

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

**Probate Action No. 18 of 2023**

IN THE ESTATE OF **NASIR MAHMOOD ALI**  
late of Dreketi Feeder Road, Saweni, Lautoka in  
the Republic of Fiji, Taxi Proprietor, Deceased,  
Intestate.

**BETWEEN:** **MAHMOOD ALI** of Dreketi Feeder Road, Saweni, Lautoka,  
Businessman.

**APPLICANT**

**AND:** **NAZREEN SHERIN NISHA** of Dreketi Feeder Road, Saweni,  
Lautoka, School Teacher.

**RESPONDENT**

**Before:** Mr. Justice Deepthi Amaratunga

**Counsel:** Mr. M Saneem for the Plaintiff  
No appearance of Respondent

**Date of Hearing:** 9.8.2024

**Date of Judgment:** 25.09.2024

**JUDGMENT**

## **INTRODUCTION**

- [1] Applicant filed this action under Probate Jurisdiction to obtain Limited Letters of Administration (Limited LA) for his deceased son named Nasir Mahmood Ali (Nasir). Late Nasir Mahmood Ali was divorced prior to his death from Respondent and she had also filed action in Family Jurisdiction seeking distribution of property from the estate of Nasir after death of late Nasir. She was separated from late Nasir prior to divorce and she was having a *de facto* relationship, which had resulted even children been taken to Police and application for child abuse and recovery filed by late Nasir.
- [2] The child abuse application based on such exposure of children for violence prior to death of late Nair but this had not proceeded to hearing and residence of children continued with Respondent.
- [3] Late Nasir was suffering from terminal illness and had died intestate. His two children are the sole beneficiaries of the estate of late Nasir.
- [4] Late Nasir was a Taxi Driver and before his death an application for the transfer of the Taxi made but the transfer was not completed before death of late Nasir and for completion of this an administrator of the estate required . Respondent is objecting to grant of Limited LA.
- [5] The estate of late Nasir comprised interest in the land where Respondent and children reside and a Taxi. After hearing limited LA was granted for the Applicant considering best interest of children as well as conflict due to Respondent's claim against the estate of late Nasir in Family jurisdiction.
- [6] Being aggrieved Applicant Appealed to Court of Appeal and is seeking stay of the judgment till final determination of said appeal by Court of Appeal.

## **FACTORS TO CONSIDER IN STAY**

- [7] *New World Ltd v Vanua Levu Hardware [Fiji] Ltd* [2016] FJSC 29; CBV0004.2016 (4 August 2016) Supreme Court held,

“In arriving at a decision as to whether the Petitioner’s circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* Civil Appeal ABU 0011.04S, 18th March 2005. They were:

- “(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See *Philip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co. (NZ) Ltd* [1972] 2 NZLR 41 (CA) I.
- (b) Whether the successful party will be injuriously affected by the stay.
- (c) The bona fides of the applicants as to the prosecution of the appeal.
- (d) The effect on third parties.
- (e) The novelty and importance of questions involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience and the status quo.”

[8] Applicant in the affidavit in support states if the stay is not granted Respondent will allow the transfer of the Taxi Permit and this is not beneficial for the estate. The transter of Taxi Permit was allowed by relevant authority and completion of the transfer needs the grant of Limited LA. So the reason that the transaction is not beneficial for the estate is not a reason for completion of a contractual obligation of the estate.

- [9] Applicant had filed an affidavit in support and for this annexed Notice and Grounds of Appeal and there are five grounds of appeal and they are
- i. Learned Judge erred in law and fact of granting Respondent the limited grant.
  - ii. Learned Judge erred in law and in fact in holding the grant to the Respondent would be in the best interest of the beneficiaries.
  - iii. Learned Judge erred in law and in fact to holding that the Taxi out to be transferred without delay.
  - iv. Learned Judge erred in law in the application of Section 32 of the Non Contentious Probate Rules.
  - v. Learned judge erred in law and fact in failing to give the parties an opportunity be heard.

### **Appeal Grounds**

- [10] There is an interest in the property apart from Taxi belonged to the estate of late Nasir. Sole beneficiaries of the estate are children and Respondent is claiming from the estate in Family Court. So Respondent it is not suitable to appoint Respondent as administrator.
- [11] Counsel for Respondent at the hearing relied on Tristram and Coot's Probate Practice pp354,355 which referred to Section 32 of Non Contentious Probate Rules. This can be varied considering best interest of children. Grandfather of the children who is neighbor and elderly person is appointed considering welfare of the children.
- [12] Late Nasir was suffering from terminal illness and Respondent and late Nasir were separated and she is also in *de facto* relationship with third party and there was at least one complaint to Police due to domestic commotion where even the children were taken by Police. This shows that there are considerations as to best interest of children. At that time late Nasir was not at home and after he got the information about the commotion had met authorities and sought advice regarding children and child recovery application made.
- [13] Applicant's house and where the Respondent reside with children are close by. So children's best interest is primary consideration as the Limited LA is granted till at least one child attains age of majority.

[14] Section 41 of the Constitution of Republic of Fiji under Bill of Rights Chapter deals with Rights of Children and Section 41(2) states the best interest of the child is primary consideration.

[15] Section 41 of the Constitution Republic of Fiji states,

“Rights of children

41.—(1) Every child has the right—

(a) to be registered at or soon after birth, and to have a name and nationality;

(b) to basic nutrition, clothing, shelter, sanitation and health care;

(c) to family care, protection and guidance, which includes the equal responsibility of the child’s parents to provide for the child—

(i) whether or not the parents are, or have ever been, married to each other; and

(ii) whether or not the parents are living together, have lived together, or are separated;

(d) to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardous or exploitative labour; and

(e) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) only for such period of time as is necessary; and

(ii) separate from adults, and in conditions that take account of the child’s sex and age.

(2) The best interests of a child are the primary consideration in every matter concerning the child.”

[16] Applicant is grand father of two children and it is in the best interest of the children to grant limited LA to such elderly person where there were already incident where children were taken to Police due to an incident between Respondent and her partner who visit her on some occasion. Limited grant to

Applicant who is also neighbor and grandfather of beneficiaries, till the children attain age of majority is preferred option in my mind for best interest of children.

- [17] Since children's father is dead considering the circumstances in which children live and past incidents it is in the best interest of the children to grant limited LA to Applicant. So Section 32 of Non Contentious Probate Rules applied for best interest of children.
- [18] Plaintiff's counsel at hearing stated that Respondent might decide to migrate and may need to sell the property they are residing hence she should be given limited LA. This is not a reason to grant limited LA to Respondent. The property they reside needs to be preserved for future of the minors. This property will be more secured with it being administered by grandfather of the children due to proximity where parties reside.
- [19] Apart from the primary consideration of children, Respondent had filed a claim against the estate for distribution of property in Magistrate's Court and had also seized a Taxi owned by late Nasir. An application for transfer of the Taxi was not completed due to approval from Land Transfer Authority being delayed, and when the approval granted by LTA, late Nasir had died. Respondent is using probate jurisdiction to prevent transfer of Taxi Permit.
- [20] An application for transfer of the Taxi Permit was made prior to death of late Nasir to Land Transfer Authority by a brother of late Nasir, but when the approval obtained late Nasir had died. Respondent is preventing this transfer as administrator of the estate of late Nasir is required for completion of the said transfer of Taxi Permit.
- [21] Considering the circumstances limited LA was granted to Applicant allowing only transfer of Taxi Permit to be completed as it would be abuse of process to prevent an application lodged prior to death of late Nasir being prevented through probate proceeding being stayed after judgment.

**Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory. (not determinative factor)**

[22] Applicant in this action obtained limited LA and the immediate reason was for transfer of Taxi belonged to late Nasir to a prospective transferee.

[23] Apart from transfer of said taxi permit Applicant was not allowed to transfer any property belonging to late Nasir. Appeal will not be rendered nugatory by not granting stay. Keeping a deteriorating property in the custody of court is not benefiting any party and failure to transfer taxi permit may result in loss of such permit and loss of value of the vehicle which is a waste of the property of the estate of late Nasir. Neither Respondent nor Applicant are beneficiaries of the estate of late Nasir so they are not directly affected by a stay application.

[24] The purpose of grant of Limited Probate is to prevent waste of property belonging to an estate. It is clear that transfer of Taxi Permit cannot await attainment of age of majority so a limited grant is required.

[25] Regulation 11(1) of Land Transport (Public Service Vehicles Regulation) 2000 (the Regulation) allows a sale of permit 'subject to the provisions of the Regulations.'

[26] The purchaser must notify the sale and the discretion to transfer such a permit is vested with Land Transfer Authority (LTA) in terms of the Regulation 11A. Once that is exercised such transfer can be completed. It will be an abuse of process to prevent such transfer approved by LTA. In order to make the transfer Limited LA is required, as sole beneficiaries are minors.

[27] Halsbury's Laws of England Wills and Intestacy (Volume 102 (2021),

'All property, whether personal or real, to which a deceased person was entitled for an interest not ceasing on his death now devolves on his personal representative.'<sup>1</sup>

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<sup>1</sup> 920. Devolution of property on death.

[28] The purpose of appointing an administrator or trustee is not to hinder any transfer of interest of deceased and for this purpose a limited administrator is required. If the Appeal is successful there is not rendered nugatory by refusal of stay.

**Whether the successful party will be injuriously affected by the stay.**

[29] Appointment of administrators are required without delay and stay of such an order by the court will injuriously affect prospective transferee and potential income from the asset is lost and wasted. Both parties to this action are not beneficiaries of the estate.

[30] If the transfer of Taxi Permit is delayed it will affect the party who obtained the decision of LTA in his favor. Without limited grant such transfer cannot be completed.

[31] So there is injurious effect to prospective transferee due to death of late Nasir. It also has an effect on the estate of Nasir. Non appointment of personal representative leads to waste of the estate.

[32] There is no public interest or novelty in this action. There is a pending transaction of late Nasir at the time of his death and this required appointment of administrator.

**Overall Balance**

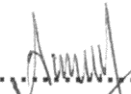
[33] It is futile to grant an order for limited administration and then stay it till appeal is determined. A limited grant was required to complete transfer of Taxi Permit of late Nasir. It cannot await final grant to minors after they attain age of majority. In this instance Taxi permit will be lost to both parties due to inordinate delay in the appointment of limited administrator for the Estate of Late Nasir. Application for Stay refused. No costs awarded.



**FINAL ORDERS**

- a. Application for stay is refused;
- b. No costs.



  
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Deepthi Amaratunga  
Judge

**At Suva** this 25<sup>th</sup> September, 2024.

**Solicitors**

Gordon & Company

Saneem Lawyers