

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

HPP No. 34 of 2022

IN THE ESTATE OF SADA NAND late of
118 Fletcher Road, Vatuwaga, Suva,
Retired, Deceased, Testate.

And

IN THE MATTER of an application by
REV ABEL PREM NAND of Suva, Pastor
and **ANAND SAMI PILLAY** aka **ANAND**
SWAMI PILLAY of Nadi pursuant to
Sections 3 and 12 of the Succession, Probate
and Administration Cap 60.

Between:

Rev Abel Prem Nand of Suva, Pastor and **Anand Sami**
Pillay aka **Anand Samy Pillay** of Nadi, Mechanic.

APPLICANTS

And:

Alind Satya Nand of 4 Hakea Drive Tolmans Hill, 7007,
Tasmania , Australia, Geologist and **Ashveen Lata Nand**
aka **Ashveen Lata** aka **Asveen Lata Ali** of 1/22 Meera
Street, South McKay, Queensland, 4740, Australia,
Accountant c0 **NAMBIAR LAWYERS**, Barristers and
Solicitors, 42 Knolly Street, Suva.

RESPONDENTS

Date of Hearing : **20th November 2023**
For the Applicant : **Mr Maopa E.**
For the Respondent: **Ms Singh N.**
Date of Decision : **16 January 2024**
Before : **Levaci, SLTTW Acting Puisne Judge**

JUDGEMENT

(APPLICATION BY ORIGINATING SUMMONS FOR GRANT OF PROBATE FOR WILL AND REMOVAL OF CAVEAT)

PART A: BACKGROUND

1. The Plaintiffs have filed an Originating Summons seeking for Grant of Probate for a Will prepared and issued on 16 December 2020 appointing the Plaintiffs as Executors and Trustees as well as beneficiaries of the Will. Thereafter a Caveat was filed by the Defendants (children of the Deceased) against the application for Grant of Probate and the Defendants filed a Warning to Caveat. The application is for grant of probate which seeks to cancel any existing Caveat.
2. The Plaintiff is seeking the following Orders from the Court:
 - 1) The Applicants are entitled to apply for Grant of Probate on the basis that they are beneficiaries and the executors and trustees of the Estate of **SADANAND** aka **SADA NAND** pursuant to his last Will and Testament dated 16th December 2020. Hence grant of Probate is hereby ordered in favor of the Applicants.
 - 2) That the earlier Will executed on 31st July 2018 be revoked and of no legal effect.
 - 3) Any further order or relief which this Court considers fair and just in the circumstances.

PART B: AFFIDAVITS

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

“3. The deceased Sada Nand died on 1.3.21 at CWM Hospital. I annexed herto a copy of the death certificate marked as annexure APN2.
4. The late Sada Nand was my uncle from my father’s side moreso my father’s younger brother and we had a very good and cordial relationship. The late Sada Nand also knew the 2nd Applicant and his family for over 40 years as a close family friend.
5. Prior to his death I verily believe that the late Sada Nand made his last Will and Testament dated 16.12.20 where he appointed both of us (the Applicants) as the Beneficiaries and the Executors and Trustees of his Will. I annexed herein a copy of the Will marked as annexure APN 3.

6. The said Will was executed before Messrs Babu Singh and Associates in Nadi.

7. The deceased had four (4) children namely:

- (i) Alind Satya Nand;
- (ii) Arvind Nitya Nand;
- (iii) Ashveen Lata Nand; and
- (iv) Sherin Lata.

All of them stay overseas.

8. That I have known the deceased for a very long time since I was a child. Prior to his death, I was told by the deceased during his lifetime he gave his other assets/shares in his properties in Australia to all his children. I verily believe that his children were not treating him properly when he was alive and he made it clear that he did not want to give anything further he had at the time of his death to them. He was saddened by the actions of his children not assisting them. After his wife's death we the applicants assisted in taking care of his wellbeing.

9. The Respondent have placed Caveat on our application for grant of Probate. I annexed herein a copy of Caveat marked as annexure APN 4.

