IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

CIVIL ACTION NO: HPP 5 of 2013

BETWEEN	:	**FATMA BI** also known as **FATIMA BI** of Nasarawaqa, Lekutu, Bua as intended executrix and trustee of the Estate of Liakhat Khan late of Nasarawaqa, Bua in the Republic of Fiji Islands, Domestic Duties.
		PLAINTIFF
AND	:	**SALEND JEET KOR** of P.O. Box H219, Nasole, Nasinu.
		DEFENDANT
BEFORE	:	Justice Riyaz Hamza
COUNSEL	:	Mr. Sushil Sharma for the Plaintiff Mr. Ashneel Nand for the Defendant

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RULING

INTRODUCTION AND BACKGROUND

[1] The Plaintiff instituted these proceedings by way of a Writ of Summons, which was issued on 24 January 2013. As per the Statement of Claim attached thereto the Plaintiff, inter alia, states:

1. That she is the lawful wife and the intended executrix and trustee in the Estate of Liakhat Khan.

2. The Defendant is a de-facto wife of the late Liakhat Khan.

3. Liahkat Khan died testate on 3 July 2012. Prior to his death, he executed a Will dated 15 June 2012, in which he appointed the Plaintiff Fatima Bi as the executrix and trustee of his Last Will and Testament.

4. Liakhat Khan had executed the Will after the contents of the said Will was duly explained to him by the Solicitor's Clerk of Messrs Maqbool and Company, Labasa, who attended to the preparation of the Last Will.

5. After the death of Liakhat Khan, the Plaintiff, as intended executrix and trustee of the Last Will, instructed Messrs Samusamuvodre Sharma Law to carry out necessary legal work required for the grant of Probate.

6. Accordingly, a Probate application was filed invoking the Probate Jurisdiction of the High Court of Suva. The Probate Registry assigned Probate Number 52760 in respect of the said application.

7. By letter dated 10 August 2012, the Probate Registry had informed the Plaintiff that a caveat had been lodged by the Defendant dated 19 July 2012.

8. On 7 September 2012, the Solicitor's for the Plaintiff filed a Warning to Caveator and service was affected to the Defendant's Solicitors Messrs Kohli and Singh, on 20 September 2012.

9. The Defendant has no caveatable interest in any form for her caveat to be sustained any further by the High Court.

10. The estate property devised and bequeathed by Liakhat Khan in his Last Will and Testament are encumbered properties.

11. That as a result of the delay in the grant of the probate, the Plaintiff is unable to legally carry out her duties and obligations in dealing with the day to day business affairs which the Plaintiff's lawful husband was entitled to do.

[2] Accordingly, the Plaintiff claims the following reliefs against the Defendant:

(i) That the Caveat lodged by the Defendant bearing Caveat No. 32/2012 be removed forthwith.

(ii) That the Probate No. 52760 be granted by this Honourable Court as per the application filed by Fatma Bi also known as Fatima Bi.

(iii) That costs of this application be paid by the Defendant.

(iv) Any other expedient or relief this Honourable Court may think fit.

[3] The Defendant filed her Statement of Defence & Counterclaim, on 15 February 2013. Therein, the Defendant states that she had been in a de-facto relationship with the Deceased, Liakhat Khan, since 1 September 2000. During the de-facto relationship, the Defendant stayed with the Deceased at his residence at Lot 30, Naulu Road, Nakasi and Nasarawaqa, Bua. From the said relationship, the Defendant gave birth to 3 children.

[4] The Defendant further states, that the purported Will was not duly executed by the Deceased in accordance with the provisions of the Wills Act (Chapter 59 of the Laws of Fiji).

[5] The Defendant also claims that the execution of the purported Will was obtained by the fraud of the Plaintiff and/or her agents.

[6] The Defendant states that once the Will is declared null and void, the Estate of the Deceased would become Intestate and the Defendant and her 3 children would be entitled to shares in the Estate by virtue of the Succession Probate and Administration Act (Chapter 60,) and the Family Law (Amendment) Decree 2012.

[7] The Defendant counter claims that she is entitled to a share in the Estate of the Deceased on her own behalf and on behalf of her 3 children.

[8] The Plaintiff filed a Reply to the Statement of Defence, on 22 April 2013.

