

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Appeal No. HBA 17 of 2019
(Appeal from the Magistrate's Court at Suva in
Bankruptcy Action No.16 of 2018)

BETWEEN: **SITIVENI LIGAMAMADA RABUKA** of Donu Place, Namadi Heights, Suva in the Republic of
Fiji, Investor.

APPELLANT/JUDGMENT CREDITOR

AND: **THE ESTATE OF THE LATE ERONI BALEIWAI MAVOA** of Lot 2 Toninaiwau, Coloi I
Suva, Suva.

RESPONDENT/JUDGMENT DEBTOR

BEFORE: **Hon. Justice Vishwa Datt Sharma**

COUNSELS: **Ms. Vuki A. V.** - for the Appellant [Judgment Creditor]
 No Appearance - for the Respondent [Judgment Debtor]
 Ms. Nayacalevu S. - for Emmaline Bui Mavo

Date of Decision: 29th JUNE, 2020 @ 9.30 am

RULING

[Appeal from the Decision of the Magistrates' Court]

INTRODUCTION

- [1] This is the Appellant's [Judgment Creditor] Appeal against the Decision of the Learned Chief Magistrate delivered in Bankruptcy Action No.16 of 2018 on 30th January 2019.
- [2] The parties to the Appeal proceedings furnished Court with their respective written submissions and argued the grounds of Appeal respectively.

BACKGROUND

- [3] Solicitors representing the Appellant [Judgment Creditor] filed a request for issuance of a Bankruptcy Notice against the Executor/Trustee, Emmaline Bui Mavoia on 23rd May 2018.
- [4] This request was made on the basis that a Default Judgment was entered on 6th April 2018 against the 1st Defendant (the Estate of the Late Eroni Baleiwai Mavoia) in High Court Civil Action No. 296 of 2017 on the failure of the Deceased's Estate to serve an Acknowledgement of Service.
- [5] Subsequent to the above request for a Bankruptcy Notice, the Executor/Trustee (Emmaline Bui Mavoia) filed a Notice of Motion on 13th July 2018 seeking for the following Orders:
- i. That this Application be given an early date on the Cause List.
 - ii. That the name of Emmaline Mavoia as the Executor/Trustee for the Judgment Debtor be removed from the Bankruptcy Petition filed on 14th May 2018; and the request for Bankruptcy Notice filed on 22nd May 2018 for this matter (Bankruptcy Action No.16 of 2018) be dismissed, for irregularity and abuse of process.
 - iii. Alternatively, an Order that the request for Bankruptcy Notice filed by the Judgment Creditor on 22nd May 2018 requesting that a Bankruptcy Notice be issued by this Court personally against Emmaline Mavoia as Executor/Trustee for the Judgment Debtor be dismissed for irregularity and abuse of process.
 - iv. Alternatively, an Order that the letter from Emmaline Mavoia's counsel dated 30th May 2018 and 12th June 2018 to the counsel for the Judgment Creditor be accepted as Ms. Emmaline Mavoia's Opposition to the Bankruptcy Petition being issued; or an Order for an Enlargement of Time to allow Ms. Emmaline Mavoia to file a proper Affidavit in Opposition to the request for Bankruptcy Notice filed on 22nd May 2018 and served on 25th May 2018.
 - v. Any other Orders that this Court deems just and equitable.
 - vi. Costs against the counsel for the Judgment Creditor.

The named Emmaline Mavoia relied on her accompanying Affidavit in respect of this application herein.

- [6] It is noted that Emmaline Mavoia (Deceased's Wife in the Estate of late Eroni Baleiwai Mavoia) deposed the Affidavit in Support to this Notice of Motion.
- [7] The Affidavit in Reply was filed by the Appellant (Judgment Creditor) on 16th August 2019 opposing the Orders sought on the Notice of Motion hereinabove.

