IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 0063 of 2018
[High Court Civil Case No. 04 of 2017]

BETWEEN	:	**MIRZA MOHAMMED**
		Appellant
AND	:	**JAHURAN**
		Respondent

Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Dayaratne, JA**
Counsel	:	**Mr A Bale for the Appellant** **Mr A Kohli for the Respondent**
Date of Hearing	:	**17 May, 2019**
Date of Judgment	:	**7 June, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions arrived at by Dayaratne, JA.

Lecamwasam, JA

[2] I agree with the reasoning and conclusion of Dayaratne, JA.

Dayaratne, JA

[3] This is an appeal against the judgment of the High Court of Suva dated 28 June 2018.

The case in the High Court

[4] Mohamed Aziz died in 2001 leaving behind his wife and six sons. His last will nominated his wife Jahuran (Respondent) and eldest son Nasim (Appellant) as executors and trustees and probate has been granted to them in 2002. The Respondent applied to the High Court in 2017 to have the Appellant removed as executor and trustee of the estate and to appoint another son Mirza Rahim Buksh, in his place.

[5] The reason to seek removal was his lack of interest in the affairs of the deceased's estate and failure to co-operate with Buksh in running the family business. The immediate grievance against the Appellant was that he had refused to sign an application that was to be made to the local authority to have a bowser installed at the business premises. The Respondent had obtained the consent of the other beneficiaries of the estate (other sons) to have the Appellant removed.

[6] At the trial, the Respondent did not give evidence but relied on her affidavit filed initially, a supplementary affidavit to which was annexed the consent letters of three of the beneficiaries as well as her affidavit in reply to the affidavit filed by the Appellant. She also led the evidence of Buksh in support of her case. The Appellant did not give

evidence but relied on the affidavit he had filed in opposition and the written submissions. He took up the position that there were no valid reasons to remove him. He also alleged that Buksh has forged his signature in the application. Nevertheless, he was prepared to submit the application along with the Respondent. He stated further that Buksh was not a fit and proper person to succeed him.

[7] The learned judge has decided that the Respondent was a person interested in the estate and thus entitled in law to make the application. He was satisfied upon the evidence placed before him that the Appellant had not taken any interest in the welfare of the estate and concluded that it would be in the best interests of the estate to have him removed and appoint Buksh instead.

The Appeal

[8] In his appeal before this court, the Appellant has raised six grounds of appeal. They are;

i. *That the learned Judge erred in proceeding to hear the matter when both the Appellant and the Respondent were being represented by the same law firm.*

ii. *That the learned Judge erred when he did not call the Respondent to give evidence when she was the original Applicant in the matter.*

iii. *That the learned Judge should have used his discretion to direct that a NOAH be issued to the Appellant to enable him to come to Court and explain his absence at the various times the matter was being called namely before the Master in Labasa and when the matter was set down for hearing on the 27th of June 2018.*

iv. *That the learned Judge erred in proceeding with the hearing of the matter on the 27th of June, 2018 in the absence of the Appellant especially when he had raised a point of law with the Counsel for the Appellant intimating whether both parties were being represented by the same one law firm.*

v. *That the learned Judge erred in that he should have ordered that the Appellant be directed to appear before him in light of the finding in his judgment at paragraph [25] that the application could not have been made by Rahim nor could they have been signed by Nirmal Singh and therefore held that the Application was not properly or*

validly made and that the Respondent was perfectly entitled to refuse to sign the same.

vi. *That the learned Judge erred as he did not direct himself fully to the evidence before the Court namely that the various Affidavits filed by the Respondent where her thumbprint was not properly attested to and that the Appellant's lawyer was witnessing the Consent to Removal of Trustee dated 25th January, 2017 on behalf of the Respondent and that the Consent to Removal of Trustees by two of the beneficiaries who lived in Australia were not properly notarized.*

[9] Since the first and fourth grounds of appeal are on the same issue, I will deal with them together. It is also important to note that learned counsel for the Appellant informed court that he will only pursue these two grounds of appeal and accordingly did not address court on the other grounds.

The allegation that the same law firm represented both parties in the High Court

[10] In a rather unprecedented move, the Appellant has raised before this court, two grounds of appeal which do not arise from the judgment of the High Court. They are not related to the facts or the law applicable to the case that was heard in the High Court. The issue that has been raised by the Appellant is that the same law firm represented both parties and that there was a conflict of interest. He alleges that this amounts to a breach of Rule 1.2 and 1.5 of the Rules of Professional Conduct and Practice as per the Legal Practitioners Act 2009.

[11] He contends that the learned judge should not have proceeded with the case once the learned judge himself raised issue as to whether both parties were being represented by the same law firm. He further takes up the position that the learned judge should have used his discretion and summoned the Appellant to appear in court in order to determine this issue as well as the merits of the case.

[12] It must be stated at the very outset that I am of the view that this ground of appeal cannot be raised since it is not based on a matter that had arisen / taken up in the lower court.

