

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 43 of 2017

IN THE MATTER of Non-contentious Probate Business in the Estate of Chitaiya aka Samuel Sitaiya Ramas aka Samuel Chitaiya late of Vaqia, Ba, in the Republic of Fiji Islands Laborers, Deceased-Testate.

BETWEEN: **DHUN BHAGIUM** also known as **DHUN BHAGIAM** of Vaqia, Ba, Retired Maid.

PLAINTIFF

AND: **VIMASELLU** FORMALLY OF VEISARU, Ba now of 3/14 Cambourne Road, Papatoetoe, New Zealand, as Executor and Trustee in the Estate of Chitaiya aka Asmuel Sitaiya Ramas aka Samuel Chitaiya late of Vaqia, Ba.

DEFENDANT

BEFORE: Justice Vishwa Datt Sharma

COUNSEL: Ms. Raikaci N. - for the Plaintiff
 No appearance. - for the Defendant

DATE OF DECISION: 16th June, 2020 @ 9.30 am

RULING
[Plaintiff's Recusal Application]

INTRODUCTION

- [1] Before me is the Plaintiff's Recusal Summons filed on 21st August 2019 seeking for the following Orders-
- a. That the Honourable Presiding Judge recuses himself from presiding in Civil Action No. HPP 43 of 2017.
 - b. That Civil Action No. HPP 43 of 2017 be transferred to another Judge of the High Court for its adjudication; and
 - c. Any other Orders this Honourable Court may think just under the circumstances.
- [2] The Application for Recusal is made in support of the Affidavit deposed by the Plaintiff Dhun Bhagium.

THE LAW

- [3] The Law that is applicable in a **Recusal application** of this nature had been discussed in the case of *Muir v. Commissioner of Inland Revenue and others (2007) NZ CA 334*.

BRIEF BACKGROUND

- [4] The Plaintiff filed an Originating Summons on 24th July 2017 and sought for the following relief-
- (i) An Order that the Defendant be removed as the Executor and Trustee in the Estate of Chitaiya a.k.a Samuel Sitaiya Ramas a.k.a Samuel Chitaiya vide Probate No. 37140 and the Grant of the aforesaid Probate to him be revoked forthwith.
 - (ii) An Order that the Plaintiff be appointed Administratrix with the Will annexed in the Estate of her late husband, Chitaiya a.k.a Samuel Sitaiya Ramas a.k.a Samuel Chitaiya.
 - (iii) An Order that the Letters of Administratrix with Will annexed de bonis non number 37483 granted by this Court to the Plaintiff on 20th January 2000 be restored and administered by her accordingly.
 - (iv) Any other consequential Orders that this Honourable Court deems just under the circumstances.
- [5] The matter was heard and determined by the Master of the High Court on 18th October 2018.
- [6] The Master in her Ruling stated that "upon the perusal of the Probate file number 37483, I note that on 1st September 2000 Scott J. had made Orders that Letters of Administration with Will annexed de bonis non number 37483 granted to Dhun Bhagium on 20th January 2000 be canceled and declared null and void". The Master further added that "since the Orders were made by a Judge of the High Court I find that the Masters Court has no Jurisdiction to vary that Order and it is only prudent that I should refer this matter to a Judge". "Accordingly, I am directing the Senior Court Officer to assign the file (Suva HPP 43 of 2017) to a Judge. Attached to it should be the following files; Probate number 37140, 37018, 37483, 35044 and Lautoka Civil file Number HBC 20 of 2001".
- [7] The matter was subsequently assigned for hearing before me on 25th September 2019. On Plaintiff's Counsels application, the hearing date was vacated and reassigned for hearing on 21st November 2019.
- [8] Thus, the current Recusal Application was filed by the Plaintiff's Counsel.

GROUNDS for RECUSAL

- [9] The grounds upon which the Plaintiff's application for Recusal is sought can be summarised as follows from the Affidavits filed herein on 21st August 2019 and 12th of February 2020 accordingly-
- That upon the file search conducted by the Plaintiff, in the same year of the grant of Letters of Administration in the Deceased's Estate of her Father-in-Law to her on 20th January 2000, that the Presiding Judge in this matter was based at the Probate division, wrote a letter on 14th March 2000 to her Solicitors for the return of the Letters of Administration Grant in the Estate of her husband L/A Number 37018 granted to her on 27th September 1999.
 - That although the Presiding Judge's role then in his capacity as an Officer in Charge of Probate Division was administration in nature that she has reason to believe that the prior knowledge acquired during his role in the various Estate files mentioned hereinabove and which accordingly will be prejudicial to a fair hearing of the Plaintiff's Originating Summons before the Court.

