

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC No. 127 of 2010

Between: Kali

Plaintiff

And: George Kutti

Defendant

Appearances: Mr Suresh Chandra for the plaintiff

Mr Diven Prasad with Mr A. Chand for the defendant

Date of hearing: 7th August, 2013

Judgment

1. These proceedings concern the estate of Shan Mogan aka Shan Mugum, the father of the defendant. The defendant is the sole surviving executor and trustee of the estate of Shan Mugum, his father. By his Will, Shan Mugum bequeathed his property at 4, Amputch Street, Tamavua, upon the demise of his wife to (1) the defendant, (2) Thomas Muttu, (3) DeoSagyam, and (4) Yana Parkasam. The plaintiff is the administratrix of the estate of Thomas Muttu, her husband. The plaintiff and the defendant are in confrontation over the late Thomas Muttu's share in the estate of Shan Mugum. The plaintiff alleges that the defendant is "abusing" his powers as trustee. He has failed to pay her share of the rental income derived from the property. The plaintiff claims accounts of the estate since the death of the life interest holder, and that her share be distributed to her, in terms of the Will. Alternatively, that the property be sold and distributed to the beneficiaries.
2. The defendant, in his statement of defence, states that the plaintiff obtained letters of administration of the estate of Thomas Muttu, by fraudulent misrepresentation, in order to defeat the interest of the lawful beneficiaries. She concealed that he had two children by an earlier marriage. The plaintiff deserted him, after a few months. She lost "her status of a wife..the marriage was irretrievably broken down". She nor her son attended his funeral. Thomas Muttu

lived alone in one of the flats. He was not aware of a son being born of his marriage with the plaintiff. One flat was occupied by a daughter of Shan Mugam and his grandchildren. Lately, a flat was rented out to raise funds for the maintenance of the premises. The plaintiff and her children are estopped from claiming an interest in the property. The defendant prays that the grant be revoked or recalled and the plaintiff's action be dismissed.

3. The plaintiff, in her reply to defence, states that she was legally married to Thomas Muttu, at the time of his death. They had a child of the marriage, Anand Krishna Veda born on 22nd December, 1973. The defendant chased the plaintiff from the matrimonial home. He also threatened and assaulted her. He told her not to attend the funeral.

4. *The hearing*

- 4.1 PW1, (the plaintiff) in her evidence said that she was married to the late Thomas Muttu, in 1973. They stayed together for a year in his family property, owned by her father-in-law, Shan Mugum. They had a child. He is living with her. Her father-in-law and husband's daughter also lived on that property. Her brother-in-law lived in the ground floor.
- 4.2 Thomas Muttu died in 1982. She was granted letters of administration in his estate on 8th September, 2006. He had two children by an earlier marriage. When asked why she had not included the two children when applying for probate, she said the two children were not with her.
- 4.3 Shan Mugum died one year after their marriage. The beneficiaries of his estate are his four sons. His estate property is occupied by the defendant. It was rented, after the death of her father-in-law. She was unaware of the rent received by the defendant nor who maintained the property and paid the rates. After her husband's demise, neither the defendant nor the other shareholders contacted her, as regards his shares in the estate of Shan Mugum.
- 4.4 The plaintiff said that she is claiming her share of the rental income. She wishes to stay in the property, if her share of the property is not given.
- 4.5 In cross-examination, she was asked why she obtained letters of administration, after a long period had lapsed, since the death of her husband in 1982. Her response was that she did not do so, as she was alone and teaching. She did not

declare his two children in her application for letters of administration, because they did not stay with her. She said that the two children are also entitled to the estate of their father.

- 4.6 She said that she had a “*scattered marriage*”. Thomas Muttu was unaware of the birth of her son. She admitted that she did not attend the funeral of Thomas Muttu and had not made a claim to the estate, since 1982, not even on behalf of her son. She left the matrimonial home, as she was beaten by her sister-in-law. It transpired that she had not made a complaint to the Police.
- 4.7 In re-examination, she said that she could not consult a lawyer from 1982 to 2006, as she was teaching and looking after her son. She was in contact with her husband. She did not attend Thomas Muttu’s funeral, as she would be beaten by her in-laws.
- 4.8 PW2, (Mr Ramesh Behari, Registered Valuer) produced a valuation certificate of 5th August, 2013, of the estate property. The property was inspected by his Assistant Valuer. PW2 said he visited the property “*today*”, (on the date of hearing) and confirmed the contents of the certificate. The current market value of the freehold interest in the land and buildings was assessed at \$220,000; the current monthly rental of the ground floor at \$350, and \$400 for the top floor; the previous rental for each floor at approximately \$50 less; and the potential rent at \$500 and \$600 respectively.
- 4.9 He said that fifteen years ago, the rental for each floor was approximately \$150 less than the current rent. Both flats were rented. He compared sales of other properties in close proximity. The property required a great deal of maintenance.
- 4.10 In cross-examination, PW2 said that on 7th August, 2013, he verified his Assistant’s valuation. It emerged that he did not have a report of his visit. He had not taken any measurements when he went to the property. He could not speak to the tenants, as the both flats were “*vacant, locked*”. His Assistant had obtained information on the rentals. It was put to him that he had no concrete evidence on the current rentals, and assumed that his Assistant’s report was correct.
- 4.11 He agreed that he had made assumptions on the previous rentals, based on his experience.

