[2022] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

APPLICATION NO COA2021APP00212

BETWEEN	**LINCOLN WRIGHT (Executor of the estate of Hartley Nugent)**	**APPLICANT**
AND	**VERNON NUGENT**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Co for the applicant

Mrs Claudia Forsythe and Nelton Forsythe instructed by Forsythe & Forsythe for the respondent

9 and 13 May 2022

MCDONALD-BISHOP JA

[1] Mr Lincoln Wright ('the applicant') is the purported executor of the estate of Hartley Nugent ('the deceased'). Mr Vernon Nugent ('the respondent') is the deceased's son.

[2] Subsequent to the deceased's death on 6 January 2020, the applicant and one of the deceased's daughters presented a will, dated 25 October 2019, purported to be his last will and testament ('the will').

[3] The applicant applied to the Supreme Court for a grant of probate. However, on 4 November 2020, with the consent of five of his siblings and his mother (the widow of the deceased), the respondent entered a caution to oppose probate being granted, thereby mounting a challenge to the validity of the will. The respondent contends that at the date of the will, the deceased lacked the mental capacity to dictate the preparation of the will

due to his medical condition and, further, that the signature purporting to be that of the deceased as testator is not his. On 30 November 2020, the applicant responded with a warning to the caution.

[4] On 4 January 2021, the respondent filed an acknowledgment of service and a notice of application for court orders, directed to a judge or master, seeking, among other things, directions and an order that the caution remains in effect until the determination of the validity of the will. On 23 February 2021, the application was fixed for consideration before Reid J (Ag), as she then was. She made orders for, among other things, the amendment of the notice of application and the filing and service of affidavits by the parties. The hearing of the application was adjourned to 27 July 2021 where, on that date, the hearing was further adjourned to 27 September 2021. By that time the respondent had filed a fixed date claim form commencing probate proceedings on 15 June 2021.

[5] On 27 September, the notice of application was listed before Lindo J ('the learned judge'). Counsel for the applicant, Mr Wildman, made an oral application (on a preliminary objection) for the caution to be removed. The application was argued on the premise that no legal basis existed for the maintenance of the caution as the respondent failed to provide sufficient evidence to show that the will was not duly executed according to law. On 3 November 2021, the learned judge, among other things, refused the applicant's oral application for the caution to be removed and leave to appeal the decision.

[6] The Court of Appeal Rules 2002 ('CAR') permit the applicant to further apply to this court for leave to appeal, and that is what he has done. Therefore, now before this court is an application by the applicant for permission to appeal the decision of Lindo J delivered orally on 3 November 2021, refusing his application for the caution to be removed.

[7] The application for permission to appeal is supported by two affidavits of the applicant: the first sworn to on 5 November 2021, and a further affidavit sworn to on 10

March 2022. In opposition to the application, the respondent filed an affidavit and a supplemental affidavit sworn to by him on 23 November 2021 and 21 April 2022, respectively.

[8] The applicant is seeking permission to advance the following grounds of appeal:

> "I. The Learned trial judge erred in law in failing to remove the caution against the Last Will and Testament of the late Hartley Nugent, instituted by the Respondent, he being one of the children and beneficiaries of the Last Will and Testament of the late Hartley Nugent.
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> II. The learned trial judge erred in law in failing to appreciate that, there was no evidential basis for maintaining the caution against the Applicant, as the affidavit evidence relied on by the Respondent did not demonstrate that there was any triable issue to raise uncertainty as to the due execution of the Last Will and Testament of the late Hartley Nugent.
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> III. The learned trial judge erred in law in failing to appreciate that the evidence relied on, as contained in the affidavit evidence of the Respondent, contained inadmissible hearsay evidence which could not form the basis for impeaching the duly executed Last Will and Testament of the late Hartley Nugent."

[9] The general rule is that permission to appeal in civil cases will only be given if the court considers that an appeal will have a real chance of success (see rule 1.8(7) of the CAR).

[10] Mr Wildman, in contending that the proposed appeal has a real chance of success, submitted that the will was properly executed in keeping with the provisions of the Wills Act and the Statute of Frauds. Counsel submitted that section 6 of the Wills Act is germane to this application as a proper application of this provision will show that the will was properly executed according to law. In support of this contention, he relied on the case of **Pearl Clarke v Vivian Beckford and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 69/1991, judgment delivered 3 May 1993.

