

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

CAVEAT NO. 35 of 2011
(Probate No: 51649)

IN THE ESTATE of Ram Lochan
Lata of Tawatwa Saru, Lautoka in
the Republic of Fiji Islands,
Deceased Testate.

BETWEEN Roshni Lata **Applicant**
(Caveatee)

AND Krishen Prakash **Respondent**
(Caveator)

COUNSEL : Mr. S Singh for the Applicant
Mr. Degei for the Respondent

Date of Judgment : 8 August 2013

JUDGMENT

1. This is an application commenced by motion dated 11 July 2012, Pursuant to Section 47 of the Succession, Probate Administration Act [Cap 60], for removal of current No. 35 of 2011.
2. The caveatee, Roshni Lata, widow of Ram Lochan, filed an affidavit in support of the application sworn on 28 June 2012 filed on 2 July 2012.
3. On perusal of the case record, it is evident that several adjournments had been granted for caveator to file affidavit in response to the affidavit in support of caveator which he failed to do so. On 12 November 2012, court declined to grant any further adjournments for affidavits in response and

fixed this matter for hearing on 19 February 2013.

4. It is to be noted that there are two caveats lodged by each party in respect of the same probate. This application before the court for determination of removal of caveat No. 35 of 2011, and Mr Degei submitted to court that he has instructions to act for caveator, Krishen Prakash, in the Caveat No. 35 of 2011. The court proceeded to hearing on 19 February, 2013 as both counsel had proper instructions from caveator and caveatee in the Caveat No. 35 of 2011.
5. Both counsel made Oral Submissions on 19 February 2013, and moved 14 days from the date of hearing to file written submissions. Counsel for the caveatee filed Written Submissions on 5 March 2013 with the leave of the court whereas counsel of the ceveator has not filed Written Submission.

6. **Facts**

Krishen Prakash filed a caveat against the grant of probate in the Estate of Ram Lochan on 26 September 2011, in terms of Section 46 of the Succession Probate and Administration Act (Chapter 60).

7. Warning to the said caveat dated 26 September 2011, was filed on 29 May 2012. There is no dispute as to the service and the date of service. It is further evident that warning to caveator was served on caveator on 20 June 2012, and appearance to warning was filed on 28 June 2012.
8. Apart from filling the said appearance to warning within time in terms of non contentions probate rules, the caveator has not taken any steps to takeout summons for direction and no contrary insterest was disclosed in his appearance.

9. Law and Analysis

Section 47 of the Succession, Probate and Administration Act Cap. 60 states:- “47

- (1) in every case in which a caveat is lodged, the court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be, removed the same.*
- (2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in his caveat.*
- (3) Such application may be heard and order made upon affidavit or oral evidence, or as the Court may direct.*

15. Rule 44 of the Non-Contentious Probate Rules 1987 states that:-

“44 Caveats

- (1) Any person who wishes to show cause against the sealing of a grant may enter a caveat in any registry or sub-registry, and the [district judge or] registrar shall not allow any grant to be sealed (other than a grant ad colligenda bona or a grant under section 117 of the Act) if he has knowledge of an effective caveat; provided that no caveat shall prevent the sealing of a grant on the day on which the caveat is entered.*
- (2) Any person wishing to enter a caveat (in these Rules called ‘the caveator’), or a solicitor [or probate practitioner] on his behalf, may affect entry of a caveat:*
 - (a) By completing Form 3 in the appropriate book at any registry or sub-registry; or*

- (b) By sending by post at his own risk a notice in Form 3 to any registry or sub registry and the proper officer shall provide an acknowledgement of the entry of the caveat.*
- (3)(a) Except as otherwise provide by this rule or by rules 45 or 46, a caveat shall be effective for as period of six months from the date of entry thereof, and where a caveator wishes to extend the said period of six months, he or his solicitor for probate practitioner] may lodge at, or send by post, the registry or sub-registry at which the caveat was entered a written application for extension.*
- (b) An application for extension as aforesaid must be lodged, or received by post, within the last month of the said period of six months, and the caveat shall thereupon (save as otherwise provided by this rule) be effective for an additional period of six months from the date on which it was due to expire.*
- (c) A caveat which has been extended as above may be further extended by the filing of a further application for extension subject to the same conditions as set out in sub paragraph (b) above.*
- (4) An index of caveats entered in any registry or sub-registry shall be maintained and upon receipt of an application for a grant, the registry or sub-registry at which the application is made shall cause a search of the index to be made and the appropriate district judge or registrar shall be notified of the entry of a caveat against the sealing of a grant for which the application has been made].*

- (5) *Any person claiming to have an interest in the estate may cause to be issued from [nominated registry] a warning in Form 4 against the caveat, and the person warning shall state his interest in the estate of the deceased and shall require the caveator to give particulars of any contrary interest in the estate, and the warning or a copy thereof shall be served on the caveator forthwith.*
- (6) *A caveator who has no interest contrary to that of the person warning, but who wishes to show cause against the sealing of a grant to threat person, may within eight days of service of the warning upon him (inclusive of the day of such service), or at any time thereafter if no affidavit has been filed under paragraph (12) below, issue and serve a summons for directions.*
- (7) *On the hearing of any summons for directions under paragraph (6) above the [district judge or] registrar may give a direction for the caveat to cease to have effect.*
- (8) *Any caveat in force when a summons for directions is issued shall remain in force until the summons has been disposed of unless a direction has been given under paragraph (7) above or until, it is withdrawn under paragraph (11) below.*
- (9) *The issue of a summons under this rule shall be notified forthwith to the [nominated registry].*
- (10) *A caveator having an interest contrary to that of the person warning may within eight days of service of the warning upon him (inclusive of the day of such service) or at any time thereafter if no affidavit has been filed under paragraph (12) below, entre an appearance in the [nominated registry] by filing Form 5; and he*

shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court.

