

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 34 of 2012

IN THE MATTER of an Application under
of the Succession, Probate and Administration
Act [Cap 60] Section 35 for an Order for
Removal of Executor and Trustee.

BETWEEN : DHANI NARAYAN

PLAINTIFF

AND : DIVENDRA KUMAR aka DEVENDRA

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Rosa for the Plaintiff
Mr. Titoko for the Defendant

Date of Hearing: 14th June, 2016

Date of Ruling : 22nd November, 2016

RULING

*[Application to remove Trustee pursuant to Section 35 of the Succession Probate and
Administration Act Cap 60 and the Inherent Jurisdiction of this Honourable Court]*

INTRODUCTION

1. The Plaintiff filed this Originating Summons and sought for the following orders-
 - (a) An order that the Defendant do show cause why he should not be removed as one of the Trustees of the Estate of Jainap aka Jainab; And
 - (b) Costs of this application.

2. This application is made pursuant to *Section 35 of the Succession Probate and Administration Act Cap 60* and the *Inherent Jurisdiction of this Honourable Court*.

LAW

3. *Section 35 of the Succession Probate and Administration Act Cap 60* deals with the removal of executor and provides as follows-

35. The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

(a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and

(b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and

(c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and

(d) make such further or consequential orders as it may consider necessary in the circumstances.

PLAINTIFF'S CASE

4. *That on 21st day of July, 2009 Letters of Administration De Bonis Non No. 48565 was issued by High Court in Fiji in the names of DHANI NARAYAN and DIVENDRA KUMAR aka DEVENDRA KUMAR as the Executors & Trustees for the Estate of Jainap aka Janab late of Ellington Rakiraki That he states the facts herein believing the same to be accurate and true based on the knowledge and information he has unless where otherwise stated.*
5. *That the Defendant is one of the Trustees for the Estate of Jainabp aka Jainab vide Letters of Administration De Bonis Non No. 48565 issued on 21st July 2009..*
6. *That the Estate property consist of an Agricultural Crown Lease No. 7532 consisting of 6.8796 hectares, Lot 1, Olan RR 1225 as covered under Sugar Cane Contract No 56 Malau Sector and also a residential lease as comprised in Crown Lease No 8406 containing an area of 2099m² being Lot 14, both the properties are situated at Ellington, Rakiraki..*
7. *That the Defendant has not carried out his duties as a Trustee.*

8. *That the Defendant does not make available original documents pertaining to the said estate in his possession whenever the same are required by the Plaintiff to obtain certain loan from Sugar Cane Grower's Fund for work to be carried out on the Estate.*
9. *That the Defendant has failed to execute the renewal of lease with the Lands Departments since the lease expired in 1994 or thereabouts.*
10. *That the Defendant has refused to sign bank withdrawal slips to enable the trustees to have excess to their shares of monies from cane proceeds deposited under the bank account of the said Estate.*
11. *That as a result of the Defendant's actions, the Defendant has not paid his contribution of land rentals for the Estate to Lands Department so land rental for the Estate remains in arrears.*
12. *That the advances made by the Fiji Sugar Corporation Ltd, Penang Mill in respect of the Estate has been stopped by FSC.*
13. *The Defendant has allowed neighbors who are not beneficiaries to graze their animals on the said Estate property and the animals have caused damaged to the Plaintiff's sugar cane crop. And as a result the defendant's share of land is Vacant.*
14. *That the Defendant dismantled water pipes connections to the Plaintiff's residence located on the said Estate.*
15. *That the Defendant has caused trouble and causes disunity and disharmony with the Plaintiff's family. This has affected the effective management of the said Estate by the trustees.*
16. *The Plaintiff prays for the Orders sought in the Summons filed herewith.*

DEFENDANT'S CASE

17. *That he is responsibly and faithfully administering the deceased's Estate and is not hostile as claimed by the Plaintiff.*
18. *The dispute is on the part of the Plaintiff who is to be blamed for his failure to administer the Estate and it affects the beneficiaries from benefiting from the Estate.*
19. *He puts the Plaintiff to strict prove on certain matters deposed by the Plaintiff in his Affidavit.*
20. *The Defendant is asking Court to dismiss the Summons and order costs against the Plaintiff.*