Further, an issue of this nature can only be decided on evidence. No evidence has been placed before us and in any event, it would not have been possible to do so at this stage.

[13] Although mindful that these grounds of appeal may therefore, be rejected summarily, I am inclined to delve in to them in order to demonstrate that they are totally unfounded. I wish to firstly examine the two grounds as set out by the Appellant, in order to ascertain the factual accuracy of the contents therein.

Is it one law firm?

[14] The first ground of appeal as it is formulated, pre-supposes that the Appellant and Respondent were represented by the same law firm.

[15] Apart from the bare statement that it was one law firm, the Appellant has not placed any material to substantiate his claim. On the other hand, at paragraph 15 of the written submissions of the Appellant it is stated that *"A reasonable lay person would not have come to the conclusion that the Firms were different, by the representation made by the Counsels that the firms are Kohli & Singh Labasa and Kohli & Singh Suva"*. This clearly implies that the Appellant himself is not convinced that it is one firm but assumes that it would be the view of a layman. What is important is not the perception of a lay person, but whether they are two separate law firms or not.

Did the High Court judge raise an issue about the law firm?

[16] The fourth ground of appeal states that the learned judge has '***raised a point of law*** *with the Counsel for the Appellant intimating whether both parties were being represented by the same one law firm'* (emphasis added). In view of the above, court requested learned counsel for the Appellant to refer to the High Court proceedings where the learned judge has raised the said issue. He referred us to page 7 of the High Court proceedings and the question was *"And the Will was drafted by your own firm, which is another one, other things that troubles me, how can the Kohli & Singh be here, Kohli & Singh is there. When your partners want the draft to the Will Mr.Kohli? "*

[17] A perusal of the said proceedings clearly bears out the fact that the learned High Court judge had posed certain questions concerning the Will that had been produced and the

question quoted above has been asked in that context. That is the only question by the learned judge where any reference has been made to the law firm. It is not possible to impute that he was concerned or disturbed about one law firm appearing for both parties as contended by the Appellant. This certainly is not *'a question of law'* raised by the learned judge and I find the statement contained in the fourth ground of appeal to be baseless and misleading.

[18] The learned judge does not seem to have been perturbed about such issue and therefore, the question of calling the Appellant to seek clarification does not arise. If in fact the learned judge had any doubt, he would very well have sought clarification from the lawyers who were present in court. Further, the absence of any reference to that effect in his judgment demonstrates that it was never an issue.

Position of the Respondent

[19] Learned Counsel for the Respondent in his written submissions filed in this court had explained that the law firm Kohli & Singh Suva has represented the Appellant whilst Kohli & Singh Labasa had represented the Respondent. Having given details, he further states that they are two different law firms and also that the offices of the two firms are located in two separate islands.

[20] In his oral submissions, learned counsel for the Respondent explained in great detail the history of the two law firms and stated categorically that they were two different entities. He said that the Appellant had made a complaint to the Independent Legal Services Commission and that upon being required to submit an explanation, he had done so with supporting documents. It is interesting to note that the Appellant at paragraph 16 of his written submissions had taken up the position that *"The Respondent may rely on the argument that their lawyers had a Chinese Wall in place to ensure conflict of interest"*. The issue of conflict of interest would arise only if it is established that it was one firm or that they had a connection. Since his position was that they were two separate law firms with no connections, the learned counsel for the Respondent very correctly did not take up the defence that was predicted by the Appellant or any other defence.

[21] It is unfortunate that the learned Counsel for the Appellant did not even attempt to respond to the position as explained by the learned counsel for the Respondent. Although the learned counsel for the Appellant had cited several cases concerning the issue of conflict of interest (including the concept of a *Chinese Wall*), they are not relevant to this case. Infact, they were cases where the issue of conflict of interest had been taken up in the trial court or where lawyers had been sued for professional misconduct.

Has the law firm looked after the interests of the Appellant?

[22] At the commencement of hearing, court asked the learned counsel for the Appellant as to whether the Appellant had taken steps personally to obtain the services of the law firm as well as the counsel who appeared for him in the High Court. The answer was that the Appellant had personally taken steps to retain the services of the law firm and that Mr. Robinson had appeared as counsel instructed by the said law firm.

[23] Although an allegation of conflict of interest had been made, the learned counsel for the Appellant did not take up the position that the law firm failed to safeguard the interests of the appellant or that the firm has acted to his detriment. I have nevertheless looked at the proceedings of the High Court to find out if the law firm or the learned counsel who appeared for the Appellant in the High Court acted in the best interests of the Appellant. Admittedly, the law firm had retained the counsel on behalf of the Appellant. They have taken steps to file his affidavit in response to the affidavit filed by the Respondent wherein the position of the Appellant with regard to the application has been clearly set out. Dismissal of the Notice of Motion has been sought and his right to remain as executor and trustee had been urged.

