in fact did sign and put his name to it on 2 April 2004.

[72] It is not, as Almeida Guneratne JA (as he then was), found in **Ram v Ram** [2017] FJCA 98; ABU 29.2014 (14 September 2017) that the learned trial judge had given reasons for his finding not in the evidence and therefore needed to be impugned, but in this case there is no evidence to dissuade the judge from arriving at the only conclusion he could have reached.

Conclusion

[73] This is essentially a family dispute which over time has been allowed to fester. The Court notes that that at the outset of the proceedings, the parties had agreed to a truce pending the determination of this probate action. Thus on 27 August 2008, they entered into an interim Settlement under which the appellant and Subash Chand, the respondent's brother were appointed as joint Administrators of the estate and further, there be a joint bank account to be operated by the Administrators to receive incomes and pay expenditures and outgoings and also pay for the maintenance of the children. While this court is unaware of the present status of the Settlement, it is a good place to begin afresh. It can only hope that this long drawn out saga finds an amicable solution, in keeping with the spirit of consensus evident in the 2008 Settlement and in honour of the families much acclaimed and colourful Pater.

[74] As to the appeal, I remain of the opinion that Seneviratne J's decision on both facts and law given all the evidence before him, were arrived at property after a full and, might I add a patient hearing. I note that in spite of the Court's invitation for the parties to file submissions at the close of the hearing, it was not taken up.

[75] I am not minded to disturb the High Court's conclusion.

Dayaratne JA

[76] I agree with the reasons given and the conclusion arrived at by His Lordship Jitoko VP.

[77] **Orders**

1. *Application for leave to adduce further evidence is denied.*
2. *Appeal is dismissed.*
3. *Costs of $3,000.00 against the appellant in favour of the respondent to be paid within 21 days.*

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

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Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

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Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

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