

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No HBC No: 256 of 2015

Between : JAYSON RAFFE

PLAINTIFF

And : KENNETH NORMAN RAFFE AND BRIAN GREGORY KIRSCH

DEFENDANTS

Civil Action No. HBC 325 of 2015

In the estate of REGINALD RONALD
RAFFE

BETWEEN : KENNETH NORMAN RAFFE, and BRIAN GREGORY KIRSCH,
as Executors and Trustees of the Estate of REGINALD RONALD
RAFFE

PLAINTIFFS

AND : JAYSON RENDELL RAFFE

DEFENDANTS

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms. Jane Needham, Mr Richard Naidu with her, for the
Defendants, the Executors
Mr. I. R. Coleman, Mr P.I. Knight with him, for the Plaintiff,
Jayson Raffe.

Date of Hearing : 17 November 2017

Date of Decision : 12 December 2017

DECISION

INTRODUCTION

This is an application to stay a final judgment of this Court pending an appeal to the Court of Appeal.

There is no element of public interest involved and no novelty or importance of any question herein. How far should an executor be allowed to go to thwart the expressed intentions of the testator in his will, a will be it noted of which probate was granted on 7 May 2014. It is important for the above to be stated because it has been apparent to this Court from the outset that the whole exercise has been an unilateral one launched solely by one of the two executors (Kirsch) to which the other executor Kenneth Norman Raffe (Kenneth) has not been a willing party if at all. This was made crystal clear to the Court in the course of the hearing when Kenneth in his sworn testimony stated that what the Plaintiff, Jayson Raffe (Jayson) says is consistent with the will and he, Kenneth would need to understand if a loan to PVL by the estate was in the interest of the beneficiaries. At this time to give greater clarity to what is entailed by the proposed scheme of Kirsch I shall refer to the "Executors' " submission in support of a stay. At para 6 it is stated the notice of appeal seeks orders to transfer the deceased's business to Plantation Village Limited (PVL) or a company formed for that purpose. To my mind, this is the clearest example I have ever come across of a scheme by an executor which is at variance with the expressed intentions of the testator. With this out of the way I shall turn to the motion for a stay.

1. This is the Application by the "Executors" for the following Orders:
 - (1) That the judgment dated 25 September 2017 in the consolidated actions be stayed until the appeal therefrom has been decided.
 - (2) That the interim injunction granted on 3 July 2015 and the order granted on 29 March 2016 pursuant to s.51(1)(c) of the Trustee Act be extended until the determination of the appeal or further order of the Court of Appeal.
 - (3) That the costs of this application abide the result of the appeal.

2. It is stated that the "Executors" will rely on the affidavit of the executor Kirsch affirmed on 1 October 2017. The affidavit is made by Kirsch as executor and trustee ostensibly on behalf of and with the full authority of his co-executor (Kenneth).
3. At this juncture I note that to the date of the hearing of this motion (17 November 2017) no affidavit nor any indication has emanated from Kenneth to suggest that he is involved in this stay application or indeed is involved in pursuing this appeal. Since there is no evidence before the Court of any power of attorney granted by Kenneth to Kirsch nor of any written authorization by Kenneth I am constrained to consider this as the sole effort of Kirsch.
4. I have stated the above in limine and rather fully because it goes a long way to my reaching a decision on whether to grant a stay which is clearly intended by one executor (Kirsch) only, to prevent all the beneficiaries obtaining the fruits of the judgment which enabled them all qua beneficiaries to receive the gifts that their late father, the testator expressly intended them to obtain under his will. Para 3 of the will states quite unequivocally that the testator gives the whole of his estate to his children. Nothing is given to the executors and trustees. No power of sale nor to delay the immediate receipt by the beneficiaries of the assets of the estate has been given to the executors and trustees. In these circumstances horse sense will dictate that the executors cannot go outside the will to find a basis in the Trustee Act, to sell the assets or to run a business.
5. Mr Kirsch's strategy is patently not in consonance with the co-executor's (Kenneth) view. This alone cuts the ground from under Kirsch's proposal, especially when in his Counsel's oral submission at the trial she said that there was no ambiguity in the will but that the "executors" came to court with a different plan.
6. Having decided that the intention of the testator was that the trustees were to transfer the entire estate to the 4 beneficiaries in equal shares as tenants in common, I would have thought that would bring an end to the matter.

7. Instead Kirsch qua executor is dissatisfied with my decision. Any careful judge is obliged to look askance at his application to stay my decision, which if granted by the courts of the land would have the effect of denying the beneficiaries qua beneficiaries the fruits of the judgment and further delay their receiving the assets of their late father's estate which he expressly intended them to receive under his will.
8. It is disingenuous to allege that if a stay were not granted the Appellant would lose the fruits of a successful appeal. Let me remind the executor Kirsch and his lawyers from within and without that there are no legitimate fruits for the executor even if an appeal were to succeed. The executor qua executor gains nothing from a successful appeal. The fruits belong entirely and exclusively to the beneficiaries none of whom with the exception of Jayson have been parties to the consolidated action or at all.
9. I am reminded here of the words of Lord Denning M.R. in : Midland Bank Trust Co. Ltd v Green [1979] 3 All ER at page 32 where he said "Now for the story of the litigation. It bids fair to rival in time and money the story of Jarndyce v Jarndyce".
10. Jarndyce is the fictional case in Charles Dickens' Bleak House, which like all fictional cases are based on real life ones. Protracted litigation in the Chancery Court of 19th century England inevitably resulted in the milch cow of the estate becoming a gaunt cow.
11. No judge in Fiji would wish the instant case to become the Jarndyce of the South Seas.
12. I had asked Counsel for the Executor whether they had any authority decided in England or in Fiji or in Australia or in New Zealand where an executor had succeeded in an appeal against the primary judge's finding of the expressed intention of the testator.
13. Counsel for the Executor as a result of her diligent research managed to come up with only one 1900 authority reported in the Bankruptcy and Probate Cases N.S.W.R. Volume

