

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

CIVIL APPEAL NO. ABU 036 of 2022

[Suva Probate Action No. HPP 26 of 2022]

BETWEEN : **SHARANJIT KAUR SINDHU aka SHARAN SINDHU aka**
SHARAN LATEEF aka SHARANJIT KAUR LATEEF

AND

ESTATE OF REXINA SHIREEN LATEEF

Appellant

Coram : **Dr Almeida Guneratne, P**
Morgan, JA
Andrews, JA

Counsel : **Mr. Naidu and Mr. K Chandra for the Appellant**

Date of Hearing : **05 September 2023**

Date of Judgment : **29 September 2023**

JUDGMENT

Almeida Guneratne, P

[1] I agree with the judgment of His Lordship Justice Morgan which I read in draft in its entirety.

Morgan JA

Brief Background and Facts

- [2] This is an appeal against the decision and orders of the High Court dismissing the Ex Parte Application of the Appellant for orders to permit the sale of the property referred to below.
- [3] The Appellant in this matter is the Administratrix (with will) of the Estate of Rexina Shireen Lateef late of Suva, Fiji but residing in Manila, Philippines, Retired, deceased, testate (*“the Deceased”*).
- [4] By her last Will and Testament dated 7th January 2013 (*“the Will”*), the Deceased gave, devised and bequeathed a property she owned in Suva, (*“the Property”*) to her nephew Rehan Lateef (*“the Beneficiary”*) a minor. The Will provided as follows:-
- “4. I GIVE DEVISE AND BEQUEATH my house at 17 Catalina Street, Suva Point, Suva, Fiji Islands to Rehan Lateef, to be held in trust by my Trustee and distributed at a time in the discretion of the Trustee.”*
- [5] The Administratrix is the mother of the Beneficiary.
- [6] The Administratrix considered that it was in the best interests of the Beneficiary to sell the Property. It is not necessary for the purposes of this judgment to consider the merits of this decision save to say that her reasons for reaching this decision were fully placed before the High Court in an affidavit.
- [7] Two valuations of the Property were obtained in 2018 and 2022 from registered valuers in Suva which valued the Property at F\$1,350,000.00 and F\$900,000.00 respectively.
- [8] The Administratrix entered into an Agreement for the Sale and Purchase of the Property for the sum of F\$1,360,000.00 on the 7th January 2022 (*“the Agreement”*).

[9] The Agreement was conditional on the consent of the High Court of Fiji to the sale pursuant to Section 24 of the Trustee Act 1966.

[10] The Appellant explained in her submissions filed in this Court that the Agreement was made conditional or subject to the consent of the High Court because:-

- “(a) *Ms Sindhu had invoked the powers available to her, as a trustee for the Estate, under s.23 of the Trustee Act.*
- (b) *Rehan, to whom the Property had been left, was still a minor and could not direct Ms Sindhu to sell the Property under s.23 (4) of the Trustee Act.*
- (c) *It was considered appropriate to obtain the consent of the Court under s.85 (refer above).”*

[11] The Appellant proceeded to obtain such consent by an Ex-Parte Notice of Motion for Sale of Trust Property filed in the High Court in Suva on 15 March, 2022 supported by an Affidavit sworn by the Administratrix deposing to the background and facts of the matter including her reasons for sale and intentions with respect to the proceeds of sale.

[12] By the Notice of Motion the Appellant applied for the following orders:-

- “1. *The Administratrix be permitted to sell the trust property comprised in State Lease No. 2746 being Lot 32 Muanivatu in the Tikina of Suva and province of Rewa with an area of 1 rood and 13.7 perches referred to, under the Last Will and Testament of late Rexina Shireen Lateef (**Deceased**) dated 7 January 2013, as 17 Catalina Street, Suva Point, Suva, Fiji Islands (**Property**).*
2. *The Property be sold in accordance with the terms of the executed sale and purchase agreement dated 7 January 2022 for the benefit of the beneficiary, Rehan Lateef also known as Rehan Mandip Lateef (**Beneficiary**).*
3. *The proceeds of sale to be remitted by the Administratrix in Australia (subject to compliance with all requirements of the Exchange Control Act 1950) and to be held in trust with JBWere Limited, asset managers and to be distributed at a time in the sole discretion of the Administratrix, being a date not earlier than the date on which the Beneficiary reached the age of majority.*

4. *Any other orders that the Court considers just.*”

[13] The application was made pursuant to Section 85 of the Trustee Act 1966.

[14] The Notice of Motion was heard by Justice Vishwa Dutt Sharma on the 22 May, 2022.

[15] In a Decision dated the 1st June 2022 the learned Judge ordered, for the reasons stated in the Decision that the application for the Sale of the Property of the Beneficiary and Minor Rehan Lateef be dismissed.

