

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 61 of 2012

BETWEEN: Frank Bert Whippy

Plaintiff

AND: Gluck William Pilot Whippy

Defendant

Appearances: Mr N.Prasad for the plaintiff

Ms S.Narayan for the defendant

Date of hearing: 11 October, 2013

JUDGMENT

1. By notice of motion filed on 28 February,2012, the plaintiff seeks the following orders:
 - (i) *that an injunction be granted restraining the Defendant from disposing of and or from dealing with the Estate property comprised in Certificate of Title No. 4268 comprising an area of 2110 acres being freehold land situated in Wainunu, Savusavu until the determination of this action;*
 - (ii) *The Defendant ..disclose and/or submit to the Court and full account and inventory of the Estate property in particular income received and/or deposit into Court all income derived from the use and occupation of the Property by third parties and from sale of timber from the date of the grant on 29 March 2007 to date.*
2. The affidavit in support of the plaintiff provides that:
 - a) The plaintiff was a direct descendant and beneficiary of the estate of Samuel Whippy. The estate property principally comprises a certificate of title no. 4268 comprising 2110 acres.
 - b) On 21 June, 2007, the defendant was appointed as sole administrator of the estate.
 - c) The plaintiff has the mandate and confidence of the majority of the family members to apply to this court, to have the defendant removed as Administrator and appoint himself as the “*new Administrator*”.

- d) The majority of the family members who supported the defendant's appointment as Administrator, have now withdrawn their support for him, as a result of misuse of funds received for "road compensation", entering into logging agreements and allowing squatters to use the estate land to plant and cut down commercial grade timber, causing irreparable damage to the property.
 - e) In February, 2008, the defendant had a meeting with the beneficiaries and other family members and verbally agreed to have Phyllis Martha Whippy, a beneficiary, to provide funding for a survey. The defendant has now gone ahead with his own survey of the estate land, without the consent of the beneficiaries.
 - f) In February, 2008, the defendant surveyed out a portion of the estate property for David Chang, who is not a beneficiary of estate, as set out in the defendant's letter dated 2nd February, 2005. The defendant has not disclosed to the beneficiaries the basis for allocating estate property to David Chang, despite their serious objections.
 - g) The defendant's surveyors have marked out portions of land within the areas under existing farms causing distress to beneficiaries, who have lived on the estate property for over 20 years. A copy of the proposed subdivision of the land is attached.
 - h) The defendant continues to get paid for timber and "road", but has failed to give an account to the beneficiaries.
 - i) The plaintiff has lodged a caveat against certificate of title no. 4268.
 - j) The defendant must be prevented from undertaking any dealing with the estate property and furnish to this court a complete statement of affairs of the estate.
 - k) The plaintiff, is entitled to a substantial portion of the land in the estate and gives an undertaking as to damages.
3. The defendant, in his affidavit in opposition, while admitting that the plaintiff was a descendant of Samuel Whippy states:
- i. A portion of the land was allocated 40 years ago by the Whippy family ,to a resident.
 - ii. The letter, the plaintiff relies on to show that he has the support of the other beneficiaries, was given by the other beneficiaries, in 2003 prior to the defendant's appointment as administrator in June, 2007. The document titled Authority to Sue the defendant filed by the plaintiff, is undated.

- iii. Logging activities are undertaken on the property by Jacob Andrews and David Chang, the administrators of Andrews family trust on an area of 200 acres within the estate property. This was acquired by these persons prior to the defendant's appointment as sole administrator, as evidenced in certificate of title no.29326 attached.The Forest Department had authorised Mr Jacob Andrews and Mr David Chang authorised to log within that area.
- iv. Squatter settlements have existed on the estate property, prior to the defendant's appointment. They can only be evicted by legal action, when the defendant is fully authorised to act on behalf of the estate.
- v. The defendant disagreed to Martha Phyllis paying the surveying costs of the estate, since it was on the basis that she be given 80 acres. No surveying of the estate property has been done so far, due to the cost factor. It would cost \$50,000.00 approx exclusive of other incidental costs.
- vi. The defendant has not allocated any piece of land from the estate property to anyone, including David Chang.
- vii. The sketch plan produced by the defendant is unregistered and was drawn for the purpose of obtaining a quotation for survey.
- viii. No monies have ever been generated from the estate property or any sales or logging on the said property .
- ix. The estate property has been left idle and unattended to for over 5 years.
- x. He would not be able to discharge his duties as Administrator, if injunctive orders are made against him.
- xi. The plaintiff is indirectly challenging the court order of 21st June, 2007.

