

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 96 of 2016

BETWEEN : **MAHENDRA CHAND** and **SHAMA DEVI** both of Deo Street,
Namaka, Nadi. Carpenter and Domestic Duties respectively.

PLAINTIFFS

AND : **UDAY CHAND** alias UDAI CHANDRA of Deo Street, Namaka, Nadi
as the sole surviving executor & trustee of the estate of Dhan Raj
deceased, occupation not known to the Plaintiffs.

DEFENDANT

Counsel : **Mr. Jitendra Reddy for the Plaintiffs**
(Ms) Barbra Kristine Angco Doton for the Defendant

Date of Ruling : **Friday, 06th April 2018**

RULING

(A) INTRODUCTION

(1) This is an application filed by the Plaintiffs seeking the following Orders;

- (a) *The Defendant be removed as a trustee of the estate of Dhan Raj and the first named first Plaintiff Mahendra Chand be appointed the trustee of the estate of Dhan Raj.*
- (b) *Alternatively, there be an order that the Defendant to Transfer the CT No. 33943 to both the Plaintiffs pursuant to the last will and testament of Dhan Raj.*
- (c) *The Deputy Registrar be authorised by this court to execute the transfer of the CT No. 33943 if the Defendant fails to execute the transfer.*
- (d) *The Defendant be ordered to pay all legal costs on a solicitor client basis.*
- (e) *Any other relief this honourable court deems just.*

- (2) The application is made by “Originating Summons,” dated 31st May 2016 and is supported by an Affidavit sworn on 14th April 2016 by ‘Mahendra Chand’ (the first named Plaintiff).
- (3) The application is made under Order 5 rule 3, Order 7 rule 3, Order 85 rule 4 of the High Court Rules, 1988, Trustees Act Cap 65 and the Succession and Probate Administration Act Cap 60.
- (4) The application was vigorously opposed. The Defendant filed an answering affidavit sworn on 05th September 2016. An Affidavit in reply sworn on 18th November 2016 by the first Plaintiff was filed on behalf of the Plaintiffs.
- (5) The application was heard before Justice Sapuvida on 02nd May 2017.

(B) THE FACTUAL BACKGROUND

- (1) What are the circumstances that give rise to the present application?
- (2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings/affidavits.
- (3) The first named Plaintiff in his affidavit in support of the application deposes *inter alia*;
 1. *I am the first named first Plaintiff in this action and the second named second Plaintiff Shama Devi is my wife.*
 2. *I make this affidavit on myself and on behalf of the 2nd named Plaintiff as well, who has authorised me to make this affidavit on her behalf.*
 3. *That Dhan Raj of Namaka, Nadi, Cultivator, and now deceased (**hereinafter referred to as the “Deceased”**) was the proprietor of the property comprised and described in Certificate of Title No. 33943 formerly CT 7965 situated at Deo Street, Namaka, Nadi. (A copy of the said Certificate of Title is annexed herewith marked with letter “A”)*
 4. *That the deceased died leaving a Will dated the 3rd day of April 1987 wherein the wife of the deceased, Tara Devi was appointed the sole executrix and trustee of the said will of the deceased. (A copy of the last will and testament of Dhan Raj is annexed herewith marked with letter “B”)*
 5. *That the said Tara Devi has since passed on without administering the estate.*
 6. *That subsequent to the death of Tara Wati, the two sons of the deceased, Uday Chand, the Defendant herein and his brother Bijay Chandra aka Samuel Vijay Chand were granted Letters of Administrators De Bonis Non of the deceased’s estate by the High Court of Fiji. (A copy of the said Letters of Administration De Bonis Non is annexed herewith marked with annexure “C”).*

