

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HPP 11 of 2013

Between: Viliame Jitoko

Plaintiff

And: Loata Vakacegu

Defendant

Appearances: Ms P. Preetika for the plaintiff

M V.Faktaufon with Ms L. Jackson for the defendant

Date of hearing: 27th May, 2015

Judgment

1. The plaintiff is the son of the late Viliame Jitoko,(the deceased). The defendant is the wife of the plaintiff's step brother, the late Viliame Vakacegu. Viliame Vakacegu was appointed administrator of the estate of the deceased. After the death of Viliame Vakacegu, the defendant obtained letters of administration in the estate of the deceased. The statement of claim recites that the deceased left a will of 30th September,2003, prepared by the Housing Authority and witnessed by two employees of its Legal Department. The plaintiff is the sole executor and beneficiary under that will. In these proceedings filed on 3rd June,2014, the plaintiff seeks: (i) revocation of the letters of administration granted to the defendant and the late Viliame Vakacegu in the estate of the deceased, on the ground that the defendant is not the "*next person entitled to apply for grant of letters of administration*", as she is a daughter in law and there are 5 surviving children of the deceased, and, (ii) that probate be granted , in terms of the will of the deceased.

2. The defendant in her statement of defence states that:

- (a) She was the best “*next person entitled*” to apply for grant, as her late husband had not completed administration of the estate of Viliame Jitoko and none of the five children of the deceased, including the plaintiff took the initiative to apply for letters of administration, after her husband’s death in October, 2010. She states that the plaintiff was “*fully aware*” that Viliame Vakacegu and later, the defendant applied for letters of administration de bonis No.51746 in the estate of the deceased.
- (b) She is not aware of any will of the deceased and questions the plaintiff’s motive in producing the “*alleged will*” at this late stage, 8 years after his death.
- (c) The caveat lodged by the plaintiff against the estate property was cancelled on 10th July, 2012, as the plaintiff failed to produce a copy of the will to the Registrar of Titles.
- (d) The plaintiff is estopped from relying on any alleged will, as the period under which the plaintiff should have notified the administrator under the public notifications in the local newspapers, expired.
- (e) In October 2012, the defendant issued the plaintiff with notice to vacate the property.

3. ***The hearing***

PW1 (the plaintiff)

- a. The plaintiff,(PW1) in evidence in chief said that his father, Viliame Jitoko passed on in 2007. In October,2012, he came across a copy of his father’s will, when he was cleaning his father’s house. The plaintiff occupies that house. The estate of the deceased comprises a Housing Authority sub lease, half of which belonged to the defendant’s late husband.
- b. When he took the will to the High Court to have it registered, he was told that the will is null and void, as the estate of the deceased was being administered by the defendant.
- c. The will was witnessed by two legal officers of the Housing Authority. He was the beneficiary. He was told by the legal officers that the original had been dispatched to his father. He produced a receipt dated 30th September,2003, issued by the Housing Authority, as payment received for drafting the will. His father had not informed him of the will.
- d. PW1 said that there was no confusion between the children of the deceased, as to who should apply for letters of administration, as alleged by the defendant.

- e. It transpired in cross-examination that in 2009, the plaintiff had placed a caveat on the estate property, as beneficiary.
- f. The plaintiff said that he was not aware if his father had destroyed the original of the will. He did not give the will to the defendant, as he did not have the original copy. He admitted that he commenced this action, as he received notice to vacate the estate property.

PW2, (Elizabeth Robanakadavu, formerly lending executive in the Housing Authority)

- g. PW2 said that both copies of the will were given to the testator. She identified her signature on the copy of the will. The signature of the testator was placed in her presence. The other witness to the will, Shobnam Shareen was also present, at that time.
- h. In cross-examination, PW2 said that she asked the testator all the relevant questions. He did not present his identity, but his signature was similar to that on the title of his lease.

The defendant

- i. The defendant, in evidence in chief produced the letters of administration granted to her husband. She said that her husband was trying to administer the estate. The beneficiaries had agreed to renounce their shares in the estate property of the deceased in his favour. One had signed a deed of renunciation.
- j. There were no claims to the estate of Viliame Jitoko, after the advertisement was placed in the Press.
- k. In cross-examination, the defendant said that neither she nor her late husband knew of the existence of a will. As to the attempts made by her to distribute the shares of the estate, the defendant said that she had spoken to one of the heirs.
- l. In re-examination, she said that she had taken so long to administer the estate, as she was not living in Suva and was often abroad. Her solicitor was dealing with the administration of the estate. In order to complete the administration, the plaintiff has to vacate the estate property, in order that it could be sold.