4. The hearing

4.1 Mr Prasad supported the case for the plaintiff. He submitted that the central issue in this case is the failure of the defendant to discharge his duties, as administrator of the estate. There has been a delay in distributing the property to beneficiaries and a misuse of funds obtained from "road compensation" and sale of timber. Squatters have been allowed to occupy the estate and cut down commercial timber

The estate has been surveyed and a portion carved out for David Chang, who is not a beneficiary. This, Mr Prasad submitted, raises a serious issue. He relied on the tests laid down by Lord Diplock in the *American Cyanamid*

case,(1975) 1 All ER 504. Damages, would not compensate the beneficiaries, as they are entitled to the property. Finally, Mr Prasad submitted that the balance of convenience favours the plaintiff, since no steps have been taken by the defendant to discharge his duties.

4.2 Ms Narayan, in reply, submitted that the plaintiff has not produced any evidence to establish that the defendant has entered into logging contracts or sold commercial timber. She said that David Chang had acquired a certificate of title, prior to the defendant's appointment as administrator. David Chang was engaged in logging within his CT. The defendant could not fulfil his duties, due to an earlier action filed by way of originating summons against him. This action was dismissed.

5. *The determination*

5.1 The plaintiff seeks to restrain the defendant from disposing of or dealing with the estate property on several grounds.

5.2 The first is that the defendant has misused funds he received from "road compensation" and logging agreements. This is denied. I find that the plaintiff has not adduced any evidence, to substantiate his assertion that the defendant has received monies, as compensation or from logging contracts.

5.3 The second is that the defendant has allowed squatters to plant and cut down commercial grade timber. The defendant's riposte is that settlements have existed on the property, prior to the defendant's appointment as administrator and they can only be evicted by legal action. It is further stated that some of the squatters claim to be descendants of beneficiaries of the estate. Here again, the plaintiff has not produced any evidence, as to when the squatters found their way to the land.

5.4 The main ground of attack is that the defendant has surveyed a portion of the estate property for David Chang, who is not a beneficiary of estate. Ms Narayan pointed out that the letter produced by the plaintiff, in support of this contention provides that the defendant on 2nd February, 2005, as joint administrator, had agreed that logging activities may be carried out by David Chang and Jacob Andrews on CT 29326 and that the caveat on this property may be removed. CT 29326, produced by the defendant depicts that these persons had acquired an area of 200 acres within CT 4268 of 1st June,

1995,(the estate property) prior to the defendant's appointment as administrator. I conclude that the plaintiff's allegation is unfounded.

5.5 The next allegation is that the defendant did not agree to beneficiary, Martha Phyllis's proposal to fund the surveying costs of the estate. The defendant states he disagreed to this proposal, as it was conditional. Martha Phyllis wanted 80 acres, in return. The defendant also states that the estate property has not been surveyed, as it would cost \$50,000 exclusive of other incidental costs. The defendant has attached a quotation from Pro Survis and Development Consultants, in support. I find these explanations convincing.

5.6 The plaintiff has produced a sketch plan prepared by the defendant's surveyors. It is stated that this survey is within existing farms and would cause distress to beneficiaries, who have lived on the estate for over 20 years. The defendant states that the proposed sketch plan is unregistered and was drawn for the purpose of obtaining a quotation for a survey, after which he would consult the beneficiaries. Be that as it may, there is no evidence adduced of any loss or damage that would be caused to beneficiaries.

5.7 Finally, Mr Prasad valiantly argued that the defendant has admitted that the property is been "*misused*". He relied on paragraph 12 of the affidavit in opposition, which reads :

*..I myself have no intentions to leave the property to the risk of the squatter residents however, I verily believe that they will have to be removed through legal means, and I can only proceed to do the same once I am fully authorised and am allowed to act on behalf of the estate freely. The numerous proceedings that are being filed over and over again by the Plaintiff and others are individuals claiming to be beneficiaries are in fact hindering me from proceeding to do his duties as administrator and this has been the case ever since my appointment in June 2007, hence, **the misuse** of the estate property.(emphasis added)*

5.8 I do not accept the narrow linguistic interpretation advanced. The word "*misuse*" must be read in the context in which it was used, rather than by concentrating exclusively on the word in isolation. It is clear that the

defendant is providing the reasons he did not take steps against squatters, who are misusing the property.

5.9 In my judgment, the plaintiff's application is misconceived. The plaintiff's allegations are unsubstantiated. The plaintiff fails to meet the threshold requirement that an applicant must satisfy in an application for interim relief, namely, that there is "*a serious question to be tried*", as laid down by Lord Diplock in the celebrated *American Cyanamid* case.

6 Orders

- a) I decline the interim relief sought.
- b) The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 1500.

7th November, 2013

A.L.B.Brito-Mutunayagam

Judge