XXI: In the Estate of Rodd (deceased) where the question was whether the executor was entitled to any commission. By no stretch of the imagination can this be justification for what the executor is attempting to do here through the protraction of the litigation. Indeed in the above case the Chief Justice said at page 40: "In the case before me the words the testator has used shew his intention very clearly indeed". I adopt and apply the Chief Justice's words to this matter. The facts of that case are as different from the facts of this case as chalk is from cheese because the will of Rodd provided for commission to be paid to the executor whereas the will of Raffé does not provide for the executor to do what he is proposing to do.

14. If I may say so with respect, I obtain very little if any assistance from the other cases which were quoted before me. This is because I refused to be hornswoggled by the red herrings drawn across the path of the Court. I use the word "hornswoggle" as Lord Lane did when as Lord Chief Justice of England he used the word in a 1980s judicial context.
15. Indeed I have come to my conclusions independently of the authorities for the simple reason this appears to be the first case of an executor challenging the primary court's pronouncement of a testator's expressed intentions.
16. This is not the usual appeal by an aggrieved beneficiary against the primary judge's judgment. This is an appeal by an executor against my decision pronouncing the expressed intention of the testator contained in the will of which probate was granted 3 ½ years ago.
17. This executor Kirsch has no interest in the assets of the estate nor any benefit under the will. It therefore beggars description that he can actually allege that if a stay is not granted an appeal will be rendered nugatory. How can any decision here or in any appeal court deprive the executor of the results of the appeal.

18. Whichever way the appeal goes only the beneficiaries are affected and none of them are parties to the consolidated action or this appeal except Jayson who is resisting a stay. In my considered opinion whatever the outcome of the appeal none of the beneficiaries will be adversely affected. Consequently I find it hard to repress a rising sense of righteous indignation at the actions of the executor with which his legal advisors within and without obviously chime which are patently aimed at depriving the beneficiaries of receiving, without any further delay the concrete realization of the expressed intention of the testator.

19. In fine this is an appeal against and an attempt to stay my judgment in 2 actions which had been consolidated on the application of the executor Kirsch.

The grounds for consolidation are stated to be:

- (a) The subject matter of both actions are common.
- (b) The evidence filed by the parties in each action is relevant to consideration of the reliefs sought in each action.
- (c) It is expedient and convenient that the questions concerning the reliefs sought in each action be considered together and orders of the court be made in one consolidated action.

Thus the judgment encompasses both actions.

20. The advocacy of Kirsch's Counsel has impelled me to reproduce below para 16 of Jayson's Counsel's written submission dated 17 November 2017.

"The evidence reveals that the financial advantages for the Second Plaintiff (Kirsch) of "dragging out" the proceedings, potentially for years, are palpable. It is submitted to be relevant in this context that the interpretation of the deceased's last will urged on the High Court by the Plaintiffs, and maintained by the Second Plaintiff (Kirsch) in the appeal, fetters the entitlement of the beneficiaries to receive their unchallenged equal one quarter interests in the estate of their late father, and places the Second Plaintiff (Kirsch) in a position of control, from which he would benefit financially. Put simply, if crudely, there is nothing in it for the beneficiaries of the estate in maintaining the appeal, and much in it for the Second Plaintiff (Kirsch)".

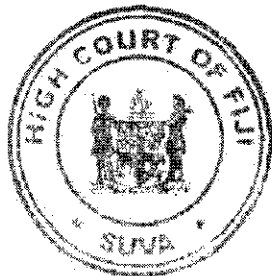
21. Kirsch's Counsel's efforts to come up with reasons to question or to stay a judgment given by a court carrying out its bounden duty imposed on it by the Constitution to decide a matter in accordance with the law and the evidence ill serves Kirsch.
22. The decision of the Fiji Court of Appeal in *Natural Waters of Viti Limited and Crystal Clear Mineral Water (Fiji) Limited : Civil Appeal ABU 0011 of 2004S* does not assist the Appellant (Kirsch). In para (7) therein are the principles to be applied on an application for stay.
 - (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41 (CA).
 - (b) Whether the successful party will be injuriously affected by the stay.
 - (c) The bona fides of the applicants as to the prosecution of the appeal.
 - (d) The effect on third parties.
 - (e) The novelty and importance of questions involved.
 - (f) The public interest in the proceeding
 - (g) The overall balance of convenience and the status quo.

It does not take any great effort to see that none of the above avails Kirsch as the Appellant. This is conclusive to determine the instant stay application.

23. In the result I am of opinion for the reasons clearly stated already that there are no merits in the appeal and even if the appeal were to be allowed Kirsch as Executor has not been deprived of any fruits of a successful appeal which were never his in the first place thus negating any need for a stay.

24. The Notice of Motion for a stay and for the extension of the orders made earlier are not granted. The executor, Kirsch, shall solely bear the costs of this application which I summarily assess at \$1,500 and which I order him in his personal capacity to pay the beneficiary Jayson Raffé.

Delivered at Suva this 12th day of December 2017.



David Alfred

Judge

High Court of Fiji