

**IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION**

Civil Action No. HPP 104 of 2022

BETWEEN : **SEREMAIA SUVEINAKA** of Gaji Road, Samabula, Suva,
Unemployed.

PLAINTIFF

AND : **WAISAKE NUKUDUA KALOULIA** of Nabulini village,
Wainibuka.

DEFENDANT

Counsel: **Plaintiff:** Mr. Rainkanikoda. S
Defendant: Mr. Meru. E

Date of Hearing: 09. 10. 2023(8.30 am)

Date of Judgment: 09.10.2023(3pm)

JUDGMENT

INTRODUCTION

1. Applicant (Plaintiff) who was the sole beneficiary of his late mother's estate, had instituted this action to revoke letters of administration granted to Respondent (Defendant). Defendant is a brother of late Losena Tinairogosau Suveinaika (the Deceased). Plaintiff also seeks an order of the court to appoint him as the administrator.
2. Defendant had already disposed valuable assets of the estate of the Deceased but had not accounted for the proceeds and was not in a position even to state the assets that were disposed and the proceeds.

3. Plaintiff admits that he is having some difficulty in 'thinking' had signed 'some documents' where he had **transferred and assigned "all my claims shares and interest in the estate"** that he will become entitled. According to Plaintiff the contents of the said document was not explained to him. This document was filed as annexed 'D' to the affidavit in support.
4. Plaintiff had purportedly instituted this action on 2.9.2022 by way of Notice of Motion, in terms of Section 23 of Succession Probate and Administration Act 1970.
5. The revocation of letters of administration is a 'Probate Action' in terms of Order 76 rule 1(2) of High Court Rules 1988, which must begin by way of **writ of summons** in terms of Order 76 rule 2(1) of High Court Rules 1988. There is no provision to convert an action filed by way of 'Notice of Motion' and or purported 'Amended summons' to a writ of summons and it is inevitable that action is struck off.

Facts and Analysis

6. Plaintiff was the sole beneficiary of the estate of the Deceased, at the time of death of the Deceased, who was his mother according to birth certificate and death certificate. These facts are not disputed.
7. In paragraph 8 of the affidavit in support Plaintiff allege that he got involved in an accident and as a result, at some times **he is slow in his thinking** and the trauma of the accident still haunts him.
8. There was no psychiatric report filed by Plaintiff to state his state of mind or his present condition. He had sworn an affidavit in support for this application. When he had admitted that he is having difficulty in 'thinking', it would be essential to provide evidence of his mental status through a professional as to his capacity or seek appropriate orders if there is a need to appoint another person to institute an action.
9. Plaintiff admits that he had signed some documents upon request of Defendant who is an uncle of him, and the contents were not explained to him. One such document is marked as 'D' to the affidavit in support and this document was witnessed by Emali Koronawa, a barrister and solicitor. According to it the content was '**read over and explained**' and Plaintiff had '**appeared fully understand the meaning and effect**' of the contents. How a barrister and solicitor could assess mental status of Plaintiff who admit he has some abnormality in his mental status is not explained. According to Defendant, Plaintiff is 'intellectually challenged or slow'.
10. Defendants in the affidavit in opposition not denying the abnormal mental status and corroborate it in paragraph 5(a) and states;

“The Applicant is intellectually slow or challenged and he clearly admits this at paragraph 8.”

11. If so Defendant who relied on document marked ‘D’ to the affidavit in support to obtain letters of administration also needs to , explained how Plaintiff was made to understand content of the document marked ‘D’ where he had transferred and assigned all the rights of the estate of the Deceased.
12. According to said document marked ‘D’, Plaintiff had,

“... In consideration of Natural love and affection which I bear towards Waisake Nukudua Kaloulia.....the estate of Losania..... all claims shares and interest in the estate of the said Losania.... In favor of my uncle Waisake... and I do **hereby transfer and assign** to the said Waisake... absolutely all rights, titles and interests to which I may be entitled to in the said estate.”
13. Defendant had obtained the Letters of administration for the Estate on 18.8.2022 pursuant to said document marked ‘D’ to affidavit in support.
14. Plaintiff is seeking to revoke the “letters of administration No. 69881 granted to (Defendant) be revoked forthwith and granted to the Applicant”,
15. Removal of a grant of letters of administration is a ‘probate Action’ in terms of Order 76 rule 1 (2) of High Court Rules 1988.

“ In these Rules “probate action” means an action for the grant of probate of the will or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for decree pronouncing for or against the validity of alleged will , not being an action which is non –contentious or common form probate action”.
16. So this action was wrongly instituted by Plaintiff by Notice of Motion and needs to be struck off *in limine*.
17. This is different from removal of administrator appointed after a proper grant in terms of law, failing his duties as administrator and or trustee in terms of Trustee Act 1966. Plaintiff is disputing the grant of letters of administration to Defendant on a document he signed without knowing its content and or its effect. So the revocation of grant needs to be distinguished from removal of administrator for want of obligations of a trustee.
18. Even if I am wrong on the above, the crux of this matter is the validity of said document marked ‘D’ to affidavit in support. There are disputed facts as to its execution where Plaintiff allege that the contents were not explained. This document not only renounced right of Plaintiff to obtain letters of administration, but also all the rights and interests of the estate

of the Deceased were transferred and assigned to Defendant. Accordingly, Defendant becomes the sole beneficiary of the entire estate of the Deceased.

19. So the removal of Defendant in terms of Section 23 of Succession Probate and Administration Act 1970, upon a finding as to the validity of the document marked 'D' to the affidavit in support. It is sought a condition precedent to this application of Plaintiff in terms of Section 23 of Succession, Probate and Administration Act, 1970.
20. The facts are disputed as to the execution of the said document and if this action was instituted by way of originating summons it can be converted to writ of summons but Plaintiff instituted this action by way of 'Notice of Motion' which cannot be converted in terms of Order 28 rule 9(1) of High Court Rules 1988. Later on 18.11.2022 'Amended summons' was filed.
21. An action can be instituted in terms of Order 5 rule 1 of High Court Rules 1988, in following manner
 "...writ, originating summons, originating motion or petition."
22. From the above modes of institution of civil proceeding, originating summons can be converted to writ of summons in terms of Order 28 rule 9(1) of High Court Rules 1988.
23. In terms of Order 5 rule 5 of High Court Rules 1988
 'Proceedings may be begun by originating motion or petition if, **but only if**, by these Rules or by or under any Act the proceedings in question are required or authorized to be so begun.'
24. Plaintiff had not mentioned in his 'Notice of Motion', under which provision of High Court Rules or any other law which allowed institution of an action by 'Notice of Motion' or 'originating motion'. There is no provision to institute action by way of 'amended summons', after instituting action by way of 'Notice of Motion'. To file an amended summons there were no summons filed and this application was wrong from the start and was not cured though nearly one year had lapsed.

Conclusion

25. Plaintiff had purportedly instituted this action by way of "Notice of Motion". Later filed purported 'Amended Summons' in terms of Section 23 of Succession Probate and Administration Act 1970 for revocation of grant of letters of administration granted to Defendant and for fresh grant be issued to Plaintiff. The revocation of the grant of letters of administration is a probate action. It is mandatory for such action be instituted by way of writ of summons. As this action was not instituted by originating summons, it cannot be


be converted to writ of summons Notice of Motion is struck off. Considering circumstances of the case action no cost ordered.

Final Orders

- a. Notice of Motion filed struck off.
- b. No costs.

Dated at Suva this 09th day of October, 2023.




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Justice Deepthi Amaratunga
High Court, Suva