[24] When the trial was taken up, Mr. Robinson who appeared as counsel for the Appellant, has explained his client's position to court and has raised legal objections to the maintainability of the application both on grounds of procedure as well as substantive law. The witness called by the Respondent has been cross examined. Oral submissions have been made resisting the application of the Respondent and written submissions too have been filed. This conduct makes it clear that the interests of the Appellant have been looked after both by the counsel as well as the law firm.

[25] Had there been any breach of the Rules of Professional Conduct and Practice by the said law firms, the remedy is for the Appellant to bring it to the attention of the relevant authority. We were informed that this has been done. Therefore, the Appellant will have to await the outcome of any inquiry that will be conducted by them. A court can look in to an issue of this nature only if it comes up whilst the matter is proceeding in that particular court or if an action is instituted against a lawyer seeking damages on grounds of fraud or professional misconduct.

[26] Taking the totality of the circumstances in to consideration, I am convinced that there is no legal basis for this court to consider the said grounds of appeal and further that they are misconceived and without any merit whatsoever. Therefore, I reject these grounds of appeal.

Other grounds of appeal

[27] Although the learned counsel for the Appellant did not pursue the other grounds of appeal, I will briefly consider as to whether there is any merit in them. The second ground of appeal was that the learned judge had failed to call the Respondent to give evidence whilst the third ground of appeal was that he was in error by not issuing a Notice of Adjourned Hearing (NOAH) to enable the Appellant to appear in court and explain his absence before the Master of Labasa and the High Court of Suva. In civil proceedings, it is the responsibility of the parties to conduct their cases in a manner they consider is best to establish their respective positions. There is no duty cast upon the judge to summon a party to the case or a particular witness and have his/her evidence recorded. The judge's task is to arrive at a determination based on the evidence that has been placed before him. In this case, both parties had legal representation and it was their business to conduct their case. Therefore, I find no merit in these two grounds of appeal and they must necessarily be rejected.

[28] The fifth ground of appeal was that the learned judge should have directed the Appellant to appear before him in view of his findings regarding an application that was to be submitted by the parties to the local authority. I note that the Respondent in her initial affidavit dated 24 January 2017 has set out the background regarding the said application.

The Appellant in his affidavit in opposition dated 9 August 2017 has explained his position regarding the contents of her affidavit. He also alleged that Buksh had forged his signature. In her affidavit in reply dated 18 August 2017, the Responded had clarified matters raised by the Appellant. At the trial, Buksh gave evidence and explained his position regarding the said application. A copy of the application has been produced as 'Exhibit A'. Clarification on matters such as the signature appearing in the said application, who prepared it etc have been explained in detail (pages 20-23 of the proceedings).

[29] There was more than adequate evidence before the learned judge regarding the said application and there was no necessity for further evidence. In his judgment, the learned judge has dealt with that evidence in detail. Although the Respondent had complained that the Appellant had unreasonably withheld his consent in making the said application to the local authority, the learned judge had opined that the application could not have been submitted by anyone else other than the Appellant and the Respondent since they were the executors. He has concluded that the Respondent cannot rely on the Appellant's refusal to sign the application as a ground to have him removed as an executor. The removal of the Appellant as executor and the cancellation of the probate granted to him was on the basis that he had taken no interest in the affairs of the estate of his late father or offered any assistance to improve the family business. The judge considered it desirable to relieve him of such responsibility in the best interests of all beneficiaries. In view of the above, the said ground of appeal has to fail.

[30] The sixth ground of appeal was that the learned judge failed to direct himself fully to the evidence. If there were any shortcomings or deficiencies in the documents that had been produced as evidence or in the manner of their presentation, it was the duty of the opposing party to raise objections at the appropriate time. I note that the learned judge has carefully perused the documents at the time they were produced and had sought clarification from the lawyers. No objection had been raised by the Appellant at the time of their production. Therefore, I reject this ground of appeal.

[31] A perusal of the High Court record demonstrates that the learned judge has taken a keen interest in the proceedings and had sought clarification whenever he felt it was necessary.

He has carefully perused the documents that had been produced in court and has posed pertinent questions when in doubt. In his judgment he has carefully analyzed the evidence and has applied the relevant legal provisions in arriving at his conclusions.

[32] The decision of the learned High Court judge has been made considering the provisions contained in Section 35 of the Succession, Probate and Administration Act and upon a proper appreciation of the evidence placed before him. The learned judge has relied on the decision of the Australian High Court in the case of **Miller v Cameron** (1936) 54 CLR 372 regarding grounds for removal of a trustee. He has given cogent reasons as to why he has decided to remove the Appellant and appoint Buksh in his place. Therefore, I see no reason to interfere with the judgment of the High Court. Accordingly, the appeal is dismissed with costs fixed at $2,500.

Orders of Court

1. Appeal dismissed.
2. Costs $2,500 payable to the respondent by the appellant.

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL