

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 158 of 2021

BETWEEN : **KYRA MARGRET PETERSEN** formerly of Lot 5 Bovo Road,
Nasinu and presently resident at 2910 Webb Street, Vallejo CA
94591, USA.

Plaintiff

AND : **HIRAM JOSEPH PETERSEN AND RAY DUNCAN**
PETERSEN of Naselesele, Matei as Trustees and Executors of the
Estate of Duncan Petersen late of Matei, Taveuni.

First Defendant

AND : **HIRAM JOSEPH PETERSEN** of Matei, Taveuni.

Second Defendant

AND : **SALOTE PEREZ AKA SALOTE TAUFUSI** of Naselesele,
Matei, Taveuni as the Administratrix of the **Estate of Ray Duncan**
Petersen late of Naselesele, Matei, Taveuni.

Third Defendant

AND : **SALOTE PEREZ AKA SALOTE TAUFUSI** of Naselesele,
Matei, Taveuni.

Fourth Defendant

AND : **REGISTRAR OF TITLES**

Nominal Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. M. Saneem for the plaintiff

Ms. M. Tumalevu (On instruction) for the first and second defendants.

Ms. Tikoisuva for the third and fourth defendants.

Mr. Kant for the nominal defendant.

Date of Ruling : 06.02.2024

RULING

(Injunction and when does right to claim personal estate of a deceased commence for the purpose of sec 10 of Limitation Act)

01. This court, upon hearing the Motion filed by the plaintiff, granted interim injunction against the defendants on 21.07.2021 as follows:

The defendants and their agents or servants whosoever are stopped from transferring or selling and or alienating all three properties described in Certificates of Title No. 14164, 14165 and 14711 situated on the Island of Taveuni.
02. The defendants opposed the interim injunction granted by the court and filed their respective affidavits. In the meantime, the parties proceeded to the pre-trial steps in this matter and are at the discovery stage at the moment. The Pre-Trial Conference Minutes to be finalized soon. The hearing on the interim injunction was held on 12.07.2023 and the legal submission of the counsels filed later.
03. Granting of interlocutory injunction is a matter of discretion. The object of the interlocutory injunctions is to protect the plaintiff against grievance by violation of his right for which he could not be adequately compensated in damages recoverable in the action if he obtains the judgment in his favour at the end of the trial. However, the plaintiff's need for protection must be weighed against the need of protection of the defendant against the harm that may be caused to him from being prevented from exercising his right if he obtains judgment in his favour. The court should determine where the balance of convenience lies. (Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 at page 406). Accordingly, the court has to consider (i) Whether there is a serious question to be tried; (ii) Whether damages would be adequate remedy; and (iii) Whether balance of convenience favor granting or refusing Interlocutory Injunction.
04. Justice Laddie having considered number of cases including **American Cyanamid** (supra) concluded in **Series 5 Software v. Clarke** [1996] 1 All ER 853 at page 865 as follows:

“...it appears to me that, in deciding whether to grant interlocutory relief, the court should bear the following matters in mind. (1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”

05. The facts of the matter albeit brief is that, late Duncan Petersen had six children and he owned properties mentioned in the interim injunction granted by this court and another property described in Crown Lease No. 416567 being Lot 31 on DP 2995 situated at Kinoya Sub-division, Nasinu, Naitasiri. The plaintiff is the daughter of late Petersen. First named defendants are the brothers of the plaintiff and trustees and executors of the Estate of late Petersen. First named first defendant sued in his capacity as the trustee and executor of the Estate of late Peterson and his personal capacity as the second defendant. The second named first defendant passed away and the third defendant sued in her capacity as the Administratrix of the Estate of Ray Duncan Petersen (second named first defendant) and her personal capacity as well. The plaintiff is the beneficiary of the estate of late Petersen. The plaintiff alleged her father died leaving a Will executed in 2006 (First Will). According to the First Will the plaintiff and her sisters are entitled to a piece of land to build their houses. Upon death of her father, the said Will was read to the family members by her uncle and her sister told there was another Will (Second Will) executed by her father.
06. The Second Will provides only for payment of \$ 2000 to the plaintiff. The brothers are the only beneficiaries to all the properties mentioned above under the Second Will. The plaintiff claims that the second Will is a forged one; it does not comply with section 6 of the Wills Act; it is not genuine and not duly executed by her father. Nevertheless, all three properties were transferred to second named first defendant and after his death to the fourth defendant by way of transmission by death. There is a serious allegation of fraud against the defendant. This clearly demonstrates that, there is a serious question to be tried. In fact, the counsel for the first and second defendants too admitted that, there is a serious question to be tried in this case.
07. Lord Diplock in American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 at page 406 as follows:

a. when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the nineteenth century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where "the balance of convenience" lies.

08. The question to be determined in this matter is whether the second Will was forged and whether transfer based on the second Will was fraudulent. If the injunction is not granted and the court finally decides the question in favour of the plaintiff, the plaintiff may lose her right over the property mentioned above, because there is a possibility of transfer of those property by the defendants. If the injunction is granted and the court decides in favour of the defendants, the defendants are not going to lose anything in those property, because the property is in their names. Accordingly, the balance of convenience lies in favour the plaintiff.
09. The plaintiff has provided sufficient evidence for the proof of her ability to pay damages in case the question is finally determined in favour of defendants. In any event, there is a need in this case to maintain the status quo in respect of the three properties mentioned above. This warrants grant of permanent injunction till final determination of this matter.

10. The defendant raised irregularity as the inappropriate Orders and Rules of the High Court were cited in the Motion for the injunctive reliefs. Since the need to maintain the status quo of the all three property supersedes in this matter, citing an inappropriate rules cannot be considered as fatal, because granting injunction is discretionary power which should be exercised for the interest of justice. In any event, the modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice: see: Marsh v. Marsh (1945) A.C. 271 at 284.' There is nothing to say that, citing inappropriate rules has caused substantial injustice to the defendants in this application for injunction.
11. The defendants' counsels submitted that, the plaintiff's action is time barred. Conversely, the counsel for the plaintiff disputed it. Interestingly, both counsels rely on section 10 of the Limitation Act (Cap 35) which is as follows:

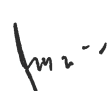
Limitation of actions claiming personal estate of a deceased person

10. Subject to the provisions of subsection (1) of section 9, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.
12. Both counsels agree that, the limitation period for this case is twelve years from the date when the right to receive share or interest accrued. However, they calculate the time from different dates. The counsel for the defendant submitted that, the plaintiff claims the right from the Last Will executed on 18th January 2016 and therefore the limitation period should be reckoned from that date. Conversely, the counsel for the plaintiff submitted that, time should be reckoned from the date the Probate was granted, being 3rd June 2011.
 13. Generally, the estate of any deceased becomes effective from the date of death of such person. There are several provisions in the laws of Fiji which support this proposition. The section 2 of Law Reform (Miscellaneous Provisions)(Death and Interest) Act provides that, all causes of action subsisting against or vested in any person shall survive against or, as the case may be, for the benefit of, his estate **on the death of such person**. Likewise, section 9 of the Succession, Probate and Administration Act [Cap 60] provides that, upon grant of probate or administration, all property of which a deceased person dies possessed, or entitled to, in Fiji shall, **as from the death of such person**, pass to and become vested in the executor to whom probate has been granted, or administrator for all the estate and interest of the deceased therein. This means that, even though the Probate of Letter of

Administration is granted later, the property is vested in the executor or administrator, as case may be, as from the date of death. Any claim, to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, arises out of the right of inheritance. The right of inheritance of real or personal property of a deceased arises only upon his death.

14. Even though the property is bequeathed in the Last Will, it is upon death of the testator a beneficiary can claim such right, because a testator can revoke the Will at any time before his or her death. Accordingly, the right of the beneficiary of an Estate accrues from the date of death of the deceased who dies testate or intestate. Therefore, the limitation period should, for this purpose, be reckoned from the date of death. It is not from the date of Last Will as argued by the counsel for the defendants, nor from the date of grant of probate or administration as contended by the counsel for the plaintiff.
15. Late Petersen died on 09th July 2010 and twelve years from that date expired 8th July 2022. This action commenced on 16.07.2021 and it was well within the limitation period.
16. If the plaintiff is successful in her claim, it is very likely that, she will be entitled for a reasonable amount of costs for bringing this action in order to establish her right under the first Will and vice versa. Therefore, I decide that, it is proper to make the costs in the cause.
17. In result, I make the following orders:
 - a. The injunction granted on 21.07.2021 is made permanent and shall be in force till determination of this matter, and
 - b. The costs in the cause.




U. L. Mohamed Azhar
Master of the High Court

At Lautoka
06.02.2024