10. I verily believe that the Will executed on 16th December 2020 is valid and lawful as last Will and Testament of Sadanand aka Sada Nand.

11. I verily believe that the earlier Will dated 31st July 2018 relied upon by the Respondents has been revoked by the later Will in which we are the trustees and beneficiaries.”

5. In Opposition, the Respondent filed an Affidavit as follows:

“1. I am one of the respondents in this matter and I am also deposing this Affidavit on behalf of **ASHVEEN LATA NAND** aka **ASHVEEN LATA** aka **ASHVEEN LATA ALI**. A copy of the authority from Ashveen Lata Nand aka Ashveen Lata aka Ashveen Lata Ali is annexed and marked as “A”.

5. THAT as far as am aware, I admit paragraphs 1 and 2 of the Applicants affidavit.

6. THAT I neither admit nor deny paragraphs 3 and 4 of the Applicants affidavit and further state that as far as I and my siblings are aware, Abel Prem Nand (herein referred to as “1st Applicant”) did not have contact with Sada Nand also nown as Sada Nand (herein referred to as “the Deceased”) for the past 20 years and only came into contact after the demise of the Deceased's wife and the Respondents mother, Phulmati.

10. That I further state that the Deceased did not own any properties in Australia, however, he had invested in certain AMP shares and we haven't received any benefits from such investment.

11. THAT my siblings and I had supported the Deceased and the demise of his wife, his mental health had deteriorated significantly and as a result Ashween Lata Nand aka as Ashween Lata aka Ashween Lata Ali (herein after known as the 2nd Respondent) and I communicated regularly with the deceased.

12. THAT the 2nd Respondent and I noticed that the mental health of the Deceased had deteriorated significantly and his actions had been unduly influenced by the 1st Applicant.

13. THAT after the demise of the Deceased wife (being my mother namely Phulmati) the Deceased and the Respondents had a discussion whereby it was decided that the Deceased would reside at his wife's property in Suva.

14. THAT the deceased had also requested the Respondents would assist in facilitating the sale of the property in Lautoka and my younger brother, Arvind Nitya Nand, organized a real estate agent to sell the property for him.

15. THAT after the demise of the Deceased, we had sought the assistance of the Applicant with the funeral as we were unable to travel to Fiji due to their travel restrictions imposed as a result of the COVID pandemic.

16. THAT the 1st Applicant had requested for the Respondents consent letter containing the date of birth and names in order to uplift the death certificate of the Deceased, which was duly provided to him.

17. THAT the first Applicant had the keys of the house for the Deceased and his personal items such as wallet containing bank card, pin, passport and mailbox keys.

18. THAT we only came to know of the actual motive of the 1st Applicant when we requested for a copy of the death certificate of the deceased and his personal property and the Applicants failed to cooperate by directing us to liaise with Messrs Babu Singh and Associates.

19. THAT I admit to paragraph 9 of the Applicants Affidavit and further state that the Caveat was lodged due to concerns about the validity of the will of the Deceased.

21. THAT I further state that during the phase-in time during which the alleged Will put forward by the Applicants was made the deceased was sick and was not mentally fit to

execute any document. In any event, if the Applicants are proposing that the Will that they are in possession of is in fact the last Will and Testament of the deceased, I put them to strict proof to establish the same and put forward a medical certificate that confirms that the deceased was mentally and medically fit at the time of the said Will was executed and that he had made the said Will at his own direction without undue influence from any third party.

22. THAT I further state that the Will put forward by the Applicants was made at the point in time which the deceased was under the care and custody of the Applicant. Hence we cannot confirm whether the said Will was made of his own free will.

23. THAT I verily believe that the Deceased would have never considered distributing his estate with the 1st Applicant at all as the 1st Applicants father had issues with the deceased previously and there was no communication at all between the 1st Applicant and our Family. In any event, I verily believe that if the Applicants had no malicious intent behind the said Will and the deceased's Estate, they outright to have put us on notice of the said Will and after the demise of the deceased other through themselves or their Solicitors being Messrs Babu Singh and Associates.

