

IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

Probate Action No. HPP 100 of 2021

**IN THE MATTER of PART V of Succession and Probate and Administration Act No 20 of
1970**

BETWEEN

MAVILEKO TOLOI of 12 Fernbird Place, Massey, Auckland, New Zealand and

EMORI TUINAOSARA TOLOI of Navoli, Ba.

PLAINTIFFS

AND

AME ROKOTUIBAU TOLOI also known as WAME TOLOI of 53 Votua Road, Suva.

DEFENDANT

Counsel : Mr. V. Faktaufon with Ms. Z. Ali for Plaintiffs
Defendant in person
Date of Hearing : 17th February 2023
Date of Judgment : 03rd August 2023

JUDGMENT

[1] The Plaintiffs filed this originating summons seeking the following orders against the Defendant:

1. A declaration that the Defendant has failed to administer the deceased's estate and obtained grant of probate for the same 23 years since the demise of the deceased.
2. A declaration that the Defendant renounces his duties as the Executor and Trustee named in the Last Will of the Deceased deposited on 08.09.1987.
3. An Order for the Plaintiffs and their power of Attorney holders be appointed as joint Administrators in the Estate of the Deceased.
4. An Order that the Beneficiaries to the Estate of the Deceased have their interests registered on the property described in NL 14465.
5. An Order that the Defendant compensate the Plaintiffs for all equitable contributions and expenses to the property and its maintenance in the sum of \$31,518.
6. An Order for the expenses of conducting the above be borne by the Defendant.
7. For such further cost and any other Orders which the Court deems just.

[2] Both Plaintiffs and the Defendant are siblings. The Defendant and other sibling, Orisi Tolo were named Executors and Trustees of the Deceased's Estate pursuant to the Last Will dated 08.09.1987. The Deceased passed away in Labasa on 08.02.1997. Orisi Tolo also

passed away on 27.02.2000 leaving the Defendant as the sole Executor and Trustee to the Deceased's Estate.

- [3] The Testator in his Last Will allocated equal shares of his property to five beneficiaries and his widow to occupy the dwelling on the Native Lease land 14465 as long as she remains in that status. She continued to live in the property until she died in 2010.
- [4] The Plaintiffs state that in the last 23 years Deceased's estate had remained un-administered. And the Defendant has failed to maintain the properties of the estate.
- [5] The Defendant states that he never knew that he was named as one of the Executors of the deceased's Last Will until he was informed by the first named Plaintiff in late October 1997. It was a time where he was preparing to migrate to South Africa. The Defendant states that he was not shown the original Will nor a copy of it. The Defendant states that he received a copy of the Will in 2015 and immediately engaged Naco Chambers professional services in order to obtain the Probate Grant.
- [6] The Defendant returned to Fiji in 2019 and in 2020 he has found that Naco Chambers had not secured the Probate despite making necessary payments. A complaint had been lodged with the Legal Practitioners' Unit, the professional body responsible for discipline matters of the Legal Practitioners, and Probate No. 66413 was obtained on 05.10.2020.
- [7] The Defendant states that the Plaintiffs who have equal shares as beneficiaries in their late father's Will are now attempting to usurp his lawful role as the Executor and Trustee to administer the property as directed by the Probate No. 66413.
- [8] The Defendant further states that in 2018 without his prior consent the first named Plaintiff renovated the property and rented out. All rental proceeds since 2018 have been received by the daughter and son in law of the first Plaintiff. In 2019 the Defendant was

informed by the tenant that she had been instructed by the first Plaintiff and her daughter to chase him out of the property should there be an attempt to enter into the property.

[9] The Defendant avers that he may be allowed to continue with the executorship and proposes his willingness to consult with the Plaintiffs in order to disposing off the property by sale.

[10] Section 31 of the **Succession, Probate and Administration Act** which provides (inter alia):
"Where an executor neglects to apply for or to renounce probate within 6 months from the death of the testator ... or where an executor is unknown or cannot be found, the court may, upon the application of any person interested in the estate, ... grant administration with the will annexed to the applicant, and such administration may be limited as the court thinks fit.

[11] The Court also has power to remove an executor under Section 35 of the **Succession, Probate and Administration Act** where it states:

"The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

(a) make an order removing any executor of the will of such deceased person from office as such executor and revoking any grant of probate already made to him or her;

(b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and

(c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and

(d) make such further or consequential orders as it may consider necessary in the circumstances".

