

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HPP 74 of 2020

Consolidated with HPP 71/20

Titilia Tamana Saurara

aka Titilia Vuataki

Applicant

v.

Miliakere Divuki Tamani

nee Vuataki

Respondent

Counsel: Mr S. Nand for the applicant

Mr R. Vananalagi for the respondent

Date of hearing: 11th February, 2021

Date of Judgment: 25th April, 2023

Judgment

1. The applicant, in her summons seeks that Caveat No. 48/2020 filed on 25th June, 2020, in the estate of Kitione Vuataki, (deceased) by the respondent be removed and probate in the estate be granted to her. The application is made in terms of the Non Contentious Probate Rules, (NCPRs) and section 47 of the Succession, Probate and Administration Act.

2. The supporting affidavit states that the deceased died testate on 10th April,2020. He executed his Will on 30th April, 2015. The respondent is the daughter of the deceased from his first marriage. The applicant states that she will give the respondent her interest in the estate. The applicant states that her solicitors filed a Warning to Caveat, which was issued by Court on 17th August,2020. The respondent did not file an Appearance to Warning.

The determination

3. At the hearing, Mr Vananalagi, counsel for the defendant moved that the summons be struck out on the ground that it is not in conformity with Or 7, r2, in that the plaintiff has used Form 5 for ex parte summons and not Form 3.
4. In my view, this summons has not caused any inconvenience prejudice to the defendant. The cause of action and relief sought is clear.
5. The application to strike out is declined.
6. Mr Nand, counsel for the applicant submitted that the respondent has not shown a contrary interest in terms of Rule 44(7) of the NCPRs.
7. The applicant filed a Warning to Caveat on 18th August,2020, which was served on the respondent, (Caveator) on 29th August, 2020. An appropriate affidavit of service on the respondent was filed.
8. The NCPRs are applied in Fiji by virtue of section 52(2) of the Succession, Probate and Administration Act.
9. Rule 44(10) states:

*A caveator having an interest contrary to that of the person warning may **within eight days of service of the warning upon him** (inclusive of the day of such service) or any time thereafter if no affidavit has been filed under paragraph(12) below, **enter an appearance in the registry in which the caveat index is maintained** by filing Form 5 and making an entry in the appropriate book; and he shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court.(emphasis added)*

10. Rule 44(12) states :

If no appearance has been entered by the caveator or no summons has been issued by his under paragraph (6) of this rule, the person warning may at any time after eight days of service of the warning upon the caveator (inclusive of the day of such service) file an affidavit in the registry in which the caveat index is maintained as to such service and the caveat shall thereupon cease to have effect provided that there is no pending summons under paragraph(6) of this rule.

11. On the the procedure for dealing with a caveat, the judgment of the Court n **Reddy v Webb**, [1994] FJCA 36; Abu 0014.94s (11 November, 1994) stated:

We note that the procedure for dealing with a caveat under the Rules is different from removal of a caveat provided under s 47 of the Act. Under the Rules, a caveat shall remain in force for six months (O 44 (4)). A caveat may also cease to have any effect if the caveator does not file an appearance or take out a summons for directions (r 44 (11)). Under these Rules, a caveat may cease to have any effect in this way without there being any need for resort to court proceedings. However, under the Act, s 47 provides that in every case where a caveat is lodged, an application may be made to the court to remove the caveat...

*The application before the trial judge was to remove the caveat under s 47 (1) of the Act. On what grounds should a caveat be removed? The section does not give any indication. It simply says "**Such application may be heard and order made upon affidavit or oral evidence**". This gives the court a discretion.*

In formulating the discretion of the court in such an application, we are of the opinion that the Court may have regard to the practice set out in the Rules as a guide. This is not the same as applying the Rules. The relevant rule for consideration in this regard is r 44 (7). For the purposes of a warning, a caveator is required to give particulars of a contrary interest. We would adopt this and formulate that a caveator should establish a contrary interest to the person applying for the removal of a caveat.

*Again in determining this issue, the Court may have regard to the nature of the contrary interest that is required to be particularised by the caveator under the Rules. Again the relevant rule in this regard is r 44 (7) which specifies that nature of the interest is to be "**any contrary interest in the estate**". We would adopt this and formulate that for the purposes of removing a caveat under s 47 of the Act, the caveator is required to establish a contrary interest in the estate of the deceased.(underlining mine)*

12. In the present matter, the respondent has not shown her contrary interest. She did not file Appearance to Warning in terms of the NCPR. Nor even an affidavit in opposition to this summons.

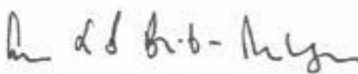
13. In the outcome, the application to remove Caveat No. 48/2020 is allowed.

14. The applicant's summons succeeds.

15. **Orders**

- a. Caveat No. 48/2020 filed by the respondent is removed
- b. The respondent shall pay the applicant costs summarily assessed in a sum of \$1000.00.




A.L.B. Brito-Mutunayagam
Judge
25th April, 2023