[9] When this matter came up before me on 4 August 2016, the Counsel for the Defendant took up a preliminary objection that the Plaintiff cannot institute this action as 'the intended executrix and trustee of the Estate of the Deceased', as the purported will is being challenged. Instead that the Plaintiff should have instituted this action in her personal capacity, as a beneficiary of the Last Will.

[10] This matter was taken up for hearing before me on 5 August 2016. Counsel for the Plaintiff and Defendant were heard.

LEGAL PROVISIONS AND ANALYSIS

[11] The preliminary objection was taken up orally by Counsel for the Defendant and not by way of Summons. The Counsel contended that this being an objection based on a question of law, he could take up the objection at any point of time. He argued that the High Court Rules 1988 does not mandate that objections of law should necessarily be brought by way of Summons.

[12] However, the Counsel for the Defendant did not refer Court to any specific legal provision which he was relying on to support the preliminary objection. He submitted that he was basing his objection on case authorities.

[13] The Counsel for the Defendant further contended that this failure makes these proceedings a nullity and is not a mere irregularity that is curable in terms of the provisions of Order 2, Rule 1 of the High Court Rules.

[14] Order 2 of the High Court Rules, are the provisions dealing with 'Effect of Non Compliance' of the Rules and 'Application to Set Aside for Irregularity'. Order 2, Rules 1 and 2 are reproduced below:

> *1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by any originating process other than the one employed.

2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summon or motion and the grounds of objection must be stated in the summons or notice of motion.

[15] The Counsel for the Defendant referred to the following authorities:

Meyappa Chetty v. Subarmani Chetty (1916) 1 AC 603; where the Privy Council held (at pages 608-609):

"….It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequences is that he can institute an action in the character of the executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant…."

Esala Tanuku v. Attorney General [2000] FJHC 13; HBC 134d.95s (26 January 2000); where Her Ladyship Madam Justice Nazhat Shameem held:

"On 9th March 1995, the Plaintiff as "intended administrator in the estate of Peni Kasa Baleiwaigasa Waqanisau Tanuku" issued writ of summons against the Attorney-General, for negligence by government doctors at the Colonial

War Memorial Hospital. The deceased, a 6 year old boy, and the Plaintiff's son, died on 17th August 1992. The writ of summons states:

"The defendant through its servants and/or agents aforesaid were guilty of negligence and failed to use reasonable care, skill and diligence in and about the treatment and attendance of the deceased as a result of which he died."

…….

……. an application for striking out the statement of claim was made by the Defendant, on the ground that the Plaintiff had not brought the action as administrator of his son's estate, that he was incompetent to bring the action, and that the entire proceedings were null and void.

…….

It is clear since the decisions of the Privy Council and the Court of Appeal in ***Meyappa Chetty -v- Subarmani Chetty*** *(1916) 1 AC 603 and* ***Ingall -v- Moran*** *(1944) 1 All ER 97 respectively, that an administrator can only institute an action after he gets his grant of letters of administration. In* ***Ingall -v- Moran*** *Scott LJ said in relation to a writ filed by the administrator a day before he was granted letters of administration:*

"It is true that, when he got his title by the grant of administration, he prima facie became entitled to sue, and could have then issued a new writ, but that was all. An application by him to treat the original writ .... as retrospectively valid from that date would have been refused by the Court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was in truth incurably a nullity; it was born dead and could not be revived."

It is clear therefore, that the writ filed in March 1995 by the Plaintiff as the "intended administrator" of his son's estate cannot be valid if this was the only capacity in which the action was brought."

Jamieson v Dominion Insurance Ltd [2012] FJHC 15; HBC132.2009 (20 January 2012). In this case, the Plaintiff, Douglas Stuart Jamieson, filed a Writ of Summons and Statement of Claim on 04 August 2009. He claimed that he is the executor and trustee of the estate of his late brother, Gregory Stuart Jamieson of Nadi. Gregory Jamieson died on 25 April 2009. He was the proprietor of a 2002 model Nissan Terrano Wagon registration number EA 819.

His Lordship Justice Anare Tuilevuka stated:

".....According to the statement of claim, Gregory Jamieson purchased the vehicle from Carpenters Motors in Nadi for the cash sum of $83,500 (Eighty Three Thousand and Five Hundred Dollars) on 23 January 2003. Upon purchase, Gregory Jamieson obtained a comprehensive insurance cover on the vehicle with Dominion Insurance Limited (DIL). This cover expired on 23 January 2004.