7. That the second administrator Bijay Chandra aka Samuel Vijay Chand has since passed away leaving the Defendant as the sole surviving executor and trustee of the estate of the deceased.
8. That the Defendant is now sued in his capacity as the sole surviving Administrator De Bonis Non of the estate of Dhan Raj, deceased herein.
9. That the 2nd named Plaintiff and I are the beneficiaries in the Estate of Dhan Raj, deceased (The Estate) in respect of CT No. 33943. (A copy of the Probate with Will is annexed herewith marked Annexure "D").
10. That Pursuant to the last will and Testament ("The Will"), of the said Dhan Raj, dated 3rd day of April, 1987, the deceased devised his properties as follows:-
 - (a) Real Estate situated at Momi Ref: 4/11/667 being Lot 10 Momi Subdivision containing 36 acres to my sons UDAY CHAND to have 17 acres, SAMUEL VIJAY NAND to have 12 acres, my grandson BOBY CHAND father's name Samuel Vijay Chand to have 5 acres and 2 acres to RADHE KRISHNA TEMPLE.
 - (b) Real Estate situated at Namaka, Nadi known as "WAQADRA" being part of CT 7965 containing 3 chains long and 1 chain wide to my son in law MAHENDRA CHAND father's name Shayamlal and my daughter SHAMA DEVI to have ½ chain long and 1 chain wide and the rest remainder and residue of my estate unto my wife TARA DEVI daughter of Ramlal absolutely.
11. That the said Defendant since becoming the Administrators De Bonis Non has disposed off the property comprised and described in paragraph 9 (a) hereinabove.
12. That the property described in paragraph 9 (b) hereinabove is left unadministered as of the date of filing this application and the Defendant has refused and or neglected to dispose the said property in accordance with provision 4(b) of the said Will.
13. That the Defendant was required by law to distribute the estate according to the Last will and Testament of the deceased particularly CT No. 33943 to me and my wife but so far failed, neglected and refused to do the same despite several requests made to him to do so.
14. That inspite of several requests and demands for the Defendant to distribute the property in accordance with the last will and testament of the deceased, the Defendant is now making excuses and deliberately delaying transfer of the said CT No. 33943 to me and my wife as he and his family are occupying part of the property without any lawful excuse for their own use, occupation and enjoyment.
15. That on the 7th day of August 2014 I engaged the services of Messrs Koya & Company Lawyers to issue a notice for the Defendant to transfer the said CT No. 33943 to me and my wife but the defendant has refused, ignored and failed to transfer the said CT No. 33943 to me and my wife. (A copy of the said Notice is attached and marked as annexure "E").

16. *That the Defendants have built their house on CT No. 33943 illegally and part of their building is protruding into the access road reserve causing nuisance and obstruction to others.*
17. *That the Defendant has failed and neglected to contribute to any town rates for the portion of Land occupied by him and his family.*
18. *The Defendant has breached the terms of the last Will and testament of the said deceased.*

PARTICULARS OF BREACH AND/OR NEGLIGENCE

- (a) *Failed to distribute the estate of the said deceased according to Law.*
 - (b) *Failed and neglected to distribute the CT No. 33943 to me and my wife in terms of the last Will of the deceased.*
 - (c) *Illegally and without any colour of right have constructed their own houses on CT No. 33943 which was required to be transferred to me and my wife.*
19. *That as a result of the breaches and neglect by the defendant, I and my wife are suffering losses and damages and will continue to do so unless the Defendant is ordered to transfer the property to us in accordance with the last will and testament of the deceased.*

PARTICULARS OF LOSSES

- (a) *Unable to properly develop our area.*
 - (b) *We are paying all the town rates to Nadi Town Council.*
20. *That I therefore pray for order in terms of the Originating Summons filed herein.*

(4) In response to above, the Defendant in his **"answering affidavit"** deposed as follows;

1. *THAT I am the person named and described as the Defendant in the action herein.*
2. *THAT in so far as the content of this affidavit is within my personal knowledge it is true in so far as it is not within my personal knowledge it is true to the best of my knowledge, information and belief.*
3. *THAT I seek leave of this Honourable Court to refer to the Affidavit of Mahendra Chand sworn on the 14th day of April 2016 and filed in the action herein on the 26th day of May 2016 (hereinafter referred to as "the Affidavit").*
4. *THAT I deny the allegations contained in paragraph 3 of the Affidavit and state that Dhan Raj was never the registered proprietor of the property comprised in Certificate of Title No. 33943 being Lot 3 on DP 7962. Late Lal Chand was the brother of Dhan Raj. Lal Chand was the registered proprietor of all that piece and parcel of land comprised in*

Certificate of Title No. 25210 being Lot 11 on DP 6042 having an area of 3479 square meters. Lal Chand subdivided the said land into smaller titles and one of the title that was carved out of the subdivision is Certificate of Title No. 33943. That although I am named as one of the Administrators of the Estate of Dhan Raj on the said Certificate of Title No. 33943 I deny that Dhan Raj was ever the registered proprietor of the said land. A copy of the Certificate of Title No. 25210 and Certificate of title No. 33943 are annexed hereto and marked as "UC1" and "UC2" respectively.

5. *THAT I admit the allegations contained in paragraph 4 of the Affidavit but further add that the said Will of Dhan Raj only refers to a Certificate of Title No. 7965 containing an area of 3 chains long and 1 chain wide. There is no reference to the Certificate of Title No. 33943 which title was only issued on the 3rd day of April 2001 whereas the said Will was made on the 3rd day of April 1987. Further that all the rights and interests in CT 7965 was cancelled when the CT 7965 was cancelled.*
6. *THAT I admit the allegations contained in paragraph 5 of the Affidavit in so far as the Estate of Dhan Raj is concerned but further say that late Tara Wati could not have carried out anything in respect of Certificate of Title No. 33943 as the property did not belong to Dhan Raj.*
7. *THAT I admit the allegations contained in paragraph 6 of the Affidavit.*
8. *THAT I admit the allegations contained in paragraph 7 of the Affidavit.*
9. *THAT as to the allegations contained in paragraph 8 of the Affidavit I say that I have never been appointed as the sole administrator of the Estate of Dhan Raj and I cannot be and not the executor and trustee of the Estate of Dhan Raj.*
10. *THAT as to the allegations contained in paragraph 9 of the Affidavit I say as follows:*
 - 10.1 *THAT I admit that Plaintiffs are named as beneficiaries under the Will of Dhan Raj.*
 - 10.2 *THAT I deny that the said Will confers any rights or interests in CT No. 33943 in the Plaintiffs as alleged or otherwise. The said title did not belong to Dhan Raj and at the time of his death the said Title was not issued and as such no rights or interests in the title could have been created.*
11. *THAT I admit the allegations contained in paragraph 10 of the Affidavit.*
12. *THAT I admit the allegations contained in paragraph 11 of the Affidavit and say that the property at Momi Ref: 4/11/667 being Lot 10 Momi Subdivision was the property of the Estate of Dhan Raj.*
13. *THAT as to the allegations contained in paragraph 12 of the Affidavit I say as follows:*
 - 13.1 *That the property comprised in Certificate of Title No. 7965 was never owned by Dhan Raj. A copy of Certificate of title No. 7965 is annexed hereto and marked as "UC3"*

- 13.2 That the property comprised in Certificate of Title No. 33943 did not exist when the said Will was made.

The land comprised in Certificate of Title No. 33943 is One Thousand one hundred and sixty four square meters (1164m²). The area that Dhan Raj has bequeathed to the first named Plaintiff is 3 chains long and 1 chain wide and for the Second Plaintiff it is ½ chain long and 1 chain wide. Since 1 chain is 20.1168 meters the total area that for the First named Plaintiff is 610.44 square meters and the total area for the second named Plaintiff is 202.41 square meters and so the total area that Dhan Raj has bequeathed to the Plaintiffs from the land is 812.85 square meters. Even if Dhan Raj was the owner of the property comprised in CT. 33943 (which he was no) the reference to the size of the land that he bequeathed to the Plaintiffs under his Will clearly shows that he did not he had no intentions of bequeathing all the property comprised in the land to the Plaintiffs even if he was the owner of the title, which was clearly not the case.

That the land then comprised in CT No. 7965 was 11 acres, one rood and three perches and two-tenths of a perch. This title has since been cancelled. Clearly Dhan Raj could not have referred to this title as he was never the registered proprietor of the title and this title comprised of a very large parcel of land in comparison to the land that is referred to in his Will.

The Certificate of Title No. 25215 which was created after CT No. 7965 was cancelled comprised of 3479 square meters. The deceased Dhan Raj was never the registered proprietor of this land either. The total area of land that he bequeathed to the Plaintiff under his last Will is only 812.85 square meters and so he could not have been referring to the property comprised in CT No. 25215 as it was not only a different size but also not his property to give away anyway.

Since neither the property comprised in CT. no. 7955 nor the property comprised in CT No. 33943 were the property of Dhan Raj he did not have any rights or interests in those properties. That therefore I as the Administrators of the Estate of Dhan Raj do not have any rights to deal with the two properties. The Estate had only one property which has been properly distributed and as such I do not have any further duties to perform as the last remaining Administrator of the Estate.

14. THAT I deny the allegations contained in paragraph 14 of the Affidavit. I repeat what I have deposed in paragraph 13 above.
15. THAT as to the allegations contained in paragraph 15 of the Affidavit I say that I did receive the said letter from the Plaintiff's solicitors and I advised the Plaintiffs of my position in the matter which is what I have deposed herein above.
16. THAT I deny the allegations contained in paragraph 16 of the Affidavit I say that all the buildings on the Certificate of Title have been built in accordance with the relevant laws and in any event the Plaintiffs do not have any rights or interests therein anyway. These houses were built during our fathers days. The Plaintiffs also built their house on the land about 20 years ago and they themselves fenced the area that they were occupying.
17. THAT I deny the allegations contained in paragraph 17 of the Affidavit and say that I pay my share of the town rates. There are three families that are in occupation of the land and so they all pay their share of the town rates. A copy of some of the receipts that I have

received for the payment of town rates I have made is annexed hereto in a bundle and the bundle of receipts all together are referred to as "UC4".

18. THAT I deny the allegations contained in paragraphs 18 of the Affidavit and its subparagraphs and repeat what I have deposed herein above.
 19. THAT I deny the allegations contained in paragraph 19 of the Affidavit and say that the Plaintiffs have not suffered any loss or damages and have had the full benefit of the use of the land. The Plaintiffs have a tenant on the property and is deriving the maximum benefit out of it.
 20. THAT Certificate of Title No. 33943 was only transferred to my brother Bijai Chand and I for our sole benefit and it was mistakenly and wrongly registered in our name in a representative capacity.
 21. THAT I am not an educated person and possess no knowledge of the law. That in our about September 2004 the Plaintiffs took me to a Justice of Peace who explained to me that the Plaintiffs had all the rights and interests in the land in issue and that if I did not agree to it then both my deceased brothers family and my family would be evicted from the property. Not knowing any better and trusting and relying on the Plaintiffs and the Justice of Peace I agreed to enter into a Deed of Family Arrangement dated the 20th of September 2004. A copy of the said Deed is annexed hereto and marked as "UC5".
 22. THAT I was induced to entered into the said Deed on the false and misleading representation by the first named Plaintiff and the Justice of Peace as well who made me believe that I altogether with my family and my brothers family did not have any rights or interests in the land where we were living and that we would otherwise be evicted from our own houses. That it was under this form of duress and undue influence that I signed the Deed.
 23. THAT under the Deed for the natural love and affection of the Plaintiffs towards me they agreed to set over and assign 1/3 one undivided interest in the CT No. 33493 to me being the area that I was occupying.
 24. THAT the Deed is null and void and of no effect.
 25. THAT there are clearly substantial dispute as to the facts in this matter.
 26. THAT I pray that the Plaintiff's summons be dismissed with costs to me.
- (5) The first named Plaintiff filed an "affidavit in reply" sworn on 18th November 2016 which is substantially as follows;
1. That I am the first named first plaintiff in this matter and I have had the privilege of reading the Affidavit of Uday Chand, the Defendant filed herein in support of his notice of Motion.

2. *I now make this affidavit from my own personal knowledge, information and belief and from legal advice obtained in this matter and from the conduct of the Defendant save where to be on information and belief and where so stated I believe the same to be true.*
3. *That I have been duly authorised by the first named first Plaintiff to swear this affidavit on his behalf as well.*
4. *I have been explained the contents of the Affidavit of the Defendant ("the affidavit") by my solicitor Mr Jiten Reddy and I have understood the same.*
5. *That in response to paragraph 4 of the affidavit, I wish to say that the Defendant is the sole surviving Administrator De Bonis Non of the estate of Dhan Raj and the said endorsement is contained in Certificate of title No. 33943, which is annexed in my affidavit as Annexure "a" and the same is also reflected in the affidavit of the Defendant marked as annexure "UC1".*
6. *That in response to paragraphs 5, 6, 7 and 8 of the affidavit, I wish to reiterate the contents of paragraph 4 of my affidavit in so far it contains admissions and I further wish to say that the Defendant as the Administrator of the estate of Dhan Raj is reflected in the said titles as mentioned above.*
7. *That in response to paragraph 9 of the affidavit, I wish to say that the Defendant was appointed the executor and trustee De Bonis Non of the estate of Dhan Raj and due to the death of the other executor and trustee Bijay Chandra aka Samuel Vijay Chand now remains as the sole surviving executor and trustee of the said estate.*
8. *That in response to the contents of paragraph 10 of the affidavit, I wish to repeat the contents of my affidavit and say that we as the Plaintiffs are entitled to relief as sought.*
9. *That I have no comments to make in response to paragraph 11 and 12 as they are admitted.*
10. *That in response to paragraph 13 of the affidavit, I repeat the contents of my affidavit and further say that I am entitled to the reliefs sought as of right as that was the last wish of the said Dhan Raj and in the absence of any other wish of the deceased, the rights of the Plaintiff's shall prevail.*
11. *That in response to paragraphs 14, 15 and 16 of the affidavit; I repeat the contents of my affidavit.*
12. *That in response to paragraph 17 of the affidavit, I wish to say that I did not have any knowledge of payments made by the Defendants because every time I went to pay the town rates at the Nadi Town Council, I was advised that I am in arrears of town rates. I had a genuine belief that I was the only one paying town rates based on what the Town Council employees were telling me.*
13. *That in response to paragraph 18 and 19 of the affidavit; I repeat the contents of my affidavit.*

14. *That in response to paragraph 20 of the affidavit, the Defendant and the other executor and trustee was only appointed in their representative capacity as is reflected on the Certificate of Title.*
15. *That in response to paragraphs 21, 22, 23 and 24 of the affidavit, I say that the said Deed was executed by the Defendant in his full concurrence and authority and he can't now turn around and make baseless allegations of inducement. (I annex herewith marked with letter "A" a copy of letter written by the Justice of Peace Mr Suresh Chandra)*
16. *That in response to paragraph 25 of the affidavit, I wish to state that there is no dispute at all to this matter. The basic fact is that the Defendant remains the sole executor and trustee of the estate of Dhan Raj and should be ordered to distribute the assets in accordance with the last will and testament of Dhan Raj.*

(C) **JURISDICTION**

- (1) Against this factual background, let me now turn to the applicable law.
- (2) The Courts power to remove the trustee and appoint a new one is enshrined in s.35 of the Succession, Probate and Administration Act. Cap 60, and s.73 of the Trustee Act. The provisions respectively read as follows:-

"s.35. 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; and
- (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".