[11] Mr Wildman also relied on the case of **Re Estate of Slidie Basil Joseph Whitter** [2014] JMSC Civ 185 ('**Re Whitter**') in contending that the caution ought to have been ordered removed on the basis of insufficient evidence. He submitted that in **Re Whitter**, Anderson J had to consider whether a caution that was lodged against the will of the deceased was properly lodged having regard to the evidence that was placed before the court. Counsel contended that in that case, the quality of the evidence did not raise any issue that could cast doubt on the validity of the will. Therefore, the caution could not stand.

[12] In her submissions on behalf of the respondent, Mrs Forsythe also relied on section 6 of the Wills Act. She argued that although the section provides for a person to sign on the testator's behalf, in this case, the affidavit evidence of the applicant is that he held and guided the deceased's hand in the signing of the will. She contended that the purported will was not made in accordance with the wishes of the deceased. For her arguments, counsel drew support from the case of **Pendock Barry Barry v James Butlin** [1838] 2 Moore 480, which held that a party seeking to propound a will must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

[13] In the light of the parties' submissions, it is considered necessary to emphasise that the decision the applicant is seeking permission to appeal is the decision of the learned judge not to order the removal of the caution. This decision had nothing to do with the propounding of the will. The validity of the will is, therefore, irrelevant to our determination of the application. For this reason, the parties' reliance on section 6 of the Wills Act and cases concerning the proper execution of a will were of no assistance to this court in determining this application for leave to appeal.

[14] Accordingly, the sole issue before this court is whether the applicant has a real chance of successfully arguing on appeal that the learned judge was wrong when she refused his application for the caution to be removed. We have not had the benefit of the learned judge's reasons for refusal of the application. However, the absence of written

reasons cannot be laid at the feet of the learned judge as none was required from her for the purposes of the application for leave to appeal. Additionally, the court has not seen the necessity to request the reasons as the question before the learned judge was a simple one of procedure which is answerable by a consideration of the rules of court. It involved no question of fact.

[15] The procedural requirements for the entry of a caution in opposition to a grant of probate are contained in Part 68 of the Civil Procedure Rules 2002 ('CPR'). For reasons that will soon become evident, it is considered useful to highlight the relevant portions of Part 68 of the CPR that are engaged in these proceedings.

[16] Rule 68.38(1) provides that a person wishing to oppose a grant of probate may enter a caution at the registry. The person who enters that caution is referred to as the "cautioner". In this case, the respondent was the cautioner.

[17] The entry of a caution prevents the registrar from allowing any grant to be sealed (other than a grant *ad colligenda bona*) once he or she has knowledge of an effective caution (rule 68.38(5) of the CPR). Therefore, with the caution in place, the registrar was prevented from granting probate.

[18] Any person claiming an interest in the estate may cause a warning to be issued to the cautioner requiring the cautioner to file an acknowledgment of service and to give particulars of any contrary interest in the estate (rules 68.39(1) and 68.39(2)(c) of the CPR).

[19] It must be stated at this juncture the court's difficulty in understanding rule 68.40(1) of the CPR, which follows. It reads:

> "68.40 (1) A person who wishes to oppose **a grant** must –
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> (a) file an acknowledgment of service in form P.19 at the registry;

(b) serve a copy of the acknowledgment of service on **the cautioner**; and

(c) issue and serve on **the cautioner** an application for directions." (Emphasis added)

[20] It would appear, from a contextual approach to the reading of the rule as well as form P.19 referred to at sub-rule (1)(a), that there is an error. First, the reference in the opening sentence to a person who wishes to oppose a "grant" raises a question as to whether it ought to have been a person who wishes to oppose a "warning" given the preceding sub-rules. Second, and even more relevant for present purposes, is the reference in sub-rules (1)(b) and (c) to service on "the cautioner". Given that the person filing the acknowledgment of service after the warning is served would be the cautioner, it would be absurd to require the cautioner to serve an acknowledgment of service and an application for directions on himself. This is why form P.19 (the form used to acknowledge service of the warning) states, among other things, that "[t]he above-named cautioner acknowledges service of the warning…" and provides instructions that the "acknowledgment of service must be filed at the registry and a copy served on the person warning…". Accordingly, reference to "the cautioner" in rules 68.40(1)(b) and (c) of the CPR is taken to be an error and is read as meaning "the person warning the caution". This interpretation is taken to avoid a manifest absurdity as it could not have been the intention of the framers of the CPR that the cautioner serves himself. The court would recommend that this rule should be revisited by the Rules Committee.