ANALYSIS and DETERMINATION

21. *The issue for this Court to determine is 'Whether the Defendant, Divendra Kumar should be removed as one of the Trustees of the Estate of Jainap aka Jainab?'*

22. The Plaintiff and the Defendant are the lawful grandchildren of the deceased Jainap aka Jainab.
23. Deceased died intestate leaving behind a duly executed 'Will' dated 06th September, 1979 appointing Vidya Wati as an Executrix and Trustee of her Estate. A probate Grant was issued by the Court to Vidya Wati on 06th November, 1985.
24. Vidya Wati took demise on 08th October, 2006, leaving the Deceased Estate unadministered. Jai Kissun, the husband of the deceased Vidya Wati, due to his ill health and old age renounced his rights to the administration of the Estate to Dhani Narayan and Divendra Kumar, the Plaintiff and the Defendant in the current action before this Court.
25. The Plaintiff and the Defendant upon application to Court to administer the Deceased Estate, were granted with a Letters of Administration De Bonis Non grant. It would be noted herein that the Court had granted a Letters of Administration Grant when the Renunciation of Jai Kissun was not signed or witnessed by any Commissioner for Oaths. Thumb print impression of Jai Kissun has been endorsed but the witnessing part remains blank. It seems that this went unnoticed by the registry and others and according to the Grant was issued to the Plaintiff and the Defendant.
26. The Plaintiff continually accuses the Defendant that he has persistently refused to perform his duties and is not cooperating with him to enable administration of the Deceased Estate. He added amongst other things :that the Defendant has failed and refused:-
 - To distribute beneficiaries entitlement from the Deceased's Estate, make available original Estate documents in his possession whenever the same are required by the Plaintiff to enable him obtain loans from the Sugar Cane Growers Fund and carry out the work on the Estate;
 - To execute the renewal of lease documents with the Lands Department since the lease has expired in 1994 despite being asked by the Plaintiff and in spite of letters sent by the Department of Lands dated 19th April, 2013;
 - To sign Bank withdrawal slips to enable the Trustees to have access to their shares of monies from the can proceeds deposited in the Estate's Bank account;
 - To cultivate the Estate land rather allow the neighbors to graze their cattle which damages the Plaintiff's sugar cane crop;
 - To pay his contribution of land rental for the Estate to the Lands Department and has fallen into arrears; and
 - To corporate rather disconnects electrical supply and dismantle water pipe connections to the Plaintiff's Residence.
27. On the other hand, the Defendant continues to accuse the Plaintiff for the following:

- That the cause of the dispute and hostility is by the Plaintiff and not him;
- That the Plaintiff is not in good terms with the Defendant;
- He carries out his administration duties but not the Plaintiff; and
- That the Plaintiff has failed to establish that the Welfare of the beneficiaries is opposed to his continued occupation of office by the Defendant.

28. I have had several opportunities on the requests of both parties and Counsels representing the parties to the proceedings to carry out a mediation to see if the matters can be resolved in terms of the deceased 'Will' between the parties.
29. Whilst mediating, I also noticed the dilemma of both the parties to the proceedings. It became very obvious to Court that the Defendant was not corporative and that he was the one responsible for causing problems and disputes amongst the parties and would not assist in any way to see that the Deceased Estate is administered and the properties distributed in accordance of the Deceased 'Will'. This behavior of the Defendant was obvious because he was not a beneficiary in the Deceased's 'Will' of which he became aware of.
30. Further I had the opportunity of perusing the Court File No. 48565 in which the application seeking a Letters of Administration De-Bonis Grant was filed and issued. To my surprise, the Deed of Renunciation given by Jai Kissan, father of the Defendant Divendra Kumar and husband of Vidya Wati was incomplete and filed into Court to obtain a L/A DBN Grant which was not even witnessed before a Commissioner for Oaths. Only the thumb impression of Jai Kissan appears on the Deed of Renunciation. Still the Court went ahead and gave the L/A DBN Grant in favour of Dhani Narayan and Divendra Kumar. In fact the L/A DBN Grant should not have been issued and granted in the first place since the Deed of Renunciation was incomplete.
31. It was also divulged to this Court through the Plaintiff's submissions that the Defendant is presently occupying the House that was in occupation by the Deceased, Vidya Wati, whereas, the 'Will' of the Deceased Jainap aka Jainab, bequeaths that house to the Plaintiff, Dhani Narayan. The Plaintiff has been deprived of his interests and entitlement in the 'Will' of the deceased by the Defendant.
- The Defendant all along denied this fact when questions were repeatedly asked of him to verify this fact.
- The 'Will' of the deceased Jainap aka Jainab at paragraph 3(c) specifically stated that '*the house to my grandson Dhani Narayan the house that is presently occupied by Vidya Wati together with $\frac{1}{4}$ acre of land adjacent to it.*'
32. This Court also noted that the Crown Lease issued to the deceased on 26th April, 1983 for a period of 25 years has now expired and not renewed. When the Plaintiff and Defendant

