

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HPP 40 of 2016

BETWEEN: DELAIMOALA KOROLEKA TAKILAI MORRIS of 65 Eastcroft House, 86
Northolt Road, Harrow HA2 0ER, London, England.

PLAINTIFF

AND: UNISE CAWARU as Administrator of the Estate of Leone Takilai Tabete, of 113
Naituva Road, Raiwai, Suva.

FIRST DEFENDANT

AND: REGISTRAR OF TITLES

SECOND DEFENDANT

AND: ATTORNEY GENERAL OF FIJI is being sued as a nominal defendant for vicarious
liability is pursuant to the Crown Proceedings Act Cap 24

THRID DEFENDANT

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Ms. Tikoisuva for the Plaintiff
Mr. Nair D with Ms. Walu S for the 1st Defendant
Ms. Taukei S for the 2nd and 3rd Defendant

DATE OF JUDGMENT: 17th May, 2023

JUDGMENT

*[Challenging the validity of the Deceased's will, Distribution of property
and Revocation of earlier grants in the Estate]*

Introduction

- (1) In the Statement of Claim filed on 24th August 2016, the Plaintiff sought for the following Orders and /or relief against the Defendants:
1. Order against the First Defendant to surrender the Letters of Administration No. 46055 issued by the High Court on 24th March 2007 and for a review of the grant;
 2. Order that the Probate be issued in favour of the Plaintiff as sole beneficiary of the Estate of Leone Takilai in accordance with the Will No. 9726.
 3. Alternatively - Order that the First Defendant distribute the property in accordance with the Will No. 9726 for the sole benefit of the Plaintiff
 4. Order that the First Defendant surrender the duplicate copy of the Housing Authority Sublease no.
 5. General Damages for loss of enjoyment of the said property
 6. Costs of these proceedings
 7. Such further and/or other relief as this Honourable Court may deem fit.
- (2) The 1st Defendant Unise Cawaru filed her Statement of Defence on 15th March 2018.
- (3) The 2nd and 3rd Defendants filed their statement of Defence on 05th April 2017.
- (4) The matter was scheduled for trial on 08th February 2022.
- (5) The Plaintiff furnished Court with its written submission.

Plaintiff's Contention

- (6) The Plaintiff Delaimoala Koroleka Takilai Morris is the biological son of Vakacegu Draunicevuga Tabete Morris, who is the biological daughter of the late Leone Takilai Tabete and Mere Wati Yaravu Tabete.

- (7) The 1st Defendant, Unise Cawaru is also the biological daughter of the late Leone Takilai Tabete and Mere Wati Yaravu Tabete and currently the Administratrix of the *Estate of Leone Takilai Tabete* by Letters of Administration granted in Application No. 46055.
- (8) That on 30th June, 1998, Leone Takilai Tabete took demise and was survived by his wife, Mere Wati Yaravu Tabete and 7 children.
- (9) That the late Leone Takilai Tabete left a Will No. 9726 dated 20th November 1996 appointing his wife Mere Wati Yaravu Tabete as the Executrix/Trustee of his Will.
- (10) He further *Devised* and *Bequeathed* his property situated at 23 Aidney Road Raiwaqa, Suva [Housing Authority Lease No. 133117] to his trustee and transfer to his wife Mere Wati Yaravu Tabete and his grandson Delaimoala Koroleka Takilai Morris [Plaintiff] in equal shares as Joint Tenants.
- (11) That on 30th October 2006 Mere Wati Yaravu Tabete fraudulently applied for and obtained a Grant of Letters of Administration in Application No. 45515 in the *Estate of Leone Takilai Tabete* knowing that Will No. 9726 was registered with the Registrar of Titles. Further, Mere Wati Yaravu Tabete also misrepresented this by stating that the late Leone Takilai Tabete had died Intestate.
- (12) The 1st Defendant, *Unise Cawaru*, without consulting the Plaintiff and being fully aware of the will of the late Leone Takilai Tabete, fraudulently applied for and obtained Letters of Administration No. 46055 in the Estate of Leone Takilai Tabete.
- (13) The 1st Defendant whilst colluding with others, fraudulently represented to the Registrar of Titles that the late Leone Takilai Tabete wrote his Will No. 9726 under duress which resulted in the Will not being attached to the Letters of Administration Application No. 46055.
- (14) The 1st Defendant had a Fiduciary Duty to the Beneficiaries of the deceased's Estate as contained in the Will No. 9726 registered with the Registrar of Titles on 31st March 1998.
- (15) The 1st Defendant breached her Fiduciary Duty and acted fraudulently by falsely declaring on 15th March 2007 that her father died intestate despite knowing that the Plaintiff was the Sole beneficiary.

- (16) The 1st Defendants intention was to gain benefit and deprive the Plaintiff's Rights as to ownership of the said property Housing Authority Lease No. 133117
- (17) The 2nd Defendant having knowledge of the Deceased's Will, processed the transfer documents to the 1st Defendant accordingly.

1st Defendants Contention

- (18) The 1st Defendant and Mere Watu Yaravu Tabete genuinely believed that the late Leone Takilai Tabete had died intestate.
- (19) The 1st Defendant was unaware of any Deceased's Will registered with the Registrar of Titles and was fraudulently obtained/ executed and not valid as the Deceased was not capable of signing any documents due to his Medical Condition and in need would use his Thumb Print.
- (20) Seeking an order that the Court to declare Will No. 9726 as invalid.

2nd and 3rd Defendants Contention

- (21) 2nd and 3rd Defendants argued that Will No. 9726 was deposited at the Registrar of Titles Office on 31st March 1998 by Mere Watu Yaravu Tabete.
- (22) However, Will No. 9726 cannot be located.
- (23) The 1st and 2nd Defendants cannot confirm the contents of the Will No. 9726.
- (24) That at the Current time, the 1st Defendant is the *Administratrix* of the Estate of Leone Takilai Tabete by Virtue of the transmission by death dealing No. 605432.
- (25) The said Deceased's property is not transferred to the 1st Defendant as she is the only *Adminstratix* of the Estate of Leone Takilai Tabete.
- (26) The 2nd Defendant was fully aware that a Will was registered in its office and processed the transfer of Property to the 1st Defendant.

Summary of Oral Evidence

(i) *Plaintiff's Case*

(27) The Plaintiff opted not to call any witness and/or evidence. However, the Plaintiff only relied on the Agreed facts within the Pre-Trial Conference Minutes and the Agreed Bundle of Documents filed herein.

(ii) *1st Defendants Case*

DW1 - Unise Cawaru

(28) *Leone Takilai Tabeta was my mother. I was appointed as the Administratrix on Application No 46055. My mother, Mere Wati Yaravu Tabeta was granted with Letters of Administration in Application No. 45515. My late mother told me that there was a Will. I was not aware that there was a Will but advised by Lawyer. I applied for a Letters of Administration grant in Application No 46055."*

"When my father was alive, no one informed me about the Will. When my mother died, no one mentioned about my father's Will. My mother wanted to see lawyer, however, she passed away. Lawyer, Ulamila Farang and informed me that I was appointed as the Executrix [Administratrix] in the mother's Estate. Copy of the Will is produced by the Plaintiff. I became aware of this Will when this case commenced Relatives of my Brother-in-law stay on the property."

In Cross Examination [By Plaintiff]

"I was not aware of mother's Instructions to the lawyer, I recognize mother's signature on my document? Yes, this is mother's signature in Application No, 45515. I did not have any part to play. Mother would have relied on legal people to carry out search. My Lawyer to obtain Letters of Administration grant on 46055, application was made by Law Solicitors. I saw the Will that appears on page 5 - 6 within the Agreed Bundle of Documents.

This will came as a surprise when shown to me. Will No. 9726 appointed my mother as Executrix and beneficiary. Unaware of my mother deposited this Will in the Registry."

Re - Examination

NIL

DW2 - Doctor Tupou Waqanikitaki

- (29) *"Medical Officer Know Leone Takilai passed away on 30/06/1998. Had a stroke in 1994. Admitted at Hospital, Right Side paralyzed, not talking and not back to his normal duties. After stroke, Dad could not sign. Letter sought from Hospital to Bank to put Thumb print after stroke. The Plaintiff said Will of father. I saw the Will Leone's signature is different on the Will from his normal signature. If signature shown, can show deference. The signature on Will not typically signed in the usual manner he use to sign. Graduated in 1991, started practicing in 1991. Unethical to look father medically. Took to Hospital for admission and physio sessions. Did not know and/or told about father Leone's Will. No one mentioned even after death."*

Cross Examination

- (30) *"Whilst signing, lines may not be straight. Mother died in 1996. Mother applied for Letters of Administration grant for Leone's (Husband) Estate. I helped mother ascertain a lawyer. Mother died of lung cancer but intact. Dad has stroke. Brain matter Leone was not conversing/ talking much. I did not produce any original signature."*
- (31) Counsel representing the 2nd and 3rd Defendants opted not to cross examine the witness [DW-2 - Doctor Tupou Waqanikitaki].
- (32) Counsel Representing the 1st Defendant did not have any Re-examination.

Analysis and Determination

- (33) The substantive issue for this Court to deliberate upon and determine is **"whether the Deceased's Will No. 9726 dated 20th November 1996 was executed by the deceased and is valid for a grant of probate in Law?"**
- (34) The Plaintiff in his Statement of Claim filed on 24th August 2016 mainly sought for relief in the form of pronouncement of Will Registered No. 9726 purported to have been executed on 20th November 1996 by the Deceased, Leone Takilai Tabete [Testator]. The Plaintiff has expressly required this Court to pronounce for the Validity of the Will dated 20th November 1996

(35) In the current action before Court, the 1st Defendant, Unise Cawaru challenged the Deceased's Will no. 9726 dated 20th November 1996, propounded by the Plaintiff principally on the grounds - [As per her statement of Defence]:

- (a) That she genuinely believed that the late Leone Takilai Tabete died Intestate.
- (b) That the will of the deceased was registered with the Registrar of Title as fraudulently obtained/Executed and not valid as the Deceased was not capable of signing any document due to his medical conditions and would use his thumb print whenever necessary.
- (c) The Deceased's will was not executed by the Deceased and is null and void.

(36) Leone Takilai Tabete died on 30th June 1998 at the CWM Hospital in Suva.

(37) Pursuant to the Will Registration No. 9726 of the Deceased dated 20th November 1996, Mere Wati Yaravu Tabete has been appointed as the Sole Executrix and Trustee of his Estate.

(38) The Deceased Devised and Bequeathed his property situated at 23 Aidney Road, Raiwaga, Suva [known as Housing Authority Lease No. 133117] to his trustee upon trust to transfer to his wife, Mere Wati Yaravu Tabete and his grandson Delaimoala Koroleka Takilai Morris in equal shares as joint tenants.

Test for propounding Deceased's Will

(39) The Deceased's Will propounded by the Plaintiff was executed on 20th November 1996.

(40) The *onus Probandi* in every case lies upon the party propounding a Will. He must also satisfy the Conscience of the presiding Court that the Instrument so propounded is the Last Will and Testament of a free and Capable Testator.

(41) Further, whenever it becomes necessary an Executor/ Trustee to establish the due Execution of a Will, he or she is required, at Common Law, to call one of the attesting witnesses,

if any was available. [Case of *Belbin v Skeates* 164 ER 669 and *Bowman v Hodgson* (1867) 1 L.R.P. and D 362 refers].

(42) However, the Court will not exclude further witnesses' from the relevant evidence for the purposes of avoiding fraud to the due execution of the Will.

(43) The burden imposed on a party seeking to propound a Will was stated by Lord Hanworth MR In the Estate of Lavinia Musgrove, *Davis v Mayhew* [1927] AC 264 at page 276.

"It is clear first, that the onus of proving a Will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. To develop this rule a little further - he must show that the testator knew and approved of the instrument as his testament and intended it to be such."

*Parke B in the course of his judgement in *Barry v Butlin* (1) says:*

"The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a Will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."

Propounding Will dated 20th November 1996.

(44) The 1st Defendant filed a Statement of Defence on 15th March 2018 challenging both the validity and the genuineness of the Deceased's Will.

(45) Therefore, *validity and genuineness are issues that needs determination.*

(46) That being the Case, than the Plaintiff needs to subpoena and/or call either of the witness's to the deceased's Will in order to *establish the due Execution, validity and the genuineness of the Will.*

(47) The Court will usually pronounce for the Will if one of the attesting witnesses deposes to the due execution of the Will.

- (48) When the formalities for Executing a Will are carried out, the presumption is that the Will is validly executed and cogent and strong evidence is needed to rebut the presumption. [*Case of Sherrington v Sherrington (2005) EWCA CIV 326*].
- (49) The Plaintiff at the trial thought fit to rely on the Agreed facts and the Agreed Bundle of Documents including the Will dated 20th November 1996 filed into Court and opted not to call any witness(s) in order to propound the Deceased's Will Dated 20th November 1996.
- (50) The Copy Will No. 9726 of the Deceased, Leone Takilai Tabete appears within the Agreed Bundle of Documents as Evidence before this Court. There was no objections by the Defence(s) to the Copy Will filed herein, since the same was agreed upon as forming part of the Bundle of Documents by the parties to the proceedings. There was no question and/or any challenge and dispute as to the whereabouts of the *Original Will* of the Deceased, since the 2nd and 3rd Defendants on its Statement of Defence had stated that "the Defendant agree only to the extent that a Will No. 9726 was deposited at the Registrar of Titles Office on 31st March, 1998 by Mere Wati Yaravu Tabete." The Defendant further stated that upon various searches of the Will No. 9726 at the office, the Will cannot be located. That due to not sighting the Will No. 9726, the 2nd and 3rd Defendants cannot confirm the content of the Will."
- (51) It was not in contention by the parties to the proceedings that there existed a Will of the Deceased Leone Takilai Tabete filed into the court proceedings within the agreed bundle of documents.
- (52) However, the 1st Defendant's substantive challenge to the Will executed on 20th November 1996 was based on the allegation of fraud. In that the 1st Defendant whilst alleging fraud, stated that the Deceased's Will No. 9726 before this Court is fraudulently obtained and executed and not valid since the deceased was not capable of signing any document due to his Medical Condition at that current time.
- (53) Apart from above, there were further allegation by the 1st Defendant:
- (i) that she and Mere Wati Yaravu Tabete believed that the late Leone Takilai Tabete (Deceased) had died Intestate
 - (ii) that the said will was not executed by the Deceased and

(iii) that the Will is Null and Void.

- (54) The Burden then falls onto the 1st Defendant to establish principally that Fraud was involved in the Execution of the Deceased's Will and therefore the said Will No. 9726 is invalid in Law. In that the signature alleged of the Deceased on the said Will dated 20th November 1996 was not the signature of the Deceased Leone Takilai Tabete and that it had been forged.
- (55) Further, DW2 Doctor Tupou Waqanikitaki in his evidence told Court that:
- "Leone Takilai, has died, had a right sided stroke in 1994 and was admitted to the CWM Hospital. His right side was paralyzed, not talking and not back to his normal duties. After stroke dad could not sign. He used his thumb print after stroke. That Leone's signature is different on the said Will and from his usual signature. He did not produce any Original signature of the Deceased."
- (56) There was no documentary evidence obtained from the CWM Hospital to establish that the deceased was admitted at the CWM Hospital in 1994 and that he had a Right Sided stroke and his right side was paralyzed.
- (57) Further, there was no original signature of the deceased produced and tendered into Court, as evidence nor any hand writing expert called to give evidence that would have substantiated or proved and established that as a result of the stroke and paralytic Medical Condition of the Deceased, that the Deceased was not in a Condition fit to endorse the signature on the Will.
- (58) Further, no question was raised by Defence Counsel as to the mental capacity of the Late Mr. Tabete or any evidence led to substantiate the fact that Mr. Tabete after suffering from stroke and paralytic Medical Condition had issues in his ability in general understanding, memory and/or mind at the time the Will was made and executed by him that is before this Court.
- (59) I find that the oral evidence of {DW2} -Doctor Tupou Waqanikitaki mainly focusses on the Deceased suffering from a right sided stroke and paralytic condition in 1994 and unable to sign rather impress thumb print on documentations and the Will not signed in his usual signature

and so on. His evidence is relative to what his medical condition was in 1994 and not in 1996 when the Alleged Will No. 9726 was executed.

- (60) Interestingly, it is notable that the Deceased's Will No. 9726 was in fact executed on 20th November, 1996 and that Leone Takalai Tabete took demise on 30th June 1998, some 19 months later.
- (61) Therefore, it can be concluded that there is a strong possibility that the signature attributed to Deceased, Leone Takalai Tabete on the Will No. 9726 and not an attempted simulation by another as alleged by the 1st Defendant herein.
- (62) I find that the 1st Defendant has failed in his bid to prove the allegation of Fraud and that the Deceased's Will No. 9726 was fraudulently obtained. Further, the 1st Defendant has even failed to prove on the balance of probabilities that the Deceased's Will No. 9726 was fraudulently executed and that it is not valid in Law.
- (63) It is also necessary to point out at the very juncture that though the alleged collusion by the Plaintiff between the 1st Defendant with the others (as pleaded at paragraph 9 of the statement of claim), fraudulently represented to the Registrar of Titles that the Late Leone Takalai Tabete wrote his Will No. 9726 under duress which resulted in the Will not being attached to the Letters of the Administration application No. 46055, the Plaintiff has not demonstrated the manner in which the 1st Defendant has colluded with the others to the satisfaction of this court. I find that generally, collusion comprises a secret agreement or conspiracy between two parties to defraud a third party. The Plaintiff contended that such collusion led to the fraudulent representation by the 1st Defendant to the Registrar of Titles.

In Conclusion

- (64) There is no dispute that there is a Will No. 9726 which was Registered with the Registrar of Titles on 31st March 1998 at 10am. This Will was lodged with the Registrar of Titles Office by the Deceased wife Mere Wati Yaravu Tabete. However, the original could not be located. The copy of the Will No. 9726 appears in the parties original bundle of documents filed in Court.

- (65) There is no Question and or challenge raised by the 1st Defendant as to the whereabouts of the original Will. [If any to be found].
- (66) The issue raised that the signature is not of the Deceased Leone Takilai Tabete and that the same has been forged by someone:
- There is no evidence of any original signature of the Deceased produced and tendered into Court in evidence to allow Court to infer any substantial significant dissimilarities between the questioned signature that appears on the Will No. 9726 and any known signatures.
 - Therefore there is a strong possibility that the signature attributed to Leone Takilai Tabete on the Will No. 9726 and not an attempted simulation by another or forged.
 - There is no Medical evidence before Court to show that Leone Takilai Tabete's alleged stroke and paralytic condition in any way impacted on the ability of Leone Takilai Tabete's memory and understanding at the time of the actual Execution of the Will and witnessed by Two witnesses as appears therein.
- (67) I find that the Plaintiff has proved his case on the **Balance of Probability**
- (68) Further, the 1st Defendant has failed to prove and establish that the signature on the said Will of the deceased, Leone Takilai Tabete No. 9726 is not his and had been allegedly forged and/or allegedly endorsed under duress.
- (69) The 1st Defendant has also failed to prove the fact that the Will No. 9726 is not valid in law and Null and Void. There has been no evidence led in Court to this effect.
- (70) The evidence before this Court on the Balance of Probability prompts me to accept the genuineness of the signature on the Will No. 9726 dated 20th November 1996 to be that of the Deceased, Leone Takilai Tabete.
- (71) Accordingly, for aforesaid rational, the Court pronounces in favour of the validity of the deceased's Will No. 9726 propounded by the Plaintiff, Executed on 20th November 1996 duly registered with the Registrar of Titles on 31st March 1998 at 10am accordingly

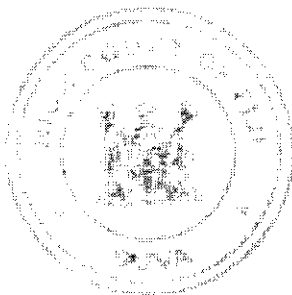
Costs


- (72) Although the matter proceeded to trial, it is only just and fair to grant any costs against the Defendants herein at the discretion of this Court.

ORDERS

- (i) This Court pronounces in favor of the Deceased propounded Will No. 9726 Executed on 20th November 1996 and registered with the Registrar of Titles on 31st March 1998.
- (ii) The Will No. 9726 in its form, contents and execution is valid in law.
- (iii) Letters of Administration Grant No: 45515 and subsequent Letters of Administration De Bonis Non Grant No. 46055 are hereby revoked and to be remitted and deposited into principal Probate Registry forthwith.
- (iv) The 1st Defendant is order to surrender and/or hand over any duplicate copy of the Housing Authority Sublease No. 133117 to the Plaintiff's solicitors forthwith.
- (v) That the Plaintiff is at liberty to file an application with the Principal Probate Registry and seek for a Grant of Probate on the Deceased's Will dated 20th November 1996. And complete the administration of the Deceased's Estate in terms of the said deceased's Will No. 9726 accordingly.
- (vi) There will be no order as to costs against any of the Defendants herein at the Discretion of this Honorable Court.

Dated at Suva this 17th day of May, 2023.




Vishwa Datt Sharma
JUDGE

CC: Toganivalu & Valenitabua, Suva
Sarrav Law, Nadena Nasinu
Office of the Attorney General, Suva