JUDGMENT OF THE MAGISTRATES' COURT

[8] The Learned Chief Magistrate in his Ruling of 30th January 2019 stated-

"The issue boils down to one central issue - if the Creditor is enforcing HBC 296 of 2017 and is pursuing the Estate of the late Eroni Baleiwai Mavoa, is it then appropriate to take out the petition against Emmaline Mavoa, a person named as the 2nd Defendant in that said action but in a different capacity - as the next of kin and the 1st person entitled to take out the Letters of Administration of the 1st Defendant. In the current position she is now named as the Executor and Trustee of the Estate and the question is can the Creditor substitute a party to this action at this stage of the proceedings without an Order or Direction from the Court."

"Under the Magistrates' Court Rules at Order viii R5(2) the Court has the power to strike out the name of any party if these has been misjoinder in the proceedings and this is available at any stage of the proceedings."

"There is no evidence that Emmaline Mavoa has been granted Probate in the Estate of Eroni Mavoa, and even though the Will has been deposited there is no following action to take out Letters of Administration and/ Probate therefore the status quo remains from the situation as it stood before the High Court in HBC 296 of 2017. The Bankruptcy Petition against Emmaline Mavoa as Executor and Trustee of the Estate is dismissed."

[9] Aggrieved by the Learned Chief Magistrate's decision of 30th January 2019, the Appellant (Judgment Creditor) filed the Appeal on the following grounds-

Ground 1

THE Chief Magistrate erred in law and in fact when he misinterpreted and mis-applied section 8 of the Succession Probate and Administration Act, and its legal effect which prejudiced the Appellant:

Ground 2

THE Chief Magistrate erred in law and in fact finding that there is a misjoinder in the proceedings and misapplied the provisions of Order VIII R5 (2) of the Magistrate's Court Rules.

Ground 3

THE Chief Magistrate erred in law and in fact by attaching undue weight to the following:

- (a) that there is no evidence of probate granted to Emmaline Mavoa;
- (b) even though the Will has been deposited there is no following action to take out letters of probate;
- (c) therefore the status quo remains as it stood before the High Court in HBC 296 of 2017.

Ground 4

THE Chief Magistrate wrongly held that "...the request for Bankruptcy against Emmaline Mavoa as Executor of the Estate is wrong in fact and in law and must be withdrawn against her..." ...and erred in dismissing the bankruptcy petition.

Ground 5

THE Appellant, the Judgement Creditor reserves the right to make such further grounds and amendments as the Appellant may file in this Honourable Court, and in particular upon receipt of the Magistrate's Court Record of the hearing of the Motion for Removal of the Name of Emmaline Mavoa as the Executor and Trustee of the Judgement Debtor, the Estate of the Late Eroni Baleiwai Mavoa.

ANALYSIS & DETERMINATION

[10] There are altogether four grounds of Appeal (Grounds 1, 2, 3 and 4) to be determined by this Court.

