

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 61 of 2016

IN THE MATTER of an Application for
Removal of Executors and Trustees in the Estate
of Shaukat Ali Probate No. 50456.

BETWEEN : **ASHIK ALI** of Kulukulu Sigatoka now resides in 17 Plunket Avenue, Muanikau,
Auckland, New Zealand, Businessman/Beneficiary.

PLAINTIFF

AND : **FAROUK ALI** of Kulukulu Sigatoka, Retired, Executor/Trustee.

DEFENDANT

BEFORE : **Master Vishwa Datt Sharma**

COUNSEL : **Mr. Amrit Chand** for the Plaintiff

Date of Ruling : **04th April, 2017**

RULING

*[Application to remove Executor/Trustee pursuant to Order 85 of the High Court Rules, 1988,
Section 73 of the Trustees Act Cap 65 and 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 namely Farouk Ali be removed as Executor and Trustee from the Estate of Shaukat Ali.
 - (b) An order that the Plaintiff namely Ashik Ali be appointed as the Trustee for Estate of Shaukat Ali.
 - (c) Alternatively, Court to execute all the Transfer transaction instruments on behalf of the Trustees.
 - (d) That the Defendant to pay costs to the Plaintiff incidental to this proceedings on a full solicitor/client indemnity basis.
 - (e) Such further and other Orders and or Directions as this Honourable Court may deem fit and just given the present circumstances.
2. This application is made in support of an affidavit deposed by the Plaintiff and pursuant to Order 85 of the High Court Rules, 1988, Section 73 of the Trustees Act Cap 65, Section 35 of the Succession Probate and Administration Act Cap 60 and the Inherent Jurisdiction of this Honourable Court.
3. The Defendant was served with the application but failed to file any response and appear at the hearing of this application.
4. The Application was heard uncontested.

LAW

5. 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.* *(Underline mine for deliberation)*

ANALYSIS and DETERMINATION

6. The issues for this Court to determine are:
 - **Whether the Defendant, Farouk Ali should be removed as the Executor/Trustees of the Estate of Shaukat Ali? AND**
 - **Whether the Plaintiff Ashik Ali be appointed as the Executor/Trustee in place of Farouk Ali?**
7. The Test to be applied herein is to find out if the Defendant in his capacity as an appointed Court Executor/Trustee of the Deceased Estate has discharged his duties required of him to be carried out in terms of the Law, and fully administered the Estate, and if not, then why not.
8. The Plaintiff and the Defendant are the lawful children of the deceased Shaukat Ali.
9. Deceased, Shaukat Ali died testate leaving behind a duly executed "Will" dated 14th November, 2007 appointing Ashik Ali and Farouk Ali as Executors and Trustees of his Estate. Farouk Ali obtained a Probate Grant since Ashik Ali was out of the Courts Jurisdiction. A probate Grant was issued by the Court to Farouk Ali on 15th February, 2011.
10. The deceased's Estate in terms of the WILL comprised of a Crown Lease No. 15414, Lot 12 N 1901 (Part of) Veivadravdra No.1 formerly CT 3821 B, having an area of 1.148 ha. This was sub-divided into 10 Lots when the Deceased was still alive. Lot 10 was dedicated as the access to the other remaining 9 lots.
11. In terms of the Deceased's WILL-
 - Insan Ali was bequeathed Lot 1;
 - Farouk Ali (Defendant) as a beneficiary was bequeathed with Lots 2, 3, 4 and 5;
 - Ashik Ali (Plaintiff) as beneficiary together with Jainab (Mother) bequeathed with Lots 6, 7, 8 and 9.
 - Lot 1 was already transferred to Insan Ali when the Deceased was still alive.

12. Lots 2, 3, 4 and 5 was transferred to Defendant Farouk Ali.
13. According to the Plaintiff, (Ashik Ali), his entitlement to Lots 6, 7, 8 and 9 remains pending transfer by Ashik Ali in his capacity as an Executor/Trustee (Grant Holder).
14. The Plaintiff submitted that the Deceased (Shaukat Ali) took demise 07 years ago and the Estate remains fully administered by the present Executor/Trustee as far as his entitlement to the Deceased's property is concerned.
15. He further deposed in his affidavit at paragraphs 13, 14 and 15 that efforts were made to contact the Defendant through his Solicitors and carry out the transfer process according to the Deceased's WILL, but to no success.
16. The Defendant is refusing to carry out any Execution of the transfer in terms of the Plaintiff's entitlement and stated that the Defendant informed that he will not execute and Instrument of transfer but will await the Deceased's Wife, Jainab to be in the Country for discussion of the matter first.
17. There is evidence before this Court that the Defendant as Executor/Trustee has not fully administered the Deceased's Estate in full but in part as suited him and deprive the Plaintiff of his entitlement. There seems to be some sort of hatred and dislike for the Plaintiff by the Defendant but that was not revealed to this Court since the Defendant failed to file any response and/or appear at the hearing.
18. Further, for some reason the Defendant is adamant not to carry out and administration and transfers in terms of the Plaintiff's entitlement until he is able to have the Deceased's wife (Jainab) in the Country to discuss the matter. It can be understood that the Plaintiff together with the Deceased's wife (Jainab) has been bequeathed with Lots 6, 7, 8, and 9 and that is the very reason why the Defendant is insisting to have a discussion with Jainab when she is in the Country.
19. I find as a fact, since the Defendant has failed to turn up to Court and counter the Plaintiff's Application, it is clear that the Defendant has failed in his duties to complete the administration of the Deceased's Estate in full in the interest of all the beneficiaries including the Plaintiff and his mother Jainab in terms of the Deceased's WILL and the Grant given to him.
20. For the aforesaid rational, I proceed to make the following orders:

FINAL ORDERS

- (i) The Defendant, Farouk Ali is hereby ordered to be removed as an Executor/Trustee of the Deceased's Estate;
- (ii) The Defendant, Farouk Ali to immediately deposit the Probate Grant No. 50546 that was given to him, into the High Court Principal Probate Registry.
- (iii) This Court now appoints the Plaintiff Ashik Ali with immediate effect as the Executor/Trustee in place of the Current Executor/Trustee Farouk Ali.
- (iv) The Plaintiff is at liberty to take necessary action to file an appropriate action to be given the formal Grant of Probate to complete the administration of the Deceased's Estate as soon as practicable.
- (v) Defendant to pay costs to the Plaintiff summarily assessed at \$750 and this to be paid personally by him and not from the Deceased's Estate.

DATED AT SUVA THIS 04TH DAY OF APRIL, 2017



MR VISHWA DATT SHARMA
Master of High Court, Suva.

cc: *Amrit Chand Lawyers, Suva*