DETERMINATION

- [10] The issue herein is whether the Presiding Judge in the matter should recuse himself from hearing and determining the impending issue before this Court on the ground that it may cause prejudice to a fair hearing of the Plaintiff's Originating Summons.
- [11] I have taken into consideration the contents of the Affidavits filed herein.
- [12] I make reference to the Law that is applicable in a Recusal Application of this nature. In the case of *Muir v. Commissioner of Inland Revenue and others* (2007) NZ CA 334. It states that -"In our view, the correct enquiry is a two stage one".

First Limb Test

First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the 'bias' ball in the air.

Second Limb Test

The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasizes to the challenged Judge that a belief in her own purity will not do, she must consider how others would view her conduct."

Above may be further summarized as follows- "*the test is whether there is a real danger or real likelihood in the sense of possibility of bias" and whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged (the English test).*

- [13] The case authority hereinabove reveals that-
- (i) A rigorous examination should be conducted if the actual circumstances or the facts of the issue have a direct bearing to show that the Judge or the Master presently presiding over this case was or may have seen, to be biased; and

- (ii) Whether those circumstances as established might lead a fair -minded lay- observer to reasonably apprehend that the Judge or the Master might not bring an impartial mind to the resolution of the instant case. (*emphasis mine*)

[14] On the first ground summarised hereinabove, upon the perusal of Deceased's Estate files Nos. 37140 and 37018 seeking Administration Grant will reveal the following-

- *Probate Grant in Application No.37140 was granted to Vimasellu (Defendant in the current case) on 27th September 1999, in terms of the Deceased's Will dated 23rd March 1999.*
- *In Application No. 37018, the perusal of the file records will confirm that an Application (Oath) was filed by Dhun Bhagium (Plaintiff) on 2nd August 2000, seeking an Order that the Probate Grant in Application No.37140 issued to Vimasellu (Defendant in the current case) be revoked and declared null and void in law on the grounds stated at paragraph 7 of her Oath- "That Probate of the Deceased Estate was Granted by the High Court to one Vimasellu, Father's name Narasaiya of Veisaru, Ba under a purported Will dated 23rd March 1999". Further, at paragraph 13 she states "That Vimasellu is not a Beneficiary in the Testator's Estate".*

[15] In Application No.37483 (Estate of Albert Ramas) - Dhun Bhagium (Plaintiff) sought for Letters of Administration de bonis non with Will Grant which was granted to her on 20th January 2000.

[16] The Letters of Administration de bonis non Grant No.37483 clearly shows the following-

- Estate of Albert Ramas who died on 9th August 1997
- The Deceased Executed a Will on 19th June 1997
- The Administration of the Deceased's Estate was granted to Samuel Sitaiya Ramas
- Samuel Sitaiya Ramas died on 1st April 1999 leaving part of the Deceased's Estate unadministered
- On 20th January 2000, Letters of Administration de bonis non with Will was granted to Dhun Bhagium (Plaintiff)
- An Affidavit deposed by Vimasellu (Defendant) was filed on 21st July 2000 in this Application.
- He deposed that LADBN with Will on Application No. 37483 was granted to Dhun Bhagium who was not entitled to any share in the Deceased's Estate of Albert Ramas or in the Estate of Samuel Sitaiya Ramas
- That Vimasellu is the proper person to Administer the Deceased's Estate and not Dhun Bhagium since she is neither a Beneficiary nor a Trustee
- Vimasellu sought for LADBN with Will Grant issued to Dhun Bhagium to be called in and further declared null and void in law
- Citation was issued by the Counsel representing Vimasellu on 17th July 2000 calling upon Dhun Bhagium to return the Grant LADBN with Will issued to her and accordingly an Affidavit was filed
- Subsequently, a Summons was issued by the Counsel representing Vimasellu on 15th of August 2000 seeking for the following Orders-
- (i) That Letters of Administration (with Will Annexed) de bonis non No. 37483 granted to Dhun Bhagium daughter of Ram Samy Naidu on 20th January 2000 be cancelled and declared null and void.
- (ii) That Dhun Bhagium daughter of Ram Samy Naidu do pay costs of this Application.
- On 1st September 2000 the Summons was listed before Honourable Mr Justice Scott who granted the Orders in terms of the Summons filed on 15th August 2000 and suspended the same to 28th September 2000.
- This Order was accordingly sealed on 7th September 2000.

[17] The Orders hereinabove was made by a Judicial Officer and not the Probate Officer who dealt with the Administration and the Execution of the Court Orders.

[18] If the Plaintiff was not satisfied with the Order made by the Honourable Judge on 1st September 2000 then she could have sought for further remedy in terms of an Appeal proceedings.

[19] Therefore, I find there are no merits in the grounds hereinabove to suggest that the hearing of the current matter by the appointed Judicial Officer will cause any prejudice to a fair hearing.

[20] **In Conclusion**, an application to **disqualify** a trial judge of the High Court is a serious matter and must be made on substantial grounds and accompanied with supporting evidence. The test of **recusal** is **objective** and the onus is on the **applicant** (Plaintiff) to establish that the disqualifying interest or matter would cause the possibility of a departure from impartial decision-making and the oath of office taken by the Judge to administer justice without fear or favour. A **subjective apprehension** is not, of itself, enough to warrant or require disqualification. The latter of the dual constitutional requirements of **independence and impartiality** is more narrowly focused on individual characteristics than the prior, which is status oriented, and extends to cover **constitutional and administrative independent of the Court**.

There is a **constitutional presumption** that a **Court is independent and impartial** unless rebutted by the Applicants.

[21] Nothing has been rebutted by the Applicant/Plaintiff to show any **apprehension of Bias** and/or Prejudice that would be caused on the part of the Judge of the High Court and no circumstances have been established that **might lead a fair-minded lay-observer to reasonably apprehend that the Judge** of the High Court might not bring an impartial mind to the resolution of the instant case.

[22] The recusal application is frivolous in nature and I find there is no fundamental basis or ground on which the Judge should recuse himself from hearing and determination of the pending application.

[23] Therefore, the Plaintiff's application in terms of the Motion seeking **for Recusal** from the current case is hereby **Dismissed** accordingly.

[24] It is important that I bring to the attention of the parties to the proceedings the following passages taken from the judgment of Kirby P. (as he then was) in **Rajski v. Wood** (1989) 18 N.S.W.L.R. 512 at p.519:

'It is one of the fundamental principles of judicial independence that the constitution of a court should be outside the control or influence of litigants in the court. This self-evident truth is reflected not only in local law and practice. It is clearly laid down in principles concerning the independence of the judiciary contained in international statements on the subject. One such collection of principles is found in a resolution of the United Nations Organisation General Assembly, Basic Principles on the Independence of the Judiciary ... Clause 14 of the United Nations Basic Principles of the Independence of the Judiciary, for example, provides:

"14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."

[25] His lordship continues:

'If parties could pick and choose judges according to their perception of the way in which their choice could advantage them, or disadvantage their opponents and then render judges answerable for sitting arrangements, great damage would be done to the integrity of the judicial process and to community confidence in the neutrality and impartiality of the judiciary. This is a reason why, ... the assignment of judges to hear cases has been by express law, inherent jurisdiction and daily convention and practice, reserved to the judiciary itself. It is not something over which litigants may exercise influence, except as the law provides, for example, by suggestion that a judge should disqualify himself or herself on the ground of actual bias or the reasonable apprehension of bias or (in the case of judicial officers of inferior courts) by action taken in proceedings prerogative in nature.'

[26] Then, in words that might describe the existing system of allocating cases in the High Court civil registry, Kirby P. says:

'Courts are vigilant to adopt procedures to guard against forum shopping and judge selection by parties to litigation. Sometimes practices are adopted to provide a random assignment of judges, precisely to reduce the risk that parties to litigation might, by their own actions, influence the choice of the judge to hear their case.'

[27] However, since the Plaintiff has made this Application for recusal for the best reasons known to her, I would rather in the circumstances recuse myself from this matter in the interest of justice and fairness to all accordingly.

ORDERS

- (i) Application for Recusal is hereby granted.
- (ii) There will be no order as to costs since the application was made ex-parte.
- (iii) The file with all documents intact is now remitted to the SCO for allocation to another Honourable Judge.

Dated at Suva this 16TH day of JUNE, 2020



Vishwa Datt Sharma
Judge

cc. Ravono & Raikaci Law, Nausori.