

In the High Court of Fiji  
Probate Jurisdiction.

No: P52804

In the Estate of Masuk Ali aka Masukh Ali aka Masukh Ali  
Sadikan Nisha Shah

Applicant

Azad Begum

Respondent

Appearances : Mr R.Prakash with Ms Karan for the applicant

The respondent is absent and unrepresented

Date of hearing: 28<sup>th</sup> February ,2013

### Judgment

1. This is the applicant's summons filed on 11<sup>th</sup> October,2012, for the following orders that :
  - (i) The *Appearance to Warning* dated 12<sup>th</sup> September, 2012, entered in the estate of the late Masuk Ali aka Masukali aka Masukh Ali( the deceased) by the respondent be struck out.
  - (ii) Caveat No: 27/2012 filed on 3<sup>rd</sup> July, 2012, in the estate of the deceased be removed and/or cancelled.
  - (iii) Probate in the estate be granted to the applicant, as the executrix and trustee named in the last Will of the deceased dated 4<sup>th</sup> June,2012.

The application is made under section 47 of the Succession and Probate Act(cap 60) and the Non-Contentious Probate Rules,1987.

2. In an affidavit in support, the applicant states as follows:

- a) The deceased made and executed his last Will on 4<sup>th</sup> June, 2012, appointing her as the sole executrix and trustee and one of the beneficiaries in his estate. A copy of the Will is attached.
- b) She made an application to Court, for the grant of probate to her.
- c) The respondent entered Caveat no 27/2012 in the estate.
- d) The solicitors for the applicant filed a *Warning to Caveator*. This was issued to the respondent by Court on 3<sup>rd</sup> September, 2012.
- e) The respondent entered an *Appearance to Warning* on 14<sup>th</sup> September, 2012, but has not stated her contrary interest in the estate of the deceased .
- f) The respondent has failed to issue and serve summons to show cause why probate ought not to be granted to the applicant.
- g) She is advised that the respondent has failed to comply with the specific requirements of the *Warning to the Caveator* served. Any objection to the grant of probate to her as executrix and trustee, is frivolous.

3. ***The determination***

- 3.1. The applicant, by her summons moves that the *Appearance to Warning* filed by the respondent be struck out and that the caveat filed in the estate of the deceased on 3<sup>rd</sup> July 2012, be removed and/or cancelled. She also seeks an order that probate in the estate be granted to her, as executrix and trustee named in the last Will of the deceased of 4<sup>th</sup> June,2012.
- 3.2. Subsequent to the respondent filing caveat in the estate of the deceased ,a *Warning to the Caveator* was issued by Court on the 3<sup>rd</sup> September, 2012, and served on the respondent. The respondent entered an *Appearance to Warning* on 14<sup>th</sup> September, 2012, stating her interest as a “*beneficiary*” followed by a detailed affidavit setting out her interest as lawful widow of the deceased.
- 3.3. This application is made under the Non-Contentious Probate Rules,1987 and section 47 of the Succession and Probate Act(cap 60). The section reads:

*(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, remove 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.

3.4. In *Reddy v Webb*, (1994) FJHC 36, the judgment of the Court of Appeal stated as follows:

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

*As the application before the trial judge was brought pursuant to s 47 of the Act, the Rules relating to removal of a caveat have no direct application and therefore it is not necessary to consider their effect.*

*Section 46 of the Act gives a right to any person to lodge a caveat with the Registrar at any time before probate or administration is granted or sealed. Section 46 (2) requires that the caveat shall set out the name of the person lodging the caveat and an address in Suva. It does not require any other information or the nature of the interest or reason for lodging the caveat.*

*The application before the trial judge was to remove the caveat under s 47 (1) of the Act. On what grounds should a caveat be removed? The section does not give any indication. It simply says "Such application may be heard and order made upon affidavit or oral evidence". This gives the court a discretion.*

*In 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 r 44(7). For the purposes of a warning, a caveator is required to give particulars of a contrary interest...*

*We would adopt this and formulate that for the purposes of removing a caveat under s 47 of the Act, the caveator is required to establish a contrary interest in the estate of the deceased. (emphasis added)*

3.5. I turn to the Non-Contentious Probate Rules, 1987, as a guide.

Rule 44 (7) requires “*the caveator to give particulars of any contrary interest which he may have in the estate of the deceased.*” (emphasis added).

Rule 44 (9) states that the “*caveator having an interest contrary to that of the person warning may. enter an appearance in the principal registry by filing form 6 ..*”

Rule 44 (11) provides that a caveat ceases to have effect, if the caveator does not file an appearance or takes out summons for directions.

3.6. Mr Prakash, counsel for the applicant submitted that the respondent has not shown her contrary interest in her *Appearance to Warning* and only states that she is a “*beneficiary*”. I do find that she has not particularised her contrary interest to the estate of the deceased, as required by Rule 44 (7).

3.7. Moreover, no steps have been taken thereafter by the respondent to file summons for directions in terms of Rule 44 (11).

3.8. It follows that the caveat must be cancelled and the *Appearance to Warning* struck out.

3.9. In my judgment, the applicant is entitled to probate, as executrix and trustee named in the last Will of the deceased.

#### 4. **Orders**

I make orders as follows that :

(a) Caveat no: 27/2012 filed on 3<sup>rd</sup> July, 2012 in the estate of the deceased is cancelled.

(b) The *Appearance to Warning* dated 12<sup>th</sup> September, 2012, entered in the estate of the late Masuk Ali aka Masukali aka Masukh Ali by the respondent is struck out.

- (c) Probate in the estate of the late Masuk Ali aka Masukali aka Masukh Ali is granted to the applicant, as executrix and trustee named in the last Will of 4<sup>th</sup> June,2012.
- (d) The respondent shall pay the applicant costs summarily assessed in a sum of \$ 1500 within 21 days from the date of this judgment.

23<sup>rd</sup> May,2014

*A.L.B. Brito-Mutunayagam*  
**A.L.B. Brito-Mutunayagam**  
**Judge**

