

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

Civil Action No. **HBC 117** of 2021

**BETWEEN** : **FARIDA BI** of Lot 5, Salim Street, Nakasi, Domestic Duties  
**FIRST PLAINTIFF**

**AND** : **MOZMA MURAZ KHAN** formerly of Lot 5, Salim Street, Nakasi, currently  
residing at 20 Elkhorn Bellbird Park 4300, Queensland, Brisbane Chef.  
**SECOND PLAINTIFF**

**AND** : **MOSHEEN MOEAN KHAN** of Lot 5, Salim Street, Nakasi, Electrician.  
**THIRD PLAINTIFF**

**AND** : **ROSELINE ROSIKANA BEAGUM** of Nawa, Bua, as the Executrix and  
Trustee of the Estate of Yusuf Khan late, of Lot 5, Salim Street, Nakasi.  
**DEFENDANT**

**BEFORE** : **Hon. Justice Vishwa Datt Sharma**

**COUNSEL:** **Ms. Prasad S. D.** for the Plaintiffs

**Mr. Kohli A.** with **Ms. Naidu** for the Defendants

**DATE OF JUDGMENT:** 29<sup>th</sup> May, 2025

## **JUDGMENT**

*[Probate proceedings, inheritance Family Provision]*

## A. Introduction

1. The Plaintiffs commenced Probate proceedings pursuant to order 76 of the High Court Rules, 1988 and sought for the following Orders:
  - (a) An order that adequate provisions be made out of the Estate of late Yusuf Khan to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as the **children and as dependents** of the said Yusuf Khan respectively, and as the court may think fit;
  - (b) A declaration that the **Probate No. 65977** issued by the Court on 24<sup>th</sup> July 2020 is **null and void and of no effect**.
  - (c) An order for the **revocation of the Probate No. 65977** issued by the Court on 24<sup>th</sup> July 2020.
  - (d) The Caveat filed on 20<sup>th</sup> May, being the **Caveat No. 33 of 2020**, remain **intact until the final determination** of this action; and
  - (e) Such further or other relief as to this Honourable Court seems fit and fair.
  - (f) Costs of and incidental to this action.
2. The Defendant filed her Statement of Defence and sought for the dismissal of the Plaintiff's substantive Action and that the original Probate Grant No. 65977 be returned to the defendant with costs.
3. Thereafter, the Plaintiff's filed their reply to the Statement of Defence of the Defendant.

## Background to Case

4. The first named Plaintiff was the legal wife of late Yusuf Khan and divorced on 21<sup>st</sup> January 2019.
5. Second and third Plaintiffs are the biological children of the Late Yusuf Khan.
6. Late Yusuf Khan took demise on 06<sup>th</sup> April 2020.
7. He left behind his last Will and testament dated 01<sup>st</sup> August 2016 which appointed the Defendant [Deceased's niece] as the Executrix and Trustee and the sole beneficiary of his Will.
8. Probate Grant No. 65977 was issued to the Defendant [Niece], Roseline Rosikana Beagum on 24<sup>th</sup> July 2020.
9. The current application before Court is filed by the Plaintiff's in their capacity as his legal wife and biological children seeking for an order **that adequate provision be made out of the Estate of late Yusuf Khan** to the Second and third Plaintiffs in the capacity as his children and as dependents of the said late Yusuf Khan and further following orders:

1. A declaration that Grant of Probate No. 65977 issued by Court on 24 July 2020 be declared Null and Void and of no effect.
2. An Order for the revocation of the Probate Grant No. 65977; and'
3. The Caveat No. 33 of 2020 filed on 20 May 2020 by the first Plaintiff, Farida Bibi to remain intact.