- [12] Accordingly the High Court has been granted the discretion “for any reason which appears to it to be sufficient” to make an order removing any executor of the Will and revoking a grant of probate already made to him, and by the same or subsequent order to appoint an administrator.
- [13] Order 85 of the **High Court Rules 1988** refers to an administration action; meaning an action for administration under the direction of the court of the estate of the deceased or for execution under the direction of the court of a trust. A beneficiary is entitled to bring an administration action in respect of the estate of a deceased. All persons having a beneficial interest in or claim against the estate need not be made parties to the action.
- [14] In an administration action, the Court can grant relief to which a plaintiff may be entitled to by reason of any breach of trust, wilful default or other misconduct of the defendant “notwithstanding that the action was begun by originating summons”. This rule permits an administration action initiated by originating summons on those limited grounds without prejudice to the power of the court to make an order under Order 28 Rule 8 of the High Court Rules. The defendant in these situations would be an executor, administrator or trustee.
- [15] In **Nazim v Shah** [2014] FJHC 218 Hon. Justice Tuilevuka discussed the nature of the Court’s jurisdiction under section 35 to remove an executor and appoint an administrator with Will annexed. His Lordship stated “as to the statutory discretion conferred under Fiji’s section 35(a) and (b), in my view, the breadth and scope of these provisions must be contextualised against the Court’s “general supervisory powers in equity”. It is vital to note that the “general supervisory powers” that equity bestows upon this Court also imposes upon this Court a solemn duty to see that a trust or an estate is properly executed. In other words, the power of the Court to remove an executor and appoint an administrator with Will annexed, is ancillary to the Court’s principal duty to see that a trust or an estate is properly executed”.

[16] Lord Blackburn in the Privy Council case of **Letterstedt v Broers** [1884] 9 App Cas 371 stated “it seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

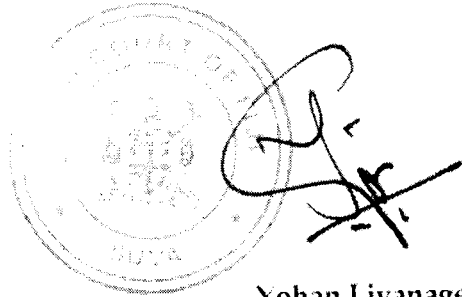
At page 387: In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependant on details often of great variety. But they proceed to look carefully into the circumstances of the case”.

[17] As stated earlier the case before me is between three siblings of the family. There were five siblings and one of them who was the other Executor and Trustee to the estate has passed away. From the affidavit evidence it is clear that there is some hostility between the parties. The Defendant states that the first named Plaintiff without his prior consent renovated the property in 2018. This was done in a background where the Defendant informed his intention to return to Fiji in 2019 and to renovate the same. The daughter and son in law of the first Plaintiff collected the rental income from the property since renovations in 2018.

- [18] Hostility between parties is not of itself sufficient reason to remove a trustee. However if there is positive evidence against the trustee on misconduct, it may not be difficult to justify the removal in light of the welfare of the beneficiaries.
- [19] The Court needs careful consideration on another aspect while giving its mind to the matters aforementioned. That is the wishes of the testator of his/her choice of the executor/trustee. Therefore when considering an application under section 35 of the Succession, Probate and Administration Act all factors discussed earlier should be given due consideration.
- [20] It is clear that the Defendant has delayed administration of his late father's estate. He states that it was initially due to not knowing whether he had been named as an executor. He received the copy of the Last Will in 2015. Thereafter the delay was mainly due to his absence from Fiji. Upon his return the Defendant had to fight another front due to the failure of his Solicitor to obtain the Probate Grant. I do not find grounds of misconduct in those averments of Defendant's affidavit.
- [21] On the other hand it appears that the first Plaintiff's daughter and son in law are gaining rental income of the estate property since 2018. Both Plaintiff's argument is that they are receiving rental income as a reimbursement of the expenses spent on renovations. This was not done by agreement with the current executor. Hence it would be difficult for the Court believe that the administration of the estate will be done in a fair manner in the event if Plaintiffs appointed as the trustees.
- [22] I am of the view that the Defendant should be allowed to attend to the administration of the estate swiftly due to the time that has lapsed since his father's death. The Defendant is responsible to safeguard the welfare of all beneficiaries. Accordingly Court makes following orders.

ORDERS

1. The Amended Originating Summons hereby dismissed.
2. Parties to bear their own costs.



Yohan Liyanage

JUDGE

At Suva on 03rd August 2023