- [11] In terms of ground number 5, no further grounds and/or amendments have been filed, so there is no need to deliberate and determine anything on this ground number 5.
- [12] It is rather important that I set out hereunder what actually transpired in -
- i. High Court Civil Action HBC 296 of 2017 - *Sitiveni Ligamamada Rabuka -v- The Estate of the Late Eroni Baleiwai Mavoia -and- Emmaline Bui Mavoia & Others.*
- In this case, the Plaintiff has already obtained a Default Judgment on 04th April, 2018 against the estate of Eroni Baleiwai Mavoia in the sum of \$187,967-64.
 - Emmaline Bui Mavoia as the 2nd Defendant has filed her Statement of Defence in this case denying having any knowledge of the Deceased's debt to the Plaintiff and her intentions as the executor and Trustee of the Deceased's Estate in terms of the Will. The matter is pending before the Court.
 - Emmaline Bui Mavoia has been made the 2nd Defendant in her capacity as the Next of Kin and the First person entitled to take out the Letters of Administration Grant in the 1st Defendant's Estate of Eroni Baleiwai Mavoia.
- ii. Magistrates Court Bankruptcy Case No. 16 of 2018 - *Estate of Late Eroni Baleiwai Mavoia -v- Sitiveni Ligamamada Rabuka.*
- The Bankruptcy Notice was filed herein by the Plaintiff (Sitiveni Ligamamada Rabuka) in HBC 296 of 2017 and as the Judgment Creditor in Bankruptcy Case No. 16 of 2018 after he successfully obtained a Default Judgment against the Estate of Late Eroni Baleiwai Mavoia for the sum of \$187,967.64.
 - The Applicant, Emmaline Bui Mavoia filed an interlocutory Motion seeking various orders in this matter.
 - The Ruling in the matter was delivered on 30th January, 2019.
- [13] I find that both the abovementioned cases **Civil Case No. HBC 296 of 2017** and **Bankruptcy Case No. 16 of 2018** have a **nexus** with the current pending Appeal before this Court.
- [14] The Plaintiff proceeded with a **Bankruptcy Action** in the Magistrate's Court on the basis of obtaining the **Default Judgment** in **HBC 296 of 2017** against the Applicant's late husband's Deceased Estate on 6th April 2018 and hence is seeking the recovery of the **Judgment sum** of **\$187,967.94** accordingly.
- [15] I reiterate that the deceased late Eroni Mavoia executed a Will appointing his wife Emmaline Mavoia as the Executrix and Trustee of his Estate. Since the demise of Eroni Mavoia, the wife Emmaline Mavoia had no intention whatsoever to file an application in the Principal Probate Registry and seek a Grant of Probate in the deceased husband's Estate.
- [16] The Petitioner (Judgment Creditor) has filed civil proceedings in the High Court HBC 296 of 2017 seeking recovery of a sum of \$187,967.64 from the Estate of late Eroni Mavoia (1st Defendant) and Emmaline Mavoia (2nd Defendant). Judgment by Default was entered against the Estate of late Eroni Mavoia and the action is still impending against Emmaline Mavoia awaiting Court's decision.
- [17] Subsequently, Bankruptcy Petition was filed in the Magistrates' Court by the Petitioner (Judgment Creditor) on the basis of the Judgment by Default obtained by him against the Estate of the late Eroni Mavoia only. However, the Petitioner (Judgment Creditor) also joined the name of the deceased's wife Emmaline Mavoia to the Bankruptcy proceedings. Since she was not the appointed Executor/Trustee or Administrator of the deceased's Estate, she had no locus standi in the proceedings until and unless appointed as the Executor/Trustee or Administrator of the deceased's Estate.

[18] The Notice of Motion filed by Emmaline Mavoia apart from other orders sought for an specific order to strike out her name from the Bankruptcy Action. Whether the Learned Chief Magistrate was correct in granting the orders on the Notice of Motion in particular that the Bankruptcy Petition against Emmaline Mavoia as Executor and Trustee of the Deceased Estate be dismissed?. Hence, the current Appeal before the Court for determination.

Grounds 1 and 4

[19] **Grounds 1 and 4** can be dealt with in consolidation since it deals with misinterpretation and misapplication of **Section 8** of the **Succession Probate and Administration Act** and that the request for Bankruptcy sought against Emmaline Mavoia as the Executrix of the Estate is wrong in fact and in law and must be withdrawn against Stay.

- The Appellants contention is that the learned Chief Magistrate misinterpreted and mis-applied Section 8 of the Succession Probate and Administration Act, and its legal effect which prejudiced the Appellant.
- The learned Chief Magistrate erred in law by failing to hold that on the proper construction of the words - "*Pending the grant of probate of a Will...*" means that an application for probate of a Will should or must have been commenced and is pending before the Court awaiting its decision.
- The fact is no application for Probate has been commenced by the Applicant Emmaline Mavoia. Therefore, there is no grant of Probate in process and pending before the Court. The Magistrates' Court failed to consider the Appellants submission that Section 8 of the Succession Probate and Administration Act is inapplicable to the Applicant's Motion and her reliance on this section is misconceived.
- The Fiji Public Trustee Corporation Limited is not named as a party in the High Court Civil Case No. HBC 296 of 2017.
- That the Estate of Judgment Debtor is not vested in Fiji Public Trustee Corporation Limited.
- The Estate of late Eroni Baleiwai Mavoia remains vested in Executor/Trustee Emmaline Mavoia in the deceased's Will.
- The Emmaline Mavoia's reliance on Section 21(1) of the Bankruptcy Act is misconceived. The Estate of late Eroni Mavoia currently has a Default Judgment against it. The Estate has not yet been ordered or adjudged bankrupt by the Court.
- That Emmaline Mavoia's intention is not to apply for grant of Probate in the deceased's Estate.

