IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.HPP 90 of 2021

IN THE MATTER OF IN THE ESTATE OF KANIL SINGH late of 111 Mead Raod, Suva Cook, Deceased, Testate.

AND

IN THE MATTER of an application by **BIMAL SINGH** pursuant to Section 6 of the Wills Act and Section 6A of the Wills (Amendment) Act

Counsel : **Appellant Ms.Dutt. S**
Date of Hearing : **04.04.2022**
Date of Judgment : **27.04.2022**

JUDGMENT

INTRODUCTION

1. This is an appeal from Master's decision delivered on 21.1.2022 refusing to admit a document as last will. This action was instituted by way of *ex parte* originating summons by Appellant (Applicant). Originating summons was filed pursuant to Section 5 of Wills (Amendment) Act 2004 and, Rule 54 of Non Contentious Probate Rules 1987. Applicant had not proved to the satisfaction of court to admit the document as last will of deceased. Master had failed to consider provisions contained is Section 6A of Wills Act 1972 and also Rule 54 of Non Contentious Probate Rules 1987. It is prudent to notify parties who are prejudiced by the orders sought, who are two sisters of Applicant. They may also be allowed to file affidavits if necessary with suitable directions to make them parties if needed. Rule 54 of Non Contentious Probate Rules 1987, allows Master a discretion to notify parties that are prejudiced by order sought and also call for additional evidence at the discretion of Master. Master's decision to dismiss the originating summons is set aside

and this matter is to be re heard with notice to two sisters of Applicant in terms of Rule 54(4) of Non Contentious Probate Rules 1987.

FACTS

2. *Ex parte* originating summons filed by Applicant was supported by an affidavit sought a declaration that document dated 23.7.2004 be last will of and testament of late Kanil Singh and he died testate.

3. Applicant requested him be granted a Letter of Administration with will annexed.

4. Applicant in the affidavit in support stated:

    a. He is a son of late Kanil Singh who died on 17.4.2019.
    b. A copy of intended last will of his father dated 23.7.2004 is annexed.
    c. Intended last will had appointed Applicant and his late mother as executors and trustees.
    d. Beneficiaries of last will are three sons of deceased.
    e. Intended last will was witnessed by two witnesses.
    f. The last will was prepared by a law firm that had ceased operation
    g. Original of last will could not be located and inquiries were made to public trustee and also from Registry of High Court
    h. The document annexed is the only evidence of last will and it contained last wishes of testator.

5. Master had requested further evidence as to why a witness to the intended last will cannot be located, by way of supplementary evidence.

6. The supplementary affidavit filed on 29.12.2021 had annexed a scanned copy of affidavit of Applicant which stated

    a. One of the witnesses to intended last will was Ms Artika Prasad but had no recollection of such an event due to lapse of seventeen years and the email communication to that effect was filed.
    b. The other witness had migrated to Australia.

7. Master had delivered judgment on 21.01.2022 refusing the application to admit the document annexed to affidavit in support dated 23.7.2004.

8. Master held, that there was no signatures of the testator and witnesses, on the intended last will annexed.

9. Master further held

> "With the evidence before me, I cannot make a finding that the document could be admitted for proof for a grant"

10. Being aggrieved by said decision of Master Applicant appealed on following grounds;

> "1. That the Learned Acting Master of the High Court erred in law and /in fact when she held that there was no evidence that one of the witnesses to the document, Ms Artika Prasad was shown or was a witness to original Will. With reference to email of Ms Artika Prasad dated 14 December 2021, submitted in the Supplementary Affidavit of the Applicant filed on 29.12.2021, her statement clearly indicates her confirmation that she was witness to the Will.
>
> 2. That the Acting Master of the High Court erred in law and /or in fact when she held that there was no evidence that Ms Artika Prasad was shown the purported document. As above, with reference to the email of Ms.Artika Prasad dated 24 December 2021 submitted in the abovementioned supplementary affidavit of the Applicant, she had contacted one of the other witnesses of the Will, Ms. Usha Rajendra who confirmed the identity of the Testator, and that he was known to her.
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> 3. Learned Master of High Court erred in law and in fact not considering the evidence of both stated witnesses of the Will, Ms Artika Prasad and Ms. Usha Rajendra in the emails submitted in the supplementary Affidavit of the Applicant. The Learned Acting Master failed to consider both evidence together in ruling upon the witnessing of the testator's signature."

ANALYSIS

11. Originating summons was made in terms of Section 5 of Wills (Amendment) Act 2004. This is Section 6 A of Wills Act 1972 which reads,

> "*Court may declare a document to be a will*
>
> **6A.-**(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under section 6, constitutes a will of the deceased person **if the Court is satisfied that the deceased person intended the document to constitute his or her will.**
>
> (2) The Court may, **in forming its view**, have regard, **in addition to the document**, to **any other evidence relating to the manner of execution or testamentary intentions** of the deceased person, including evidence, whether admissible before

or after the commencement of this section, of statements made by the deceased person.

(3) **A party that seeks a declaration under this section has the onus of proof."** (emphasis added)

12. From the above provision of law it is clear a document that had not complied with some of the requirement of as laid out in Section 6 of Wills Act 1972 can be declared by court.

