

IN THE HIGH COURT AT SUVA
CENTRAL DIVISION
CIVIL (PROBATE) JURISDICTION

HPP No.19 of 2022

IN THE ESTATE OF RAM KISSUN aka
RAM KISUN aka SURENDRA CHAND
RAM KISSUN AKA SUREND RAM
KISSUN late of Lot 6, Kalabo Stage 3A, in
the District of Nasinu in the Republic of Fiji,
Bus Driver, Deceased, Testate.

And

IN THE MATTER of an application by
JITENDRA KUMAR KISSUN aka
JITENDRA KUMAR KISSUN of 1/61a
Jane Cowie Avenue, Otahuhu, Auckland,
New Zealand as Applicant.

Date of Hearing : 11 January 2024
For the Applicant : Mr Nand S.
For the Respondent: In Person
Date of Decision : 7 March 2024
Before : Levaci, SLTTW Acting Puisne Judge

JUDGEMENT

(APPLICATION BY NOTICE OF MOTION FOR ADMISSION TO PROVE THE WILL)

PART A - BACKGROUND

1. The Plaintiff has filed an application seeking orders to admit to prove the Will No 164 dated 5th April 2005 of the Deceased **RAM KISSUN aka RAM KISUN aka SURENDRA CHAND RAM KISSUN aka SUREND RAM KUSSUN** late of Lot 6, Kalabo Stage 3A, in the District of Nasinu in the Republic of Fiji. The Applicant seeks the orders in accordance with Rule 53 of the Non-Contentious Probate Rules 1954 and the inherent jurisdiction of the Court.

2. On the date of Hearing on 25th August 2022, the Court delivered an **ex tempore ruling** that determined as follows:
 1. *The Applicant wishes to have copy will of the deceased admitted as proof.*
 2. *The deceased named in the application is Ram Kissun aka Ram Kisun aka Surendra Chand Ram Kisun aka Surend Ram Kissun.*
 3. *On Death Certificate (see supplementary affidavit filed on 13/6/22) the deceased is named as Ram Kissun. He passed away on 1 November 2007.*
 4. *The Will to be proved is for Ram Kissun.*
 5. *The testator appointed Sadhna Devi Kissun as Executor and Trustee bequeathed his property to his wife Rattan Kumari.*
 6. *Sadhna has relinquished all the rights and interests as Executor and Trustee. Renunciation signed is dated 28/12/21.*
 7. *Rattan Kumari has passed away on 16/12/21.*
 8. *Before I proceed to determine the application I find it proper that persons/issues/beneficiaries to the Estate of Rattan Kumari are made aware of this application and give consent to the application or state their objection.*
 9. *Thus the applicant is either to re-date the application and serve with affidavit on the 3 remaining issues apart from him and Sadna or get a written consent from them as a supplementary affidavit.*
 10. *Applicant is to also provide to this Court with copy grant for Estate of Ram Kumari.*

PART B: AFFIDAVITS

3. In Affidavit in Support, the First Applicant deposed as follows –

“1. THAT the Executrix and Trustee **SADHNA DEVI KISSUN** aka **SADHNA DEVI CHAND KISUN** aka **SADHNA DEVI CHAND MANI** named In Opposition, the Respondent filed an Affidavit as follows the Will of the deceased dated 5th April 2005 has relinquished all her rights and interest as Executrix and Trustee of the **Estate of RAM KISSUN aka RAM KISUN aka SURENDRA CHAND RAM KISSUN aka SUREND RAM KISSUN** and appointed me as the Executor and Trustee of the sad estate. A copy of the Renunciation of Administration is attached as Annexure “A.

2. THAT the said deceased executed his last Will and Testament on the 5th day of April, 2005 which said Will was duly executed with the Wills Act of Fiji. A copy of the said Will as annexure B”.

3. THAT the said Will dated 5th April, 205 was in existence and a copy was located after the death of the Testator.
4. THAT I am one of the lawful son of the testator and after the death of my father I discovered that my father died leaving a Will dated 5th April 2005 in which he gave his property to my mother namely: **RATTAN KUMARI** who passed away on 16th day of July , 2012 at Colonial War Memorial Hospital. A copy of the Death Certificate of my mother is attached as Annexure C”.
5. THAT I intend to make an application to the High Court of Fiji for the grant of the Probate of the **ESTATE of RAM KISSUN aka RAM KISUN aka SURENDRA CHAND RAM KISSUN aka SUREND RAM KISSUN.**
6. THAT I am advised and believe htat the Probate Registry of the High Court of Fiji will require the original will for the grant of probate.
7. THAT on 4th January 2022, my lawyers Messrs Nands Law wrote to the Probate Reigstry requesting for the original registered Will dated 5th April 2005 of the deceased, however the Probate Registry released us a copy of the said Will. A copy of the letter dated 4th January 2022 is annexed hereto marked as Annexure D.
8. THAT my lawyers Messrs Nands Law wrote to High Court registry again on 24th January 2022 to confirm that the copy Will No. 164 released to our office is the only Will held by their office and the Registry replied in its letter of 28th January 2022 confirming the same. Copies of the letters dated 24th January 2022 and 28th January 2022 are annexed hereto marked as annexure “E” and “F” respectively.”
4. The Applicant filed a Supplementary Affidavit in compliance with Court orders as follows-
- “5. THAT after the demise of the deceased, it was discovered that the deceased had left a Will behind dated 5th April 2005 which said Will was duly executed in accordance with the Wills Act of Fiji. A copy of the said Will was attached as Annexure “B” in the Affidavit in Support filed on 9th March 2022 and is attached as Annexure “JK-2”.
6. THAT as per Will dated 5th April 2005, my sister namely SADHNA DEVI KISSUN was appointed as the Executrix and Trustee of the deceased whereby the Trustee was directed by the deceased testator to devise and bequeath all his properties to his wife namely: BATTN KUMARI (f/n Karpal Singh) who passed away on 16th July 2013 at Colonial War Memorial Hospital. A copy of the said death certificate was attached as annexure “C” in the Affidavit in Support filed on 9th March 2022.

7. THAT my sister namely Sadhana Devi Kissun had relinquished all her rights and interest as Executrix and Trustee of the Estate of the deceased. A copy of the Renunciation of Administration was attached as an annexure "A" in the Affidavit in Support filed on 9th March 2022.
8. THAT from the Will dated 5th April 2005, I note that the said Will was prepared by Messrs Khan and Co after which I made numerous enquiries with them to enquire about the original copy of the said Will.
9. THAT my solicitors Messrs Nands Law had also made written correspondences dated 7th April 2022 and 28th April 2022 with Messrs Khan & Co to enquire about the original Will and information regarding the witnesses namely; Ahmed Hussain (f/n Sheik Hussain) and Romina Singh (f/n Chattar Hari Singh). Copies of the letters dated 7th April 2022 and 28th April 2022 is annexed hereto and marked as annexure "JK-3".
9. THAT I am advised by my solicitors which I believed to be true that Messrs Khan & Co has not responded to their letters in a timely manner and after numerous follow ups they had finally responded on 13 May 2022. Copy of their response letter dated 13th May 2022 is annexed hereto and marked as annexure "JK-4".
10. THAT upon perusal of their letter dated 13th May 2022 I noted that my deceased father had also executed a Will on 24th April 1993 which said Will was also prepared by Messrs Khan & Co. A copy of the Will dated 24th April 1993 is annexed hereto and marked as annexure "JK-5".
11. THAT only 2 differences in the Will dated 24th April 1993 and 5th April 2005 are that my sister Sadhana Devi Kissun is named as the Executrix and Trustee in the 2005 Will whereas my deceased mother namely, Rattan Kumari and I were named as Trustees in the 1993 Will.
12. IN 2005 Will, the rest and remainder of the estate was bequeathed to my deceased mother namely Rattan Kumari for her own use and benefit absolutely whereas in the 1993 Will, it was bequeathed between my deceased mother and myself in equal shares.
13. THAT in their letter dated 13th May 2022, Messrs Khan & Co have further confirmed that the persons who had witnessed the Will of the deceased; Ram Kissun were Mr Ahmed Hussain and Mrs Romina Singh, who were both legal executives employed by their firm back then.

14. I do not have any contact details of the witnesses as mentioned above therefore it would be merely impossible for me to give confirmation from them however I have been advised by my solicitors which I believe to be true is that the letter from Meessrs Khan & Co dated 13th May 2022 serves as confirmation of their attestation on the Will of the deceased dated 5th April 2005.

15. My intention are to distribute the Estate of my late father according to his wishes which I undertake to do.”

5. The Respondent filed her Affidavit in Opposition as follows:

“1. THAT the applicant does not have locus or authority to bring this action when the registered trustee is Sadhana Devi Kissun aka Sadhna Devi Chand Mani.

2. THAT there has not been any application remove the current registered trustee Sadhana Devi Kissun aka Sadhna Devi Chand Mani. There is no evidence submitted by the applicant that the current trustee cannot bring this action under her name as executrix and trustee of Estate of Ram Kissun.

3. THAT I response to paragraph 1 of Jitendra Kumar aka Jitendra Kumar Kissun, that the applicant is submit proper deed of renunciation and the trustee Sadhana Devi Kissun cannot appoint another trustee of her own will.

4. THAT the applicant who resides overseas is not a suitable person to be appointed a trustee even on courts discretion as he will not be able to qualify as the trustee since he is a residence of New Zealand and does not have Fijian domicile.

5. THAT there is no original copy of the will of the deceased dated 5th April 2005, with reference a letter dated 28th April 2022 from Nand Law was issued to Messrs Khan & Co seeking response on the letter dated 7th April 2022 which was delivered to Messrs Khan & Co on 8th April 2022 seeking confirmation if the said will LATE Ram Kissun being will No. 164 was made by Messrs Khan & Co and if the office is in possession of the original copy.

6. THAT on 13th May 2022 Messrs Khan & Co has responded in writing to Nand Law that during search for the above mentioned will they manage to locate a will and testament dated the 24th of April 1993 which has also been executed by the deceased Ram Kissun.

7. THAT the above mentioned letter didn't mention or confirmed Messrs is known if the will dated 5th April 2005 was even prepared by their office. Thus a photocopy was lodged and registered with High Court of Fiji Will no. 164.

9. THAT Jitendra Kissun is very dishonest for granting of probate, his intentions are to distribute the ESTATE of my deceased father according to his wishes which Jitendra wishes to undertake so. Jitendra Kumar Kissun also lied to Sadna Devi Kisun and other of my two siblings Reshma Devi Kisun and Shabna Devi Kisun that the house is in miserable condition, half side of the house has fallen off, with missing posts, missing roof as I have failed to take care of the property after my mother Rattan Kumari who is deceased 16th July 2022.

11. THAT deceased Ram Kisun may have changed the Will from 1993 where my deceased mother Rattan Kumari and Jitendra Kumar Kisun were named as Trustees and in the new will in 2005 my dad appointed my elder sister Sadna Devi Kisun as Executrix and trustee after Jitendra Kumar Kisun dumped, abandoned his 3 months old baby (Son) with my old parent and had affair with his girlfriend. Even didn't bother to register his sons name, and my parents did his birth certificate registration.

15. THAT my deceased father had so much hatred for JITENDRA KUMAR KISUN, then how he has known that it was our fathers wish to allow Jitendra Kumar Kisun to distribute the ESTATE amongst the 5 of us. Jitendra Kumar Kisun has violated the trust of all of us to fulfil his greed for cash so that he can purchase a property in Auckland, he has luxury life with expansive cars while his one and only son Abhishiek Nishant struggles each day. Sadna Devi Kisun always sent Abhishek Nishant clothes, shoes and cash from New Zealand, sine her husband is very sick from last year and Sadna Devi is only employed she has shopped supporting Abhishiek Nishant and then Reshma Devi Kisun without fail every week sends cash to ABhishiek Nishant but not Jitendra Kumar Kisun.

16. THAT I strongly disagree and oppose for granting of probate to Jitendra Kumar Kisun because of his lies, selfishness, greed and how he treats his son. The said property would be approximately 100 thousand, how much all three of my siblings will get if converted to their currency, for me if I purchase a land I won't be able to construct a house as I'm unemployed and a single mother of three daughters. Blessed from my parents to have a house for my children and my nephew (my son). If anything happens to me at least my nephew Abhishiek Nishant, Jitendra Kumar Kisun son will have shelter or give on rent and use it on his personal use."

6. The Applicant filed their Reply to the Affidavit in Opposition as follows:

"4. That in response to paragraph 3 of the Opposition, I deny the same and state that I am advised by my Solicitors which I believe to be true that a nominated trustee in a will has the powers to relinquish her rights of administration in the Estate in favour of any beneficiary and in this case, my sister Sadhna Kissun as renounced her rights of administration in my favour.

5. THAT I strongly deny paragraph 4 of Opposition and state that I have been advised by Counsel and verily believe that there are no such requirements in any of the relevant legislations which prevent an overseas person to be appointed as trustee of an Estate in Fiji.

6. THAT in response to paragraphs 5-8, I take note of the same that since there was only a copy of the Will, that was the whole reason why I had to file an application in Court to admit the last will as the true copy of the Will to enable a grant of probate to be made.

7. THAT additionally I state that after the demise of the deceased, it was discovered that the deceased had left a Will behind dated on the 5th of April 2005 which said Will was duly executed in accordance with the Wills Act of Fiji. A copy of the said Will was attached as annexure "B" in the Affidavit in Support filed on 9th March 2022.

10. THAT further I am advised by my solicitors which I believe to be true that the deponent in paragraph 10 of her opposition is deposing matters based on hearsay and not matters of fact amounting to scandalous and irrelevant depositions hence the same should be struck out for non-compliance of Order 41 rule 6 of the High Court Rules.

11. THAT in response to paragraph 16 of the Opposition, I deny the same and state that I have advised by my solicitors which I believe to be true that after the demise of my parents, each of the surviving beneficiaries (that is my siblings) will have equal shares in the Estate of the property.

12. Further to the above, at the moment the Estate property is not been administered by anyone and my sister, Sylvia Kissun has been collecting rent from the property for her own benefit without any authorization and or consultation from other beneficiaries.