"73-(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in

substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

In particular, and without limiting the generality of the provisions of subsection (1), the court may make an order appointing a new trustee in substitution for a trustee who –

- (a) desires to be discharged;
- (b) has been held by the court to have misconducted himself in the administration of the trust;
- (c) is convicted of any misdemeanour involving, or of any felony;
- (d) is a person of unsound mind;
- (e) is bankrupt; or
- (f) is a corporation that has ceased to carry on business, or is in liquidation, or has been dissolved.

Section 89 (1) states who may apply for the appointment of a new trustee:

89. –(1) An order under the provisions of this Act for the appointment of a new trustee, or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under a disability or not, or on the application of any person duly appointed trustee of the property or intended to be so appointed.

(D) PRINCIPLES TO BE APPLIED

- (1) Against this background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the order the Plaintiffs now seek.
- (2) Apart from the statutory jurisdiction under Section 35 of the Succession, Probate and Administration Act, Cap 60, the court also has an inherent jurisdiction to do the same based on the principles of equity.

Commenting on the inherent and statutory jurisdiction, the New Zealand Court of Appeal said in **“Georgina Kain & Ors v Hutton & Ors”** CA 246/01 ;

“The jurisdiction to appoint and remove trustees is both inherent and statutory, the legislative authority being s.51 (1) of the Trustee Act 1956 which provides as follows:

.....

The inherent jurisdiction is derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries. The relevance of that objective is recognised in well-known cases such as Letterstedt v Broers (1884) 9 App Cas 371 and Hunter v Hunter [1938] NZLR 520.

- (3) What is the rule of conduct of this Court in an application such as this?

Commenting on the rule of law, Blackburn LJ in "*Letterstedt v Broers*" (1884) 9 App Cas 371 said;

"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."

(Emphasis Added)

- (4) The same principles are resonated in **Snell's Principles of Equity (28th ed)** at pages 210 to 211 – that the welfare of the beneficiaries must be the court's guide in exercising both its inherent and statutory jurisdiction to remove a trustee (or executor)

"Apart from statute, the court has an inherent jurisdiction to remove a trustee and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. The welfare of the beneficiaries is also the court's guide in exercising its statutory powers of removal."

(Emphasis Added)

In Miller v Cameron (1936) 54 CLR 372 the Court held;

"The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary."

(Emphasis Added)

In the same case, **Latham C.J** observed that;

"It has long been settled that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration (Letterstedt v. Broers [1]). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his office as trustee. No distinction in this connection can be drawn between a bankruptcy and an assignment for the benefit of creditors. A trustee who becomes bankrupt is removed almost as of course (Bainbrigge v. Blair [2]). There may be exceptions under special circumstances to this rule, but the rule is generally applied (In re. Barker's Trusts [3]). If the bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (In re Adams' Trust [4])."

(Emphasis Added)

Smith J of the New Zealand High Court, in Hunter v Hunter [1937] NZLR 794, held;

"In determining whether the trustees should be removed, the Court has a discretion. The leading case is Letterstedt v Broers (1884) 9 App Cas 371. The Privy Council there held that there is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy, and that the main principle upon which the jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate."

(Emphasis Added)

Scott J in Chellaram v. Chellaram (1985) 1 Ch.D 409 at p.428 said;

"The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations... The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no

reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees."

(E) ANALYSIS

- (1) Before passing to the substance of the Plaintiffs Originating Summons, let me record that Counsel for the Plaintiffs and the Defendant in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by Counsel before Justice Sapuvida as well as to the written submissions and the judicial authorities referred to therein.

- (2) At the outset I would observe that, the Plaintiffs Originating Summons dated 31st May 2016 is supported by an affidavit sworn on 14th April 2016 by "Mahendra Chand" (the first named Plaintiff). In the body of the affidavit the deponent states, "*I make this affidavit on myself and on behalf of the 2nd named Plaintiff as well, who has authorised me to make this affidavit on her behalf.*"

I note that the first named Plaintiff has **no written authorisation to depose** on behalf of the 2nd named Plaintiff. I cannot comprehend the basis on which the first named Plaintiff was deposing. It is rather startling (as I can tell from the record) that at the hearing before Justice Sapuvida, the Defendant did not take an objection to the **admissibility of the supporting affidavit**. In the absence of any objection being taken by Counsel for the Defendant to the admissibility of the supporting affidavit, I can do little about it.

- (3) In simplified form, the allegations of breach of Trust and negligence deposed by the 1st named Plaintiff (the beneficiary) in his affidavit are that;

* Failing to distribute the estate of the deceased according to law

* Failing and neglecting to distribute C.T. No. 33943 to the Plaintiffs in terms of the last will of the deceased.

