

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 54 of 2019
(On Appeal from the High Court of Fiji
in Civil Action No. HPP 54 of 2019)

BETWEEN: **ROSALINE LUM** also known as **ROSALINE LAI MEE LUM** of 806 Wang Wauk Road, Wang Wauk, New South Wales 2423, Australia, Retired Pharmacist.

APPELLANT/PLAINTIFF

AND: **THOMAS LOUEY JOHNSUN** as Executor and Trustee of the Estate of **MARY LUI**, late of 35 Warrena Street, Walgett, New South Wales, Australia, Store Keeper.

FIRST RESPONDENT/FIRST DEFENDANT

AND: **KATHERINE LUM** also known as **KATHERINE LAI NEE YAP** of 3 Sobraon Road, Marsfield, New South Wales 2122, Australia, Retired.

SECOND RESPONDENT/SECOND DEFENDANT

AND: **PETER LUM** also known as **PETER LAI KEONG LUM**, of 22 Keysor Road, Pagewood, New South Wales, Australia 2035, Retired.

THIRD RESPONDENT/THIRD DEFENDANT

AND: **LYNETTE CHIEW LAN LUM** also known as **LYNETTE CHIEW LAN CHOONG**, as executor and Trustee of the Estate of **PATRICK LUM**, late of 139 Botany St, Randwick, New South Wales 2031, Australia.

FOURTH RESPONDENT/FOURTH DEFENDANT

AND: **ROBERT LUM** also known as **ROBERT JOHN LUM**, of 22 Lamette Street, Chatswood, New South Wales, Australia 2067, Retired Chemical Engineer.

FIFTH RESPONDENT/FIFTH DEFENDANT

AND: **JOHN LUM** also known as **JOHN LAI PING LUM**, of 3 Murray Road, Pagewood, New South Wales 2035, Australia, Retired.

SIXTH RESPONDENT/SIXTH DEFENDANT

AND: **ROSALINE LUM** also known as **ROSALINE LAI MEE LUM**, as Executor and Trustee of the Estate of **LUI FUNG CHAN LUM** also known as **LUI F LUM** late of 10 Murray Road, Pagewood, New South Wales 2035, Australia, Process Worker.

SEVENTH RESPONDENT/SEVENTH DEFENDANT

BEFORE: Justice Vishwa Datt Sharma

COUNSEL: Mr. Singh R. - for the Plaintiff
Ms. Vuki A. V. - for the Defendants (1 -7)

DATE OF DECISION: 13th December, 2019 @ 9.30 am

DECISION

[Appeal to Set Aside Master's Decision and Orders in the Originating Summons in Civil Action Number 54 of 2019 to be granted pursuant to O.59, rr.8 and 12 of the High Court Rules 1988]

- [1] This is an Appeal filed against the master's Judgment and Orders delivered on 3rd October 2019 in Civil Action No. HPP 54 of 2019.
- [2] The Appellant seeks the following Orders -
- a) The Judgment be Set Aside;
 - b) The Orders in the Appellant's Originating Summons in Civil Action No. HPP 54 of 2019 be granted, specifically Orders that:
 - (i) *Lui Feng Chan Lum also known as Lui Feng Chan be removed as Executor and Trustee of the Estate of Lum Wai also known as Lum Bing Wai; and*
 - (ii) *The Appellant be appointed as Administrator with the Will annexed in the Estate of Lum Wai also known as Lum Bing Wai.*
 - (iii) *Such other Orders as the Court deems just.*

UPON the grounds that the learned Master erred in law and failed to exercise her jurisdiction judicially and in accordance with applicable legal principles in finding that "the Fijian court does not have jurisdiction to remove the Executor and Trustee appointed by the New South Wales, Supreme Court" by failing to find that:

- (i) *The High Court of Fiji has Jurisdiction to Remove the Executor and Trustee; and*
- (ii) *Under the principles of Equity and Laws of the High Court of Fiji can remove and/or appoint an Executor and Trustee for the proper administration of the Estate*

- [3] The Appeal is filed pursuant to *O.59, rr.8 and 12 of the High Court Rules 1988*.
- [4] The Appellant furnished Court with written submissions whilst the counsel for the Respondent agreed with the Appellant's written submissions and did not file any submissions.
- [5] The **Master's finding** was as follows:

"I cannot accept the Plaintiff's counsel's submission that the Fijian Court can remove the Executor and Trustee.