- 4.12 It was put to him that his certificate did not state that he had made a comparison of sales in the relevant areas of Tamavua. He had not brought his calculations.
- 4.13 PW2 said that he was asked to give a one page report. Time constraints did not permit him to prepare a full report.
- 4.14 In re-examination, he said that his assistant had done the calculations. It was a brief report. He was confident that the value given in his report is the correct value of the property, even if he had prepared a full report.
- 4.15 DW1, (the defendant) said that he was trustee of his father's estate. He was the only surviving beneficiary.
- 4.16 Thomas Muttu's first wife was dead. The marriage of Thomas Muttu to the plaintiff lasted three to four years. They lived at no 4 Amputah Street. The two children of Thomas Muttu by his earlier marriage migrated to Canada, after a short stay with Thomas Muttu and the plaintiff.
- 4.17 DW1 said that he rented out the upstairs flat, after his mother and Thomas Muttu died, at a monthly rental of \$ 80, in 1982. The ground floor was not rented. It was occupied by his brother and sister. They took the rent from the upstairs flat. His sister was mentally handicapped. From 2000 to 2010, the upstairs flat was rented out. Presently, the flats are unoccupied.
- 4.18 The plaintiff had not contacted DW1, after Thomas Muttu passed on. She did not attend his funeral. He died before their child was born.
- 4.19 In cross-examination, he said that the three children of Shan Mugum have a share in the estate. He accepted that the property should be distributed to the beneficiaries.
- 4.20 DW1 said that he had not kept account of rentals, since 1982. He produced a document setting out the income and expenditure, since 2000.
- 4.21 He confirmed in re-examination, that he had not kept receipt of the various expenses he incurred. He said that if he had not done repairs, the house would have collapsed.

5. The determination

- 5.1. The plaintiff, as administratrix of the estate of Thomas Muttu, claims her share in the estate of Shan Mugam, and accounts of his estate.
- 5.2. The defendant submits that the grant of letters of administration to the plaintiff should be revoked, since the plaintiff obtained the letters fraudulently, in that she admittedly did not disclose that Thomas Muttu had two other children from his earlier marriage.
- 5.3. In my view, that does not entitle the grant of the letters of administration to be revoked. In terms of section 6 (1) of the Succession, Probate and Administration Act, (cap 60) the administrator only “*hold(s) the property to distribute the same*”.
- 5.4. The next contention is that the plaintiff is not entitled to claim a share of her late husband’s estate, since she deserted Thomas Muttu within a short time after their marriage. She had obtained letters of administration in 2006, twenty four years after his demise in 1982.
- 5.5. Counsel for the defendant, Mr Diven Prasad relies on *In re Alifereti Veimosoi*, (2010) FJHC 333 for the proposition that a surviving wife who leaves her husband does not qualify as a “*surviving wife*” under section 6(1) of the Succession, Probate and Administration Act, to the shares of her husband. In that case, the Master held that the term “*surviving wife*” is open to judicial interpretation, since it is not defined in the Act.
- 5.6. I do not agree with the reasoning in that judgment. In that case, the wife was living in adultery. In my view, it is not open to a Court to disregard the plain meaning of words in a statute.
- 5.7. In the present case, albeit unhappily the parties lived together for a short time and had no contact with each other, they were not divorced.
- 5.8. In my judgment, the plaintiff as “*surviving wife*” is entitled to one-third of the estate of Thomas Muttu, in terms of section 6(1)(c) of the relevant Act. The two children of the late Thomas Muttu, as well as his son by the plaintiff “*take per stirpes..the remaining two-thirds of the residuary estate absolutely*”.
- 5.9. Next, the plaintiff claims a share of the rental received from the property, after the life interest holder passed on in 1985.
- 5.10. The agreed facts recorded at the pre-trial conference provides that Shan Mugam had by his Will, bequeathed the life interest in the property to his wife

who died on 6th April,1985,and thereafter to his sons,the defendant, Thomas Muttu and two others..

5.11. An executor is required to keep an “*accurate accounts of the trust property, and must be always ready to render it when required*”:*Halsbury’s Laws of England*,(4th Ed), Vol 48, para 832. (footnotes omitted)

5.12. In *Nand v Kumar & Nand*,(Civil Appeal No:0086 of 2008) as cited by Mr Suresh Chandra, counsel for the plaintiff in his closing submissions, it was stated that:

A trustee will be held personally liable if he does not ensure production of accounts even if he delegated that duty:Carruthers v Carruthers[1896] AC 659 at page 665.

5.13. It is common ground that the defendant had not kept proper accounts of the estate and not made any distributions to the estate of Thomas Muttu.

5.14. It was the duty of the defendant, as executor to keep accounts and convey to the plaintiff and other beneficiaries, their share in the estate of Thomas Muttu.

5.15. In my judgment, there is clearly a breach by the defendant of his duties, as executor.

5.16. The issue then, is what sum of money the plaintiff is entitled to claim as loss of rental income.?

5.17. I turn to the evidence in this regard.

5.18. The plaintiff, in her evidence said that she was unaware of the rental income received by the defendant.

5.19. PW2, a Registered Valuer was called to testify on this point. He produced a certificate of valuation of the property.The previous, current and potential rentals of the ground and top floor are set out in the certificate, as I have referred to above,in my analysis of his evidence.

5.20. I find cogent reasons to cast doubts on the contents of the certificate of valuation and the evidence of PW2 for the following reasons. Firstly, the property was inspected by his Assistant Valuer. He was not called. Secondly,I do not find convincing PW2’s evidence that he visited the property on the morning

of the hearing. He did not produce any notes of his visit and had signed the certificate, two days before his stated visit.

5.21. Thirdly, it transpired that PW2 had not spoken to the tenants of the property. He said that it was “*vacant,locked*”. He relied on his Assistant’s report on the present rental. He said that he made assumptions on previous rentals.

5.22. Moreover,PW2 acknowledged that he did not provide a full report because of time constraints. He said that he was asked to produce a “*one page report*”. The certificate of valuation itself concludes that it “*forms part of the report only and if and when a full Valuation Report is required then a detailed report will be carried out.*”.

5.23. The closing submissions of the plaintiff accepts the defendant’s evidence that he received rent of \$ 80 a month for a flat. The defendant said that only one flat was rented from 1982, at \$ 80.

5.24. The defendant produced a summary of rentals received for subsequent years.He received rentals totaling \$ 21,050 as follows:\$150 from December,2000, to May,2003;\$ 260 from May,2004, to March,2005;and \$ 350 from August,2005, to January,2009;and \$400 from November,2009,to April,2010,with several months intermediate where no rents were received. The defendant states that he incurred expenses of \$ 21000 during that period and presently, the two flats are vacant.

5.25. The plaintiff has not controverted the defendants’ testimony on the rentals received. The defendants’ evidence that the flats are presently vacant was confirmed by PW2, in the first instance.Accordingly, I accept the defendants evidence.

5.26. The failure to produce receipts of the expenses incurred gives me doubts as to the reliability of the defendant’s evidence, in this area .I specifically disallow the expenses claimed for his sister, legal fees and advertisements. I would allow a deduction of 40 % for city rates and repairs from the total rental income received.

5.27. In my judgment, the estate of Thomas Muttu is entitled, upon the demise of the life interest holder, to a sum of \$ 5413.50 as rentals calculated as follows:

(a) From May,1985, to December,2000, at \$ 80	15040.00
(b) From December,2000, to April,2010,	21050.00
Total rental received	36090 .00
Less 40 %	14436.00
The estate of Thomas Muttu (1/4 th share)	\$ 5413.50


6. I conclude that the plaintiff, as administratrix of estate of Thomas Muttu is entitled to one-fourth of the estate of Shan Mugum to be distributed to herself and the other beneficiaries. The estate of Thomas Muttu is also entitled to a sum of \$ 5413.50 ,as rental income for the period May 1985, to April,2010.

7. Orders

I make Orders as follows:

- (a) The plaintiff,as administratrix of the estate of Thomas Muttu,is entitled to one-fourth of the estate of Shan Mugum, to be distributed to herself and the other beneficiaries of the estate of Thomas Muttu, in terms of section 6(1)(c) of the Succession Probate and Administration Act(cap 60).
- (b) The defendant shall pay the plaintiff, a sum of \$ 5413.50, to be distributed to herself and the other beneficiaries of the estate of Thomas Muttu, in terms of section 6(1)(c) of the Succession Probate and Administration Act(cap 60).
- (c) The defendant shall pay the plaintiff a sum of \$ 2000 as costs summarily assessed.

6th February, 2015


A.L.B. Brito-Mutunayagam
Judge