

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Probate Action No. HPP 4 of 2021

IN THE MATTER of the Estate of ADI
TITILIA FRANCES MARAMANIKAIBAI
TIKOCA aka ADI TITILIA FRANCES
MARAMANIKAIBAU TIKOCA MALANI aka
FRANCESS MALANI TIKOCA late of
Kashmir, Lautoka in the Republic of Fiji, Legal
Practitioner, Deceased, Testate.

BETWEEN: FILIPE WAQA KAISUVA of Lot 31 Gaji Street, Samabula, and Suva in the
Republic of Fiji, Risk and Compliance Manager.

PLAINTIFF

A N D: VARINAVA VUTIKULULU TIKO of Kashmir, Lautoka in the Republic of Fiji,
Businessman, as the INTENDED ADMINISTRATOR of the Estate of ADI
TITILIA FRANCES MARAMANIKAIBAU TIKOCA aka ADI TITILIA FRANCES
MARAMANIKAIBAU TIKOCA MALANI aka FRANCESS MALANI TIKOCA.

1ST DEFENDANT

A N D: FIJI PUBLIC TRUSTEE CORPORATION PTE LIMITED as nominal
Defendant pursuant to Section 8 of the Succession Probate and Administration
Act 1970.

2ND DEFENDANT (NOMINAL)

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSELS: Mr. Fatiaki S. for the Plaintiff
Ms. Vasiti M. for the 1st Defendant
2nd Defendants presence excused.

Date of Decision: 8th November, 2023 at 9.30am

DECISION

[Interlocutory Injunction pursuant to Order 29 Rule1 of the High Court Rules, 1988]

INTRODUCTION

1. The Plaintiff filed a Notice of Motion coupled with an Affidavit in Support and sought for the following orders:
 - 1) An interim injunction restraining the 1st Defendant by himself and/or his servants and/or agents and/or howsoever from selling, leasing, transferring, assigning and/or in any manner or form howsoever from dealing or disposing of the property comprised in Itaukei Lease No. 34529 known as Ocolitebetebe No. 1 Subdivision being Lot 1 on SO 7815 in the Tikina of Vuda and the Province of Ba and consisting an area of 2022 square-meters until the hearing and determination of this action;
 - 2) That the 1st Defendant be restrained by himself and/or through his servants and/or agents and/or howsoever from operating, accessing, removing, withdrawing, transferring monies and/or dealing howsoever with the Bank of the South Pacific Account No. 81337814 held in the name of Adi Titilia Frances Maramanikaibau Tikoca aka Adi Titilia Frances Maramanikaibau Tikoca Malani aka Francess Malani Tikoca late of Kashmir, Lautoka in the Republic of Fiji, Legal Practitioner, Deceased, Testate until the hearing and determination of this action;
 - 3) That the 1st Defendant be restrained by himself and/or through his servants and/or agents and/or howsoever from withdrawing and/or transferring monies and/or dealing howsoever with the deceased's share of the Term Deposit held with the Bank of the South Pacific, Account No. 82725589, in the name of Adi Titilia Frances Maramanikaibau Tikoca aka Adi Titilia Frances Maramanikaibau Tikoca Malani aka Adi T F Maramanikaibau Tikoca late of Kashmir, Lautoka in the Republic of Fiji, Legal Practitioner, Deceased, Testate until the hearing and determination of this actin **ALTERNATIVLEY AN ORDER** the 1st Defendant pay into Court, the deceased's share of the proceeds of the said term deposit.
 - 4) That the 1st Defendant forthwith by way of affidavit, depose and account for all and any monies that the 1st Defendant has withdrawn and/or transferred from the deceased's bank accounts held with the Bank of the South Pacific referred to in paragraphs (2) and (3) above.
 - 5) That the 1st Defendant do forthwith release into the custody of this Court, the following personal properties of Adi Titilia Frances Maramanikaibau Tikoca aka Adi Titilia Frances Maramanikaibau Tikoca Malani aka Francess Malani Tikoca late of Kashmir, Lautoka in the Republic of Fiji, Legal Practitioner, Deceased, Testate as stated in the informal will of the said deceased which is contained in Facebook Messenger text messaged dated 03rd September 2020 being:
 - (i) Motor Vehicle - Toyota Prado Registration No. "LAUF12"
 - (ii) Apple Laptop
 - (iii) iPhone
 - (iv) Briefcase
 - (v) Assorted Jewellery
 - (vi) Law Text Books
 - 6) That the 1st Defendant pay costs of this application.

2. The First Defendant filed its Affidavit in Opposition on 08th December 2021 opposing the orders sought by the Plaintiff and the Plaintiff subsequently filed its Affidavit In Reply.

Brief Facts

3. The Plaintiff is a cousin and blood relative of the deceased, Frances Malani who passed away on 16th September, 2020 at the Lautoka Hospital.
4. The 1st Defendant, Varinava, was married to the late Frances Malani prior to her death.
5. Frances, among other forms, communicated with the Plaintiff through the use of Facebook Messenger.
6. Prior to France's death, she had in August 2020 communicated through Facebook Messenger to the Plaintiff's wife, Elesi Kaisuva that she had intentions (testamentary) of bequeathing and devising certain properties to the Plaintiff and his family.
7. On 3rd September, 2020, 13 days prior to her death and upon being told by her doctor that she was going to die in one month, Frances sent a Facebook Messenger text message to the Plaintiff containing her testamentary intentions in respect of certain properties that she owned. The Plaintiff states and Frances acknowledges in the messages that the 1st Defendant is aware of her testamentary intentions.
8. Frances thereafter passed away on 16th September, 2020 and upon her death the Plaintiff reached out to the 1st Defendant regarding Frances's testamentary intentions. However given that there was no *formal will*, the 1st Defendant refused to honour his wife's intentions and has relied on succession of Frances's estate according to law intestacy pursuant to Section 6 of the Succession Probate and Administration Act 1970.
9. Due to the 1st Defendant's position regarding France's intentions, the Plaintiff on 19th January, 2021 instituted this action by filing a Writ of Summons and Statement of Claim seeking several declaratory orders for the said Facebook Messenger text messages to be accepted as an *informal will* in accordance with Section 6A of the Wills Act.
10. After filing of the action, it became evident to the Plaintiff that the assets and personal properties that Frances had willed to him in the said text message were in the possession and control of the 1st Defendant who had also a vested interest in the same which necessitated the filing of an interim injunction application to preserve the said properties until the determination of the substantive matter.
11. It is said injunction application which now before this Court for determination.

1st Defendants Contention

12. Frances and 1st Defendant met on 28th November 2018, married on 18th February 2019.
13. On 14th September 2020, Frances went into Coma from which she never woke. She died on 16th September 2020.
14. She had no knowledge of any document being or purporting to be, or having the form or effect of a Will or Codicil, or other Testamentary instrument of Adi Titilia Frances Maramanikaibau Tikoca or being draft of any and/or Codicil or other Testamentary instrument of the said deceased and/or copy of Will or Codicil which is alleged to have been lost or destroyed.
15. The Plaintiff has changed the descriptions of the assets in the messages, allegedly sent by Frances. Certain parts are in iTaukei Language are a loose translation and is subject to Court directed translation.
16. Alternatively, Frances did not have the Testamentary capacity at the time of the message dated 03rd September 2020 as per the reasons enumerated at paragraph 7 of the Affidavit in Opposition.

2nd Defendant

17. Is a nominal party to the action pursuant to section 8 of the Succession, Probate and Administration Act (SPA) 1970.

Determination

18. The Plaintiff's Notice of Motion seeks interim injunctive Orders against the 1st Defendant from dealing with specific properties of the Estate of Adi Titilia Frances Maramanikaibau Tikoca Malani until the final determination of the substantive action akin to the validity of the alleged Will prepared by the deceased via Texts Message.
19. In the substantive action the Plaintiff is seeking inter-alia a declaration pursuant to section 6A of the Wills Act 1972, that the Facebook Messenger text messages dated 03rd September 2020 from Frances Malani to the Plaintiff constitutes the Deceased's Testamentary intentions and last Will and Testaments of the deceased.
20. However, the 1st Defendant is opposing the Plaintiff's application.
21. On this basis, the Plaintiff is seeking for restraining and injunctive orders accordingly.
22. The Notice of Motion seeking for Interlocutory Injunction filed on 01st April 2021 is not signed by the Solicitor for the Plaintiff and remains blank.

23. The 1st Defendant had lodged an application Letter of Administration No. 67069 on 16th February 2021 seeking for a Letters of Administration grant in the Deceased's Estate of Adi Titilia Frances Maramanikaibau Tikoca Malani and remains impending issuance of Letters of Administration Grant since Caveat No. 67 of 2020 has been lodged by beneficiary Asinate Daugunu.
24. The governing principle applicable when considering an application for an interim injunction were laid down in the leading case of *American Cyanamid Co v Ethicon Ltd (1975) (1) ALL.E.R 504* as follows:
- (a) Whether there is a serious question to be tried;
 - (b) Whether damages are an adequate remedy; and
 - (c) Whether the balance of convenience favours the granting or refusing an interlocutory injunction.
25. In *Honeymoon Island (Fiji) Ltd v Follies International Ltd [2008] FJCA 36; ABU0063.2007S (4 July 2008) [Tab 2]* the Court of Appeal said:
- "[12] The grant of interlocutory injunctive relief is discretionary. The Court must be satisfied that there is a serious question to be tried, in other words whether the applicant has any real prospect of succeeding in its claim for a permanent injunction at the trial. If the Court is satisfied that there is a serious question to be tried the Court must then consider whether the balance of convenience lies in favour of granting or refusing to grant the interlocutory relief sought: *American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] AC 396.*
- [13] As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "If damages..... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted": *American Cyanamid* (supra) at 408." [Emphasis added].
26. The guidelines laid down by Lord Diplock in *American Cyanamid Co v Ethicon Ltd [1975] AC 396* are still regarded as the leading source of the law of injunction where it was held that in granting or refusing of interim injunction following guidelines can be taken into consideration:
- (a) A serious question to be tried at the hearing of the substantive matter.
 - (b) Whether the damages is an adequate remedy.
 - (c) In whose favour the balance of convenience lie if the injunction is granted or refused.