What the Fijian Court can do is to cancel a Resealed Grant.

Section 45 effect is that once Resealed in Fiji, Court has power to enforce the Grant but does not give power to remove the Executors and Trustees appointed by another Jurisdiction Probate Registry.

Hence, I find the Fijian Court does not have Jurisdiction to remove the Executor and Trustee appointed by the New South Wales, Supreme Court.

For this reason, the Application shall fail and is dismissed, parties to bare own costs"

- [6] The **Plaintiff's [Appellant's] original Originating Summons** before the Master sought for the following Orders:

- (a) *Lui Feng Chan Lum also known as Lui Feng Chan be removed as Executor and Trustee of the Estate of Lum Wai also known as Lum Bing Wai; and*
- (b) *The Plaintiff be appointed as Administrator with the Will annexed in the Estate of Lum Wai also known as Lum Bing Wai.*

ON THE GROUNDS THAT:

- (i) *The Executor and Trustee appointed by the High Court (Probate Division) is deceased and unable to administer the Estate;*
- (ii) *The Plaintiff as the Daughter of the late Lum Wai also known as Lum Bing Wai and a Beneficiary of the Estate of Lum Wai also known as Lum Bing Wai is eligible to apply.*

- [7] In summary, the counsel representing the **Petitioner** submitted that the Defendants (Beneficiaries of the Estate) consented to the application before the Master and they do not oppose the Appeal. The Resealed Probate is a Fiji Grant and it is necessary for the Executor and Trustee be appointed for the proper administration of the Estate. The Fiji High Court has Jurisdiction over its Grants. The parties acknowledge that the Fiji High Court (vice versa) cannot have Jurisdiction over the Australian Grant. However, once the Australian Grant is Resealed in Fiji the High Court has Jurisdiction over the Resealed Grant. The Application is not to substitute or remove the Trustees from the Australian Grant. The fact of Resealing by the High Court of Fiji is that the Grant is deemed a Fijian Grant over which Fijian courts can exercise Jurisdiction. The Plaintiff undertakes to distribute the property as per the Will of the Deceased. Once the foreign probate is Resealed by the Court, that Probate is operated and enforced in Fiji like it was an Original Probate Granted in Fiji. The Courts powers towards probates that are Originally granted in Fiji are the same powers to

be implemented towards the Resealed Probates. The Executor has died, therefore she does not have the capacity to execute the duties. The proper operation of the Fijian Grant is not possible. The Court therefore inherits jurisdiction to remove and appoint a new representation to perform the duties of the Executor. An Executor must be appointed to maintain and distribute properties and assets and a Beneficiary (Plaintiff/Appellant) is a fit and proper person to perform that role. All the Beneficiaries are party to the proceedings and are agreeing to the Appellant's appointment.

- [8] The issue raised by the High Court was simply **what was the effect of the Re-sealed Grant?**
- [9] *Section 45(1) & (2) of the Succession, Probate and Administration Act 1970* deals with Probate, etc., may be sealed.
- [10] Probate number 964608 in the **Estate of Lum Wai also known as Lum Bing Wai** was granted by the New South Wales Supreme Court on 22nd September 1983 to his Wife **Lui Fang Chan** as Executrix and Trustee. This Probate Grant was subsequently **Re-sealed in the High Court of Fiji on 23rd February 1984 Re-sealed Grant No. 19780** refers.
- [11] The **Executrix and Trustee Lui Fang Chan** took demise hereinafter and as a result the Deceased's Estate was left unadministered, in particular to administer the Estate with regards to Lease Property Numbers. 53119 and 46248 respectively.
- [12] The **Petitioner's (Plaintiff) Appeal** is now seeking for the following Orders-
- (i) *Setting Aside of Master's Order of 03rd October 2019; and*
 - (ii) *Plaintiff/Petitioner be appointed as the Executrix and Trustee of the Re-Sealed Probate so that the Deceased's Estate in Fiji can be administered and distributed in terms of the Deceased's Will accordingly.*
- [13] The question that arises herein is "*What is the purpose of a Re-Sealed Grant given by the Fiji High Court Probate Division?*" When the foreign probate or administration is "resealed", it can be used in Fiji to collect, transfer and distribute the assets of the deceased situated in Fiji.
- [14] The **Originating Summons** before the Master firstly sought for the **removal of the Executrix and Trustee Lui Fang Chan** from the Deceased's Estate of Lum Wai also known as Lum Bing Wai. Secondly, that the **Plaintiff be appointed as the Administrator with the Will Annexed in the Estate of Lum Wai also known as Lum Bing Wai.**
- [15] The **questions** that arises in mind are -
- (i) *Why did the Plaintiff (Petitioner) seek for the removal of the Executrix and Trustee when she had already taken demise on 04th December, 2015; and*
 - (ii) *The Plaintiff (Petitioner) is a Beneficiary of the Deceased's Will. Why is it that her appointment as Administratrix with Will Annexed is sought herein?*