* Illegally and without any right have constructed their own house on C.T.33943 which was required to be transferred to the Plaintiffs.

- (4) Against this, in the affidavit of the Defendant (the executor), there is a clear suggestion that; (Reference is made to paragraphs 4, 5, 10 and 13 of the affidavit of Uday Chand (the Defendant) sworn on 05th September 2016.)

Para 4. THAT I deny the allegations contained in paragraph 3 of the Affidavit and state

that Dhan Raj was never the registered proprietor of the property comprised in Certificate of Title No. 33943 being Lot 3 on DP 7962. Late Lal Chand was the brother of Dhan Raj. Lal Chand was the registered proprietor of all that piece and parcel of land comprised in Certificate of Title No. 25210 being Lot 11 on DP 6042 having an area of 3479 square meters. Lal Chand subdivided the said land into smaller titles and one of the title that was carved out of the subdivision is Certificate of Title No. 33943. That although I am named as one of the Administrators of the Estate of Dhan Raj on the said Certificate of Title No. 33943 I deny that Dhan Raj was ever the registered proprietor of the said land. A copy of the Certificate of Title No. 25210 and Certificate of title No. 33943 are annexed hereto and marked as "UC1" and "UC2" respectively.

5. *THAT I admit the allegations contained in paragraph 4 of the Affidavit but further add that the said Will of Dhan Raj only refers to a Certificate of Title No. 7965 containing an area of 3 chains long and 1 chain wide. There is no reference to the Certificate of Title No. 33943 which title was only issued on the 3rd day of April 2001 whereas the said Will was made on the 3rd day of April 1987. Further that all the rights and interests in CT 7965 was cancelled when the CT 7965 was cancelled.*

10. *THAT as to the allegations contained in paragraph 9 of the Affidavit I say as follows:*
 - 10.1 *THAT I admit that Plaintiffs are named as beneficiaries under the Will of Dhan Raj.*
 - 10.2 *THAT I deny that the said Will confers any rights or interests in CT No. 33943 in the Plaintiffs as alleged or otherwise. The said title did not belong to Dhan Raj and at the time of his death the said Title was not issued and as such no rights or interests in the title could have been created.*

13. *THAT as to the allegations contained in paragraph 12 of the Affidavit I say as follows:*
 - 13.1 *That the property comprised in Certificate of Title No. 7965 was never owned by Dhan Raj. A copy of Certificate of title No. 7965 is annexed hereto and marked as "UC3"*
 - 13.2 *That the property comprised in Certificate of Title No. 33943 did not exist when the said Will was made.*

The land comprised in Certificate of Title No. 33943 is One Thousand one hundred and sixty four square meters (1164m²). The area that Dhan Raj has bequeathed to the first named Plaintiff is 3 chains long and 1 chain wide and for the Second Plaintiff it is ½ chain long and 1 chain wide. Since 1 chain is 20.1168 meters the total area that for the First named Plaintiff is 610.44 square meters and the total area for the second named Plaintiff is 202.41 square meters and so the total area that Dhan Raj has bequeathed to the Plaintiff from the land is 812.85 square meters. Even if Dhan Raj was the owner of the property comprised in CT. 33943 (which he was no) the reference to the size of the land that he bequeathed to the Plaintiffs under his Will clearly shows that he did not he had no

intentions of bequeathing all the property comprised in the land to the Plaintiffs even if he was the owner of the title, which was clearly not the case.

That the land then comprised in CT No. 7965 was 11 acres, one rood and three perches and two-tenths of a perch. This title has since been cancelled. Clearly Dhan Raj could not have referred to this title as he was never the registered proprietor of the title and this title comprised of a very large parcel of land in comparison to the land that is referred to in his Will.

The Certificate of Title No. 25215 which was created after CT No. 7965 was cancelled comprised of 3479 square meters. The deceased Dhan Raj was never the registered proprietor of this land either. The total area of land that he bequeathed to the Plaintiff under his last Will is only 812.85 square meters and so he could not have been referring to the property comprised in CT No. 25215 as it was not only a different size but also not his property to give away anyway.

Since neither the property comprised in CT. no. 7955 nor the property comprised in CT No. 33943 were the property of Dhan Raj he did not have any rights or interests in those properties. That therefore I as the Administrators of the Estate of Dhan Raj do not have any rights to deal with the two properties. The Estate had only one property which has been properly distributed and as such I do not have any further duties to perform as the last remaining Administrator of the Estate.

