IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

HPP ACTION NO: HPP 35 OF 2013

IN THE MATTER of the estate of MICHAEL RAJALINGAM late of 22 Johnson Street, Suva in the republic of Fiji, Retired, deceased, Testate

AND

IN THE MATTER of Probate No. 33200 granted on the 19th day of August, 1996

BETWEEN	:	**VINCENT THOMAS RAJALINGAM**
		Plaintiff
A N D	:	**EDMOND CLARENCE RAJALINGAM**
		Defendant

COUNSEL	:	Ms. R. Naidu for the Plaintiff
		Mr. N. Lajendra for the Defendant
Date of Hearing	:	15th December, 2015
Date of Decision	:	4th February, 2016

RULING

[1] The defendant by summons dated 20th November 2015 sought inter alia, the following reliefs from the Court.

1. That the plaintiff renders a proper account of the expenses for the estate of Michael Rajalingam with supporting documents verifying the said expenses and file the same into Court by affidavit within 14 days.
2. That the caveat No. 817076 lodged against Certificate of title No. 8909 being lot 3 on Deposited Plan No. 2118 be extended pursuant to section 110(3) of the Land Transfer Act (Cap 131) until further order of the Court;

[2] The plaintiff and the defendant are brothers and they have five more brothers who are the beneficiaries of the estate of their father Michael Rajalingam who died leaving a last will appointing the plaintiff and the defendant as the executors of his estate. Michael Rajalingam died on 22nd November 1991 and the probate was granted to the plaintiff and the defendant in the year 1996.

[3] On 09th July 2015 the plaintiff filed originating summons seeking the removal of the defendant as an executor and a trustee of the estate of Michael Rajalingam. The learned High Court Judge by his judgment dated 30th April 2015 ordered that the defendant be removed as an executor and a trustee of the estate of Michael Rajalingam and few months later the defendant filed this summons seeking the reliefs aforementioned under sections 89(1) and 90(1) of the Trustee Act (Cap 65), Order 85 rules 2(3)(a) and 5(2)(a) of the High Court Rules, 1988, section 110(3) of the Land Transfer Act (Cap 131) and also under the inherent powers of the Court.

[4] Section 89(1) of the Trustee Act provides:

> An order under the provisions of this Act for the appointment of a new trustee, or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under a disability or not, or on the application of any person duly appointed trustee of the property or intended to be so appointed.

[5] Section 90(1) of the Trustee Act provides:

> Any person who has, directly or indirectly, an interest whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he would be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee to appear before it and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require.

[6] The entire estate of Michael Rajalingam comprised of one property which is lot 3 on Deposited Plan No. 2118 and there is a house on this land. Both the plaintiff and the defendant are living in this house. It was submitted by the learned Counsel for the defendant that despite several requests made, the plaintiff failed to submit accounts of the estate.

[7] The learned counsel for the defendant submitted at length on the responsibilities of a person in a fiduciary relationship and cited the decision in ***Vosailagi v Mara [1992] FJHC 62 HBC0569d,91s (4 December1992)*** where it was observed as follows;

> Of the general rule of equity that no one in a fiduciary position (such as a trustee) is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of the beneficiaries whom he is bound to protect and to whom he must account for any personal benefits, Rigby L.J. in **Lagunas Nitrate Co. v. Lagunas Syndicate (1899) 2 Ch.D. 392 said at p.442**:
>
> "It is an equitable rule which has always been guarded and enforced with the utmost jealousy, that no fiduciary agent shall, under pain of consequences

thoroughly well known ..., intentionally place himself in a position in which his interest may conflict with his duty.

The rule is not a mere arbitrary or technical rule of equity, but is based upon high grounds of morality, and the Courts of Equity have always held any departure from it to be a serious wrongdoing. The equitable rule referred to does not in any way depend upon fraud or any presumption of advantage actually taken; indeed, it applies equally, even though it be shown that no advantage has been taken."

[8] In ***Vosailagi v Mara*** *(supra)* it was held:

Then it has been said that a trustee has a duty to give each of his 'cestui que trust', on demand, information with respect to the mode in which the trust fund has been dealt with and where it is. More particularly, Kekewich J. speaking of the same duty said in **Re Watson (1904) 49 Sol. Jo. 54**:

"The duty of a trustee is three-fold: there is the duty to keep accounts, the duty to deliver accounts, and the duty to vouch accounts... The duty to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid ..."