[21] Be that as it may, this error does not affect this case and the matters for the court's consideration. In employing the construction of rules 68.40(1)(b) and (c) as stated above, the cautioner had up to 14 days after being served with the warning to file and serve an acknowledgment of service and to issue and serve on the person warning the caution an application for directions (see rule 68.40(1) and (2) of the CPR).

[22] In the instant case, the applicant issued his warning pursuant to rule 68.39(1), to which the respondent responded with an acknowledgment of service and application for

directions in keeping with the CPR. This application for directions was made to a judge or master in chambers (and not the registrar as it ought to have been) and was subsequently placed before a judge who made orders for the preparation of affidavits and adjourned the matter. It was upon a subsequent adjourned hearing on 27 September 2021 that the matter came before the learned judge.

[23] At the time the respondent's application for directions went before the learned judge, a fixed date claim form had already been filed by the respondent commencing probate proceedings on 15 June 2021. It was in that context that Mr Wildman made the application on behalf of the applicant challenging the continuity of the caution. The reported basis for the application is that there was no evidence that the will was not duly executed according to law and his client was being prevented from obtaining a grant of probate. Mr Wildman cited no legal basis or authority for his application but advised this court, when asked the legal underpinning for the application, that it was within the inherent jurisdiction of the court to grant the order removing the caution. He made no reference to Part 68 of the CPR.

[24] On 3 November 2021, the learned judge, among other things, refused the application to remove the caution (by denying the preliminary objection) and adjourned the first hearing of the amended fixed date claim to 14 February 2022. What is indisputable is that by the time the applicant's application for directions came on for hearing on 27 September 2021, the learned judge had before her a fixed date claim form, challenging the validity of the will.

[25] The existence of the fixed date claim form and the fact that the caution was in force at the time the application for directions was issued, have given rise to a consideration of rule 68.40(4) of the CPR. The rule states:

> "Any caution in force when an application for directions is issued remains in force **until the commencement of a probate claim** unless, upon giving directions, the registrar orders that the caution ceases to have effect." (Emphasis added)

[26] It is clear that unless, upon giving directions, the registrar orders that a caution ceases to have effect, that caution, once in force at the time of the application for directions, remains in force until the commencement of a probate claim. For completeness, it is important to note other circumstances delineated under Part 68 in which a caution may cease to have effect other than upon commencement of probate proceedings. They are as follows:

(1) where a cautioner withdraws the caution by giving notice to the registry at any time before a warning is filed (rule 68.38(6));

(2) where the cautioner fails to file an acknowledgment of service within 14 days of receiving service of the warning and the person warning the caution files an affidavit proving service of the warning (rule 68.40(3)); and

(3) where a period of six months has elapsed since the entering of the caution and no application for direction or no written request for extension had been made (rules 68.38(2) and 68.38(3)).

[27] In keeping with the provisions of rule 68.40(4), the caution would have remained in force until the commencement of the probate claim given that the registrar had not ordered it to cease. Rule 68.55 of the CPR speaks to the commencement of probate proceedings and provides at rule 68.55(1) that "probate proceedings must be begun by issuing a fixed date claim form in form 2". The respondent, in keeping with the dictates of the rule, issued a fixed date claim form on 15 June 2021. Accordingly, on this basis, it could be said that with probate proceedings having commenced by the issuance of a fixed date claim form on 15 June 2021, the caution would have ceased to have effect as of that date. This would mean that at the time of the applicant's oral application, there was, by operation of law, no subsisting caution that could be the subject of an order for

removal. Accordingly, on this basis, the learned judge's refusal of the application could not be a meritorious subject of an appeal, whatever her reasons for refusal might have been.