13. The burden of proof is with the Applicant to prove on balance of probability that document annexed to affidavit in support is the last will of deceased.

14. In my mind application of Section 6A of Wills Act 1972, cannot be done by ex parte originating summons. This provision can be applied after oral evidence is taken to that effect in a 'probate action'. (i.e contentious business)

15. Even if I am wrong on the above the Section 6A of Wills Act 1972 cannot be applied to a document that lacked basic evidence as to how the Applicant obtained that document. This is more fundamental fact to proof of that document as a copy of last will.

16. Applicant's affidavit had not revealed why a document without signatures be considered a copy of the last Will.

17. In order to satisfy the court that document which lacked requirements in terms of Section 6 of Wills Act 1972, Applicant may produce following evidence

    a. The Document (intended Will).
    b. Other evidence as to the manner of execution.
    c. Evidence regarding testamentary intensions of deceased.
    d. Statements made by deceased.

18. Applicant had annexed intended last will, but had failed to state the circumstances that led to discovery of such a document and why such a document to be considered as a 'copy'. This document lacked signature of testator or witnesses.

19. There were emails from both witnesses attached to the affidavit but strangely no affidavit was obtained from any of the witnesses to the intended will.

20. The emails attached to the supplementary affidavit of Applicant revealed as follows;

i. Witness Artika had stated she can't remember execution or deceased due to lapse of seventeen years. She had stated that she had left law firm in 2005 and at that time all last wills were in security safe and there was a register.

ii. Witness Usha had stated that she was aware of deceased, and original will could be with W.M.Scott or deceased could have taken it. She further stated that there was a register of last wills and another name was suggested to obtain more information.

21. There is no evidence of as to the inquiry of the name suggested in the said email or from Mr. W.M.Scott as to what happened to the registry and last wills when the firm ceased its operations in Fiji.

22. Appeal Ground 1 is incorrect. At no stage had Ms.Artika confirmed her signature on the document. There was no evidence that she was shown or emailed a scanned copy of indented document. Since it had no signatures of witnesses but only their names it is wrong to state that Ms Artika had confirmed being a witness. Master had held that there was no evidence of intended last will shown to both witnesses.

23. Appeal Ground 2 is again a wrong position on available evidence. The fact that Ms Artika had contacted other witness to the document had not proven that either of them had seen the documents filed in court. This is a mere conjecture.

24. Appeal Ground 3 is Master had failed to consider the email of Usha. This email only confirms that she knew the deceased and not the execution of intended last will that is annexed to this originating summons. Usha had not confirmed that she signed the intended last will.

25. The burden was with Applicant to satisfy the court that document annexed was last will of deceased.

26. Halsbury's Laws of England "686. Distinction between non-contentious and contentious business." stated[1],

> "**Probate business is divided into non-contentious** or common form business, and **contentious business.** Common form business consists of the obtaining of grants

[1] Wills and Intestacy (Volume 102 (2021), paras 1–566; Volume 103 (2021), paras 567–1304) - 9. The Grant of Probate or Administration - (1) The High Court > (i) Jurisdiction Distinction between non-contentious and contentious business

of probate and letters of administration where there is no contention as to the right to obtain them, including the passing of probates and administrations through the court in contentious cases when the contest is terminated, and all business of a non-contentious nature in matters of testacy and intestacy, not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration. All other business of the court, except the warning of caveats, is contentious" (emphasis is mine) (foot note deleted)

27. Accordingly, ex parte originating summons, is a Non-contentious or common form business. So there was a requirement for Master to consider Rule 54 of Non Contentious Probate Rules 1987 and this was mentioned in the said summons, but this was not done.

28. Originating summons was relying on Rule 54 of Non Contentious Probate Rules 1987 which reads;

> "54(1) Subject to paragraph (2) below, an application for an order admitting to proof a nuncupative will, or a **will contained in a copy** or reconstruction thereof where the **original is not available**, shall be made to a registrar.
>
> (2) In any case where a will is not available owing to its being retained in the custody of a foreign court or official, a duly authenticated copy of the will may be admitted to proof without the order referred to in paragraph(1) above.
>
> (3) An application under paragraph (1) above shall be supported by an **affidavit setting out the grounds of the application, and by such evidence on affidavit** as the applicant can adduce as to
>
> (a) the will's existence after the death of the testator **or** , where there is no such evidence, the facts on which the applicant relies to **rebut the presumption that the will has been revoked by destruction.**
>
> (b) in respect of a nuncupative will, the contents of that will; and
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> (c) in respect of a reconstruction of a will, the accuracy of that reconstruction.
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> (4) The registrar **may** require **additional evidence** in the circumstances of a particular case as to **due execution** of the will or as to **the accuracy of the copy will**, and **may direct** that notice be given to persons who would be prejudiced by the applicator."(Emphasis added)

29. Order 59 rule 1 of High Court Rules 1988 states

> 'Master may exercise powers of the Registrar (O.59, r.1)

1. The jurisdiction conferred on the Registrar under these Rules may be exercised by the Master.

30. Order 59 rule 1 of High Court Rules 1988, should be read with Order 32 rule 9 and Order 1 rule 11 of High Court Rules 1988. Master's jurisdiction see *(see Robert Yang and Alfred Yang & Crown Cork (Fiji) Limited v Fiji Development Bank & Hasmukh Bhai Patel and H.D's Garment Workshop Limited* [2010] HBC 407/00L 30 September 2010).