[9] The learned counsel for the defendant cited various other previous decisions where the Court has followed the decision in Re Watson *(supra)*. However, the learned counsel for the plaintiff did not challenge the above position of the law regarding the duties and responsibilities of executors and/or trustees.

[10] When a clarification was sought by the Court from the learned counsel for the defendant, he submitted that, what was meant by accounts is the amount spent by the plaintiff for the maintenance of the house. The position of the defendant is that without first ascertaining the exact amount spent by the plaintiff for the maintenance of the house he is not in a position to quote a price for the house. The solicitors of the plaintiff by their letter dated 23rd September 2015 submitted to the solicitors of the

defendant two statements of account one of which gives the details of the expenses incurred by the plaintiff and the other gives the details of the expenses incurred by Lawrence Michel Rajalimgam who is one of the beneficiaries of the estate of Michael Rajalingam. However, the defendant was not satisfied with these statements of account and sought further proof such as receipts and invoices to establish that these expenses were in fact incurred by them.

[11] The position of the defendant is that without knowing exactly how much the plaintiff has incurred on the maintenance of the property he is not in a position to decide on its purchase price.

[12] I do not see any rational behind this argument. The expenses incurred by the administrator will be accounted for at the time the proceeds of the sale of the property are distributed amongst the beneficiaries of the estate. When an intended purchaser quotes a price for a property he does not have to take into consideration the expenses incurred by the owner or the seller to maintain it. Whatever the price he pays, will be to the benefit of all the beneficiaries of the estate, including him.

[13] It is pertinent to note that the defendant was a co-executor of this estate for nearly 19 years. He cannot now, after he was removed as an executor, be heard to say that he was not aware of the expenses incurred for the maintenance of the property. It is more so because he was in occupation of these premises and any maintenance work could not have been done without his knowledge and concurrence. If he participated in the administration of his father's estate he could have known what were the expenses incurred by the plaintiff. It is also pertinent to note that the defendant has already quoted $ 696,000 for the property. Therefore, in my view the defendant's position that without having knowledge about the exact amount the plaintiff and the other beneficiaries incurred for the maintenance of the property he cannot make an offer is without merit. The only reasonable conclusion the Court can arrive at, in these circumstances is, that the defendant is making an attempt to prevent the sale of the property or to delay the process of the administration of the estate.

[14] From the averments contained in the affidavit of the defendant filed on 20th November 2015 it appears that he did not want this property be sold. Paragraphs 10 and 11 of the affidavit reads as follows;

> The position that I had taken in that application was the intention as I saw in my late father to ensure that Certificate of Title No. 8909 would not be sold and retained until the last of the siblings leave Fiji and thereafter the property can be disposed.

[15] It is the position of the defendant that two of his brothers also do not want to sell this property. In support of this contention the defendant tendered two letters sent by the two brothers marked as "D" along with his affidavit.

[16] A last will has to be interpreted giving effect to the intention of the testator. Paragraph 4 of the last will of Michael Rajalingam reads as follows;

> I GIVE DEVISE AND BEQUEATH all my property both real and personal of whatsoever nature and wheresoever situate to and unto my trustees UPON TRUST:
>
> a) To pay out from my estate my debts and funeral expenses;
> b) To distribute the residue of my estate to my sons ANDREW MICHAEL RAJALINGAM, LAWRENCE MICHAEL RAJALINGAM, EDMUND CLARENCE RAJALINGAM, JOHN REGINALD RAJALINGAM, UTTAM LAL RAJALINGAM AND FRANCIS MICHAEL RAJALINGAM in equal shares absolutely for their sole use and benefit.

[17] From the last will it is absolutely clear that the testator's intention had been to give benefit of the estate to all the beneficiaries equally and not to one or two beneficiaries. The beneficiaries become entitled to their respective shares of the estate upon the death of the testator. Therefore, each and every one of them is entitled have their share of the estate free of any encumbrances. The defendant and two other bothers cannot deprive the other beneficiaries of their entitlement. If the defendant intends to purchase the property he can quote the existing market price and

purchase it. As I stated earlier, for the defendant to quote a price for the property, if he is genuinely interested in buying it and has no intention of delaying the process of the administration of the estate, the amount incurred by the plaintiff for the maintenance of the property is not required.

