

IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

Probate Action No. HPP 11 of 2020

In the Estate of Surya Munidial Bidesi also known as Suruj Naiain Bidesi late of
255 Waimanu Road, Suva, Fiji, Company Managing Director, Deceased.

BETWEEN

UDESCH CHANDRA BIDESI also known as **ANTHONY UDESCH CHANDRA BIDESI** of
8 Kinmont Rise, East Tamaki Heights, Auckland, New Zealand, Businessman.

PLAINTIFF

AND

ATISH CHANDRA BIDESI also known as **PETER ATISH CHANDRA BIDESI** of
255 Waimanu Road, Suva, Fiji. Businessman in his personal capacity and as
Executor and Trustee of the Estate of Surya Minidial Bidesi a.k.a.
Suruj Narain Bidesi.

DEFENDANT

Counsel : Mr. Sharma D. for the Plaintiff
Mr. Chand A. for the Defendant

Date of Hearing : 09th April 2021

Date of Ruling : 04th October 2021

RULING

[1] The plaintiff instituted these proceedings seeking the following orders against the defendant:

1. An order that the defendant at the cost of the Estate of Surya Munidial Bidesi also known as Suruj Narain Bidesi, immediately do the following:
 - i. Transfer to the plaintiff the property at Lot 1 Hercules Street [CT No. 10533] free from all encumbrances and charges;
 - ii. Transfer to the plaintiff the property at Lot 1 & 2 Robertson Road [CT No. 7747] free from all encumbrances and charges;
 - iii. Pay to the plaintiff 1/3 of the residual monies in the NZD account (to be verified by the court);
 - iv. Pay to the plaintiff 1/3 of the nett proceeds from the Tamavua River property (to be verified by the court);
 - v. Pay to the plaintiff 1/3 of the nett sale proceeds from the property at Waila or alternatively to set a time line for the sale of the said property.
2. An order that the Chief registrar of the High Court of Fiji order the defendant to file an inventory in the Estate of Surya Munidial Bidesi within one month pursuant to section 39 of the Succession, Probate and Administration Act and such inventory to include the following disclosure together with full bank statements, receipts and invoices to the plaintiff:
 - i. A list of all assets owned by Surya Munidial Bidesi in Fiji and abroad at the date of his death;
 - ii. A list of all assets owned by Bidesi & Sons Limited in Fiji and abroad at the date of his death;

- iii. Full Accounts relating to all Surya Munidial Bidesi's Estate;
 - iv. A record of all monies held in the bank account of Surya Munidial Bidesi as well as the company [Bidesi & Sons Limited] in which he owned majority of shares at the time of his death in November 2013;
 - v. A record of rental from the properties located at Lot 1 Hercules Street and Lot 1 & 2 Robertson Road, Suva from the date of Surya Munidial Bidesi's death, and how these funds have been used by the defendant and/or Bidesi & Sons Limited;
 - vi. A record of all payments made from the Estate of Surya Munidial Bidesi {including payments made from his NZD Bank Accounts} since the date of his death in November 2013 and the legal basis for making these payments.
3. An order that in the event the defendant fails to comply with the orders of the court then he be immediately removed as the Executor and Trustee of the estate of Surya Munidial Bidesi and the court appoint an independent person to act as the Trustee of the said Estate.
 4. An order that the defendant immediately return to the Estate of Surya Munidial Bidesi all funds that the defendant has unlawfully removed from the Estate's accounts.
 5. An order that the court appoint an independent accountant to investigate and audit the accounts of the estate of Surya Munidial Bidesi and to audit all the expenditure made by the defendant.
 6. An order that the said accountant have the power to investigate all monies removed or withdrawn by the defendant from the accounts belonging to late Surya Munidial Bidesi and Bidesi & Sons Limited.
 7. An order that the defendant personally compensate the plaintiff and pay damages for all losses the plaintiff has suffered by the defendant's failure to honour the specific bequests made to the plaintiff in a timely manner.
 8. A declaration that the defendant by his conduct has sought to challenge and defeat the provisions of late Surya Munidial Bidesi's Will.