### Determination

10. At trial proper, the Plaintiff called two (2) witnesses, the first and third Plaintiffs in their capacity as the legal wife and the Biological child as dependents of the late Yusuf Khan.
11. The application was made pursuant to **Section 3 of the Inheritance (Family Provision) Act 2004** which deals with 'Power of Court to Order Provisions' and the Plaintiff's sought for an order that **Adequate Provision be made out of the Estate of Late Yusuf Khan** to the Second and third Plaintiffs only.
12. The Defence called the Defendant as the only witness in this matter.
13. It is not in dispute that the first named Plaintiff was the Legal wife of Late Yusuf Khan, married on 07 January 1994 and divorced on 21 May 2019. That the second and third named Plaintiffs are two children of their marriage. Yusuf Khan took demise on 06 April 2020 leaving a Will dated 01 August 2016 appointing his Niece, Roseline Rosikana Beagum as the testator and bequeathing all his real and personal property to his niece. The **first named Plaintiff placed a Caveat No. 33 of 2020 on 20 May 2020 to prevent issuance of Grant to the Defendant in the Deceased's Estate of Yusuf Khan.**
14. However, on 24 July 2020, Probate Grant was issued to the Defendant when the Caveat was in place. The Probate Registry was privy of this knowledge of Caveat and therefore should have held the issuance of the Probate Grant to the Defendant. The Grant has been returned to the Probate Registry on 05 March 2021.
15. There is no challenge to the Deceased's Will dated 01 August 2016. However, the Plaintiffs are seeking for an order that **Adequate Provision** be made out of the deceased's Estate of Yusuf Khan to the second and third Plaintiff's as the children and dependent of Yusuf Khan.
16. Both Plaintiffs [Second and third] are of 35 and 36 years old respectively. Third Plaintiff has his own family and supports them financially whilst the second Plaintiff was married but got a divorce.
17. **Section 3 (1) of the Inheritance (Family Provision) Act, 2004**, provides that:  
  

'If any person dies whether testate or intestate and **adequate provision is not made for a spouse, child or dependant from the estate of the deceased person**, the **Court may**, on application by or on behalf of the spouse, child or dependant, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the spouse, **child or dependant.**'

**"Child"** is defined by the Act in relation to a deceased person, any child, stepchild or adopted child of the deceased person and includes a child *en ventre sa mere*; in light of the concept of a parents continuing obligation to his progeny, irrespective of.

In Contrast:

**'Dependent'** in relation to a deceased person, means any person who was being wholly or substantially maintained or supported by the deceased person at the time of his death being-

(a) a parent of the deceased person;

(b) the parent of a surviving child under the age of 18 years of the deceased person; or

(c) a person under 18 years; or

In short, **'Dependent'** expressly restricts the age of a person under 18 Years.

18. The second and third Plaintiffs have not challenged the Deceased's Will. However, a Writ of Summons instead was filed and commenced seeking an order that **adequate** provision be made out of the Estate of Late Yusuf Khan to the second and third Plaintiffs as the **'children'** and as **'dependents'** of the said Yusuf Khan respectively.
19. In **Bimla Wati v Chand** (Civil Action No. 11 of 2004) Pathik J held that in **absence of any specific provision in the Act under consideration for the mode of commencing proceedings, an action may be commenced by originating summons.**
20. The **Questions** then arises;

**Firstly:** whether the second and third Plaintiffs are **'children'** and/or **'dependent'** of the deceased's Yusuf Khan, and

**Secondly:** whether they are entitled to an **order for adequate provision be made out of Yusuf Khan's Estate?**

21. The last Will and testament of Late Yusuf Khan appointed the Defendant as the Executrix and Trustee and bequeathed all the Deceased properties to the defendant [Niece] Roseline Rosikana Beagum. It is not disputed that the Will is fraudulent. The two (2) children of the deceased second and third Plaintiffs have not been made as beneficiaries entitling them a right to the assets of deceased Yusuf Khan.
22. The second Plaintiff, Mozma Muraz Kahn did not give evidence at the trial. However, the third Plaintiff, Mosheem Moean Khan confirmed that the second Plaintiff was studying and working in Australia. She was 35 years of age and is a qualified Chef and has worked at Bad Dog, Outrigger Hotel and in the Cook Islands before she went to Australia on student Visa. She has been in employment for more than 2 years now.

23. The third Plaintiff, Mosheem Moean Khan is now 36 years old, married with 2 children worked for 8 years before he went to Australia where he worked for 6 months before returning to Fiji. He confirmed, he is fit and healthy and was looking for employment.
24. It is **not in dispute that the second Plaintiff Mozma Muraz Khan and third Plaintiff, Mosheem Moean Khan are both children of the deceased, Yusuf Khan and have attained the ages of 35 and 36 years** respectively. In light of the concept of a parent's continuing obligation to his progeny, irrespective of age.
25. I am prompted to refer to cases and decisions of the New Zealand Courts which have entertained applications by an '**Adult Child**' under their corresponding **Family Protection Act, 1955**.
26. In Leading case of Little v Angus (1981) NZLR 126, Williams v Aucutt [2000] 2 NZLR 479 and Henry v Henry [2000] NZCA 43 refers.
27. In the first case, the testatrix bequeathed \$4480 to the Plaintiff 39 year old married daughter and the rest valued at \$223,190 was left to the son. The **Court of Appeal held that the Plaintiff should have been left with one third of the Estate**.
28. In Henry v Henry ( op.cit) **O' Regan J** delivered the reasons of the court of Appeal as follows:  
  