31. Firstly, when there is no original last will or evidence of existence of such cannot be found there is a presumption that it had been destroyed or revoked. Destruction of last will by testator can also be considered as revocation of it. This is an evidential presumption that can be rebutted with sufficient evidence.

32. Rule 54 (3)(a) Non Contentious Probate Rules 1987 recognized the presumption that the will was revoked or destroyed by testator, if there were no evidence to prove that the last will existed after death of deceased. The usual practice is that testator is given one original of last will while law firm may retain another.

33. Halsbury's Laws of England p 108. **Presumption of intention**[2], stated

> "Similarly, if a will was last traced to the possession of the testator and is not forthcoming at his death, there is a prima facie presumption, in the absence of circumstances tending to a contrary conclusion, that the testator destroyed it with the intention to revoke it. The presumption may be rebutted by evidence, which, however, must be clear and satisfactory."

34. In this case there is no evidence of existence of original last will after death of deceased. Hence, the presumption of last will was destroyed or revoked applied.

35. Applicant needed to adduce evidence to rebut the presumption. This had not been done by Applicant.

36. Applicant had not adduced evidence by way of an affidavit, as to the practice of law firm though some sketchy evidence is produced through email correspondence between Ms Artika and Ms Usaha and also between emails from law firm and Ms Artika.

37. Either Artika or Usha had not provided a sworn affidavit.

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[2] (Wills and Intestacy (Volume 102 (2021), paras 1–566; Volume 103 (2021), paras 567–1304) - 1. Testamentary Disposition (7) Revocation of Will (iii) Voluntary Revocation c. Revocation by Destruction)

38. Master could not rely on email correspondence between two witnesses to admit the intended last will.

39. Applicant had not attempted to adduce evidence in terms of Rule 54(3)(a) Non Contentious Probate Rules 1987 at all. This was a mandatory requirement when original will cannot be found after the death.

40. Apart from that Applicant had failed to adduce sufficient evidence to prove the execution of last will, as held by Master.

41. There is a discretion grated to Master in terms of Rule 54(4) Non Contentious Probate Rules 1987 to give notice to parties prejudiced by this application.

42. According to death certificate of deceased there were five issues and deceased had not mentioned the names of two issues in the intended last will, and this creates some doubt and these two parties being prejudiced by this application.

43. At the same time Applicant had made this application on *ex parte* basis without making these two parties that were left out from intended will.

44. There was no evidence of them being informed about the this application and or existence of intended last will and more specifically they being left out. These are not essential in a properly executed will when the original is found, but when the intended will was without even any signatures such notice is needed .

45. Apart from that one of the executors of the last will had preceded testator and more than fifteen years had lapsed from date of execution of the intended last will and demise of testator. These are factors sufficient to exercise discretion granted in Rule 54(4) of Non Contentious Probate Rules 1987. In my mind, non-consideration of these facts are sufficient to set aside the order of Master to dismiss this application.

46. If the orders sought are granted on *ex parte* it will prejudice two issues. In the exercise of prudence these two issues should have been made parties to this action instead of making this an *ex parte* application. Since it was not done, Master may request notice being served to such parties, and this was not done.

47. There was a discretion left with Master in terms of Rule 54(4) of Non Contentious Probate Rules 1987 to notify. Master had not considered this provision in her judgment. So this matter should be re-heard by Master with notice to two siblings of Applicant who were left out from the intended last will. They are Kartika Kreshma Singh and Shaadna Devi in terms

of death certificate of deceased. They were both living at the time of death as per the death certificate of the testator of intended last will.

48. Applicant is directed to take all necessary and prudent steps to notify them of this action trough courts directions.

49. Apart from that Master can direct any additional evidence from Applicant exercising the discretion granted in Rule 54(4) of Non Contentious Probate Rules 1987 and may consider this decision as guidance for such directions.

50. Master's decision, that there was no evidence to make a finding that annexed document could be admitted to proof for a grant, was taken before exercising discretion granted in Rule 54(4) of Non Contentious Probate Rules 1987.

51. For the reasons given Master's decision to dismiss the originating summons is set aside. This matter is to be re heard with due regard to Rule 54 of Non Contentious Probate Rules 1987 after issuance of notice to Kartika Kreshma Singh and Shaadna Devi. Applicant is directed to provide assistance in this regard as directed by Master.

FINAL ORDER

a. Master's decision to dismiss the application is set aside.
b. This matter is remitted for re- hearing after giving notice to parties who are prejudiced by this application namely Kartika Kreshma Singh and Shaadna Devi and affidavit of them be filed.
c. No costs.

Dated at Suva this 27th day of April, 2022.

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Justice Deepthi Amaratunga
High Court, Suva