15. THAT in response to paragraphs 20 -22 I deny the same and state that the deponent has not deposed on merits or provided any evidence to effectively oppose my application nor has she given reasons why copy of the Will no. 164 dated 5th April 2005 of the Deceased should not be admitted as a true copy.

PART B: SUBMISSIONS BY THE PARTIES

7. The submission by the Applicant is that pursuant to Order 1 Rule 11 of the High Court Rules which applies the practice and procedure for Non-Contentious Probate business from the High Court of England should apply in so far as applicable with necessary modifications to

grants of probate and administration. Reference was made in the Counsels submissions to the case of The Estate of Athena Yiossis [2011] SASC 99; (21 June 2011) in which Justice Gray used the approach adopted by Justice Sulan in Englhardt Deceased that the –

“the Court must be satisfied that an original will has been lost, that sufficient efforts have been made to find the original Will, that the copy Will is an accurate Copy and that all persons prejudiced, if the Application has been granted, have consented and are sui juris, and that the copy document sought to be admitted to probate is complete copy of the original document.”

8. Reference was made to the case of Re Estate of Elizabeth Cunningham Sugar [2013] FJHC 515; HPP 41.2013 (4 October 2013) where the applicant sought for the admission of the photocopy of a Will under Rule 54 of the Non-Contentious Probate Rules 1987 as he was the remaining Trustee of the will of Elizabeth Cunningham Sugar whilst the other Trustee had passed away previously. The Master Rajasinghe (as he was then) was ‘*satisfied that the applicant successfully established the execution of the will of Elizabeth Cunningham Sugar and in existence after the death of the testator*’.
9. The final argument of the Applicant is that the Respondent who has opposed the application has failed to address the Court on why the Will should not be admitted as a true copy of the original Will.

PART C: LAW AND ANALYSIS ON NON-CONTENTIOUS PROBATE

10. The Plaintiff relies upon the provisions of Rule 53 of the Non-Contentious Probate Rules 1954 and the inherent jurisdiction of the High Court.
11. Order 1 Rule (11) of the High Court Rules (‘HCR’) provides –

“11. The Rules for the time being in force in Her Majesty’s High Court of Justice in England and the practice and procedure of that Court with respect of non-contentious probate business shall apply so far as they are applicable, with such modifications as may be necessary, to grants of probate and administration issued in common form from the Registry of the High Court.”
12. Rule 54 (3) of the Non-Contentious High Court Probate Rules 1987 which I find is in force in England which is applicable in Fiji by virtue of Order 1 Rule 11 of the HCR states that:

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 application can adduce as to –

- i. The Wills existence after the Death of the testator or where there is no such evidence, the facts on which the applicant relies upon to rebut to the presumption that the will has been revoked by destruction;
 - ii. In respect of a nun-cupative will, the contents of that will; and
 - iii. In respect of reconstruction of a will, the accuracy of the re-construction.
13. The application before me pertains to the application of the Trustee, Mr Jitendra Kissun Kumar who relies upon his Affidavit in support.
 14. In his Affidavit he seeks for the Copy of the Will of the Estate of Ram Kissun aka Ram Kisun aka Surendra Chand Ram Kissun aka Surend Ram Kissun dated 5th April 2005 and registered in the High Court of Fiji being Will No 164 be admitted to proof.
 15. In the Will of 5th April 2005, the wife of the deceased, Rattan Kumari was appointed as the Trustee and Executor of the Estate of the deceased. Rattan Kumari passed away after the demise of the Deceased and thereafter probate was granted to her daughter and sibling of the Applicant, Sadhna Devi Kisun.
 16. The Affidavit as stated earlier, provides for the consent and renunciation of rights of Sadhna Devi Kissun and assignment of rights to the Applicant.
 17. The Respondent who opposes the application by way of an Affidavit, amongst other things, disputes the appointment of the Applicant as the Testator and Executor but does not challenge the existence of the Will nor as to its veracity. She also does not challenge the execution of the Will nor the Wills existence after the demise of the Testator.
 18. The Court, having considered all the applicable laws, finds that there is a Will that was duly executed by the Deceased which continued in existence after the demise of the testator. That a Copy of the Will is hereby annexed forthwith in the Affidavit of the Applicant.
 19. The Court is satisfied that the Copy of the Will is a true copy of the original Will of the Testator dated 5th April 2005 which could not be located.
 20. The Court is satisfied that the Respondent has been unable to disprove that the Will should be revoked nor prove that the original Will had been destroyed.

21. The Court therefore finds that the Applicant has satisfied the Court to grant that the copy of the Will be admitted as proof thereof.

Costs

22. That costs be borne by parties.

Orders of the Court:

23. (a) *That the Court admits the proof of the Copy of the Will registered as No 164;*
(b) *Costs be borne by parties.*




Mrs Senileba LWTT Levaci
Acting Puisne Judge