24. THAT it is evident that the Applicants had maliciously obtained information from us and extracted the death certificate of the deceased with the intention of obtaining Probate in the Estate of the deceased without consulting us or informing us. I understood it was known to the Applicants that I and my remaining siblings all reside overseas hence we would not have known of the Probate being lodged until a search would have been made by either of us in Fiji.

25. THAT we had only come to know about the application of Probate being advertised in the local newspaper in Fiji after we had given instructions to our Solicitors Messrs Nambiar Lawyers to proceed with the application for probate in the Estate of the deceased.

26. THAT after the demise of the deceased, we made contact with our Solicitors in Fiji namely Nambiar Lawyers to seek advice on the probate process.

27. THAT we assist Lawyers, we had provided them with a copy of the Will, being the last Will we had in our possession. Annexed hereto and marked is a copy of the said Will.

28. THAT our Solicitors conducted a Will search at the registry to confirm if the Will was actually registered in Fiji and they were advised the said Will was not registered.

29. THAT given there was no registered Will, we instructed our Solicitors to proceed with making an application for Letters of Administration to the estate of the deceased.

30. THAT the application was advertised in the local newspaper Fiji Sun dated 2nd April 2021. Annexed hereto and marked as C is a copy of the said advertisement.

31. THAT whilst the advertisement was made within the local newspaper, our Solicitors also prepared a draft application for letters of administration and sent this to the registry for vetting purposes before it was sent to us for execution. Annexed hereto and marked as D is a copy of the confirmation from the registry on the vetting of the said documents.

32. THAT whilst this process was ongoing, we had come to know that an application for Probate was also made by Messrs Babu Singh Lawyers in relation to the estate of the deceased. We had made contact with Mr Babu Singh to seek clarity on this but he was not too helpful in releasing the required information to us but to the contrary was requesting us to disclose to him a copy of the Will that was in our possession.

33. THAT given those discussions between us and the legal representatives of the Applicant were not too fruitful, we then instructed our Solicitors to file an application for Caveat against the estate of the deceased which was duly made. Annexed and marked as E as a copy of the said application.

34. THAT regardless of the abovementioned, it is clear that the deceased demise has left 4 living beneficiaries behind, Alind Satya Nand, Sharin Lata, Arvin Nitya Nand and Ashween Lata. Annexed and marked F is the copy of the Deceased death certificate confirming our relationship with the deceased.

35. THAT further to this we will also have an assigned document that also confirms the wishes of the deceased and in differential to this by virtue of being the children of the deceased we as the beneficiaries have full right and interest in the Estate of the deceased.

36. THAT due to the nature and form of the Will presented by the Applicants and the conduct they have portrayed, we have reason to believe that the said Will is fabricated and is not a genuine representation of the wishes of the deceased. The said Will was never brought to our attention at any point in time between the death of the deceased and our application with the Court registry up until email exchanges began in relation to the interference of the Applicant and their Solicitors to this matter.

37. THAT we the Respondents put the Applicants to strict proof to establish that the document relied on them is the last testament of the deceased and was in fact reflection of his intent.”

6. In Response the Applicants deposed of an Affidavit through the 1st Applicant as follows-

“4. I admit to paragraph 6 and further state that the Late Ada Nand always visited his elder brother (applicants late father) whenever he visited Lautoka during his lifetime.

5. Further the Late Mr Sada Nand also played a pivotal role in coloing and comforting me and my siblings when my father died in 2013. In 2019 when I got posted to Suva, I frequented their home in Vatuwaqa and usually talked with Mr Sada Nand. On the eve of my aunt’s trip to Australia for medical treatment in 2019 I went to the Late Mr Sada Nand’s house to pray for her (my aunt and respondent mother) and that was her last time she was in Suva. Later she passed away in Australia. The Late Mr Sada Nand went to the funeral in Australia.