9. An order that by his conduct the defendant stands disinherited from the Estate of Surya Mundial Bidesi.
10. An order that the defendant refrain from transferring or pledging as security the properties at Lot 1 Hercules Street and Lot 1 and 2 Robertson Road, Suva to any third party pending the determination of this action.
11. An order that the defendant provide an account for the source of monies used to pay all legal fees to date in opposing the defendant's claim for distribution.
12. An order that the defendant be refrained from using monies belonging to the estate of Surya Mundial Bidesi to pay for legal fees in this case.
13. Interest on any award damages personally against the defendant.
14. Alternatively, an order that the court interprets the Will of Surya Mundial Bidesi in order to give effect to the late Surya Mundial Bidesi's intentions.
15. Costs against the defendant personally on an indemnity basis.
16. Such other relief as the Honourable Court may deem just and equitable.

[2] The defendant in this matter filed a summons to have the entire affidavit of Lemeki Sevutia expunged or in the alternative to have certain paragraphs of the affidavit of the plaintiff which is attached to the affidavit of Lemeki Sevutia expunged.

[3] The plaintiff lives in New Zealand and due to Covid 19 pandemic he is unable to travel to Fiji. Therefore, he swore the affidavit and sent a soft copy to his solicitors to file it before the time granted by the court expired and in the affidavit of Lemeki Sevutia that the original of the affidavit has been couriered.

[4] This affidavit was filed in response to defendant's affidavit filed in support of his application to strike out the plaintiff's claim.

[5] In the summons filed by the defendant on 09th July 2020 he is seeking the following orders:

- (1) The affidavit of Lemeki Sevutia sworn and filed on 18th June 2020 ("Sevutia Affidavit") be wholly removed and expunged;

- (2) Alternatively, paragraphs 17, 31(d),(e),(f), (g), 33(e), 34(aa, ac(iii)) 37(g,h,i,ab), 45(c) and the annexures marked "B" and "E" of the affidavit of Udesh Chandra Bidesi sworn on 18th June ("Plaintiff's Affidavit") and marked as annexure "A" in the Sevutia Affidavit, be removed and/or expunged from the court record;
- (3) The plaintiff files an affidavit in response in accordance with the Rules of the High Court within 14 days after the order;
- (4) The Court extends the time for the defendant to file his affidavit in reply (which is due on 10th July 2020) to 21 days after the plaintiff files his affidavit in response or after this application is determined by the court;
- (5) The plaintiff and/or his Lawyers, pay the costs of this application on an indemnity basis; and
- (6) Such other orders as the court deems just.

[6] Order 41 rule 6 of the High Court Rules 1988 provides:

The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

[7] The ground on which the defendant is seeking to have the entire affidavit of Lemeki Sevutia is that his affidavit is scandalous, irrelevant or otherwise oppressive as it discloses as annexure "A" an affidavit containing without prejudice and/or private and confidential materials disclosed to the plaintiff for the purpose of settlement.

[8] The defendant seeks to have the entire affidavit of Lemeki Sevutia expunged for the reason that certain averments are without prejudice and/or private and confidential materials. The plaintiff himself has admitted by seeking to have only certain paragraphs of the affidavit of the plaintiff that all the contents of the plaintiff's affidavit are not without prejudice and/or private and confidential materials.

[9] The defendant in this regard relied on the decision in **Paul v Director of Lands** [2020] FJSC 3; CBV0018.2019 (9 June 2020) where the court observed at paragraph 22 that Lemeki Sevutia also failed to state as how he can say what Applicant/Petitioner verily believes what is stated at paragraph 30 of his Affidavit.

[10] The defendant also cited the decision in **Devi v Pacific Transport Limited** [2017] FJHC 124:

It is obvious from r.5 (2) itself that it operates as an exception from the primary rule of evidence stated expressly in Order 41, r.5 (1) that a person may only give evidence as the “facts” which he ‘is able of his own knowledge to prove’. r.5 (2), by including Statements of information or belief plainly allows the adduction of hearsay. But such Statements will have no ‘probative value’ unless the sources and grounds of the information and belief are revealed. The purpose of r.5 (2) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he/she is not able of his/her own knowledge to provide but which, the deponent is informed and believes, can be provided by means which the deponent identifies by specifying the original sources and grounds of his/her information and belief. By having to reveal original source (not the immediate source), the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the Court to assess the weight to be attributed to such evidence.

[11] In the matter before this court the same litigation clerk has sworn the affidavit but the facts of these two matters are different. In this matter the litigation clerk has only stated that the office received the affidavit of the plaintiff via email and as I said earlier the original of the affidavit would be couriered. These are fact within the knowledge of the litigation clerk. Therefore, the above decision relied on by the defendant has no bearing on this matter.