However;

- Counsel representing the Respondent Emmaline Mavoia submitted that the learned Chief Magistrate did not err in law in his application of Section 8 of the Succession Probate and Administration Act.
- It is correct that Emmaline Mavoia has not filed any application for Probate nor initiated any process for the application for a grant of Probate in the Respondent's Estate.
- Section 8 of the Succession Probate and Administration Act is the proper provision that provides for the services of notices and proceedings to the Public Trustee pending the grant of Probate. In the current matter, it continues to be the position of Emmaline Mavoia that Public Trustee is the appropriate person to accept service of notices and proceedings for the Estate of the late Eroni Mavoia and not Emmaline Mavoia.

- Order 15 Rule 7 of the High Court Rules 1988 deals with the procedure for commencing suites against a deceased person. Under **Rule 7(4) the Court** has the power to appoint the Public Trustee. In this matter, the Trustee that is being referred to seeking request for Bankruptcy Notice is one who is appointed by the High Court for an Estate matter. For the Judgment Debtor there is no Letters of Administration or Probate issued by the High Court to confirm who the Trustee of the Estate of the Judgment Debtor is. Instead the Appellant without any proper legal basis inserted the name of Emmaline Mavoia into the other Bankruptcy documents.
- The basis of the Bankruptcy Action by the Judgment Creditor is the Default Judgment that his lawyers took out against the Judgment Debtor in HBC 296 of 2017. Emmaline Mavoia is the 2nd Defendant in HBC 296 of 2017.
- Default Judgment was only entered against the Estate of the late Eroni Mavoia and not against Emmaline Mavoia.

[20] Reference is made to **Section 8 of the Succession Probate and Administration Act** which provides as follows-

"Pending grant estate to vest in Public Trustee"

8. Pending the grant of probate of a will or administration of the estate of an intestate, the real and personal estate of a deceased person shall, without any charge being leviable therefore, vest in the Public Trustee for the purpose of accepting service of notices and proceedings and acting as nominal defendant."

[21] **Section 9 of the Succession Probate and Administration Act** provides -

" Upon grant of probate or administration property to vest"

9. that upon the grant of probate or administration, all property of which a deceased person dies possessed, or entitled to, in Fiji shall, as from the death of such person, pass to and become vested in the executor to whom probate has been granted, or administrator for all the estate and interest of the deceased therein, in the manner following, that is to say-

- (a) on testacy or on partial intestacy, in the executor or administrator with the will annexed; and*
- (b) on intestacy, in the administrator.*

[22] Whereas, **Section 26 of the Act** provides-

In case of renunciation or failure to take probate, right of executor gone"

26. Where an executor renounces probate of the will, or dies without having taken probate, or where, being personally cited to take probate, he does not appear to such citation, the right of such executor in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his estate shall go, devolve and be committed in like manner as if such person had not been appointed executor.

[23] From the provisions of **Section 8** of the law, it is very specific and can be ascertained that the purpose of the provision is to nominate some person who can be served with proceedings brought against the Estate, during the timeframe when no Executor or Administrator has been formally appointed by the Court. **Section 9** deals with grant of probate or administration, all property of which a deceased person dies possessed, or entitled to, in Fiji shall, as from the death of such person, pass to and become vested in the executor to whom probate has been granted, or administrator for all the estate and interest of the deceased therein, **Section 26** hereinabove deals with the Renunciation of Probate accordingly.

