

**IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION**

PROBATE ACTION NO.: HPP 73 of 2021

**IN THE ESTATE of GLENN
CLIFORD SMITH AKA GLENN
SMITH late Nadi, Fiji, Businessman,
Deceased, Testate.**

**BETWEEN : LOUISE ELIZABETH JOSEPH
PLAINTIFF**

**AND : EMILY MARIANNE SMITH AKA EMILY
MARRIANE NORRIS
DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms. R. Lal and Ms. M. Raga [Lal Patel Bale Lawyers]

DEFENDANT : Ms. L. Vaurasi and Ms. M. Baleilevuka [Shekinah Law]

RULING BY : Master Ms Vandhana Lal

DELIVERED ON : 12 April 2023

RULING

1. The Defendant seeks orders to have the writ of summon and statement of claim struck out wholly. The said application is made pursuant to Order 18 Rule 18(1) and she has filed an affidavit in support of the application which was sworn on 07th February 2022.
2. The first ground relied upon by Defendant for striking out of the claim is that it discloses no reasonable cause of action.

3. The other grounds relied upon by the Defendant are that the claim is frivolous and vexatious and is an abuse of the court process.
4. The Plaintiff brings this action as a de-facto partner of the deceased and being a beneficiary of the Estate and Shareholder of Companies.
5. Instead of the Defendant being sued in her capacity as the Executrix and Trustee of the Estate of Glenn Clifford Smith, the Defendant is sued in her personal capacity.
6. The causes of action are summarized as follows:
 - i. *Improper shares held by deceased and thus improper gifts in the will. For this the Plaintiff seeks certain declaratory orders in the prayer.*
 - ii. *Breach of fiduciary duty by the Defendant.*
 - iii. *Revocation or recall of grant or removal of the Defendant as executor and trustee.*
7. According to the Defendant, the issues regarding the Plaintiff and deceased relationship and Plaintiff holding shares in certain companies and the issues regarding Plaintiff's involvement in the companies has no relevance to the probate jurisdiction.

Furthermore, the Defendant states that only mere statement of will being contested and being defective is made without proper pleading and basis to contest the validity of the will. No proper legal grounds are pleaded to challenge the legality of the bequests of the shares in the companies.

The Defendant submits that the prayers sought by the Plaintiff is outside jurisdiction of Order 76 of the High Court Rules which is limited to granting and revoking of Probate/Letters of Administration.

Furthermore, according to the Defendant, the issue of whether the Defendant held improper shares in certain companies are matter of Company Law and not Estate Law.

8. The Plaintiff has instituted this action by filing a writ of summons in the probate jurisdiction.
9. Order 76 of the High Court Rules “*applies to probate causes or matters and the other provisions of these Rules may apply those causes and matters including application for the rectification of a will subject to the provisions of the order*” – Order 76 Rule 1 High Court Rules.
10. Probate action is defined as “*action for grant of probate of the will, or letters of administration of the Estate, of a deceased person or for revocation of such a grant or for a decree pronouncing for or against the validity of alleged will, not being an action which is non-contentious or common form probate business*” – Order 76 Rule 2.
11. One of the cause of action outlined as item III is “Revocation or Recall of the Probate”.
12. A claim for revocation of probate or administration with will is instituted when a will has been proved in common form, and it is alleged that the will is invalid, or that the grant was improperly obtained.
13. The Supreme Court Practice (1991 Edition) on page 1257 at paragraph 76/1/5 explains: “*these arise, after a grant has been made under the non-contentious procedure, on such ground as the alleged invalidity of the will, or that the person who has obtained the grant is not entitled to it*”.
14. A perusal of the Plaintiff’s claim outlines that the Plaintiff’s complaint is regarding the deceased’s authority to devise/bequeath the shares in companies as a gift given the fact the shares were held in trust by the Plaintiff.

15. As a result the Plaintiff seeks declaratory orders that the deceased was improperly and illegally holding the shares in certain companies as a result the gifting of these shares under the 25 July 2017 will is null and void and of no legal effect.
16. My findings are that the orders sought by the Plaintiff relates to administrative actions under Order 85 of the High Court Rules and the proceedings should be by way of originating summons.
17. The issues raised in the statement of claim by the Plaintiff relates to Order 82 Rule 2 (a) and Rule 3(C) in particular.
18. The grounds outlined by the Plaintiff in seeking the revocation of the grant does not fall under any of the grounds outlined under the Wills Act. The validity of the will is not being challenged but rather the gifts made by the deceased are being challenged.
19. The issues deal with will and construction and legacy.
20. The issue is to determine the construction of the bequest in the testator's will that is whether the gifts being shares in the respective companies can be effected; that is was the testator capable of gifting the shares.
21. The Defendant is sued ~~up~~ in her personal capacity and not as an executor and trustee for the estate of the deceased. Hence I find there to be no cause of action against the Defendant in her personal capacity.
22. The validity of the will is not challenged ss no proper grounds are pleaded to challenge the validity of the Will. Hence there is no reasonable cause of action and it is an abuse of the Court process to bring a writ action under Order 76 of the Rules.

Orders

23. The writ of summons filed on 29 October 2021 is wholly struck out pursuant to Order 18 Rule 18 (1) (a) and (d) of the High Court Rules.

24. The Plaintiff shall pay the Defendant cost of this application assessed at \$1,000 and to be paid with 14 days of delivery of this ruling.



A handwritten signature in blue ink, appearing to be "Vandhana Lal", is written over the seal and extends to the right.

Vandhana Lal [Ms]
Acting Master
At Suva.

12 April 2023

TO:

1. **Suva High Court Probate Action No. HPP 73 of 2021;**
2. **Lal Patel Bale Lawyers, Solicitors for the Plaintiff;**
3. **Shekinah Law, Solicitors for the Defendant.**