- (11) *A caveator who has not entered an appearance to a warning may at any time withdraw his caveat by giving notice at the registry or sub-registry at which it was entered, and the caveat shall thereupon cease to have effect; and where the caveat has been so withdrawn, the caveator shall forthwith give notice of withdrawal to the person warnings.*
- (12) *If no appearance has been entered by the caveator or no summons has been issued by him under paragraph (6) of this rule, the person warning may at any time after eight days after service of the warning upon the caveator (inclusive of the day of such service) file an affidavit in the [nominated registry] as to such service and the caveat shall thereupon cease to have effect provided that there is no pending summons under paragraph (6) of this rule.*
- (13) *Unless a [district judge or, where application to discontinue a caveat is made by consent, a registrar] by order made on summons otherwise directs any caveat in respect of which an appearance to a warning has been entered shall remain in force until the commencement of a probate action.*
- (14) *Except with the leave of a [district judge] no further caveat may be entered by or on behalf of any caveator whose caveat is either in force or has ceased to have effect under paragraphs(7) or (12) of this rule or under rule 45 (4) or rule 46(3).*
- (15) *In this rule, ‘nominated registry’ means the registry nominated*

for the purpose of this rule by the senior district judge or in the absence of any such nomination the Leeds District Probate Registry.”

10. As stated in my earlier paragraph, the caveator had the opportunity to file proper appearance to warning disclosing the nature of his contrary interest and to take summons for direction under which, he has failed to do so.

In the application under Section 47 of the Succession, Probate and administration Act, the Court has discretion to remove Caveat. Thus the court of Appeal in **Rosy Reddy – v- Manchama Webb and Lawrence Webb** (unreported Civil Appeal No. 14 of 1994 delivered on 11 November 1994) stated that:

“We note that the procedure for dealing with a caveat under the Rules is different from the removal of a caveat provided under section 47 of the Act. Under the Rules a caveat shall remain in force for six months (r 44 (4)). A caveat may also cease to have any effect if the caveator does not file an appearance or take out s summons for direction (r 44 (11)). Under these Rules, a caveat may cease to have any effect in this way without there being a need for resort to court proceedings. However, under the Act, section 47 provides that in every case where a caveat is lodged, an application may be made to the Court to remove the caveat.”

In ***Amos v. Fiji Public Trustee Corporation Limited* [2010] FJHC 617**; Probate 48456.2009 (28 July 2010), Calanchini J stated as follows:

“The Applicant seek removal of the caveat under section 47 (1). The section does not offer any guidance as to the grounds on which a caveat should be removed. In effect, section 47 gives the Court discretion.

In the ***Reddy decision*** (supra) the Court of Appeal stated on this point that:

“In the formulating the discretion of the Court in such an application, we are of the opinion that the Court may have regard to the practice set out in the Rules as a guide. This is not the same as applying the Rules. The relevant rule for consideration in this regard is r44 (7). For the purpose of a warning, a caveator is required to give particulars of a contrary interest. We would adopt this and formulate that a caveator should establish a contrary interest to the person applying for the removal of a caveat.”

11. Under Section 44(5), the caveator has to file an Appearance in the form required under the Rules and to state the nature of his contrary interest in the estate as to what constitutes a contrary interest.

“On the question of what should be the nature of the contrary interest, the Court of Appeal in **Reddy’s case** (supra) stated:

“Again in determining this issue, the Court may have regard to the nature of the contrary interest that is required to be particularized by the caveator under the Rule. Again the relevant rule in this regard is r 44 (7) which specifies that nature of the interest is to be “any contrary interest in the estate.” We would adopt this and formulate that for the purposes of removing a caveat under section 47 of the Act, the caveator is required to establish a contrary interest in the estate of the deceased.”

12. Counsel for the caveator in his Oral Submissions relied on two authorities in similar applications in High Court. This court having considered **Sahidan Bi v Mohammed Raza [2003]** FJAC 60; HPC 0032. 1998 (20 June 2003) and **Tagici v Ernst [2011]** FJHC 115; LA 498391 and 50037 (7 February 2011) is of view that both authorities in fact support the position advanced by the applicant in determination of removal of the caveat.

13. Counsel to the caveator further submitted that the caveat lodged by the caveator is valid and removal would affect the rights of the caveator and the discretion of the court in determining the removal of caveat should be exercised in favour of the caveator. It is noteworthy to state that caveator has not complied with non contentions probate rules and failed to file an affidavit in response to the affidavit of the applicant and thus should be considered as uncontested caveat application to the removal of the caveat.
14. In the outcome, for the above reasons, the application to remove Caveat No. 35 of 2011 is granted and it is ordered that it be removed forthwith paving in the way for the grant of probate in the estate of Ram Lochan. However, the issuance of probate in favour of Roshni Lata could only be eventuated after the decision is made or caveat is revoked or lapsed in relation to caveat no 23 of 2011 which has been lodged for the same estate of Ram Lochan.
15. I order cost against the Respondent in the sums of \$750.00 to be paid to the solicitors for the applicant within 14 days from the date of this judgment.

Susantha N. Balapatabendi

JUDGE