

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate No: 53175.

IN THE ESTATE of **SUKHDEI** also known
as **SUKHDEI RATTAN** late of 59
Westerham Drive, Dannemora, Auckland,
New Zealand, Domestic Duties, Deceased,
Testate.

BETWEEN : **VIMLESH ANAND** of Auckland, New Zealand, Legal Practitioner.

APPLICANT/ CAVEATEE

AND : **RAJEND PRASAD** of 57 Skellings Drive, Dannemora, Auckland, New
Zealand, Occupation not known to the Applicant.

RESPONDENT/ CAVEATOR

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. S. Parshotam** for the Caveatee /Applicant

Ms. Vulimainadave K. for the Respondent / Caveator

Date of Hearing : **19th February, 2013**

Date of Decision : **10th September, 2013**

DECISION

A. INTRODUCTION

1. The Plaintiff filed the summons to remove caveat. The Plaintiff filed a warning to caveator on 5th December, 2012 and the same was served to the caveator on 13th December, 2012. An affidavit of service of the caveat was filed on the 27th December, 2012. On the same day a summons for removal of caveat under

Section 47 of the Succession, Probate and Administration Act was filed by the Plaintiff and the said summons was called over for hearing on 19th February, 2013. The caveator did not take steps in terms of Non-contentious Probate Rules of UK, Rule 44(6) or 44(10). Neither an appearance to warning as required by said rules either within time period or even after that, but when the summons was filed an affidavit in opposition was filed but even in the said affidavit in opposition the caveator is not contesting the grant of probate, but state that he has contributed to a property of estate.

B. ANALYSIS

2. Rule 44(6) of the Non Contentious Probate Rules of 1987 states as follows

‘A caveator who has no interest contrary to that of the person warning, but who wished to show cause against the sealing of the grant to that 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.

3. If the caveator has no interest contrary to the caveatee Rule 44(6) applies and In terms of Rule 44(6) of the Non Contentious Probate Rules of Uk (1987) the caveator who wished to show cause must within 8 days of service of the warning may issue summons for directions. If the affidavit of service of the warning is not filed the caveator can file summons for directions even after the expiration of the time period of 8 days from the service of the warning. So, if the affidavit of service of the warning is filed and 8 days lapsed from the service the caveatee may request for removal of the caveat, but this is not possible without the filing of the affidavit of service.
4. If the caveator has an interest contrary to the caveatee then Non Contentious Probate Rules 1987, Rule 44(10) is applicable, and it states as follows

‘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 any time thereafter if no affidavit has been filed under paragraph(12) below, **enter an appearance in the registry in which the caveat index is maintained** by **filing Form 5** and **making an entry in the appropriate book;** and he shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court.’(emphasis added)

5. The warning to caveat was filed in the court just before the end of the court vacation on 5th December, 2012 and it was apparently issued on or around 11th December, 2013 and by this time the annual December, vacation for the High Court commenced. Despite this fact the said warning issued by court was served on to the solicitor of the caveator on the 13th December, 2012. The High Court recommenced for the year 2013 on 14th January, 2013 and the caveator failed to act either under Rule 44(6) or Rule 44(10) of the Non-contentious Probate Rules of UK (1987). It is not only an appearance is needed but it also needed to be in Form 5 of the said Rules.

6. In Re The Estate of Kumar [1998] FJHC 34; HPC0021.1997& HPP0023.1997(18 March 1998) Justice Byrne held

‘As no other form of appearance is given in Tristram and Coote I am prepared to accept the failure to comply with the form as set out in the book vitiates any appearance not entered in accordance with that form. This makes common sense as the person filing a Warning to Caveat must be entitled to know the interest in the estate claimed by the Caveator. I therefore accept the submission of the Application in Action in HPC 21 of 1997.’

7. According to the said decision of Justice Byrne, even the form of appearance is important and the reason for that is that the caveatee should know the reason

for opposition, if not the process can be abused for ulterior motives for the sake of delay in any grant.