".....the court has a wide discretion to decide on a testator's disposition as it **"thinks fit"**, subject to the requirement to do no more than necessary to remedy the failure to make adequate provision for the beneficiary....."
29. In William v Aucutt (supra), Court of Appeal stated that -  
  

"This is obviously not an area in which an assessment can be made with any precision."
30. The Plaintiff Farida Bi had on 20<sup>th</sup> May 2020 placed a Caveat No. 33 of 2020 on the Estate of Yusuf Khan from any grant of a probate until prior notice to her. However, for reasons bests known to the Probate Registry that a probate grant was subsequently issued without taking into consideration the fact that the Caveat was very much in existence and operation.
31. The Court in exercising its discretion, is required to '**order such provision as the Court thinks fit be made out of the estate of the deceased person.**'
32. I reiterate that the Court as a wide discretion to decide on a Testator's disposition as it '**thinks fit**' subject to the requirements to do no more than necessary to remedy the failure to make adequate provision for the beneficiary.
33. The evidence of the third Plaintiff, [PW2] Mosheem Moean Khan testified that when his father late, Yusuf Khan was injured and hospitalized for 4 - 5 weeks although then he was separated from the wife, PW2, looked after him at Labasa Hospital, feeding him and fulfilling his needs and wants since he was in his diapers until Yusuf Khan's death in 06 December 2020 and conducted his 40 days funeral rituals.

34. PW2 further told Court that his father, Yusuf Khan supported him with first semester fees, paid from his FNPF Contributions. During second semester PW2 had a scholarship and Yusuf Khan paid cash money to him.
35. According to [DW1] Roseline Rosikana Beagum, she testified that:
 

"Yusuf Khan is her mum's youngest brother. Since childhood she lived with the family and attained secondary and tertiary education - treated like own child. Yusuf Khan made a Will. He told me that he wants to make a Will in her (Roseline Rosikana Beagum's) name."
36. The fact of the matter herein is that it can be concluded that the Late Yusuf Khan financially supported both the children (second and third Plaintiffs) during their education and continued with their family relationship as is evident from the third Plaintiff [PW2] Mosheem Moean Khan testimony. That was the very reason as to why the third Plaintiff was him when he was hospitalized and fulfilled his needs and wants and thereafter carried out his late father's [Yusuf Khan's] 40 days funeral rituals after his demise.
37. In terms of the inheritance (Family Provision) Act 2004, whilst contrasting the terms 'child' and 'dependent' a 'child' is defined as any child .....of the deceased person," in light of the concept of a parents continuing obligation to his progeny, irrespective of age whereas the term 'dependent' expressly restricts the age to a person under 18 years.
38. However, I also reiterate that New Zealand Courts have entertained applications by an '**Adult Child**' under the corresponding Family Protection Act, 1955, the cases that I have highlighted herein before in my Judgment.
39. In **Tuibua v Wati** (2002) FJHC 30 where the Plaintiff filed an Originating Summons seeking provisions for herself under **section 3 (1) of the law** under consideration, Scott J delivered:
 

***"Moral as well as legal obligations have to be taken into account and the financial resources of the estate are highly relevant."***
40. The Financial resources of the Deceased's Estate and the Question as to whether there has been a breach of moral duty are important considerations to be taken into account in applications under the inheritance (Family provision) Act.
41. It is also important that cite the case of **William v Aucutt (supra)** at page 497 which stated:
 

***"A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belongings to the family and of having been an important part of the overall life of the deceased. Just, what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case."***
42. The second Plaintiff [Mozma Muraz Khan] and third Plaintiff [Mosheem Moean Khan] after all are the 'children' who have now attained their respective Adult ages of 35 and 36 years and were simultaneously 'Dependents' of their late father Yusuf Khan.
43. Taking into consideration all the circumstances of this case coupled with the Inheritance (Family Provision) Act 2004, in my view, it can be reasonably said that late Yusuf Khan has not

sufficiently provided for his two children namely Mozma Muraz Khan (second Plaintiff) and Mosheem Moean Khan (third Plaintiff). I find that there was a breach of moral duty.

