[2012] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 40/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN WILBERT CHRISTOPHER APPELLANT

AND PATRICK FLETCHER RESPONDENT

The appellant appearing in person

Debayo A Adedipe for the respondent

1 October and 30 November 2012

HARRIS JA

[1] By his will, Mr Leslie Christopher, the father of the appellant, named Mr Eric White and the respondent, Mr Patrick Fletcher, the executors. Mr Christopher died on 20 March 1995. Under the will, the appellant was devised an ½ an acre of land, which was given to him by his father prior to his death. Mr White died sometime in 2003. The appellant, on 28 March 2008, brought a claim against the respondent seeking to have him removed as an executor and to secure the appellant's appointment as the legal

representative of the estate in place of the respondent. On 6 November 2009, the claim was dismissed by Donald McIntosh J as being frivolous and vexatious. The appellant challenged the order of Donald McIntosh J. On 1 October 2012, the appeal was dismissed and the court awarded costs to the respondent to be agreed or taxed.

[2] Two affidavits of the appellant, sworn on 28 July 2008 and on 3 April 2009 respectively, and an affidavit of the respondent, sworn on 12 September 2008, were before this court. The vast majority of the contents of the appellant's affidavits are irrelevant. The main complaints of the appellant were essentially that his father's will was a forgery, that the respondent failed to execute his duties as an executor and should be removed and that the learned judge failed to deal with the appellant's claim adequately. I will venture to make mention of such portions of his affidavits as may be necessary to deal with his complaints. Paragraphs 19 and 20 of the affidavit of 28 July 2008 read:

> "19. THAT IN DECEMBER 2007 THE CLAIMANT VISITED THE NORMAN MANLEY LEGAL AID CLINIC AND AFTER PERUSAL OF THE WILL BY THE ATTORNEY"S [sic] ATTACHED TO THAT INSTITUTION THEY INFORMED ME
>
> A. THAT THE WILL WAS NOT VALID AS IT WAS NOPT [sic] PROPERLY WITNESS [sic] AND SIGNED BY THE WITNESS.
>
> B. THAT TI [sic] WAS NOT STAMPED AT THE GOVERNMENT STAMP OFFICE.
>
> C. THAT THE WILL WAS NOT READ OVER TO THE TESTATOR AND SIGNED ACCORDINGLY.

D. THAT THE SIGNITURE [sic] OF THE TESTATOR COULD BE FORGED

(see copy of the testator [sic] will)

20. THAT THE MATTER WAS REPORTED TO THE MANDEVILLE POLICE WHO SAID THAT THE MATTER MUST BE REFERRED TO THE DIRECTOR OF PUBLIC PROSECUTION [sic] FOR THEIR INVESTIGATION. THIS WAS SUPPORTED BY JUSTICE MCINTOSH AS THE MATTER INVOLVES ALUMINA PARTNERS OF JAMAICA WHO ALONG WITH THE DEFENDANT HAD ACTED CONTRARY TO THE LAND AQUISITION ACT AND COMMON LAW

(see letter from the commissioner of police which was sent to the D.P.P.)

THEREFORE THE CLAIMANT PRAY [sic] THAT THIS HONOURABLE COURT GRANT JUDGEMENT TO THIS CLAIM AND CAUSE THE

1 THE APPOINTMENT OF THE DEFENDANT AS EXECUTOR TO BE RENOUNCED.

2 THAT THE CLAIMANT BE THE APPOINTED EXECUTOR TO HIS FATHER"S [sic] ESTATE.

3 THAT THE DEFENDANT DO PAY THE CLAIMANT COST [sic] FOR THE PROSECUTION OF THIS APPLICATION."

[3] In his affidavit of 3 April, the appellant stated that at the hearing, the learned judge asked him for the will which he produced and upon the perusal of it, several questions were asked of him by the learned judge. The appellant, at paragraph 8 went on to aver that:

> "… He asked me if the land that I inherited was in the Will, I said yes and he asked when was the land transferred to me. I told him in 1994. He said that if the land was transferred in 1994 the will has nothing to do with it."

In paragraphs 9 to 11 he said:

> "9. I also pointed out to the judge that the Respondent was not a proper person to handle the estate of my father and me as he on two occasions in 1995 and 2003 signed over my property and the estate property to Alpart without my consent or knowledge and without the consent of the executor Eric Whyte [sic]. It was also told to me that the Respondent is an agent to [sic] Alpart in the securing of land on their behalf. I tried to submit the agreement between the Respondent and Alpart to the judge who refuse [sic] to accept it as part of my evidence to my claim. The judge also refused to accept [sic] the Exhibit that was mentioned in my Submission from No. -1-14 and only accept [sic] No. 2-13 into evidence.
>
> 10. I told the judge that the Will was not valid and if he could asked [sic] the Respondent the 14 questions that I had submitted in the Bundle would prove that the Will was not done properly and only a few of the beneficharies [sic] are enjoying the benefit while others are not getting what is theirs.
>
> W.C. 3 Copies of the Agreement that the Respondent had signed with Alpart.
>
> 11. I told the judge that should he allow the respondent to remain as the executor only Alpart and some of the beneficharies [sic] will continue to deprive the estate and the other beneficharies [sic] of their inheritance and the government will be deprived of their revenue."