8. I am not aware of the contents of Paragraph 9 of the Affidavit in Reply and further state the Respondent and his siblings have been living overseas since they were young and single. They were not around in Fiji whenever I visited Mr Sada Nand.

9. I am not aware of paragraph 10.

10. I deny paragraph 11 of the Affidavit in Reply and further state the respondents never had any knowledge of the Late Mr Sada Nand’s health as they were never in contact with him since the death of his wife (Respondents mother).

12. I deny the contents of paragraph 13 and further state that the respondent and his siblings grew up at Vatuwaqa. The Late Mr Sada Nand and his wife lived in that property until his death. I verily believe that once, he was asked by his younger son Arvind to vacate the house in Vatuwaqa.

13. I am unaware of the contents of paragraph 14 and put the Respondents to strict proof of the same.

14. I deny the contents of paragraph 15 and state that it was I who contacted the first named respondent and informed him of the Late Sada Nand’s death and also told him that Mr Sada Nand’s last wishes which was for the children not to spend any monies to his funeral expenses and that he just wanted to be prayed over and cremated.

15. I deny the contents of paragraph 16 and further state that I was asked by the Messrs Babu Singh and Associates to acquire the death certificate because there was official business to be done. At the registry I was told one of the requirements was that the next of in needs to lodge this application. I rang 1st named Respondent being the eldest son of the Late Mr Sada Nand to give the consent to which he voluntarily did so.

16. I admit to paragraph 17 and further state that the keys to the house was in my possession when Mr Sada Nand passed away. It was on 1st March 2021 when the Late Mr Sada Nand called my son Merrick Nand (a schoolteacher) saying that he was not feeling too well and that he needed to be attended to. When the message was relayed to me, my son (Merrick) and I and my daughter (Merrisha) who is a doctor rushed Sada Nand to the hospital. Sad to say, before my very eyes he gave up his last breath. And that's how I got hold of the keys and his personal items mentioned therein. Later I was asked by Alind to hand over the keys to one of his friends Irene and this was done.

17. As to paragraph 17 I deny a motive behind what I was doing and further state that I was instructed by the lawyer by the Late Sada Nand that any information pertaining to Sada Nand need to come from his children or his trustee under to the will.

20. I deny the contents of paragraph 21 and further state that the Late Mr Sada Nand was in a stable and sound mind when executing his last Will. I verily believe that he had exercised his own free will when he made his last will dated 16/12/20 at the office Messrs Babu Singh & Associates in Nadi.

21. As to paragraph 22, the Late Mr Sada Nand executed his last Will when his own children deserted him and without love and care. I along with my family intervened and attended to him daily until his passing.

22. As to paragraph 23, I state it was the year 1974 there were some differences regarding the Will of my grandfather. But after a year or so the two brothers (the late Sada Nand and my father Daya Nand) were able to iron out their differences. I state that their settlement and adjustments were made resulted in even a better relationship. But, to say there was animosity between the Late Mr Sada Nand and my father is grossly unfair. I verily believe the Respondent and his siblings were miles away (overseas) to really known what was happening in Fiji when we were loving and caring for Mr Sada Nand.

30. I deny the contents of paragraph 35. The Respondent are not the beneficiaries of the last will and testament of Mr Sada Nand hence they have no interest or caveatable interest of his estate.

33. That I verily believe we the Executors and Trustees of the Estate of Sada Nand and are entitled to the grant of Probate as per his last Will and Testament dated 16th December 2020.”