- [16] Isn't it correct to say that the **Orders that should have been sought by the Plaintiff (Petitioner)** in her Original application before the Master should have been *not for the removal of the Executrix and Trustee and not for the Plaintiff to be appointed as the Administratrix rather seek an Order for a Letters of Administration De Bonis with Will to issue?*
- [17] The explanation for above is that a Probate Grant was already given by the Supreme Court of New South Wales, Australia. Accordingly, the Probate Grant was Re-Sealed in the Fiji High Court to enable the Executrix and Trustee to Administer the Deceased's Estate properties located in the Fiji Jurisdiction.
- [18] Upon the demise of the **Executrix and Trustee Lui Fang Chan** the consequent grant after the Reseal within the Fiji Court Jurisdiction would be to seek a grant for **Letters of Administration De Bonis Non with Will** since the Plaintiff/Appellant is one of the Beneficiaries of the Deceased's Will.
- [19] I **hold** that the Master was correct in arriving at her decision finding that the Fijian Court does not have the Jurisdiction to remove the Executrix and Trustee appointed by the New South Wales, Supreme Court of Australia.
- [20] However, I disagree with the finding that the **Fijian Court can cancel a Re-Sealed Grant instead of the removal of the Executrix and Trustee.**
- [21] The reason being that the **Executrix and Trustee Lui Fang Chan** after grant of the Re-Sealed Grant took demise and was unable to fully administer the Deceased's Estate in Fiji and if the Deceased's Estate is left unadministered after the demise of the Executrix and Trustee, then the process that should follow thereafter is to appoint another Beneficiary from the Deceased's Will who would be upon appointment able to fully administer the Deceased's Estate.
- For example, in Fiji Probate Jurisdiction whenever a Probate Grant is given and the Executrix and Trustee takes demise without fully administering the Deceased's Estate then another Beneficiary from the Deceased's Will will make an application for a consequent Grant in order to fully administer the left over Estate of the Deceased.
- [22] The Defendants as beneficiaries of the deceased's estate have consented to the application before the Master and further are not opposing the appeal filed herein. The High Court of Fiji Probate Division has jurisdiction to exercise under the inherent powers and in terms of Succession Probate and Administration Act 1970 to approve grants in order for the estate to be fully administered within the Fiji jurisdiction. The re-sealed grant was approved and given by the High Court of Fiji. The Plaintiff (Petitioner) in her Affidavit has undertaken to distribute the estate property as per the deceased's Will. It is rather unfortunate that the Executrix and Trustee has taken demise before completing the administration of the assets within the estate located in Fiji.
- [23] I cannot find any reason for not acceding to the alternative orders sought to complete the administration of the deceased's estate.

[24] In this case, taking into consideration the aforesaid rationale, I will **allow the Petitioner's Appeal only in part** that the **Re-Seal Grant needs to be cancelled** and in lieu since other orders are sought accordingly grant the following Orders instead -

ORDERS

- (i) The Plaintiff is hereby entitled to apply for the Grant of Letters of Administration De Bonis with Will Annexed in the Deceased's Estate with the Principle Probate Registry since the appointed Executrix and Trustee has taken demise and further the Plaintiff is one of the Beneficiaries of the Deceased's Will herein.
- (ii) The Deceased's Estate to be advertised locally and proper procedures to be followed and completed in order for the Grant of Letters of Administration De Bonis Non with Will to issue.
- (iii) The Petitioner upon grant of Letters of Administration De Bonis Non with Will grant to fully administer the Deceased's Estate and distribute the properties and assets as per the Deceased's Will.
- (iv) Orders accordingly.

Dated at Suva this 13th Day of December 2019



Vishwa Datt Sharma
Judge
High Court Suva