

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION  
AT LAUTOKA

PROBATE JURISDICTION

Civil Action No. HBC 74 OF 2013

BETWEEN : RAMA DEVI of Lot 58 Gibson Place, Natabua Housing, Lautoka.

PLAINTIFF

AND : SHIRO MANI of Labasa. Lab Technician.

1<sup>ST</sup> DEFENDANT

AND : SUMAN LATA of 5 Balram Dass Street, Kermod Road, Lautoka.

2<sup>ND</sup> DEFENDANT

AND : JAILLAL of 5 Balram Dass Street, Kermod Road, Lautoka.

3<sup>RD</sup> DEFENDANT

Counsel : Mr Eroni Maopa for the plaintiff.  
: Mr Rajendra Chaudhary for the defendants.

Date of hearing : Friday, 18<sup>th</sup> January, 2019.

Date of ruling : Thursday, 28<sup>th</sup> February, 2019

## RULING

- (1) I am asked to rule that, having heard the evidence of the two attesting witnesses to the will and the evidence of the solicitor who has prepared the will; it is competent for me to receive evidence to rebut the evidence of the attesting witnesses.
- (2) The propounders of the will, the defendants, vigorously opposed the application. Counsel for the propounders of the will, **Mr Chaudhary, contended that the evidence in rebuttal will generally be allowed when the party wishing to adduce it has been taken by surprise or misled. Counsel submitted that the plaintiff cannot claim that she was taken by surprise in any manner whatsoever or misled and as she has failed to prove any such ground, the discretion should not be exercised in her favour.**
- (3) The question is whether it is competent for the court to receive evidence to rebut the evidence of the attesting witnesses?
- (4) **It is important to remember that, in this case there is a plea by the plaintiff by which the validity of the will or the capacity of the deceased testator had been impeached and fraud has been alleged.** The two attesting witnesses have been cross-examined as to their credit. Counsel for the plaintiff says that the two attesting witnesses are not to be credited because there is evidence the other way. Thus, the evidence of the two attesting witnesses should be scrutinized very closely. Everything should be done to ascertain the truth. Therefore, the principles to be applied when fresh evidence or rebuttal evidence is sought to be introduced is not applicable to a case of this kind and I do not accept the defendants' contention. The finality in the litigation is good. Justice is better !
- (5) Vere – Wardale v – Johnson and Others [1942] 2 ALL E.R. 250, at P.395 is authority for the proposition that *“the evidence of the attesting witness to a will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal.”*

Willmer LJ at page 397 stated:

*“It appears to me that the object of the legislature in imposing the strict formalities required by the wills Act, 1837, was to prevent fraud. My duty*

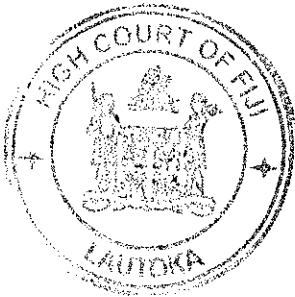
*here is to do all that I can see that no fraud is perpetuated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.*


*In the circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regards to the attesting of this will as may be available."*

(Emphasis added)

**Order**

The plaintiff's application for leave to call **rebuttal evidence with regard to the attestation of the will** is allowed.



  
08/02/2019  
Jude Nanayakkara  
[Judge]

At Lautoka,  
Thursday, 28<sup>th</sup> February, 2019