PART C: SUBMISSIONS BY THE PARTIES

7. The Applicant, in their submissions relied upon Order 85 Rule 2 (c) of the High Court Rules. The Applicant does not contest the validity of the Will dated 16 December 2020. The Plaintiffs are the Executor and Trustee of the Will of the late Sada Nand dated 16 December 2020. The Will also bequeathed all the property of the Late Sada Nand to the Executor and Trustees and pay all funeral and testamentary expenses. The Will expressly prohibited the property to be devolved to the children. The Will was prepared and witnessed by a lawyer and clerk and is very clear and concise. Hence the Will is valid and cancels any earlier Will.
8. The initial Will which was prepared and later cancelled was done so on 31 July 2018. No probate was given for the earlier Will.
9. The Respondents in their oral submissions stated that the Caveat was still valid pursuant to Order 1 Rule 2 of the Non-Contentious Probate Rules 1987. Under section 44 sub-section (13) and (14) that unless an originating summons has been requested for removal of Caveat, the Caveat remains effective and valid until a probate action is filed. The Plaintiffs only seek Grant of Probate. There was only an AMP shares overseas which was given to the children and no other benefits. The Respondent were in consistent contact with the deceased until he was very sick, medically unfit and was not in a position to sign any proposed Will. A separate proceeding contesting the Will has been filed.
10. In Response the Plaintiff argued that the Respondents were not present in Fiji and were unaware of the Deceased state of health nor have they contacted him up to the time of death. There was no reference to any appearance after warning was filed against the Caveator hence the Caveat had been discharged in section 44 (11) of the Non-Contentious Probate Rules 1987. The Caveator should have entered an appearance to a warning which it did not rendering the Caveat cancelled. Section 44 (13) requires an order by the Registrar on a summons to extend the Caveat’s validity which is not the case.

PART D: LAW ON GRANT OF PROBATE AND CAVEATS

11. The Plaintiff relies upon the provisions of Order 85 rules 2 (1) & (2) (c) of the High Court Rules and rule 2 (3) (c) of the High Court Rules 1988 as well as section 3 and 12 of the Succession, Probate and Administration (Fiji) Act.
12. Section 3 and 12 of the Succession, Probate and Administration Act for granting of probate provides that –

Jurisdiction of Court

3.-(1) Subject to the provisions of this Act, and to any rules made hereunder the court shall have jurisdiction in contentious and non-contentious probate matters and proceedings and in the granting or revoking of probate of wills and administration of estates of persons dying leaving property in Fiji.

(2) The jurisdiction vested in the court by the provisions of subsection (1) shall, subject to any modifications effected by any rules made under the provisions of section 52, be in conformity with the law and practice in force in England on the 1st day of January, 1967, or on such later date as the Chief Justice may from time to time appoint by notice in the Gazette, so far as the same can be read as capable of application to local circumstances.

Real estate to vest according to will

12. Subject as aforesaid, the real estate of every person who dies testate shall be held by the executor to whom probate has been granted or the administrator with the will annexed according to the trusts and dispositions of the will of such deceased person.”

13. Order 1 Rule (11) of the High Court Rules 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.”

14. In the Non-Contentious Probate Rules 1987 under section 44 (5) provides –

‘(5) Any person claiming to have an interest in the estate may cause to be issued from the registry a warning in Form 4 against the Caveat, and the person warning shall state his interest in the estate of the deceased and shall require the caveator to give particulars of any contrary interest in the estate; and the warning or a copy thereof shall be served on the caveator forthwith.’”

15. Section 47 of the Succession and Probate and Administration Act:

"(1) In every case which a caveat is lodged, the court may, upon application by the person applying for probate or administration or for the sealing of any probate or letter of administration, as the case may be, remove the same;

(2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned on the caveat;

(3) Such application may be heard and order made upon affidavit or oral evidence, or as the court may direct".

16. In Rosy Reddy -v- Manchamma Webb and Lawrence Webb ABU 0014 of 1991S Tikaram P JA, Thompson JA and Kapi JA distinguished the application of section 47 of the Succession, Probate and Administration Act from Rule 44 of the Non-Contentious Probate Rules and held that –

“We think it is important at the outset to clarify the nature of the issue before the trial judge. Whilst it is true that the Public Trustee on behalf of the appellant purported to deal with the caveat in accordance with r 44 of the Rules, the application before the trial judge was brought pursuant to s 47 of the Act which is in the following terms:

"47. -(1) In every case in which a caveat is lodged, the court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be, remove the same.