[12] Therefore, the application to have the entire affidavit of Lemeki Sevutia with the affidavit of the plaintiff must necessarily fail.

[13] The grounds upon which the defendant relies on the have the paragraphs of the plaintiff’s affidavit referred to above are as follows;

- i) The plaintiff’s affidavit contains annexures that are privileged as they were issued by the defendant to the plaintiff on a without prejudice and/or private and confidential basis for the purpose of advancing settlement discussion.

- ii) The plaintiff's affidavit at 31(d),(e),(f), (g), 33(e), 34(aa, ac(iii)) 37(g,h,i,ab), 45(c) refer to discussions between the defendant and the plaintiff to resolve the dispute. They are not relevant to the merits of the matter as pleaded by the plaintiff.
- iii) The settlement discussions were held without prejudice and/or private and confidential basis.

[14] The paragraphs, the defendant is seeking to expunge are as follows:

- 17. As to paragraph 14 I confirmed that the defendant and I were and (apart from this dispute) are still on good terms, we are after all brothers. I felt that Munro Ley would be able to give proper legal advice to the Defendant to honour the intentions of my late uncle.
- 31. As to paragraph 35;
 - (d) The defendant then tried to force me to give up my entitlements under my late uncle's Will and in return he said he would give me the two properties that my late uncle had already bequeathed to me.
 - (e) He sent a Deed which had already been signed to me to sign and in turn I was required to give up my other bequests such as the Waita land, the sale proceeds from the Tamavua and the monies held in NZD account.
 - (f) A copy of the letter and Deed from MC Lawyers is annexed hereto and marked "B" and "C".
 - (g) After the defendant has changed lawyers his new lawyers Munro Leys also sent me another Deed after we had met where the defendant was now willing to honour all my late uncle's bequests to me but still refused to give me the Robertson Road property.
- 33. As to paragraph 37;

(e) Furthermore, at this moment the defendant still holds my entitlement to 30% of the net sale proceeds from the sale of Tamavua property. According to the defendant the net sale proceeds is \$FJD898,000.00 and in the worst case scenario I am entitled to \$269,400.00 which monies are still held by the defendant in Fiji. A copy of the letter from Munro Leys dated 22nd October 2019 confirming this is annexed hereto marked as "E".

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(aa) I also looked at the breakdown of the sale of the Tamavua property which was provided to me by a letter from Munro Leys dated 22 October 2019 and was astonished to see that out of sale proceeds of \$1,800,000.00 the following was deducted by the defendant:

CGT	F\$158,000.00
VAT	F\$255,000.00
Real Estate Commission	F\$100,000.00
City Rate	F\$ 5,000.00
Company Tax	F\$380,000.00
Total	F\$898,000.00

(ac)(iii) The Defendant since October 2019 still refuses to transfer the Robertson Road property to me and I see from the litigation he has again changed his position and now refuses to transfer both Robertson Road and Hercules Street properties.

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(g) The Defendant through MC Lawyers tried to force me to give up some of the bequests under the Will.

- (h) A copy of the letter of the letter from MC lawyers and the signed Deed that the defendant sent to me is already annexed.
- (i) When I refused to sign to Deed the Defendant took the position that the properties located at Robertson Road and Hercules Street were owned by Bidesi & Sons Limited and could not form part of my late uncle S.M. Bidesi's Estate.
- (ab) I have been advised by my solicitors that the defendant would have had to pass a Resolution as Trustees of the Estate of S.M. Bidesi to transfer S.M. Bidesi's shares.

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- (c) Furthermore, he has been conniving about how he could cheat me from my uncle's estate and this culminated in his attempt in April 2019 when he through MC Lawyers tried to force me to accept a Deed whereby he wanted me to give up all rights to the Waila property, the NZD monies, the 30% of the sale proceeds from the Tamavua Property and in return he was offering the two properties at Hercules Street and Robertson Road which already belonged to me under my uncle's Will.

[15] The question arises here for determination is whether the contents of the defendant's affidavit sought to be expunged, are privileged.

[16] In this regard the learned counsel for the defendant relied on the following decisions:

The general principle relating to without prejudice communication were discussed in the case of **Slaveski v Economakis** [2006] VSC 2244 (21 June 2006) which was highlighted by Justice Scutt in **Naigulevu v National Bank of Fiji** [2008] FJHC 14; Civil Action 598.2007 (15 February 2007) at Paragraph 3.48

There is a rule of evidence that communications between parties which are genuinely aimed at settlement of a dispute between them cannot be

put in evidence without the consent of both parties in the event that the dispute is not settled. This rule is called 'without prejudice privilege'.