- [24] In the deceased's Estate of late Eroni Baleiwai Mavoa, no doubt and it is not disputed that the deceased left behind a Will appointing his wife Emmaline Mavoa as the Executrix and Trustee of his Estate.
- [25] However, the Executrix/Trustee, Emmaline Mavoa has never made or has intended to make an application in the deceased's Estate seeking for a Probate Grant. Hence, a Probate Grant is yet to be issued in the late husband's Estate.
- [26] Further, the Judgment by Default in the impending *High Court Civil Action No. HBC 296 of 2017* was entered against the Estate of the late Eroni Mavoa (1st Defendant) and no Default Judgment or otherwise was entered against Emmaline Mavoa named as the 2nd Defendant in the abovementioned case.
- [27] Therefore, since there is no grant of Probate sought or any application pending in the Principle Probate Registry seeking for a Probate Grant in the deceased's Estate, the provisions of Section 8 of the Succession Probate and Administration Act comes into play and provides that the services of notices and any proceedings in the deceased's Estate to be referred to the Public Trustee instead and not to Emmaline Mavoa the Executrix/Trustee named in the deceased's Will.
- [28] I also make reference to *Order 15 Rule 7(1) of the High Court Rules 1988* which deals with Proceedings against Estates and provides that **where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.**
- [29] It is also noted that the pending High Court Civil Action No. HBC 296 of 2017 is still pending determination of the issue against the 2nd Defendant, Emmaline Mavoa sued by the Judgment Creditor as the next of kin and the 1st person entitled to rake out the Letters of the Administration in the 1st Defendant's Estate.
- [30] I find that the Learned Chief Magistrate in his Ruling of 30th of January 2019 correctly interpreted and applied the principles of *Section 8 of the Succession Probate and Administration Act* accordingly. Hence, the Petitioner's 1st ground of Appeal fails and is hereby declined.

Grounds 2 and 3

- [31] **Grounds 2 and 3** can also be dealt with in consolidation in terms of the misjoinder in the proceedings and in terms of *Order VIII Rule 5(2) of the Magistrates Court Rules* and the status quo in High Court Civil Action HBC 296 of 2017.
- [32] The Appellant's contention is that the Chief Magistrate erred in failing to properly consider that Emmaline Mavoa styled in the High Court Civil Action HBC 296 of 2017 as the first person and next of kin entitled to take out Letters of Administration of the Judgment Debtor, is also the same person named as the Executor/Trustee of her late husband's Will. He did not fully consider the case authorities submitted by the Appellant that stated that the Trustee can carry out most of the functions of the office prior to any grant of Probate.
- [33] Further, the Magistrates' Court erred in its interpretation that Emmaline Mavoa as the named Executor/Trustee in her husband's Will to be different in capacity from her being styled as the first

person and next of kin entitled to take out Letters of Administration of the Judgment Debtor in the High Court Civil Action HBC 296 of 2017.

- [34] The capacity and function of both roles as personal representative of the Estate of the Judgment Debtor is the same and in essence there is no difference in capacity other than that the Trustee's authority is from the Will while that of Letters of Administration from the Court's. Hence, there is no misjoinder nor a need to substitute a party, as Emmaline Mavoia whose role as personal representative of the Estate of the Judgment Debtor remains the same whether as Executor/Trustee or with Letters of Administration.
- [35] The Chief Magistrate erred in not considering that the Appellant's right of relief for debt recovery and cause of action against the Applicant, Emmaline Mavoia as the person entitled to take out Letters of Administration or as the named Trustee of her husband's Will remains the same.
- [36] Further, there is no evidence of Probate granted to Emmaline Mavoia even though the Will is deposited and therefore status quo remains as it stood before the High Court in HBC 296 of 2017.