According to the statement of claim, DIL agreed to extend/renew the cover from 24 January 2004 to 24 January 2005 upon Gregory Jamieson paying a renewal premium in the sum of $2,546.75. The statement of claim also alleges that the said renewal premium was duly paid on 11 February 2004 by Gregory Jamieson. This alleged payment is denied by DIL in paragraph 5 of the statement of defence. According to the Statement of Claim, the vehicle in question was actually stolen in the early hours of 14 February 2004 at around 3.00 a.m. The Police located the vehicle at around 5.30 a.m. on the same day. It had been abandoned at a rural location just outside Nadi Town. The vehicle was allegedly in such a damaged condition - so much so that it was simply uneconomical to repair it. The particulars of the damages alleged are itemized in paragraph 13 of the statement of claim. Douglas Jamieson seeks indemnity from DIL."

…….

"The matter had proceeded along its normal course when it emerged at discovery stage that Gregory Jamieson did not leave a Will. This discovery prompted DIL's solicitors - AK Lawyers – to question the following:

(i) Douglas Jamieson's locus to commence the action in his purported capacity as "executor and trustee of the estate of Gregory Stuart Jamieson".

(ii) whether or not the action was properly constituted."

Eramasi Balekaba v Jagdish & Another [2013] FJHC 555; HBC111.2012 (16 October 2013); where His Lordship Justice Tuilevuka held that:

"Whether the writ filed herein which indorses the father suing as "next of kin" of his intestate deceased child is valid, is the issue before me. It is so because the father in question did not have letters of administration at filing time. There is authority in ***Ingall v Moran*** *(see below) that a writ filed by a claimant purportedly on behalf of an intestate's estate is null and void, and therefore incurable, if the claimant did not have letters of administration at the time of filing. On this authority, AK Lawyers seek to strike out the writ and statement*

of claim under Order 18 Rule 18 of the High Court Rules. The Plaintiff's lawyers have not appeared to defend the writ."

[16] When analysing the above authorities it is abundantly clear that cases where a person dies intestate must be distinguished from cases where a person dies testate or where he dies having executed a valid Will.

[17] As decided in ***Meyappa Chetty v. Subarmani Chetty*** (supra) where a person dies intestate, his administrator derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. However, where a person dies testate it is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequences is that he can institute an action in the character of the executor before he proves the Will.

[18] In the instant case, the Deceased, Liakhat Khan, died testate. He had purportedly executed a Will on 3 July 2012. It is true that the Defendant is challenging the Will on the basis of fraud and also on the basis that the Will was not duly executed by the Deceased in accordance with the provisions of the Wills Act. The matter is before Court and it is for Court to adjudicate as to whether the Will is valid or not.

[19] This is the reason why the Plaintiff has come to Court as the "intended executrix and trustee of the Estate of the Deceased". She pleads that the Caveat lodged by the Defendant be removed and for Probate to be granted in her name.

[20] The Counsel for the Plaintiff submitted to Court that the preliminary objection taken up by the Counsel for the Defendant is without any basis and should be dismissed. He reiterated that this action has been instituted by the Plaintiff in terms of the provisions of Order 76 of the High Court Rules. These are Special Provisions dealing with Probate Proceedings. Order 76, Rule 1 stipulates as follows:

1. *(1) This Order applies to probate causes and matters, and the other provisions of these Rules apply to those causes and matters including*

applications for the rectification of a will subject to the provisions of this Order.

(2) In these Rules "probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business.

(3) In this Order, "will" includes a codicil.

[21] Furthermore, it must be emphasized that in the Minutes of the Pre-Trial Conference, which were finalized on 14 July 2014, both parties have agreed "That the Plaintiff is the intended executrix and trustee in the Estate of Liakhat Khan on Will dated 15th day of June 2012."

CONCLUSION

[22] For all the aforesaid reasons, I hold that the preliminary objection taken by the Counsel for the Defendant is without any merit.

[23] Accordingly, I make the following Orders:

ORDERS

1. The preliminary objection taken up by the Defendant is struck out and dismissed.
2. I order that the Defendant pay summarily assessed costs in the sum of Fijian Dollars $2,000.00, to the Plaintiff, within one month of this Ruling.

Dated this 19th day of March 2019, at Suva.

HIGH COURT OF FIJI SUVA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI