

IN THE HIGH COURT OF FIJI AT SUVA  
PROBATE JURISDICTION

Probate Action No. HPP 44 of 2022

BETWEEN

FRANCIS MOW of Lot 6 Vusavusa St, Vatuwaqa, Suva. Taxi Driver.

1<sup>ST</sup> PLAINTIFF

&

SIMON ALEXANDER MOW of Lot 6 Vusavusa St, Vatuwaqa, Suva. Civil Servant.

2<sup>ND</sup> PLAINTIFF

AND

PAULINE AMRUS MOW CAMPBELL as the Executrix and Trustee of the  
ESTATE OF DENNIS JOSEPH MOW also known as MOUCHEN DENIS JOSEPH of 6 Simla  
St, Lautoka. Businesswoman.

1<sup>ST</sup> DEFENDANT

&

VENINA LEWAKUNA MOU also known as VENINA MOW MOHAMMED also known as  
VENINA A JAN as the Executrix and Trustee of the  
ESTATE OF DENNIS JOSEPH MOW also known as MOUCHEN DENIS JOSEPH of 1 Koula  
Road, Ba. Domestic Duties.

2<sup>ND</sup> DEFENDANT

Counsel : Mr. R. Vananalagi for the Plaintiff  
Ms. B. Malimali for the Defendants  
Date of Hearing : 24<sup>th</sup> October 2022  
Date of Judgment : 18<sup>th</sup> May 2023

**JUDGMENT**

[1] The Plaintiffs filed this Originating Summons to seek determination by the Court on the following,

1. An order for the removal of Defendants as the Executrices and the Trustees of the Estate of Dennis Joseph Mow.
2. An order for the Defendants to surrender the Probate Number 62553 issued on 26<sup>th</sup> September 2018 with immediate effect.
3. An order for the 1<sup>st</sup> Plaintiff to be appointed as the Executor and Trustee of the Estate of Dennis Joseph Mow and to continue with the full administration of the Estate and distribute the assets of the Estate in terms of the expressed Will of Dennis Joseph Mow.
4. An order that this Summons be heard by oral evidence or partly oral evidence if there is a dispute of fact and alternatively convert into a Writ action should there be a need.

5. Any other relief deemed just and equitable.

- [2] The Summons filed pursuant to section 35 of the **Succession Probate and Administration Act 1970** and Order 28 Rule 5(3) and Rule 9 of the **High Court Rules 1988**.
- [3] The two Plaintiffs are beneficiaries of the Estate of their late father Dennis Joseph who died on 1<sup>st</sup> November 2016. According to the Last Will of Dennis Joseph his two sisters (the two Defendants) were made as Executrixes and Trustees of the Will. The Probate No 62553 was issued to the Defendants on 26<sup>th</sup> September 2018.
- [4] The Plaintiff currently resides at their late father's house at 6, Vusavusa St, Vatuwaqa, and Suva with the 2<sup>nd</sup> Plaintiff. Their other sibling Stephanie Mow married and living with her husband in Lautoka. Plaintiff's late father had a taxi registration LT 1669 and Plaintiff states that he started driving the taxi following his father's demise. The 1<sup>st</sup> Plaintiff states that the Defendants advised him that the Taxi permit will be transferred to him. However the 1<sup>st</sup> Plaintiff states that later he was advised by the 1<sup>st</sup> Defendant that she would not transfer the permit to him. Instead she intends to transfer it to her name. The 1<sup>st</sup> Plaintiff states that the taxi has been parked idle since late 2018 after the expiry of the insurance and Road Tax. The Land Transport Authority has informed the 1<sup>st</sup> Plaintiff that they will only deal with the Executors and Trustees of the Estate. The 1<sup>st</sup> Plaintiff states that he has lost a regular weekly income of \$250 from the taxi. He has sent two demand notices through his Solicitors to the Defendants for the transfer of the Taxi Permit. In reply the Defendants have asked the Plaintiff to return the Taxi Permit to them. Thereafter the Plaintiffs filed this action.
- [5] The 1<sup>st</sup> Defendant states that according to the Will it was decided not to sell the immovable property immediately and allow time for the 1<sup>st</sup> Plaintiff who is the youngest of three children of the deceased to live there until such time all three siblings want the house sold. She further states that her late brother had a taxi business and at one time he

owned about 6-7 taxis. One of the taxis has been transferred to the 1<sup>st</sup> Plaintiff prior to her brother's death and that was the one 1<sup>st</sup> Plaintiff currently driving. The Defendants state that the taxi permit in question belonged to late Dennis Mow and therefore it becomes part of his Estate. However due to the 1<sup>st</sup> Plaintiff's possession of the permit, the Defendants were not in a position to renew it and thereafter transfer the same to the highest bidder. According to the Defendant the 1<sup>st</sup> Plaintiff has offered \$5000 for the permit and when it was advertised on Facebook by the sister of the 1<sup>st</sup> Plaintiff, offers received up to \$60,000. The Defendants have informed the 1<sup>st</sup> Plaintiff that if the taxi permit was going to be sold then they would open a Trust Account to have the proceeds of sale. The Defendants further state that they want to administer the Estate according to the Will of their late brother.

[6] Section 35 of the **Succession, Probate and Administration Act 1970** provides as follows;

The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and
- (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
- (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and
- (d) make such further or consequential orders as it may consider necessary in the circumstances.

[7] At the hearing of the Originating Summons the Plaintiff's counsel informed the Court that they only seek an interpretation on whether the taxi permit comes under the meaning of 'remainder' as stated in the Will.

[8] The Plaintiff's Originating Summons seek orders under section 35 of the Succession Probate and Administration Act 1970 and Order 28 Rule 5(3) and Rule 9 of the High Court Rules 1988. In fact if the intention was to seek an interpretation or construction of the Last Will of Dennis Joseph Mow, the Plaintiff should have made this application under Order 85 Rule 2 of the High Court Rules 1988. However I am of the view that these proceedings could be continued with the said defect per Order 2 Rule 1 (3) of the High Court Rules as there has been no prejudice caused to the Defendants.

[9] In **Sharma v Kumar** [2016] ABU 13 of 2013 the Court of Appeal held 'in construing a will, the objective of the court is to ascertain the intention of the testator as expressed in his or her will when it is read as a whole. The court has to put itself in the position of the testator at the point in time when he or she made the will. The main source of evidence should come from within the "four corners" of the will'.

[10] Paragraph 4 of the Dennis Joseph Mow's Last Will states as follows,

4. I GIVE DEVISE AND BEQUEATH the whole of my property both real and personal of whatsoever nature and kindsoever and wheresoever situate of which I shall be possessed to which I shall be entitled or over which I and including Housing Sub Lease No 222999 situated at 6 Vusavusa Street Vatuwaqa Suva over which I may have power of appointment or disposition unto my children's for their own use and benefit absolutely.

4.i Suva Residence at 6 Vusavusa Street Vatuwaqa Suva if.

I. Sold to my children's Stephanie Mow, Simon Alexander Mow and Francis Mow.

II. Not sold, then the same shall be given to my son Francis Mow to reside and maintain at the discretion of me of my said executor/s and trustee/s.

To my son Francis Mow:

- b. the remainder of all my real and personal property, furnishings and furniture, mechanical tools.

[11] The 1st Plaintiff believes that he is entitle to the Taxi Permit under paragraph 4 (b) of his father's Will. It appears that there is a typo error of the word remainder in clause 4 (b) of the Will.

[12] According to the Defendant's evidence the Taxi is not part of remainder of the Estate. The Court notes clause 5 (c) and (d) of the Will. Where it states,

5. I EMPOWER my Trustee/s to have all or any of the following powers in addition to those conferred upon them by any ACT or Statute;

- c. To retain any Business investments standing in my name at the date of my death for such period as my trustee/s shall think fit notwithstanding that such investment may not be authorised trustee investments within the meaning of the Trustee Act (Cap 65)

- d. To carry on my business in which I may be engaged at the time of my death for such a period as in the absolute discretion my trustee/s may think fit.

[13] According to the annexure FM-3 of the Plaintiff's Affidavit it is clear that the said taxi registration LT 1669 had been registered under Dennis Joseph Mow's name as a public service vehicle. In my view the permit and the vehicle used under the permit should be classified as a 'business'. It would not fit into the meaning of remainder under clause 4 (b) of the Will where the testator expressed his wishes on his residential property. He has given specific directions on his businesses under clause 5 of the Will.

[14] Though the Plaintiff's counsel submitted that they only seek an interpretation on a limited issue I am mindful of the initial application made by the Originating Summons. That is to

remove the current Trustees. There are three beneficiaries in this estate. Only two of them have made this application. Predominantly the application supports the interests of 1<sup>st</sup> Plaintiff. The third beneficiary, elder sister of the two Plaintiffs submits a letter through the Defendant opposing the relief sought by the Summons. At this juncture I am guided by Lord Blackburn's Privy Council Judgment on Letterstedt v Broers [1884] 9 App Cas 371. There is no evidence to the satisfactory before me that the Trustees of late Dennis Joseph Mow's Will are acting contrary to the welfare of the beneficiaries.

[15] In conclusion the Court is of the view that the Plaintiff's action lacks merit.

### ORDERS

1. The Originating Summons filed on 12<sup>th</sup> April 2022 is hereby dismissed.
2. The 1<sup>st</sup> Plaintiff to surrender the taxi permit LT 1669 and the vehicle within 21 days of this order, to the 1<sup>st</sup> Defendant to be part of the estate of late Dennis Joseph Mow for further administration of the Will dated 30<sup>th</sup> August 2016.
3. Any payments due for the renewal of the taxi permit be paid from the estate funds.
4. 1<sup>st</sup> Plaintiff to pay cost of \$ 1500 (one thousand five hundred dollars) to the 1<sup>st</sup> Defendant within 14 days of this judgment.



Yohan Liyanage

JUDGE

At Suva on 18<sup>th</sup> May 2023