[28] There is, however, an alternate hypothesis which, if it were to be advanced, would still not affect the correctness of the learned judge's decision. This alternate position emanates from the fact that the fixed date claim form was not filed with the particulars of claim as required by rule 68.55(4) of the CPR. While under Part 8 of the CPR a fixed date claim form is to be accompanied by affidavit, under Part 68.55 it must be accompanied by particulars of claim. The respondent had filed affidavits in support of the fixed date claim form instead of particulars of claim. The learned judge sought to rectify this and set matters right by ordering the filing of the particulars of claim on or before 12 November 2021. However, even if, for argument's sake, one were to contend that the issuance of the fixed date claim form, without the requisite particulars of claim, did not properly commence the probate proceedings, this could not avail the applicant. This is so because the caution would, nevertheless, have had to remain in force until the probate proceedings were commenced. On this alternate hypothesis, this would have been until the filing of the particulars of claim on or before 12 November 2021. Then, upon the filing of the particulars of claim, the caution would have ceased. So, whether particulars of claim were filed or not, there would have been no legal basis for the learned judge to grant an order for the caution to be removed.

[29] The court considers it necessary to add that rule 68.40(4) establishes that by operation of law, the caution would cease to have effect upon commencement of a probate claim unless it was brought to an end, before then, upon the order of the registrar. It is the registrar who is given the power under the CPR to make the order. A judge is not clothed with the authority under the CPR to remove or order the cessation of a caution. Indeed, it is curious that the registrar was never involved in the instant case. It is considered prudent to urge strict observance of and adherence to Part 68 of the CPR, particularly those provisions which place the duty and responsibility on the registrar to

deal with applications for directions following the entry of a caution. In this regard, it seems necessary to highlight rule 2.5(1) of the CPR, which states:

> "2.5 (1) Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –
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> (a) a single judge;
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> (b) a master; or
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> (c) a registrar."

[30] It seems safe to conclude that if the matter were to proceed to a hearing of the appeal, the applicant would be hard-pressed to satisfy this court that the learned judge erred in refusing to remove the caution. This is because, by virtue of the operation of rule 68.40(4) of the CPR, the caution would have ceased to have effect upon the issuance of the fixed date claim form (even without the particulars of claim) on 15 June 2021. Even further on an alternative basis, if it were to be argued that the commencement of probate proceedings was not perfected until the issuance of the particulars of claim, then it would have continued in force until the issuance of the particulars of claim (which was ordered to be filed on 12 November 2021). On either analysis, the caution would not have been amenable to an order for removal by the learned judge. For these reasons, the application was misguided and the arguments advanced in support of it are, correspondingly, untenable.

[31] Accordingly, the proposed appeal has no realistic chance of success and so the application for permission to appeal must, perforce, fail.

[32] Concerning the question of the costs of the application for permission to appeal, the court had raised the issue with counsel for their submissions at the end of the hearing of the application. Mrs Forsythe submitted that an order for costs should be made in favour of the respondent. The court enquired whether the estate should fairly be asked

to absorb these costs given the representative standing of the applicant as the purported executor. The court also raised the question of the making of an order for costs against the applicant in his personal capacity or Mr Wildman, his counsel, by an order for wasted costs. This is because even a cursory reading of the CPR would have disclosed that the application had no legal basis and was bound to fail. Counsel, Mr Wildman, however, responded that the learned judge had entertained the application and so the consideration of a costs order against the applicant or him would not be appropriate or fair.

[33] Having considered (a) the submissions of counsel on both sides that were deployed in this court relative to the application for permission to appeal; (b) the procedural misstep in the court below by the respondent in his notice of application addressed to a judge or master for the caution to remain in force until determination of the validity of the will; and (c) the applicant's ill-conceived application for removal of the caution and the learned judge's entertainment of it, which led to the unnecessary proceedings in this court, this court would make no order as to costs. The respondent must share the blame for the wasted time expended on an unnecessary application in the court below and in this court, having regard to the provisions of the CPR. I find compelling reason to deviate from the general rule that costs follow the event.

[34] Accordingly, I would propose that the application for permission to appeal is refused and that there be no order as to costs against the deceased's estate. The applicant and respondent must personally bear their own costs.

EDWARDS JA

[35] I agree.

SIMMONS JA

[36] I agree.

MCDONALD-BISHOP JA

ORDER

1. The application for permission to appeal, filed on 10 November 2021, is refused.

2. There shall be no order as to costs against the estate of the deceased, Hartley Nugent.

3. The applicant (in his personal capacity) and the respondent are to each bear their own costs of this application.