- (5) Moreover, in the written submissions, the Defendant (the executor) elaborated on the above matters in the following relevant extracts;

- Para 23 *With respect it is submitted that the last will and testament of the deceased makes no reference to CT No. 33943. The said CT No. 33943 was never registered to the deceased and as such the deceased did not have any interest in the said property to give to the Plaintiffs.*
24. *Paragraph 10 of the Plaintiff's Affidavit in Support sworn on the 14th day of April 2016 states that pursuant to the will, the deceased had devised real estate situated at Namaka, Nadi known as "Waqadra" being CT 7965 containing the area of 3 chains long and 1 chain wide to the Plaintiffs. The area devised by the deceased testator in his will to the Plaintiffs is ½ chain long and 1 chain wide.*
25. *A copy of CT No. 7965 is annexed to the Affidavit of the Defendant sworn on the 5th day of September 2016 and marked as UC3. The said CT No. 7965 shows that the last registered owner of the property was one Lal Deo. The area as stated in the Certificate of Title was eleven acres, one rood, three perches and two tenths of a perch. The said Certificate of Title was wholly cancelled on what appears to be the 18th day of March 1969 after land had been subdivided and sold to various third parties.*
26. *The Plaintiffs allege that the Defendant had failed to distribute the estate according to law, failing to distribute CT No. 33943 in terms of the last will and illegally constructing his house.*

27. *It is respectfully submitted that the Plaintiffs have failed to show any evidence that the deceased testator had intended that CT No. 33943 would be inherited by the Plaintiffs. The property referred to in the will is a completely different property of a different land area and did not exist when the deceased had signed his last will and testament.*
28. *CT No. 33943 was registered on the 3rd day of April 2001 to Uday Chand Bijai Chandra as Administrators De Bonis-Non of the Estate of Dhan Raj. Dhan Raj executed his last will and testament on the 3rd day of April 1987 and passed away on the 2nd day of December 1987, almost 14 years before the property was registered to the Estate.*
30. *The language of the will is clear in that it refers to a property comprising of 3 chains long and one chain wide contained in CT No. 7965. At the time of signing the will, the testator did not have any interest in CT No. 33943. He was not the registered proprietor and there is no evidence to show an interest that the deceased may have had on the said property at the time of signing his will. It therefore submitted that any future interest that was acquired by the Estate of Dhan Raj would from part of the rest and remainder of the estate and pursuant to the will the person entitled to this was the deceased's wife, Tara Devi and not the Plaintiffs.*
40. *The property comprised in CT No. 33943 has an area of 1, 164 square meters and the property mentioned in the will that is comprised in CT No. 7965 is 3 chains long and 1 chain wide (1, 214.06 square meters). One chain comprises 20.1168 meters. The will states that the Plaintiffs are to inherit a land area of ½ chain long and 1 chain wide which is 202.34 square meters.*
41. *It is submitted that these two properties are completely different properties. CT No. 33943 was only registered in the year 2001 whilst the testator died in the year 1987. The testator could not have willed the property to the Plaintiffs because at the time of executing the will he did not have any interest in CT No. 7965 and nor did this eventuate anytime during his lifetime.*
46. *Neither CT No. 7965 nor CT No. 33943 belonged to the late Dhan Raj and there is no evidence whatsoever that the late Dhan Raj had an equitable interest in the said properties or that he would inherit a future interest.*
47. *It is therefore respectfully submitted that the Defendant cannot transfer the property comprised in CT No. 33943 to the Plaintiffs as that was not the intention of the late Dhan Raj.*

(6) It is clear from the above quoted extracts that the executor is seriously denying and disputing the Plaintiff's interest in real estate namely CT No. 33943.

(7) The paragraph four (4) of the last Will and the Testament of deceased Dhan Raj, dated 03rd April 1987 reads as follows;

Para 4. I GIVE DEVISE AND BEQUEATH my real estate as follows :-

- (a) Real estate situated at Momi ref: 4/11/667 being Lot. 10 Momi Subdivision containing 36 acres to my sons UDAY CHAND to have 17 acres SAMUAL VIJAY CHAND to have 12 acres my grandson BOBY CHAND father's name Samuel Vijay Chand to have 5 acres and 2 acres to RADHE KRISHNA TEMPLE.
- (b) Real Estate situated at Namaka, Nadi known as "WAQADRA" being part of C.T. 7965 containing 3 chains long and 1 chain wide to my son-in-law MAHENDRA CHAND father's name Shayamlal and my daughter SHAMA DEVI to have ½ chain long and 1 chain wide and the rest remainder and residue of my estate unto my wife TARA Devi daughter of Ramlal absolutely.
- (8) The Defendant as executor and trustee has disposed of the property comprised and described in paragraph 9(a) of the Will. I note that the property described in paragraph 9(b) of the Will is C.T. 7965 and not C.T. 33943. There is no reference to the **Certificate of Title No. 33943** which title was issued on 3rd April 2001 whereas the said Will was made on 03rd day of April 1987.
- (9) I note with concern however that although no mention has been made in the Will with regards to C.T. No. 33943;
- * the C.T. 33943 has been registered in the name of the executor (the Defendant) and his brother as Administrators De Bonis-Non of the Estate of Dhan Raj, (deceased) on 03rd April 2001.