were asked to confirm whether the renewal of the lease was sought for from the Lands Department. The answer given by the Plaintiff was that a letter was sent by the Lands Department informing of the expiry of the Lease period which was conveyed to the Defendant but nothing was done since the Defendant failed to cooperate. The Defendant categorically denied or being informed of this and was unaware.

33. Reference is also made to the Plaintiff's Affidavit filed on 01st July, 2014 at paragraphs 4, 5 and 6 which can be summarized as follows-

That the Plaintiff is cultivating approximately 6 acres out of 17 acres of Agricultural lease of the Estate land under sugar cane contract No. 56 Mallau Sector and annually harvests 100 tons of cane. The proceeds is deposited in the Bank of Baroda Estate account of Jainap aka Jainab Ac. No. 91070100003859. The Defendant does not cultivate sugar cane of his share in the Estate farm for over 3 years and does not contribute to the financial earnings of the said Estate.

34. Whilst perusing the Court file, I came across the proposed agreed facts of the Defendant's document filed on 17th June, 2014. It states as follows-

- 'That my share of 8 acres of the 16 acres be given to me;
- That the Plaintiff and I share everything equally in terms of money;
- That I be allowed to do farming and pay my rent to the Lands Department;
- That the house be given to me as it belongs to my parents; and
- That I will be paying for the transfer to subdivide the land."

35. It has become obvious from the affidavit evidence before the Court now that the Plaintiff is carrying out cane farming of the 7 acres of the Estate land and the cane proceeds after cane harvest is directly deposited into the Estate account kept with Bank of Baroda.

The Defendant is seeking his share in the Estate of the land and the property. It is crystal clear from the Defendant's proposed agreed facts that he is banking on for his share and entitlement from the Deceased's Estate and until that is determined, the Defendant would continue to be an obstacle and cause obstruction with regards to the administration of the Deceased Estate, because the Defendant was now also granted the Letters of Administration De Bonis Non together with the Plaintiff.

Until and unless the Plaintiff and the Defendant join hands and cooperate with each other, only then they will be able to administer and distribute the properties and money of the Deceased Estate in terms of the 'Will' in the interest of all the beneficiaries otherwise there will never be any end to the existing dispute between them.

36. In order to ensure that the Deceased Estate of Jainap aka Jainab is fully administered and the assets of the Estate is distributed to the beneficiaries in terms of the Deceased's "will", this Court needs to remove the Defendant as one of the Administrators of the Deceased's Estate.

37. For the Rational as discussed hereinabove, I proceed to make the following Orders-

ORDERS

1. The Defendant, Divendra Kumar aka Devendra Kumar is hereby immediately removed as one of the Administrators from the Deceased's Estate of Jainap aka Jainab.
2. The Defendant is further ordered to surrender the Letters of Administration De-Bonis Non Grant issued to him dated 21st July, 2009 with immediate effect to the Principal Probate Registry in Suva.
3. The Plaintiff appointed as the Administrator to continue with the full administration of the Deceased's Estate and distribute the assets of the Estate in terms of the expressed 'Will' of the Deceased Jainap aka Jainab.
4. The Defendant is also ordered to pay costs to the Plaintiff summarily assessed at \$750 and to be paid within 14 days.

DATED AT SUVA THIS 22nd November, 2016



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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Zodiac Laws, Rakiraki*
Qarcia Barristers & Solicitors, Rakiraki