

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 106 of 2009

BETWEEN: **NAGAN ENGINEERING (FIJI) LIMITED** a limited liability company having its registered office at Old Kings Road Yalalevu, Ba Fiji.

FIRST PLAINTIFF

A N D: **LEAH LOUISE NAGAN** of Old Kings Road, Yalalevu, Ba, Company Director.

SECOND PLAINTIFF

A N D: **NEEL HEM RAJ** (father's name Ram Prasad) of Nukuloa, Back Road, Company Director.

FIRST DEFENDANT

A N D: **NIRMALA DEVI RAJ** (father's name Ram Rup) of Nukuloa, Back Road, Ba, Fiji, Company Director.

SECOND DEFENDANT

A N D: **NAGAN FERROALLOYS (FIJI) LIMITED** a limited liability company having its registered office at Nukuloa Back Road, Ba, Fiji

THIRD DEFENDANT

A N D: **MISHRA PRAKASH & ASSOCIATES** a firm of Solicitors having its offices in Ba, Lautoka and Suva.

FOURTH DEFENDANT

Appearances: Ms. Lidise V. with Ms. Kumar for the Plaintiff
 Mr. Mishra Prakash for the fourth Defendant
Date of Trial: 02 August 2023
Date of Ruling: 03 August 2023

R U L I N G

(this version of the Ruling has been amended slightly to correct some minor grammatical and clerical errors which were in the version handed out to the parties in Court).

1. The trial of this matter began yesterday. At some point during examination in chief, the issue arose as to whether Young & Associates may continue to act for the second Plaintiff, Ms. Leah Louise Nagan. Ms. Nagan, had commenced proceedings in this case against Mishra Prakash & Associates in 2009.
2. She passed away some years ago. Her estate has not been substituted.
3. It appears to be common ground that Probate over Ms. Nagan's estate was granted in Australia

4. Ms. Lidise submits that Ms. Nagan's cause of action against Mishra Prakash & Associates does not terminate upon her passing. She argues that Young & Associates is therefore perfectly entitled to pursue Ms. Nagan's cause of action. She submits that her firm has in fact received instructions to pursue the said cause of action. When asked as to whether those instructions have come from the personal representative of Ms. Nagan's estate, Ms. Lidise replies that how the firm of Young & Associates receives its instructions is a matter of solicitor – client privilege. She did hint though that the instructions have come from a "third party".
5. Mr. Mishra argues that Young & Associates cannot pursue Ms. Nagan's cause of action at this stage unless the personal representative of Ms. Nagan's estate is substituted as second plaintiff.
6. The approach of my brother Judge Amaratunga in Tirikula v Tirikula [2011] FJHC 133; HBC374.2008 (3 March 2011) is ideal.
7. The starting point is Order 15 Rule 8(1) of the High Court Rules 1988.

Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.
8. The White Book 1988 Volume 1 at paragraph 15/7/1 asserts as follows:

This rule does not alter the law as regards the survival of causes of action, but provides the procedure for reconstituting an action, where this is necessary and possible, in the event of certain changes affecting a party or the interest of liability of a party. The changes dealt with by this Order are (*inter alia*) (1) death of a party....
9. Applying Order 15 Rule 8(1) to this case, Ms. Nagan's cause of action shall not abate by reason of her death if her cause of action survives.
10. The two questions which then arise are (1) whether her cause of action survives? (2) if so, is it possible and necessary to reconstitute her action on account of her death?
11. To determine if her cause of action survives her death, one must go to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Chapter 27). Section 2(1) of this Act provides as follows:

2.-(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 32 of the Matrimonial Causes Act for damages on the ground of adultery.

12. What the above section provides is that Ms. Nagan's cause of action survives for the benefit of her estate.
13. The next question is, whether Ms. Nagan's action must necessarily then be reconstituted by an Order of this Court that the personal representative of her estate be added a party/plaintiff to substitute Ms. Nagan in her cause.
14. To answer that, I turn to Order 15 Rule 8(2) which states as follows:

Where at any state of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
15. As I have said, Ms. Nagan's cause has devolved upon her death to the holder of the Probate over her estate. The Probate in question was granted in Australia.
16. Order 15 Rule 8 (2) gives this Court the power to Order that the holder of the said Probate be made a party to Ms. Nagan's cause and be substituted in her place if the Court "thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon".
17. Do I think it necessary to add the holder of Probate as a party at this time? Is it necessary to add the holder of the Probate in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon?
18. I accept that it is normally the case that the holder of the Probate or Letters of Administration of a deceased party would apply to be added as a party. In all the cases I have read, the personal representative of the estate of the deceased party would apply under Order 15 Rule 8 sub-rule (1) and (2) to be added as a party so they could be substituted in the place of the deceased.
19. The question which arises is – what if, in the case of a deceased plaintiff, whose cause of action survives under section 2(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, where the personal representative of his or her estate has not applied under Order 15 Rule 8(2) of the High Court Rules 1988 to take over the proceedings? Can the proceedings in Court continue nonetheless?
20. I start with the observation that this Court may, on its own motion, order that such personal representative be added as a party. That power is set out in Order 15 Rule 6 (2)(b) (i) and (ii). The basis for exercising this power as such would be based on the legal position that, under section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, a cause of action which survives death passes to the personal representative of the deceased's estate.

21. Flowing from that, upon the passing of the cause of action as such, the personal representative *ipso facto* becomes the full legal authority to make decisions for and on behalf of the estate, and holds a fiduciary duty to the beneficiaries to act in the best interest of the estate. Flowing from that, logic and best practice would dictate that if the said personal representative were to apply to Court to be joined as a party and be substituted in the place of the deceased party, the court should normally be readily inclined to allow the application. This is simply because any decision regarding the case, for example - whether or not the case should continue - now vests totally in the administrator of the estate.
22. I accept that the language of Order 15 Rule 8(2) appears to give the Court the following discretion:
-the Court may if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person [personal representative of the estate] to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
- (my emphasis in italics)
23. In my view, any exercise of the above discretion must necessarily take into account the foregoing (see paragraphs 20 and 21).
24. In court yesterday, I did pose the following question to Ms. Lidise, and her reply as follows –
- Q - How is this Court to know if the personal representative of Ms. Nagan’s estate would wish to continue the proceedings against Mishra Prakash & Associates?
- A – As an Officer of the Court, I can confirm that.
25. That answer may or may not be sufficient in some situations for an action which has survived the death of a deceased plaintiff to continue without the personal representative of the estate being added as a party to continue the cause.
26. However, as I have said above, I would rather exercise my discretion by requiring that the personal representative be added as a party.
27. I set out below my reasons:
- (i) section 45 of the Succession, Probate and Administration Act (Cap 60) states as follows:
- 45.-(1)** When any probate or administration heretofore or hereafter granted by any court of competent jurisdiction, in any country or territory of the Commonwealth, is produced to and a copy thereof deposited with the Registrar by any person being the executor or administrator, whether original or by representation or by any person duly authorized by power of attorney in that behalf, duly executed by such executor or

administrator, such probate or administration may be sealed with the seal of the court.

(2) When so sealed, such probate or administration shall have the like force, effect and operation in Fiji and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities, as if such probate or administration had been originally granted by the court.

(3) The court may require any such administrator or attorney of an administrator, to give security for the due administration of the estate in respect of matters or claims in Fiji.

- (ii) subsections 1 and 2 of section 45 clearly state that a probate or letter of administration granted by any court of competent jurisdiction “**in any country or territory of the Commonwealth**” shall have no effect in Fiji unless they have been duly resealed by the Chief Registrar of the High Court of Fiji.
- (iii) the personal representative of Ms. Nagan’s estate must be added a party when he or she has resealed in Fiji the Probate granted in Australia in their favour.
- (iv) meanwhile, the trial, which began yesterday, must proceed on the strength of the assurance by Ms. Lidise as an officer of the court - that she does hold appropriate instructions.
- (v) there is no compelling reason placed before me as to why the trial should not continue, while the personal representatives of Ms Nagan’s estate make the necessary application(s). Hence, I direct that the trial should continue today. In so directing, I take into account the following from a case management perspective (in addition to Ms Lidise’s assurance):
 - (a) this is a long-pending matter.
 - (b) the issues are not really complicated. The case hinges on a series of documented transactions which are not in dispute.
 - (c) given (b) above, the onus is heavier on the defendant, Mishra Prakash & Associates, as solicitors in a fiduciary position *vis a vis* Ms. Nagan at all material times, to prove that the transactions in question, are valid
 - (d) the burden is lesser on Ms. Nagan (estate) to impugn the validity of the said transaction.
 - (e) further to (c) and (d) above, I am mindful that – had Ms. Lidise made an application that Mishra Prakash & Associates should begin the trial by calling their witnesses first, I would have been more inclined rather than not - to grant her request. In any event, the trial did commence yesterday with the plaintiff having started on their first witness.
 - (f) Ms. Nagan’s evidence, is all recorded in a particular affidavit she swore on 18 January 2010, for which I granted leave yesterday to be used in evidence at the trial.

- (vi) if, for one reason or another, the personal representative of the estate of Ms. Nagan is unwilling and/or is unable to be joined as a party to the action, I will then consider and deliberate on the appropriate sanction after hearing the parties.



.....
Anare Tuilevuka

JUDGE

Lautoka

03 August 2023