[18] It is evident that another beneficiary has quoted a higher price for the property and if the defendant is of the view that he cannot pay anything above the price quoted by his brother he must allow the executor to sell the property to the highest bidder.

[19] For the reasons set out above I am of the view that the position of the defendant that the plaintiff must tender him the receipts and invoices for him to make a bid for the property is unfounded.

[20] The second relief sought by the defendant is for the extension of the caveat No. 817076 lodged against Certificate of Title No. 8909.

[21] By the time this matter came up for hearing the Registrar of Titles had already removed the caveat.

[22] The learned counsel for the defendant submitted that the Court is empowered to make an order restoring the caveat if the removal of the caveat by the Registrar of Titles is wrong.

[23] It is the submission of the learned counsel for the defendant that the Registrar of Lands was wrong in removing the caveat before the expiry of the period of 21 days and cited the very recent decision of the Court of Appeal in the case of ***Attorney General of Fiji and Registrar of Titles v Ram Kumari & Yogesh Prasad, Civil*** **Appeal** ***No. ABU 065 of 2012*** *and* ***NBF Asset Management Bank v Taveuni Estates Limited & the Registrar of Titles [2009] FJHC 1; HBC245.2008 (13 January 2009).***

[24] The basis of the allegation of the defendant is that it was wrong for the Registrar of Titles to remove the caveat before the expiry of the period of 21 days. When an allegation is made against a particular person or an officer, he or she must be before the Court to answer the allegation. Even if, on the face of it, the decision is wrong still without giving the party against whom the allegations are made, an opportunity of

being heard the Court is not entitled in law to make any finding against such person. This is the most fundamental rule of natural justice (***audi alteram partem***).

[25] In both cases cited by the learned counsel for the defendant the Registrar of Titles has been made a party. Therefore, these two decisions have no application to the case before this Court.

[26] Section 110 of the Land Transfer Act provides as follows;

> (1) The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit.

[27] In the case of ***Catchploe v. Burke (1974) 1 NZLR 620*** it was Held:

> When it is plain to the court that the caveator cannot possibly succeed in establishing his claim against the registered proprietor it is proper to refuse to extend the caveat. ..... But where there are doubts surrounding the rights of the caveator ..... the proper course is to extend the caveat until the conflicting claims of the different parties are determine in the action brought for that purpose.

[28] The above principle was followed in cases of ***NBF Asset Management Bank v Taveuni Estates Ltd (supra)*** and ***Suva Forklift Hire Limited v Sun Insurance Company Limited Civil Action HBC 146 of 2010.***

[29] The purpose of registering the caveat by the defendant is to restrain the plaintiff, the executor and the trustee of the estate from disposing of the property in question. By doing that he has prevented the majority of the beneficiaries from obtaining the benefit of their rights in the estate. As a co-executor he had not taken any interest in administering the estate for nearly nineteen years and after his removal he registered

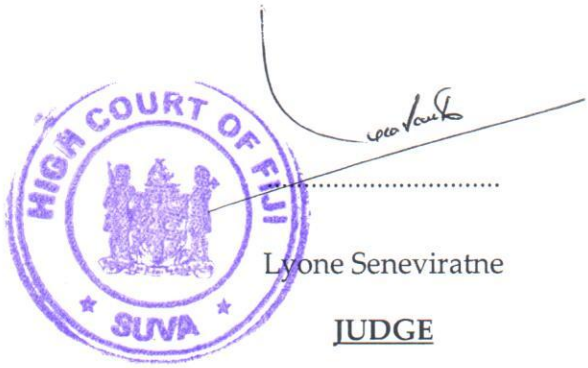
a caveat restraining the remaining executor from administering the estate. None of the other beneficiaries of the estate have challenged his rights in the estate nor have they refused to sell the property to him. If the caveat is restored and extended for a further period it will be detriment to the rights of the other beneficiaries who are waiting to receive their share of the estate.

[30] For the reasons set out above I make the following orders.

ORDERS.

The summons of the defendant dated 20th May 2015 is struck out.

The defendant shall pay the plaintiff $ 2000 as costs of this application.



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Lyone Seneviratne

JUDGE

04.02.2016