[16] The Appellant thereupon promptly filed a timely Notice of Appeal to this Court against the said decision whereby she applied for the following orders:-

“1. *An Order that the Decision be wholly set aside.*

2. *Orders in terms of the Appellant’s ex parte Notice of Motion for Sale of Trust Property dated 15 March 2022 in Probate No. 26 of 2022, in particular that:*

(a) *the Appellant be permitted to sell the trust property comprised in State Lease No. 2746 being Lot 32 Muanivatu in the Tikina of Suva and province of Rewa with an area of 1 rood and 13.7 perches referred to, under the Last Will and Testament of late Rexina Shireen Lateef (**Deceased**) dated 7 January 2013, as 17 Catalina Street, Suva Point, Suva, Fiji Islands (**Property**).*

(b) *the Property be sold in accordance with the terms of the executed sale and purchase agreement dated 7 January 2022 for the benefit of the beneficiary, Rehan Lateef also known as Rehan Mandip Lateef (**Beneficiary**).*

(c) *the proceeds of sale to be remitted by the Administratrix in Australia (subject to compliance with all requirements of the Exchange Control Act 1950) and to be held in trust with JBWere Limited, asset managers and to be distributed at a time in the sole discretion of the Administratrix, being a date not earlier than the date on which the Beneficiary reaches the age of majority.*

(d) *any other orders that the Court considers just.*”

[17] The Appellant in her Notice of Appeal and at the hearing of the matter relied on the following grounds:-

- “1. The Learned Judge erred in law in concluding (at paragraphs 29-30 of the Decision) that it was necessary for the Beneficiary to be under a physical or medical disability in order for the Court to exercise its jurisdiction under s.85 of the Trustee Act 1966.*
- 2. The Learned Judge erred in law and in fact by stating (at paragraph 35 (b) of the Decision) that the relevant Sale and Purchase Agreement for the Property (**Agreement**) annexed to the Appellant’s Affidavit in Support of the Application dated 3 March 2022 (**Affidavit**) did not show the sale price of the property (it did so, at Schedule 1 of the Agreement).*
- 3. The Learned Judge erred in law and in fact by concluding that the Property was ‘located at a prime location within the suburb of capital city, Suva. If advertised for sale, will definitely fetch a much higher price than the revised sale price of \$1,360,000’, notwithstanding evidence of a current professional valuation (dated 16 February 2022, approximately evidence of a current professional valuation (dated 16 February 2022, approximately one month before the Application was filed) tendered to the Court stating that the current market value of the Property was \$900,000.”*

[18] At the hearing of the Appeal this Court was informed by counsel for the Appellant that the Beneficiary was no longer a minor and that he had consented to the sale of the Property and that the Property had been sold. The orders prayed for in this regard were therefore no longer necessary. As a consequence the issues in contention could be considered moot however counsel for the Appellant submitted that the grounds of appeal and in particular grounds one and three, raised issues of law that should be considered by this Court for the guidance and assistance of Courts dealing with the same or similar issues in future.

Discussion

[19] I consider that grounds one and three do raise issues which require the consideration and pronouncement of this Court notwithstanding that the matter has become moot.

[20] I also consider that this Court has the authority to do so under the discretionary power of the Court contained in Section 17 of the Court of Appeal Act.

[21] I am bolstered in this view by the Judgment of this Court in **The Electoral Commission v The Supervisor of Elections** Civil Appeal ABU 0069 of 2014 where this Court decided that it could consider matters which had become moot where as in that case it would assist electoral authorities in future elections. The Honourable Justice of Appeal Almeida Guneratne stated the following in this regard in paragraphs 65 to 70 of the Judgement:-

“[65] I now turn my attention to the Respondent’s argument why, nevertheless, this Court should decline to grant the declarations sought in this appeal.

The premises on which the said argument was based

[66] That, the matter had become moot.

Re: the argument that the two declarations sought in this appeal had become moot

[67] I read that argument to mean that, the granting of the said two declarations sought in this appeal is rendered academic and therefore this Court ought not to involve itself in a futile exercise.

The principle that a Court shall not act in vain

[68] No doubt, if the matter has been rendered academic this Court would not involve itself in a futile exercise for it would then be acting in vain. Courts are not academies of law but are institutions of justice.

[69] But, would this Court be acting in vain in granting the declarations in question?

[70] I do not think so, for the simple reason that, in future elections the granting of the said declarations would be setting a precedent in that, the Respondent (the Supervisor of Elections, being a subordinate functionary to the Electoral Commission in terms of the Constitution – ‘must’ act on the directions given by the said Commission as decreed by Section 76(3) of the Constitution read with Section 8(a) of the Electoral Decree.”

[22] This Court considered that its approach in that case was consistent with the observations of the House of Lords in **R v Secretary of State for Home Affairs Dept. ex parte Salem** (1999) 2 All ER 42; where the House of Lords held that there was a discretion to hear an appeal concerning a question of public law, even if, by the time the appeal reached the appellate court there was no longer any live issue directly affecting the rights and obligations of the parties inter se. This was the case even where the appeal may be regarded academic, the appellate court may exercise its discretion where there is good reason in the public interest for doing so.

[23] The obvious good reason in this case is whether the law as stated by the learned Judge in the High Court has been correctly stated.

Consideration of Appellant's Grounds

[24] I will now consider grounds one and three of the Notice of Appeal.

[25] Ground One: which states:-

“The Learned Judge erred in law in concluding (at paragraphs 29 – 30) of the Decision) that it was necessary for the Beneficiary to be under a physical or medical disability in order for the Court to exercise its jurisdiction under Section 85 of the Trustee Act 1966.”

[26] The relevant part of Section 85 of the Trustee Act 1966 considered in the Court below states:-

“Power of Court to authorise dealings with trust property

s.85.-(1) Where, in the opinion of the Court, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other dealing, transaction, act or thing, is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons or the majority of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition, dealing, transaction, act or thing without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or

by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any dealing, transaction, act or thing, are to be paid or borne, and as to the incidence thereof between capital and income.

(2)

(3) *An order may be made under the provisions of this section notwithstanding anything to the contrary contained or expressed in the instrument (if any) creating the trust.*

(4) *An application to the Court under the provisions of this section may be made by the trustees or by any of them, or by any person beneficially interested under the trust...*

[27] As the Appellant pointed out in her submissions Section 85 does not refer to “*disability*”. The disability of a beneficiary therefore is not a necessary element for the exercise of the Courts jurisdiction under Section 85. This is clearly the right position.

[28] On the aspect of “*disability*” the learned Judge was of the view that the fact that the Beneficiary was a minor, which he acknowledged in his Decision, did not qualify the Beneficiary as being under a disability.

[29] Counsel for the Appellant contends that the Trustee Act 1966 does not define “*disability*” and that it appears not to have been judicially considered in Fiji. To assist in interpreting “*disability*” in the context of this case, Counsel referred this Court to the New Zealand Trustee Act 1956, which he contended has many similarities to the Fiji Trustee Act 1966 including a provision close in wording to Section 85. The New Zealand Trustee Act 1956 defines “*disability*” as follows:-

“2(2) For the purposes of this Act a person shall be deemed to be under disability while he is not of full age or full mental capacity.”

[30] Counsel for the Appellant also referred this Court to the Public Trustee Act of Queensland Australia and the Lexis Nexis Australian Legal Dictionary which both define a child or minor as being a person under disability.

[31] I accept the submissions set out above of the Appellant and confirm that a person who is a minor is under a disability for the purpose of Fiji law.

[32] Ground Three: which states:-

“ The Learned Judge erred in law and in fact by concluding that the Property was located at a prime location within the suburb of capital city, Suva. If advertised for sale, will definitely fetch a much higher price than the revised sale price of \$1,360,000.00”, notwithstanding evidence of a current professional valuation (dated 16 February 2022, approximately one month before the Application was filed) tendered to the Court stating that the current market value of the Property was \$900,000.”

[33] In regard to this ground the learned Judge stated at paragraph 36 of the Decision that:

“36. The intended sale property is located in a prime location within the suburb of capital city, Suva. If advertised for sale, will definitely fetch a higher price than the revised sale price of \$1,360,000.00.”

[34] The learned Judge no doubt had the best interests of the Beneficiary in mind when he made the above statement, however I agree with counsel for the Appellant that this finding was contrary to the evidence of registered valuers and that the learned Judge had no authority to make this finding.

Conclusion

[35] For the reason stated above, I find in answer to the issues raised in grounds one and three of the grounds of appeal that:-

- (a) It is not necessary for a Beneficiary to be under a physical or medical disability in order for a Court to exercise its jurisdiction under Section 85

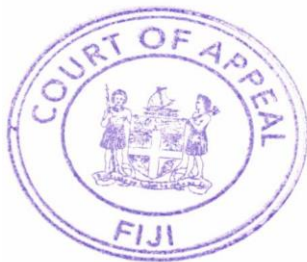
of the Trustee Act 1966 and that the learned Judge erred in law in concluding that it was necessary for the beneficiary to be under a physical or medical disability in order for the Court to exercise its jurisdiction under s.85 of the Trustee Act 1966.

- (b) A person who is a minor is under a disability for the purposes of Fiji law.
- (c) The learned Judge erred in law and in fact in reaching the conclusion he did in paragraph 36 of the Decision regarding the sale price of the Property when there was no evidence to support this conclusion and he therefore had no authority to reach such conclusion or make such finding.

[36] In view of the current situation regarding the Property as set out in paragraph 17 above, it is not necessary to consider Ground two of this appeal nor is it necessary to make any substantive orders regarding the Property. Further as the proceedings in the High Court and in this Court were ex parte there is no order as to costs.

Andrews JA

[37] I have read the judgment of his Lordship Justice Morgan, JA and I agree with it.



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The Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

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The Hon. Justice Walton Morgan
JUSTICE OF APPEAL

.....
The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Solicitors:
Munro Leys for the Appellant