AND

- * subsequently on 20th September 2004, the Plaintiffs and the Defendant had entered into a **Deed of family arrangement** in which they agreed that **C.T. 7905 is subject to C.T. 33943** and further agreed to distribute the land to the first named Plaintiff.
- (10) The Defendant complains that he signed the deed of family arrangement under duress.
- (11) Leave all that aside for a moment! I observe that the Plaintiffs have chosen to come to this Court by way of "**Originating Summons**" dated 31st May 2016 seeking the removal of the Defendant as executor and trustee of the estate of Dhan Raj (the deceased).

Of such a procedure, Buckley J. said in Re Sir Lindsay Parkinson & Co Ltd's Trusts Deed; Bishop and Others v Smith and Another (1965) 1 ALL E.R. 609

"..... it was, I think, open to the Plaintiffs to institute these proceedings either by Originating Summons or by Writ; by the terms of the rule the matter is left in the discretion of the Plaintiffs, but I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature, charging the

trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, ought normally to be commenced by Writ and not by Originating summons; for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them."

- (12) ^v It is plain from the contents of the Originating Summons that it is **contentious** at the time it was issued **because the Plaintiffs sought the removal of the Defendant as executor and trustee of the estate of Dhan Raj (the deceased) and in lieu thereof the appointment of the first Plaintiff as the trustee of the estate of Dhan Raj**; and, in the alternate, for an order that the Defendant as executor and trustee be directed to transfer C.T. 33943 to both Plaintiffs pursuant to the last Will and the testament of Dhan Raj.

The Defendant is seriously denying, disputing and impeaching the Plaintiffs interest in C.T. 33943. This demonstrates an on-going dispute between them concerning the estate.

Against this background, it is not appropriate to call this a non-contentious or common form application.

The issue requires an investigation by the Court at a proper trial where oral evidence could be called. The issue cannot be determined on affidavit evidence alone. It is impossible for me, and indeed improper, to attempt to resolve the issue on simply affidavit material.

- (13) **The Supreme Court Practice, 1979 Vol. 1 p.1304 states;**

*"Unless the plaintiff's claim is based on an allegation of fraud an originating summons will normally be the correct document for initiating proceedings with regard to the domestic affairs of an estate or trust (O.85, r.4). If, however, the proceedings relate to a breach of trust or wilful default on the part of a trustee which can be specified with some precision and **there is likely to be substantial dispute of fact, the proceedings should be commenced by writ so that the trustee shall have available to him full machinery for discovering precisely the charges against him** (Re Sir Lindsay Parkinson & Co., Ltd. Settlement Trusts, [1965] 1 W.L.R. 372.*

The notes further state that:

*"Should evidence of fraud by a defendant emerge in the course of proceedings commenced by originating summons or **for some other reason it becomes apparent that the proceedings ought to continue as though commenced by writ**, it will not be necessary to start fresh proceedings; the existing proceedings can be continued, as it begun by writ, pursuant to an order under O.28, r.8 (Re Deadman [1971] q W.L.R. 426; [1971] 2 All E.R. 101)".*

(Emphasis Added)

- (14) In the present case, the facts are in dispute, and the procedure of Originating Summons and Affidavit evidence turn out not to be suitable.

Then, what is the fate of this application?

The Court has the power to make an Order under Order 28, rule 9 (providing for continuation of proceedings as if cause or matter begun by Writ) in relation to the action.

Order 85, rule 4 provides;

4. In an administration action or such an action as is referred to in rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without prejudice to the power of the Court to make an order under Order 28, rule 9, in relation to the action.

Order 28, rule 9 provides;

9. (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

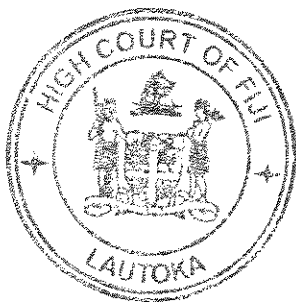
(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

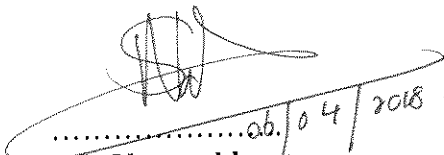
(4) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.

See; *Probate and the administration of Estates. A practical guide by Rossdale, p.265.*

(F) ORDERS

- (1) The action continues as if begun by Writ under Order 28, rule 9 of the High Court Rules, 1988.
- (2) It is further ordered that the Plaintiffs seek direction from the Court as to the future course of the action.
- (3) I direct both Counsel to appear before me on a date to be assigned.
- (4) I order that each party to bear their own costs of these proceedings.




.....06/04/2018
Jude Nanayakkara
Judge

At Lautoka
Friday, 06th April 2018