However,

- Counsel representing Emmaline Mavoia submitted that the Chief Magistrate did not err and nor did he fail to properly consider that Emmaline Mavoia qualifies under the Succession Probate and Administration Act as the first person and next of kin entitled to take out Letters of Administration of the Judgment Debtor and is styled as such in the High Court Civil Action Number 296 of 2017, is also the same person named as the Executor/Trustee of her late husband's Will.
 - Counsel submitted that it was not the duty of the Chief Magistrate in the Bankruptcy matter to qualify Emmaline Mavoia as the first person and next of kin entitled to take out Letters of Administration.
 - The Notice of Motion before the Chief Magistrate specifically sought for an Order that the name of Emmaline Mavoia as the Executor and Trustee for the Judgment Debtor be removed from the Bankruptcy Petition filed on 14th May 2018 and the request for Bankruptcy Notice filed on 22nd May 2018 in Bankruptcy Action Number 16 of 2018 be dismissed for irregularity and abuse of the process. The Jurisdiction to affirm or qualify a person to be the Executor/Trustee or Administrator lies only with the High Court.
 - The Chief Magistrate in his Judgment highlighted his powers in terms of Order VIII Rule 5(2) to strike out the name of any party if there has been a misjoinder in the proceedings.
 - The basis of the Bankruptcy Action by the Judgment Creditor is the Default Judgment obtained against the Judgment Debtor (Defendant 1) in High Court Civil Action HBC 296 of 2017. Ms Emmaline Mavoia is the 2nd Defendant in the High Court Action HBC 296 of 2017.
 - Emmaline Mavoia's name should have not been put in the request for Bankruptcy Notice by the Judgment Creditor as she is not and has never represented herself to be the Trustee of the Estate of the Judgment Debtor.
 - Subsequent to the Ruling of the Chief Magistrate of 30th January 2019, the Judgment Creditor on 30th April 2019 filed an Application in HBC 296 of 2017 to change the particulars for the 2nd Defendant Emmaline Mavoia from its current reference of next of kin and the person entitled to take out the Letters of Administration of the 1st Defendant, to their proposed Trustee and Executor for the 1st Defendant in terms of the deceased's Will. The proposed amendment was not granted by the Court.
 - While it is correct that the Will of the Judgment Debtor appoints Emmaline Mavoia as the Executor/Trustee, Emmaline Mavoia has expressed that she had not intention of assuming the role of the Executor/Trustee in the deceased's Estate.
- [37] Parties are well aware that the Petitioner (Judgment Creditor) has commenced civil proceedings in the High Court against the Estate of the late Eroni Mavoia and Emmaline Mavoia seeking recovery of \$187,967.64.

- [38] The Plaintiff succeeded in obtaining Default Judgment against the Estate of late Eroni Mavo as the 1st Defendant in HBC 296 of 2017. However, the matter against Emmaline Mavo as the 2nd Defendant although has been heard by the Honourable Court but is awaiting delivery of the Judgment of the Court.
- [39] Subsequently, the Petitioner (Judgment Creditor) proceeded with a Bankruptcy Petition Action in the Magistrates' Court on the basis of obtaining Judgment by Default against the Estate of late Eroni Mavo (1st Defendant) in HBC 296 of 2017.
- [40] *Order VIII Rule 5(2) of the Magistrates' Court Rules* empowers the Court to strike out the name of any party if there has been a misjoinder in the proceedings and this is available at any stage of the proceedings.
- [41] I find that the learned Chief Magistrate quite rightly applied the principles within the provisions of *Order VIII Rule 5(2) of the Magistrates' Court Rules* and found that there is no evidence that Emmaline Mavo has been granted Probate over the Estate of late Eroni Mavo, and even though the Will has been deposited there is no subsequent action to take out Letters of Administration or Probate Grant and therefore the status quo remains from the situation as it stood before the High Court in HBC 296 of 2017. The Chief Magistrate ruled that the Motion therefore succeeded and the request for Bankruptcy against Emmaline Mavo as the Executor of the Estate is wrong in fact and in law and be withdrawn against her and accordingly dismissed the Bankruptcy Petition against Emmaline Mavo.
- [42] For the aforesaid rationale, the Petitioner's grounds 2 and 3 fails and is accordingly declined.
- [43] In conclusion, grounds 1, 2, 3 and 4 are accordingly declined and dismissed.
- [44] Further, since the Appeal proceeded for Hearing, it is only appropriate that a summarily assessed costs of \$650 should be paid to Emmaline Mavo by the Petitioner (Judgment Creditor).

ORDERS

- (i) Grounds of Appeal 1, 2, 3 and 4 are declined and accordingly dismissed.
- (ii) The Petitioner (Judgment Creditor) to pay Emmaline Mavo a summarily assessed cost of \$650.

DATED at SUVA this 29th DAY of JUNE, 2020.



VISHWA DATT SHARMA
JUDGE
SUVA

cc. Law Solutions, Suva.
Estate of Late Eroni Baleiwai Mavo.
Shekinah Law, Suva.