

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 16 of 2015

IN THE ESTATE of JIMMY
WEATHERALL late of Raviravi Settlement,
Savusavu in Fiji, Retired, deceased, testate.

BEFORE: Master Vishwa Datt Sharma
COUNSELS: Mr. Kunal Singh for the Applicant
Date of Hearing: 02nd February, 2016
Date of Ruling: 16th February, 2016

RULING

(Application seeking grant of Letters of Administration with Will)

APPLICATION

1. This is an Ex-Parte Notice of Motion filed by the applicant **Hellen Linda Weatherall** wherein she seeks for the following order-
 - (a) That **Hellen Linda Weatherall** of Raviravi Settlement, Savusavu in Fiji, Domestic Duties be appointed as the Administratrix in the Estate of **Jimmy Weatherall** late of Raviravi Settlement, Savusavu in Fiji, Retired, deceased Testate.
2. The application is filed in support of an Affidavit of **Hellen Linda Weatherall** deposed on 29th June, 2015.
3. The application is made pursuant to *Section 4 of the Trustees Act Cap 65*.

BACKGROUND

4. According to the applicant's affidavit in support and her Counsel's written submissions, the applicant's great grandfather namely **William Weatherall** executed a 'Will' bequeathing a portion of land in Folio 4487 Register No. Vol. 45 to the applicant's grandfather and the applicants father accordingly.

After a series of changes in the Trusteeship in the Estate of William Weatherall, Frank Weatherall son of William Weatherall became the Executor. Since Frank's appointment as an Executor, he has failed to carry out the duties as required of him in law to distribute the shares in the Estate of William Weatherall to all the beneficiaries in accordance with the deceased 'Will' to which the applicant and her siblings are entitled to.

Further, after carrying out a Will search at the High Court Registry, the applicant discovered that the applicant's father left behind a 'Will' appointing applicant's brother, Jim Weatherall as the Trustee and the same was registered with the High Court Principal Probate Registry with a print out details of registration as - File No-3487, Testator - Jimmy Weatherall, Executor - Jim Weatherall, Will dated - 1/14/2011 @ 12.00AM, and date filed - 2/3/2011 @ 12.00AM.

The Applicant is unaware of the contents of the said 'Will' since it was kept in a sealed envelope in the Registry.

THE LAW

5. *Part II of Section 4 of the Trustees Act Cap 65* deals with **Appointment and Discharge of Trustees** and provides as follows-

s.4. (1) Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise-

- (a) is dead; or*
- (b) remains out of Fiji for more than one year without having properly delegated the execution of the trust; or*
- (c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him; or*
- (d) refuses to act therein; or*
- (e) is unfit to act therein; or*
- (f) is incapable of acting therein; or*
- (g) is an infant; or*
- (h) is bankrupt; or*
- (i) being a corporation, has ceased to carry on business, is in liquidation or is dissolved,*

then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons, whether or not being the person or persons exercising the power, to be a trustee or trustees in the place of the trustee first in this sub-section mentioned...

ANALYSIS and DETERMINATION

6. The Ex-Parte Notice of Motion before this court seeks for an order to appoint Hellen Linda Weatherall as the Administratrix in the Estate of Jimmy Witherall.
7. Upon a further perusal of the Affidavit in Support, the Applicant at paragraph 11 is anticipating a Grant of Letters of Administration with Will to be issued to her in her father's Estate of Jimmy Weatherall.
8. The applicant in her affidavit in support at paragraphs 6-10 states as follows-

'After the demise of the deceased, I was informed by my brother Jim Weatherall that he has in his possession a Will whereby he was appointed as a trustee.' A copy of the Will was requested from Jim Weatherall but he has refused and or neglected to provide me with a copy. That a Will search conducted at the High Court Registry became apparent that the deceased did have a Will which was registered and that my brother Jim Weatherall was the nominated trustee. I am also unaware of the contents of the Will since it is kept in a sealed envelope in the Registry. That since my father's demise, Jim Weatherall lived in Tonga and has failed to take any steps to take out a probate and secure our fathers heritage.' The property that my father is entitled to is currently registered under the Estate of William Weatherall and we have been informed by friends and relatives that Fredrick Weatherall, administrator with will of the Estate of William Weatherall has been selling part of the land without any of the beneficiaries consent...'

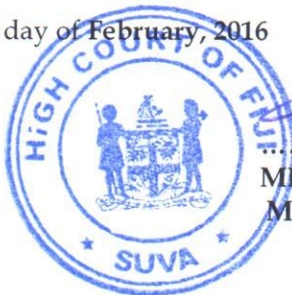
9. The deceased, Jimmy Weatherall took demise on 14th April, 2014 and the Estate of Jimmy Weatherall remained in limbo for 15 months without any attempts made by any of the surviving beneficiaries to obtain a grant of probate or administration until the 01st July, 2015 when the applicant as the intended administratrix herein lodged an application with the High Court seeking for an order 'That Hellen Linda Weatherall of Raviravi Settlement, Savusavu in Fiji, Domestic Duties be appointed as the Administratrix in the Estate of Jimmy Weatherall late of Raviravi Settlement, Savusavu in Fiji, Retired, deceased Testate.
10. This, the applicant was perfectly entitled to do in terms of Section 31 of the Succession, Probate and Administration Act (Cap. 60) which provides (*inter alia*):
"Where an executor neglects to apply for or to renounce probate within 6 months from the death of the testator ... or where an executor is unknown or cannot be found, the court may, upon the application of any person interested in the estate, ... grant administration with the

will annexed to the applicant, and such administration may be limited as the court thinks fit."

11. However, the present application before this court is made pursuant to *section 4 of the Trustees Act Cap 65* and not in accordance with *Section 31 Succession, Probate and Administration Act (Cap. 60).*
12. Further, having perused the application coupled with the documentary annexures to the applicant's affidavit, there is no evidence of any 'Will' of the deceased Jimmy Weatherall, original or a copy or otherwise annexed to the affidavit in support of the applicant apart from the details of the 'Will Search' conducted at the High Court Registry by the applicant.
13. Without citing and perusal of the alleged deceased 'Will' kept with the High Court Registry, this court cannot just assume and or anticipate that there is a 'Will' executed by the deceased Jimmy Weatherall and registered with the High Court Probate Registry. This court needs documentary evidence of the deceased 'Will' to ascertain the contents of the 'Will' with regards to the appointed Executor(ix)/Trustee and beneficiaries by the Testator in order to determine the application pending before this court. In absence of the said 'Will', this court is unable to accede to the applicant's application to appoint her as the administratrix of the deceased Estate.
14. This court is of the decision that Firstly, the application should have been made pursuant to *Section 31 Succession, Probate and Administration Act (Cap. 60)* and not *section 4 of the Trustees Act Cap 65, as is not the case here.*

Secondly, there is no 'Will' of the deceased, Jimmy Weatherall annexed within the deposed affidavit in support of the applicant, **Hellen Linda Weatherall.**
15. For the foregoing reasons, the present application is therefore refused.

Dated at Suva this 16th day of February, 2016



MR VISHWA DATT SHARMA
Master of High Court, Suva