44. Therefore, I conclude that this is a fit and proper case where the Court's discretion ought to be exercised in favour of the second and third Plaintiff's to be provide with adequate provision out of the Estate of Late Yusuf Khan to the second and third Plaintiffs as the 'children' and 'dependents' of the said Yusuf Khan respectively.
45. The second and third Plaintiffs are entitled to their fair share of the father's estate of Yusuf Khan accordingly.
46. The late Yusuf Khan died leaving the following Assets:
  1. ANZ Access Account No.: 9876284 - \$30,398.47.
  2. Housing Authority Sublease No.: 558537 - Lot 5 on DP 7869 - As to one undivided half share valued @ \$180,000.
  3. Vehicle registration no. CV545 - valued at \$5,000
  4. FNPF Account No. 2408618 for late Yusuf Khan - approx. amount unknown
47. The total net value of Assets of late Yusuf Khan is approximately \$215,398.47, excluding the total balance if FNPF Fund - Unknown to the Plaintiff.
48. Bearing in mind the above Assets of the Estate of Yusuf Khan, what portion of the Assets of the Estate should be considered as the adequate provision sufficient in the circumstances to be made out to the second and third Plaintiffs as the children and dependents of deceased, Yusuf Khan respectively.
49. **Viscount Simon L.C in Dillon v Public Trustee** (1941) AC 294 stated at page 301:
 

*".....confer(s) on the court a discretionary jurisdiction to override what would be the operation of a will by ordering that additional provision should be made for certain relations of the testator's estate, notwithstanding the provisions which the will actually contains. .... His will-making power remains unrestricted, but the statute in such a case authorises the court to interpose and carve out of (the testator's) estate what amounts to adequate provision for (wife, husband or children) if they are not sufficiently provided for. The interposition of the Court should take place of course, only after considering all relevant circumstances."*
50. Having taken into consideration above, coupled with the evidence before this Court, I exercise my discretion to alter the absolute distribution to Roseline Rosikana Begum in the deceased's Estate of Yusuf Khan as follows:
  - (i) The one undivided half share of Deceased Yusuf Khan on Housing Authority Sublease No.: 558537 annexed within Tab 4 of the Plaintiff's Bundle of Documents to be given to Mozma Muraz Kahan [second Plaintiff] and Mosheem Moean Khan [third Plaintiff] in equal shares.
  - (ii) Therefore, each child(ren) Mozma Muraz Khan and Mosheem Moean Khan receives 50% share each from Yusuf Khan's one undivided half share.
  - (iii) The other half share still remains intact in the name of Farida Bi [first Plaintiff] accordingly.

51. The remaining assets of the estate:

1. ANZ Access Account No.: 9876284 - \$30,398.47 FJD.
2. Vehicle registration no. CV545 - valued at \$5,000 FJD.
3. FNPF Account No. 2408618 for late Yusuf Khan - (approx. amount unknown) to be distributed to the niece Roseline Rosikana Beagum accordingly.

52. Caveat Registration No. 33 of 2020 is dismissed since Probate Grant No. 65977 was already issued to Executrix/ Trustee, Roseline Rosikana Beagum on 24<sup>th</sup> July 2020 remains intact and to be returned to solicitors Messrs. Kohli & Singh of Labasa to allow the distribution of the Estate as per the orders of this Court.

### Final Orders

- (i) I award Mozma Muraz Khan [second Plaintiff] and Mosheem Moean Khan (third Plaintiff) with one undivided half share of deceased, Yusuf Khan's entitlement to the property within the Housing Authority Sublease No.: 558537.
- (ii) Therefore, each of the two children Mozma Muraz Khan and Mosheem Moean Khan receives a 50% share each to make up Yusuf Khan's one undivided half share accordingly.
- (iii) The other one divided share remains intact in the name of Farida Bi [First Plaintiff] accordingly and to be distributed accordingly.
- (iv) The remaining assets of deceased Yusuf Khan's estate:
  1. ANZ Access Account No.: 9876284 - \$30,398.47 FJD.
  2. Vehicle registration no. CV545 - valued at \$5,000 FJD.
  3. FNPF Account No. 2408618 for late Yusuf Khan - (approx. amount unknown) to be distributed to the niece Roseline Rosikana Beagum accordingly
- (v) Caveat impending Registration No. 33 of 2020 is dismissed.
- (vi) Probate Grant No. 65977 to be released to Roseline Rosikana Beagum/Kohli & Singh, Labasa to carry out the distribution of the assets of the deceased Estate of Yusuf Khan as per orders of this Court made and granted herein.

Dated at Suva this 29<sup>th</sup> day of May, 2025.



  
 VISHWA DATT SHARMA  
 PUISNE JUDGE

cc. M A Khan Esquire, Suva  
 Kohli & Singh, Labasa.