(2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in the caveat.

(3) Such application may be heard and order made upon affidavit or oral evidence, or as the court may direct."

We note that the procedure for dealing with a caveat under the Rules is different from removal of a caveat provided under s 47 of the Act. Under the Rules, a caveat shall remain in force for six months (O 44 (4)). A caveat may also cease to have any effect if the caveator does not file an appearance or take out a summons for directions (r 44 (11)). Under these Rules, a caveat may cease to have any effect in this way without there being any need for resort to court proceedings. However, under the Act, s 47 provides that in every case where a caveat is lodged, an application may be made to the court to remove the caveat.

As the application before the trial judge was brought pursuant to s 47 of the Act, the Rules relating to removal of a caveat have no direct application and therefore it is not necessary to consider their effect.

Section 46 of the Act gives a right to any person to lodge a caveat with the Registrar at any time before probate or administration is granted or sealed. Section 46 (2) requires that the caveat shall set out the name of the person lodging the caveat and an address in Suva. It does not require any other information or the nature of the interest or reason for lodging the caveat.

The application before the trial judge was to remove the caveat under s 47 (1) of the Act. On what grounds should a caveat be removed? The section does not give any indication. It simply says "Such application may be heard and order made upon affidavit or oral evidence". This gives the court a discretion.

In formulating the discretion of the court in such an application, we are of the opinion that the Court may have regard to the practice set out in the Rules as a guide. This is not the same as applying the Rules. The relevant rule for consideration in this regard is r 44 (7). For the purposes of a warning, a caveator is required to give particulars of a contrary interest. We would adopt this and formulate that a caveator should establish a contrary interest to the person applying for the removal of a caveat."

PART E: ANALYSIS

17. Given the law on Granting Probate and removal of Caveat, the Court considered the Affidavits in evidence filed by both parties.
18. The Plaintiff seeks a Grant of Probate on the Will that was duly executed by the Deceased on 16 December 2020 and duly witnessed appointing the Plaintiffs as Executor and Trustee as well as beneficiaries. Clause 1 of the will and testament stipulates :

‘I **REVOKE** all former wills and testamentary dispositions hereto fore made by me and declare this alone to be my last will and testament.’
19. The Defendants contest the Will referring to an earlier will (entered on July 2018) by the Deceased bequeathing them the property. These are separate proceedings.
20. However in protest, they have lodged a Caveat No 29/21 against the granting of the Probate on 9 June 2021.
21. A Warning to the Caveator was thereafter filed by the Plaintiffs on 27th September 2021 and an Affidavit of Service was also filed.

22. The Defendant's argument is that no application was made under section 47 of the Succession, Probate and Administration Act for removal of Caveat. That the originating summons only seeks for Grant of Probate.
23. In the case of Rosy Reddy -v- Manchamma Webb and Lawrence Webb (Supra) it was held that a removal of Caveat will follow on from an order to Grant Probate in accordance with section 47.
24. Before this Court is an application for granting of probate. The Affidavit in support reveals that there is a will for which the Plaintiffs are appointed as Executors, Trustees as well as beneficiaries of the Estate.
25. Hence the next step is to determine whether the Caveat will still remain or otherwise. The criteria to consider whether to retain a Caveat is provided for in Rule 44 (5) of the non-contentious rules. It requires the Caveator to show there are particulars for a contrary interest.
26. Despite the argument of an existing previous Will as the reason for the Caveat, there has not been any orders of the Court to find and uphold the previous will entered into in July 2018 as valid. Hence the Caveator has not been able to substantiate a contrary interest for the basis of continuing the Caveat.
27. The Court therefore finds no reason not to Grant Probate and therefore automatically, the Caveat is therefore cancelled.

Costs

28. The Court will award costs of \$400 to the Applicants in this matter.

Orders of the Court:

29. **The Court orders as follows:**

- (a) That the Court grants probate;*
- (b) The court cancels Caveat No 29/21;*
- (c) That costs be awarded to the Applicants at \$400.*

