

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Civil Action No.: 2 of 2017

IN THE MATTER of THE ESTATE OF KWAN CHEW KUVAN aka CHEW KUVAN KWAN late of 88 Milverton Road, Raiwaqa, Fiji, Businessman, Deceased, Testate.

IN THE MATER of AN APPLICATION FOR INITIAL TRUSTEES TO DISBURSE PROCEEDS OF RENTAL INCOME. In pursuant to Part 111 Section 6(2) (b) Distribution on Intestacy of the Succession Probate and Administration Act Cap 60.

BETWEEN : BYRON KWAN of 88 Milverton Road, Raiwaqa, Suva, Beneficiary.

PLAINTIFF

AND : NELSON KWAN of 88 Milverton Road, Raiwaqa, Suva, Beneficiary.

1ST DEFENDANT

AND : GIRARD SEETO of 19 Helsen Street, Samabula, Suva.

2ND DEFENDANT

Appearance : In Person for Plaintiff
Ms. M. Rakai for the 1st Defendant
No appearance for the 2nd Defendant
Date of Hearing : 29th June, 2017
Date of Judgment : 26th July, 2017

JUDGMENT

INTRODUCTION

1. The Plaintiff filed Originating Summons seeking inter alia 1/3 of rental proceeds since 2002 from a property where 1st and 2nd Defendants were executors, before the court removed them both as executors on 27th May, 2015. Apart from that, he is also claiming interest on the said sum at the rate of 5% and also for economic loss, and or damages for

mental, emotional trauma. The 2nd Defendant did not appear in court, though there is an affidavit of service filed in evidence of service to him.

ANALYSIS

2. The Originating Summons sought following orders;
 1. 'An Order that all rental proceeds from the tenants of the Estate since 2002 to the present, of one third (1/3) no less than \$134,422 (One hundred and thirty four thousand four hundred and twenty two dollars) to be paid to the Plaintiff by the Defendants.
 2. An Order that pecuniary interest of 5% amounting \$6,721 (six thousand seven hundred and twenty one dollars) to be paid to the Plaintiff by the Defendants.
 3. An order that financial economic losses of no less than \$77,992 (seventy seven thousand nine hundred and ninety two dollars) incurred by the Plaintiff to be paid by the Defendants.
 4. An Order that monetary damages to be assessed by the Court for mental and emotional trauma to be paid to the Plaintiff by the Defendants.
 5. Such further or consequential orders as.....'
3. The estate of late father of the Plaintiff and 1st Defendant, to this action comprised of some real properties and one such property was a multi-story flat situated at No 88 Milverton Road, Raiwaqa.
4. Late father died on 23rd June, 2002 and according to his Last Will the Defendants were the executors and trustees of his estate. The said Last Will also stated that executors should maintain his 'invalid wife Jei Oi Larn and my invalid daughter namely Karen Kwan'.
5. The probate for the estate of Kwan Chew Kuan (father of Plaintiff and 1st Defendant) was obtained by the Defendants on 30th September, 2002.

6. The Certificate of Title of the property where rental proceeds are claimed by the Plaintiff is annexed as BK-3 and it is an admitted fact. The counsel for the 1st Defendant stated that according to the said certificate of title all shares in the property were distributed to beneficiaries. This is correct position and, that even as late as 13th December, 2002 said property was transferred in the name of Plaintiff, 1st Defendant, their sister Karen and late mother.
7. It should also be noted that executors under the last will were required to maintain late mother and said sister Karen and the 1st Defendant is claiming that he had been continuously doing that and it had incurred expenses.
8. The 1st Defendant had annexed 1-15 in his affidavit in reply, statements of accounts from 2002-2014, but these are not audited or certified by any professional body as true and correct statement of account. At the same time it is not clear whether Accounting Standards have been complied when they were prepared.
9. According to the Last Will of Plaintiff's father all remaining properties to be distributed equally to 3 children and after demise of mother, the property in issue is jointly owned by the three siblings in equal shares. Even before that, there was no obligation on the executors to collect rent from the property since they are all joint tenants of the property from December, 2002.
10. At the moment Defendants are not collecting rents for the said property.
11. The counsel for the 1st Defendant stated that the action is statute barred in terms of Section 9(2) of the Limitation Act.
12. Section 9 of the Limitation Act states as follows

Limitation of actions in respect of trust property

9.-(1) No period of limitation prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid and to the provisions of the Trustee Act, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued: (Cap. 65)

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under the provisions of this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

13. The Plaintiff is claiming proceeds of trust property, but in reality the shares (ownership) of the property was transferred in 2002, so it cannot be considered as property belonging to the estate. Since the Plaintiff became joint tenant of the property as far as in 2002 he cannot be considered a beneficiary, hence Section 9 of the Limitation Act has no application to the present case.
14. The Plaintiff had filed this action as beneficiary of his father's Last Will, but the title to the property in issue indicate that upon the death of father interest in the property were transferred to beneficiaries in terms of the Last Will as far back on 12th December 2002. So the 1st Defendant cannot be considered as executor of the property in issue since transfer of shares under said Last Will.
15. In 2002 itself the late wife and children of Kwan Chew Kuan, became owners of the property in issue as joint tenants and upon the death of Plaintiff's mother said share was also distributed among the children by the Defendants as executors and trustees of estate of late Je Oi Larn on 4th February, 2013. She died in 2011.

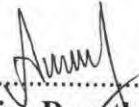
16. The Plaintiff's claim as beneficiary fails.
17. Even if I am wrong on the above, the Plaintiff had only produced one tenancy agreement and even that would not prove the receipt of all the money under such agreement.
18. In the circumstances the Plaintiff has failed to prove that Defendants have collected \$134,422 in the Originating Summons. It is also trite law that Originating Summons are not suited for an action where disputed facts are considered.
19. The 1st Defendant allege that during the time period he had made numerous improvements to the trust property and maintenance of the property, was also funded by rental proceeds.
20. It is known fact a property cannot be inhibited without proper maintenance for over 15 years. So, these issues cannot be considered by Originating Summons process.
21. The Plaintiff has instituted this action without considering proper legal position and or without obtaining proper legal advice. Even though Originating Summons can be converted in to a writ of summons in certain instances I do not propose to do so. There is no proper cause of action disclosed. In the circumstances this action is dismissed and cost is summarily assessed at \$1,000.

FINAL ORDERS

- a. Originating Summons is dismissed.
- b. The cost is summarily assessed at \$1,000.

Dated at Suva this 26th day of July, 2017




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Justice Deepthi Amaratunga
High Court, Suva