In order for the privilege to operate, it is essential that there must be some person in dispute or negotiation with another person, and the statement which it is sought to exclude from evidence must have some bearing on negotiations for a settlement of that dispute.

The mere use of the words 'without prejudice' in the communication ... does not operate to attract the rule, or privilege. The court is required to consider the statement in its context and decide for itself whether the privilege applies. Thus a letter marked 'without prejudice' which is not in fact a genuine attempt to settle a dispute will not be privileged from production in evidence, and a letter which is so aimed will be privileged even if it is not marked 'without prejudice'

- [17] It appears from the decision in *Slaveski v Econamakis* (supra) that, to apply the without prejudice privilege the communication between the parties must be genuinely aimed at a settlement.
- [18] The defendant in this matter is the executor and trustee of the estate of Surya Munidial Bidesi and the position of the plaintiff is that for 7 years after his uncle Surya Munidial Bidesi's death the defendant has been collecting rental for the estate properties. The defendant has so far failed to administer the estate of his uncle giving effect to the intentions of the testator. Instead his solicitors have been writing to the plaintiff to accept something less than his entitlement of the estate Surya Munidial Bidesi. From the averments in the affidavit in opposition of the plaintiff it appears that he did not agree to the terms of settlement signed and sent to him by the defendant through the defendant's lawyers and there is also no evidence that the plaintiff participated in any discussion to settle the matter or he instructed his solicitors to settle the matter on the terms proposed by the defendant or his solicitors. Therefore, it cannot be said that there was a genuine effort by both parties to settle the matter.

[19] On 22nd October 2019 the defendant's solicitors have sent a letter to the plaintiff's solicitors giving the breakdown of accounts for the sale of Tamavua property. In the said letter it is stated:

These figures are disclosed to you for settlement purposes only as such the letter is marked "*Private and Confidential*".

[20] It is the defendant who seeks to have the above paragraphs of the plaintiff's affidavit in opposition expunged. The burden is, therefore, on the defendant to establish that there was a genuine attempt between the parties to settle this matter. Without showing the court that he took reasonable steps to pursue a settlement he cannot rely on the principles in *Slaveski v Econamakis* (supra) decision. For that all communications between the plaintiff and the defendant or between their respective solicitors as to the settlement should be made available to the court.

[21] These letters and the terms of settlement were exchanged between the plaintiff and the defendant or between their respective solicitors. The plaintiff and the defendant are the only parties to these proceedings. Therefore, there cannot be any confidentiality in the documents relating to the dispute between them.

[22] The learned counsel for the defendant also submitted that the paragraphs sought to be expunged from the affidavit in opposition of the plaintiff are scandalous and should be expunged.

[23] Scandalous statement is a statement that is irrelevant and abusive. There is no allegation of dishonesty in the plaintiff's affidavit. The behavior of the defendant, especially for holding on to the plaintiff share of the estate shows that the allegations contained in the affidavit has some merit.

[24] The learned counsel for the defendant submits that the facts contained in paragraph 17 of the affidavit are not within plaintiff's knowledge. In that paragraph the plaintiff has expressed his opinion that is, if Munro Leys would be able to give proper legal advice to the defendant to honour his uncle's intentions. Here he opines that the defendant has failed to administer the estate and give effect to the intentions of the testator because he has not received proper legal advice. This may not be relevant to the issue before this

court. However, the rule is that irrelevant evidence can go into the record but the court must not base its judgment on such evidence.

[26] From the above the application of the defendant to have the paragraphs of the plaintiff's affidavit in opposition expunged must fail.

[27] Referring to Order 62 rule 11(1) the learned counsel for the defendant made a lengthy submission seeking costs on an indemnity basis from the plaintiff and/or his solicitors. In this matter the issue of costs does not arise since the court has decided not to grant the orders sought in the summons of the defendant. The learned counsel for the plaintiff did not insist on costs. It was his submission that awarding costs is a matter of discretion of the court.

ORDERS

1. The summons filed by the defendant on 09th July 2020 is struck out and order sought therein are refused.
2. There will be no order for costs of this application.

Lyone Seneviratne

JUDGE

04th October 2021