In the case of **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523 at 534; Kerr L.J. made the following observations:

"It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straightjacket.... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial."

In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 84 Lord Denning said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

27. The law of injunctions is well settled and the application of the American Cyanamid trite. The 1st Defendant relies on the authority of *Evolution Fiji Ltd v Radisson Hotels (Fiji) Pte Ltd (trading as Radisson Blu Resort Fiji Ltd)* [2020] FJHC 5; Civil Action 214 of 2019 (24 January 2020) [TAB 3] in its application of principles relating to injunctions.

Serious Question to be tried

28. Firstly, there is a Caveat No. 68 of 2020 filed with the Probate Registry on 02nd October 2020 obstructing Letters of Administration grant to the 1st Defendant.
29. A Declaration under Section 6A of the Wills Act 1972 is sought, that the purported testamentary documents of the deceased as recorded in the deceased's Facebook Messenger text message to the Plaintiff dated 03rd September 2020 is the last Will and Testament of the late Adi Titilia Frances Maramanikaibau Tikoca.
30. That the informed Will be admitted to prove for a grant in favour of the Plaintiff.
31. The Letters of Administration application no. 67069 still remains impending in the Principal Probate Registry issuance of grant since there is a Caveat no. 68 of 2020 in place obstructing issuance of Letters of Administration grant. Further, substantive action with regards to the admissibility of the Deceased's Will is being challenged and remains to be heard and determined.

32. The Substantive Probate Application HPP No. 04 of 2021 will take its normal cause for hearing and determination of the substantive issue of the alleged Text message Will.

33. Therefore, I find that there are no serious questions to be tried as of yet, but left to the eventual hearing and determination of the substantive matter.

Whether Damages would be an adequate remedy?

34. Whether damages are an adequate remedy or not will only become applicable if there is a serious issue to be tried.

35. This Court found that in fact there is no serious question to be tried and that the substantive matter to be left to be determined at a hearing.

36. Therefore, damages would then be an adequate remedy for the Plaintiff and not as of yet.

Balance of Convenience

37. Lord Diplock in *American Cyanamid* case at page 408 stated as follows:"

"It is where there is doubt as to the adequacy of the respective remedies no damages available to either party or to both that the question of balance of Conveniences arises."

38. I reiterate that the substantive issue at hand is with regards to existence and admissibility of the Deceased's Will via Text message to prove for issuance of Grant of Probate.

39. The substantive issue is yet to be heard and determined.

40. Therefore, find that the Plaintiff has failed to make out a case against the 1st Defendant to allow this Court to accede to its application seeking interim injunction and restraining orders.

41. The Balance of Convenience therefore favours the 1st Defendant in the refusal to grant the Interim Injunction and restraining order sought in the Plaintiff's current application.

In Conclusion

42. There is no evidence before this Court that the 1st Defendant has even endeavoured to sell, lease, transfer, assign and or in manner from dealing and/or deposing off the Estate property, assessing and/or withdrawal of any money from the Bank of the Estate and/or Term Deposit.

43. There is no further evidence to substantiate the Plaintiff's claim that the Motor Vehicle 'LAUF12', Apple Laptop, iPhone, Briefcase, Assorted Jewellery and law text books belonged

or are in fact the personal properties of Deceased Adi Titilia Frances Maramanikaibau Tikoca Malani contained in the Text Will message.

44. The Plaintiff has failed to make out a case favouring any grant of Interim injunction Orders and/or Restraining Orders against the 1st Defendant.
45. The Plaintiff's Notice of Motion is unsigned and unacceptable.
46. The Plaintiff's Motion seeking for Interim Injunction and restraining orders are for the aforesaid rational dismissed.
47. The Status Quo to remain intact until the substantive matter with regards to the validity and admissibility of evidence is heard and determined by this Honourable Court.

Costs

48. Matter proceeded to full hearing.
49. It is only fair that the Plaintiff pay a Summarily Assessed Costs for the Interlocutory application Notice of Motion) to the 1st Defendant in the sum of \$650.

Orders

- a. The Plaintiffs Notice of Motion filed on 01st April 2021 in its entirety is accordingly dismissed.
- b. The Plaintiff to pay the 1st Defendant summarily assessed cost of \$650.
- c. The Status Quo to remain intact until the substantive matter with regards to the validity and admissibility of evidence is heard and determined by this Honourable Court.

Dated at Suva this 8th day of November, 2023.



VISHWA DATT SHARMA
JUDGE



cc: Sherani Solicitors, Suva
Waqanika Law, Suva