

In the High Court of Fiji
At Suva
Probate Jurisdiction

Probate No. 66241

In the Estate of Suruj Deo

Bindu Vineete Wati

Applicant

v

Kavilash Deo

Respondent

Counsel: Mr M. Fong for the applicant
Mr A. Nand for the respondent

Date of hearing: 29th November, 2021

Date of Judgment: 25th April, 2023

Judgment

1. The applicant, in her summons seeks that Caveat No. 35 of 2020 in the estate of Suruj Deo (the deceased, her de facto husband) filed by the respondent be removed and probate in the estate be granted to her. The application is made in terms of section 47 of the Succession, Probate and Administration Act.
2. The applicant in her affidavit support states that she was appointed executor and trustee of the Last Will of the deceased of 5th May, 2020. On 14th October, 2020, her solicitors filed Warning to Caveat. On 28th October, 2020, her solicitors filed affidavit of service on the solicitors for the Caveator.

3. The respondent in his affidavit in opposition states that he has no knowledge of the Will of the deceased of 5th May, 2020. The signature on the Will is not the true signature of his father, the deceased. The applicant has no right to file for probate, as she is not the rightful trustee of his late father's estate.
4. The applicant, in her reply states that the respondent has failed to follow the proper procedure with regard to his caveat.
5. The applicant is the executrix and trustee in terms of the Will of the deceased of 5th May, 2020.
6. The applicant filed a Warning to Caveat on 14th October, 2020. An affidavit of service on solicitors for the Caveator was filed. The Caveat was filed by the same solicitors for the Caveator.
7. The NCPRs are applied in Fiji by virtue of section 52(2) of the Succession, Probate and Administration Act.
8. Rule 44(10) of the NCPR 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)*

9. 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.

10. In **Reddy v Webb**, [1994] FJCA 36; Abu 0014.94s (11 November, 1994) the judgment of the Court 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)*

11. Mr Nand, counsel for the respondent submitted that the caveat has expired and cannot be cancelled.

12. In my judgment, as stated above in **Reddy v Webb**,(supra) and reiterated by Calanchini J (as he then was) in **Amos v Fiji Trustee Corp Ltd**, [2010] FJHC 617 probate 48456.2009(28 July,2010) in every case where a caveat is lodged, an application may be made under section 47 to remove the caveat.

13. I find that the respondent has not filed an Appearance to Warning as required by the NCPR to show his contrary interest in the estate.

14. I note that the respondent has challenged the Will of the deceased in a Writ action filed against the applicant.

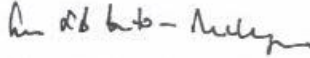
15. In the result, the application to remove Caveat No. 35 of 2020 filed by the respondent is allowed.

16. The applicant's summons succeeds.

17. **Orders**

- a. Caveat No 35 of 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