8. The Rule 44(12) of the Non Contentious Probate Rules of UK(1987) reads as follows

The Rule 44(12) of Non Contentious Probate Rules states as follows.

‘(12) If no appearance has been entered by the caveator or no summons has been issued by his under paragraph(6) of this rule, the person warning may at any time after eight days of service of the warning upon the caveator (inclusive of the day of such service) **file and affidavit in the registry** in which the caveat index is maintained **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. (emphasis added)

9. There is no summons for directions filed by the caveator in terms of Rule 44(6) of the Non-contentious Probate Rules of U.K (1987) and the affidavit of service of the warning to the caveat was filed and 8 days had lapsed from even after the commencement of the court on 14th January, 2013. The caveator has not taken any step to make the caveat effective and the caveat ceased to have effect in terms of Rule 44 (12) of the Non Contentious Probate Rules of UK (1987) upon the expiration of the stipulated time period. If the caveat is ceased to have an effect the removal will only be a formality.
10. The Plaintiff had filed an affidavit of service of the warning, on 27th December, 2012. The caveator neither filed an appearance to warning nor summons for directions as per Rule 44(6) of the Non-contentious Probate Rules of UK (1987). If the appearance to caveat was filed, then ion Rule 44(13) of the Non Contentious Probate Rules of UK (1987) are applicable and it states as follows.

Rule 44(13) of the Non Contentious Probate Rules 1987 states as follows

‘Unless a registrar of the Principal Registry 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 the probate action.’ (emphasis is mine)

11. The above rule applies when there is an appearance to warning as per the Non contentious Probate Rules of UK (1987), but this has no application to the present situation as there was no appearance to the warning been entered by the Plaintiff.
12. In re the Estate of Cinnaiya Gounder [1994]FJHC 112; HPC 0019d.1993s(7 September 1994) Justice D.V. Fatiaki held

I agree with the submission of learned counsel for the applicant that the present summons for the removal of a caveat is **NOT** A **‘probate action’** under the High Court Rules but the invocation of a specific statutory provision. Further the applicant has no cause whatsoever to dispute the testator’s will and indeed has no intention of instituting any **‘probate action’** and **ought not to be forced to do so by the mere lodgment of a caveat by a person who has neither entered an appearance to a warning or issued a ‘summons for Directions’ nor filed an affidavit disclosing the nature of any ‘contrary interest she may have in the estate.**

Whats more in seeking the grant the applicant is not instituting a ‘probate action’ under the Court’s general or inherent jurisdiction. Instead the applicant is relying upon the exercise of a specific statutory

jurisdiction vested in the Court in terms of Section 31 of the succession Probate and Administration Act (cap 60).’
(emphasis is added)

13. In the circumstances the Plaintiff filed the present summons seeking removal of the caveat, but the caveat had become ineffective on the failure of the caveator to act within stipulated time as per the Non contentious Probate Rules of UK (1987).. The caveator had not up to date complied with the Non Contentions Probate Rules of UK (1987) and whether he has an interest contrary or not if he desired his caveat to be effective it is mandatory that he complied with the said rules within the stipulated time in the stipulated manner. The caveat is deemed removed by the failure to act in terms of the said rules.
14. Without prejudice to what was stated above in the affidavit in opposition to the summons the caveator is not challenging the Last Will or the appointment of the executor, but only seeks alleged contribution from the estate. This is not a reason to allow the caveat to remain against the grant of the probate to the caveatee. The caveat needs to be struck off and considering the delay and cost involved I am inclined to grant a cost to the Plaintiff. The cost of this application is assessed summarily at \$1,250.

C. FINAL ORDERS

- a. The caveat No 31 of 2012 filed by caveator is struck off.
- b. The Plaintiff is granted as cost of \$1,250 assessed summarily to be paid by the Respondent caveator within 21 days.

Dated at **Suva** this **10th day** of **September, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva