

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: 68782

IN THE ESTATE of
MOHAMMED ISMAIL late of
402, Great South Road, Papatoetoe,
Auckland, New Zealand, Retired
formerly of Enamanu Road, Nadi
(Deceased) (Testate)

BETWEEN : **ASAD ALI AFFIF** of 402, Great South Road, Papatoetoe, Auckland, New Zealand, Businessman.

PLAINTIFF

AND : **HAIJUL NISHA** and **SIRATUL NISHA SOFIA** aka **SOFIA SIRATUL NISHA** of Enamanu, in the District of Nadi in the Republic of Fiji, Domestic Duties.

RESPONDENTS

Counsel: **Plaintiff:** Ms. Degei. A
 Respondents: Mr. Sharma J.

Date of Hearing: 4.8.2023

Date of Judgment: 4.9.2023

JUDGMENT

INTRODUCTION

1. Applicant had filed the summons purportedly under 'Section 47 of the Succession and Probate Act (sic) and the Non Contentious Probate Rules, 1987 and the inherent jurisdiction'. I used the word purportedly as the provisions contained in Succession Probate and Administration Act 1970 (the Act) for lodgment of Caveat is contained in Section 46 of the Act. Such a caveat can be removed on application in terms of Section 47 of the Act upon a hearing viva voce or through affidavits. The requirements of a Caveat in terms of the Act is contained in Section 46(2), and any person can lodge such a Caveat prior to the

grant of Probate. Such a Caveat remains in force till it is removed in terms of Section 47 of the Act. The Caveat lodged in terms of Non Contentious Probate Rules will lapse within six months in terms of Rule 44(3)(a) Non Contentious Probate Rules 1987 unless an extension is sought under Rule 44(3)(b) of the same Rules, for additional period of six months. A caveat cannot be filed under both, Non Contention Probate Rules 1987 and the Act, as the law applicable, for removal of such caveats are two distinct regimes and mutually exclusive. As both parties are relying on two separate documents as the last will, the issue of grant can only be decided by 'Probate Action'.

FACTS

2. Applicant filed the Summons *inter alia* for removal of the Caveat No 20 of 2022 lodged by the Respondents (caveators) on 3.6.2022.
3. The warning to the Caveat was issued and appearance to warning made by Respondents on 9.9.2022.
4. Applicant filed summons *inter alia* seeking removal of caveat on 22.11.2022.
5. This matter was listed before Master and allocated to me on 28.3.2023 and directions for hearing was made on 11.4.2023.
6. Both parties made oral submission on 4.8.2023 and on request Applicant was allowed to file written submissions

ANALYSIS

7. Order 1 rule 11 of the High Court Rules of 1988 states as follows

“The rules for the time being in force in Her Majesty’s High Court of Justice in England, and the practice and procedure of that Court with respect of non – contentious probate business shall apply so far as they are applicable, with such modifications as may be necessary, to grants of probate and administration issued in common form the Registry of the High Court”
8. High Court Rules of 1988 commenced on 31.3.1988 (LN 37 of 1988)^[1]. So, the law that was in force in UK High Court regarding non contentious probate business should be applied to Fiji with any modifications if necessary.
9. In UK “The Non Contentious Probate Rules 1987 (1987 No. 2024(L.10)” was made on 24.11.1987 and it was laid before UK Parliament on 10.12.1987 and it had come in to effect from 1.1.1988^[2].

10. When High Court Rules of 1988 commenced on 31.3.1988, in UK Non Contentious Probate Rules of 1987 had commenced in UK and it should accordingly be applied to Fiji in terms of Order 1 rule 11 of the High Court Rules of 1988.
11. Applicant had issued a warning to the Caveat of the Respondent, on 24.8.2022, in terms of Rule 44(5) of Non contentious Probate Rules 1987.
12. Appearance to warning of a caveator who has an 'interest contrary to that of the person warning' was on 9.9.2022 in terms of Rule 44(10) of Non –Contentious Probate Rules 1987. Applicant and Respondents are relying on two documents, as last will of the deceased. This is interest contrary to person warning.
13. In terms of Rule 44(13) of Non –Contentious Probate Rules 1987, a **Caveat will remain in force till commencement of Probate Action**, unless a direction is made otherwise under said rule. As there is interest contrary to that of the person warning caveat remains in force till a 'Probate Action' is instituted.
14. Applicant is making this application in terms of Rule 44(13) of Non –Contentious Probate Rules 1987 for removal of the Caveat, though there is no specific mention about this in summons. It is clear that default position is that 'Caveat will remain in force till commencement of Probate Action'. The direction for an order other than the default position is an exception to the said Rule, but it needs to depend on the circumstances.
15. In this matter both parties had applied to Probate Registry for grant of Probate. Both parties are relying on two documents as the last will of the deceased.
16. Applicant had made an application to probate registry seeking to admit a hand written last will of his late father made on 30.1.2020.
17. Respondents, namely widow and daughter of the Deceased had also made an application for probate on a document as the last will of the Deceased, which contains two different dates in separate places of the same document.(30.3.2016 and 28.7.2020).
18. So the grant of probate cannot be decided by other than by way of "Probate Action"
19. It is clear that on the facts, that either party needs to take an initiative to file a Probate Action, by way of writ of summons without delay, due to contentious nature of the issues on both last wills prima facie.

20. As such this application by way of summons to remove the caveat, is struck off. I do not need to deal with other reliefs sought in the summons, as it is axiomatic that neither party can obtain the Probate without commencement of 'Probate action'.

Cost

21. Respondents are seeking costs on indemnity basis and states that this is an abuse of process.
22. Applicant as well as Respondents had made separate applications for grant of probate of regarding the estate of late Mohamad Ismail. Both parties relying on two documents as the last will of the deceased. It is clear for both parties it is a stalemate position for Probate Registry to grant a Probate to either party.
23. Applicant was aware of the two applications before the registry and without further delay must file a 'Probate Action' if they want a resolution of the issue regarding grant of the Probate for the estate of the deceased, and this was not done, instead sought to obtain an order for Probate by way of this summons.
24. Both parties have equal responsibility to file a Probate Action without further delay, as such I am not inclined to grant cost on indemnity basis, but grant a cost summarily assessed at \$ 1,000 to be paid by Applicant within 21 days.

FINAL ORDERS

- a. Summons filed on 22.11.2022 is struck off.
- b. Cost is summarily assessed at \$1,000 to be paid by Applicant to Respondents, within 21 days.
- c. Parties are directed to file a Probate Action without delay and the Caveat filed on 9.9.2022 remains till commencement of probate action in terms of Rule 44(13) of Non –Contentious Probate Rules 1987.

DATED this 4th day of September 2023.



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Justice Deepthi Amaratunga
Judge High Court, Suva