The determination

4. The primary facts, as agreed at the PTC, are as follows:
 - Viliame Jitoko died on 28th November, 2005.
 - On 17th April 2007, letters of administration No.46157 were granted to the plaintiff's eldest brother, Viliame Vakacegu in the estate of the deceased.
 - Viliame Vakacegu died on 10th October, 2010.
 - On 13th February 2012, letters of administration no. 51891 were granted to the defendant, in the estate of Viliame Vakacegu.
 - The defendant, as widow of Viliame Vakacegu, was appointed as administrator in the estate of the deceased Viliame Jitoko by letters of administration de bonis non (without will) No. 51746 on 11th April 2012.
 - The defendant denies that she has any interest in the estate of Viliame Jitoko, save as to complete the administration.
5. The plaintiff seeks a revocation of the letters of administration granted to the defendant on the ground that the defendant was not the next person entitled to apply for grant, as she is a daughter in law and there were 5 surviving children of the deceased, including the plaintiff.
6. It is an agreed fact that the defendant does not have a beneficial interest in the estate of the deceased.
7. It is an accepted "*practice in respect of all such applications is however to grant the application of the person who has the largest interest or whom majority of the other beneficiaries selects*" per Shameem J in *In the Estate of Chinsami Reddy*, (2000) FJHC 134 as cited in the closing submissions of the defendant.
8. The reason given by the defendant for applying for grant was that there was confusion among the family members was because none of the five children of the deceased, including the plaintiff applied for letters of administration of the estate of the deceased, after Viliame Vakacegu died on 10th October, 2010.

9. Be that as it may, the material circumstance, as Mr Faktaufon, counsel for the defendant pointed out is that the plaintiff did not object to the grant of letters of administration to the defendant, when an advertisement was placed in the Fiji Sun of 17th November, 2010, stating that an application will be made for letters of administration de bonis non in the estate of the deceased.
10. The caveat filed by the plaintiff was cancelled by the Registrar of Titles, as the original will was not produced.
11. The plaintiff's contention that he was not aware that the late Viliame Vakacegu and the defendant made application for letters of administration is unacceptable.
12. In my view, the defendant has not presented any valid reason for the revocation of the letters of administration granted to the defendant, in the estate of Viliame Jitoko.
13. The plaintiff's action for revocation fails.
14. Next, the plaintiff states that he found a copy of a will of the deceased of 30th September, 2003, when he was cleaning the house. The original was not produced.
15. The plaintiff, in cross-examination said that he was unaware, if the deceased had destroyed the original of the will.
16. PW2, in evidence in chief testified that there was two original copies of the will of as prepared by the Housing Authority and that both copies were given to the deceased, Viliame Jitoko.

17. **R.B. Rowe et al, Tristram and Coote's Probate Practice** (25th ed, (1978) as cited in the closing submissions of the defendant states as follows.

At page 561:

Presumption of revocation

Where a will is known to have been in the possession of the testator and there is no evidence of its having subsequently left his custody but it cannot be found on his death there is a prima facie presumption that he destroyed it animo revocandi. (see p.682, post) This presumption may be displaced by evidence (e.g. of declarations of the testator's unchanged intentions, or evidence as to his state of mind, etc) and when it is sought to obtain an order admitting to proof a copy or other evidence of the contents of a will in the above circumstances, affidavit evidence of the facts relied on as rebutting the presumption of destruction animo revocandi should be lodged.

At page 682:

Presumption as to will not forthcoming at testator's death

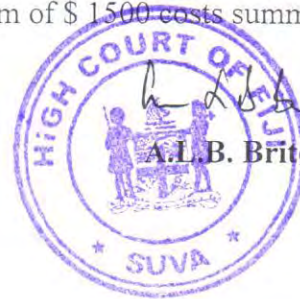
Where a will is traced into the testator's custody, and there is no evidence of its having subsequently left his custody, and there is no evidence of its having subsequently left his custody, and it is not forthcoming at his death – this will be prima facie evidence of its destruction by him animo revocandi (Patten v Poulton) (1858), 1 S & T, 55; Welch v. Phillips (1836), 1 Moo. P. C. at p. 302) and it is not necessary for those alleging revocation to show how, in fact, it was lost or destroyed (Patten v. Poulton (1858), 1 S. & T. 55). The presumption may be rebutted by surrounding circumstances; eg: declaration of unchanged affection or intention, (Patten v Poulton, (1858), 1 S & T 55; Welch v Phillips (1836), 1 Moo P C at p. 302; Mackenzie, (1909) P. 305; Drake v Sykes (1996), 22 T L R 741 and 23 T L R 747 In the Estate of Wilson, Walker v Treasury Solicitor (1961), 105 Sol. Jo. 531. The strongest proof of the improbability of revocation by destruction arises from the contents of the document itself (Saunders v. Saunders (1848), 6 N C.

18. The plaintiff testified that he found the will of the deceased in October, 2012. His evidence is manifestly untrue, as he filed a caveat on the lease, as beneficiary in 2009. The relevant memorial refers to a copy of the will.
19. In my judgment, the plaintiff has failed to rebut the presumption that the deceased revoked the original will that was in his custody.

20. In conclusion, I would note that the plaintiff admitted in cross-examination that he commenced this action, in the aftermath of receiving a letter of eviction requiring him to vacate the estate property.

21. **Orders**

- (i) The plaintiff's action is declined.
- (ii) The plaintiff shall pay the defendant a sum of \$ 1500 costs summarily assessed.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge

2nd June, 2016