[4] In his affidavit, Mr Fletcher averred that he is the surviving executor of the estate of the late Mr Christopher and the appellant was in receipt of that portion of land mentioned in the will, it having been given to him by his father during his lifetime. The appellant has been paying the taxes thereon, his name having been placed on the tax roll. He further stated that the appellant has no further interest in

the estate. It was also related by him that the beneficiaries under the will have indicated in writing that there is no desire on their part to have the appellant represent them. In paragraph 7 of his affidavit, he went on to state as follows:

> "In about 2003 I got hold of the will when it was agreed amongst the late Mr. Christopher's widow, Sarah Selina Christopher, Wilbert Christopher and the other beneficiaries that I negotiate with Alpart for the exchange of approximately 2 ½ acres of the land, part of the estate for other lands of Alpart's to facilitate the acquisition of a more convenient and favourable access to the lands formerly owned by Mr Christopher. This would have been to the benefit of all the persons who had got land from the late Mr. Christopher."

However, the agreement with Alpart was aborted.

[5] The appellant filed the following grounds of appeal:

> "1. The learned trial judge failed to take the Appellant [sic] Exhibit No. W.C.1 as evidence at the hearing of the Application.
>
> 2. The learned trial judge only took as evidence at the hearing Exhibit No. W.C.L. to W.C. 13 of the fourteen exhibits of the Appellant mentioned in his submission. Thereby depriving the Appellant of a fair hearing.
>
> 3. That the learned trial judge at the hearing of the Application refuse [sic] to enter into evidence the Exhibit of the Appellant. The agreement of the Respondent and Alumina partners of Jamaica to exchange the land that the Appellant had inherited from his father without the knowledge and consent of the Appellant on the 30.11.95and the 30 March 3003, [sic] without the approval of the executor Eric White and who gave the unprobated Will and Testament original copy to Alumina Partners of JA. Without the knowledge and consent of the Appellant Contrary to the Land Acquisition Act see [10. pt2] and see [3.pt2]."

[6] Written and oral submissions were made by the appellant, the majority of which were unfounded or were completely extraneous to the grounds. However, reference will be made to such submissions as are necessary to consider the appeal. The appellant submitted that he has not received the lands given to him under his father's will. The respondent, he contended, sold the lands to Alpart Bauxite Company without his consent and without the knowledge and consent of the other beneficiaries and he, being the oldest sibling, seeks to protect the rights of the others. He also contended that he had exhibited 13 documents to his affidavit in support of his claim and the will was the only one admitted into evidence. It was also his submission that the will was a forgery. In his written submissions he stated that the learned judge failed to follow the Civil Procedure Rules and acted contrary to rule 68.21 by depriving him of the right to have his father's estate regularized. The learned judge's decision was unsupported by "facts evidence and authority".

[7] Mr Adedipe submitted that the action brought by the appellant is without merit as he had not shown that he had an interest which would have given him a right to initiate the action. He argued that the appellant stated that he had received his bequest and based on the facts and the law, there was sufficient material before the learned judge upon which he could have arrived at his conclusion. He further submitted that the widow of the deceased was given a life interest under the will and this the appellant could not call his own. Counsel brought to the court's attention that a document from the beneficiaries indicating that they did not wish the appellant to

represent their interests in the estate was exhibited to the affidavit of the respondent but this, the appellant failed to attach to the affidavit in the record of appeal.

[8] The learned judge, in his reasons for judgment stated:

> "a. claimant admits being in possession of original Last Will and Testament of his father although he produces a photo copy to court which is Exhibit 1 in these proceedings. The Executor is not in possession of the original Will.
>
> b. claimant admits that although mentioned in the Last Will and Testament of his father, any beneficial interest to which he may have been entitled had been received by him, prior to the death of his father and should properly not be in the Will and cannot form part of his father's estate.
>
> c. the claimant is therefore not a beneficiary under his father's Will.
>
> d. the claimant cannot show that any of the beneficiaries of his father's estate would want him to be an Executor of that estate.
>
> e. the claimant's interest as far as this Court is concerned is to obtain his father's estate – for himself solely."

[9] Before proceeding further, it is necessary to state that at the date of hearing of the matter, the appellant stated that he was in possession of the original will. However, instead of producing the original, he produced a photocopy. Mr Fletcher stated that he gained custody of the document in 2003. However, it was delivered by him to a Mrs Jean Senior of Alpart to facilitate it being photocopied, but it was never returned to him. The learned judge acted on the photocopy will presented by the appellant. This would not, in any way, adversely affect his findings and conclusion. It is

also necessary to state that the appellant's complaint that only one of the documents exhibited by him was taken into account by the learned judge is without merit. None of the documents exhibited by the appellant, save and except the will, was relevant to his claim.

[10] The appellant informed the learned judge that the document tendered was a true copy of his late father's will. The authenticity of the document was not challenged by the respondent. It is mystifying and incomprehensible that the appellant, having acknowledged its authenticity, raised an issue as to its validity yet seeks to be substituted as the legal personal representative of the estate upon the removal of the respondent as executor. The real and only question which arises is whether the appellant had the capacity to have brought the action against the executor. He admitted that the land devised to him under the will had been given to him by his father during his father's lifetime. There is evidence that he has been in exclusive possession of it since that time and pays the taxes for it. This was the only gift made to him under the will. Clearly, the land is no longer an asset of his father's estate.

[11] It has been noted, as Mr Adedipe pointed out, that the proceedings were commenced by way of a claim form and a plethora of affidavits were filed. Rule 68.61(2)(b) of the Civil Procedure Rules specifies that a claim for the removal or substitution of a personal representative should commence by way of a fixed date claim form. Although the appellant had employed the wrong procedure in initiating the action, consideration will nontheless be given to the matter. By his claim, he sought,

among other things, to have the executor removed. In his claim, he stated that the respondent:

> "…..as the executor for the estate of Leslie Christopher (Mr) deceased 1995 failed to have the interest of the estate professionally managed and the Will and Testament probated as is required under the probate act [sic].
>
> Thereby depriving the beneficiaries their inheritance as to the expressed wishes of the deceased."

The appellant would only have been eligible to have brought the claim if he were a legatee of his father's estate. A legatee is entitled to a chose in action in the property comprised in the estate of a deceased - see ***Re Leigh's Will Trusts*** [1970] Ch 277 and ***Commissioner of Stamp Duties (Queensland) v Livingston*** [1965] AC 694.

[12] The appellant, not being a legatee in the estate, was not entitled to have brought an action in respect of any matter touching the estate. As a consequence, he, not being qualified to share beneficially in the estate, would not have been endowed with the right to commence proceedings for the removal of the executor. It is without doubt that his claim must fail. Therefore, it cannot be said that the learned judge was wrong in concluding that the claim brought by the appellant was frivolous and vexatious.

[13] Although the foregoing is sufficient to dispose of the appeal, it is necessary, for the benefit and enlightenment of the appellant, to state that even if he had a right to bring an action for the removal of the respondent as executor, there is no evidence that, he, the respondent had intermeddled in the estate of the deceased or committed

any acts of mismanagement to justify his removal. There is evidence from the respondent that an agreement was entered into between Alpart and himself for the exchange of 2½ acres of land for other lands owned by Alpart for the purpose of acquiring favourable accessibility to the lands that were properly devised to the beneficiaries. As rightly averred by the respondent, this was done for the benefit of the beneficiaries of the estate. The appellant and all the beneficiaries consented to the agreement. Unfortunately, the agreement was aborted. There is also evidence that the lack of funds rendered the respondent unable to proceed with an application for probate in the estate. There is nothing to support any of the allegations raised by the appellant to show that the respondent had acted in any way in contravention of the duties imposed on him as an executor.

[14] Rule 68.21, on which the appellant sought to rely as giving him a right to make the claim, is of no assistance to him. That rule relates to the situation where two or more persons are entitled to a grant of representation, in the same degree, in an intestacy. Further, if the circumstances were such that the respondent was to be removed as executor, the appellant would not be entitled to obtain a grant of representation in the estate. It would not be open to him to apply for a grant of letters of administration with the will annexed as he, having no beneficial interest in the estate, would not rank in the class of persons qualified to make such an application.

[15] In passing, it should be mentioned that a submission was made by the appellant that another judge had earlier, in dealing with another claim made by him, ordered that

he could be made an executor if the respondent had renounced his executorships but this, the learned judge ignored although it was brought to the learned judge's attention. A perusal of the record does not support the appellant's claim that any order was made as he indicated. But even if such an order was made, Donald McIntosh J would not be entitled to act upon it.

[16] The foregoing are the reasons for the decision in dismissing the appeal.