IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

HPP Action No. HPP 35 OF 2013

**IN THE MATTER** of the estate of MICHAEL RAJALINGAM late of 22 Johnson Street, Suva in the republic of Fiji, Retired, deceased, Testate

AND

**IN THE MATTER** of Probate No. 33200 granted on the 19th day of August, 1996

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| **BETWEEN** | : | **VINCENT THOMAS RAJALINGAM** |
| | | **Plaintiff** |
| **A N D** | : | **EDMOND CLARENCE RAJALINGAM** |
| | | **Defendant** |

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| **COUNSEL** | : | Ms. R. Naidu for the Plaintiff |
| | | Mr. N. Lajendra for the Defendant |
| **Date of Hearing** | : | 26th January, 2017 |
| **Dates of Submissions** | : | 27th January, 2017 and 06th February, 2017 |
| **Date of Decision** | : | 13th February, 2017 |

# RULING

[1] The plaintiff and the defendants were the co-executors of the estate of Michael Rajalingam. By its order dated 30th April, 2015 removed the defendant as an executor.

[2] The defendant filed summons dated 22nd September, 2016 praying *inter alia* for the court to quantify the sum the plaintiff is authorised to deduct as estate expenses and the plaintiff filed summons on 26th November, 2016 to have the summons dated 22nd, September, 2016 struck out on the ground of abuse of the process of the court.

[3] When both matters came up for hearing on 26th January, 2017 the counsel for the plaintiff took an objection to paragraph 1 to 33 of the defendant's affidavit in reply and sought an order whether the said paragraphs should be expunged from the affidavit in reply. Both parties have filed submissions on this issue.

[3] It is the submission of the learned counsel for the plaintiff is that the averments in paragraphs 5 and 7 to 10 of the affidavit in reply of the defendant are irrelevant, paragraphs 11 to 33 are argumentative, paragraphs 21, 26 and 31 to 33 are non-factual and paragraphs 11 to 33 are argumentative.

[4] In support of her objection the learned counsel relied on the provisions of Order 41 rule 5 of the High Court Rules and the decisions cited below.

[5] Order 41 rule 5 provides as follows;

> (1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
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> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[6] In the case of ***In re*** **J.L. Young Manufacturing Co. Ltd** [1900] 2 Ch 753 Lord Alverstone has made the following observations;

> This case is one of general importance as regards the practice of the admissibility of evidence by affidavit. In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I noticed that in several instances the deponents make statements on their "information and belief", without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on "information and belief" ought not to be looked at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; as soon as affidavits are drawn so as to avoid shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice."
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> "The point is a very important one indeed. I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice aging and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general – that when a deponent makes a statement on his information and belief."

[7] This decision has been followed in the case of Chandrika Prasad v Republic of Fiji & Attorney General (No. 6) (2001) 2 FLR 39.

[8] **Faber v Nazerian** (2012/42735) [2013] ZAGPJHC 65 (15 April 2013):

> The general rule which is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit.6 This rule is based on the principle that the applicant stands or falls by his or founding affidavit.7 The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit.8
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> The exception to this rule is found in Body Corporate, Shaftesbury Sectional Title Scheme, (supra) where the Court in upholding what was said in Shephard v Tuckers Land and Development Corporation (Pty) Ltd [1978 (1) SA 173 (W) at 177G–178A] and after confirming the general rule applicable in motion proceedings, held that the rule was not absolute and that the Court has a discretion to permit new material in the replying affidavit.

[9] The question here is whether, even if the court decides that certain averments in the affidavit are contrary to the provisions of Order 41 rule 5, it empowers the court to expunge or struck out such averments from the affidavit.

[11] The affidavits are basically statements of fact. They are sworn evidence before courts of law. I carefully considered the averments in the affidavit in reply of the defendant of which certain averments are objected to by the plaintiff on the grounds I have set out above.

[12] I find that certain averments in some of the paragraphs in the affidavit are argumentative and non-factual. However, the court cannot expunge a particular paragraph of the affidavit when part of it is based on facts and the balance is argumentative or non-factual.

[13] The principle is that the irrelevant evidence can go into the record and remain there but court cannot consider such evidence in its findings. In my view the objection of

the plaintiff is premature. The court will have to decide on the admissibility and relevancy of the affidavit evidence at the time of the preparation of its decision on the substantive matter. If the affidavit in reply of the defendant is contrary to the provisions of Order 41 rule 5 the court will disregard such averments in arriving at its findings.

[14] For the reasons aforementioned the court makes the following orders:

1. The application of the plaintiff to strike out paragraphs 1 to 33 of the defendant's affidavit in reply is refused.
2. There will be no order for costs.


Lyone Seneviratne

**JUDGE**

13th February, 2017.