[2012] JMSC Civ. 78

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011 HCV 06164

IN THE MATTER of the estate of BERNITTA BROWN, late of Salem District, Runaway Bay P.O. in the parish of Saint Ann, Businesswoman, Deceased, Testate

BETWEEN	**MARY WALLACE (Executor of the estate of Bernitta Brown deceased)**	**1ST CLAIMANT**
AND	**PAULETTE BROWN**	**2ND CLAIMANT**
AND	**JULIETTE MORRISON**	**DEFENDANT**

Mr. Linton Gordon instructed by Frater, Ennis and Gordon for the claimants

Miss Marion Rose-Green instructed by Marion Rose-Green and Co. for the defendant

HEARD: 11th May, 5th June and 12th July, 2012

Letters of Administration – Revocation - Practice and Procedure – Filing Defence out of time

IN CHAMBERS

V. HARRIS, J (AG.)

[1] At the first hearing of this matter the defendant, by way of a notice of application for court orders supported by affidavit, sought the following orders from the court:

(a) that the defence filed on April 24, 2012 be allowed to stand
(b) that the claimants file and serve a reply to the defence within thirty (30) days, if so advised
(c) costs of this application to be costs in the claim
(d) such further and other relief as this Honourable Court may deem fit.

[2] The grounds on which the orders are sought are that:

(i) the case has not yet been decided on its merits and the defendant has a real prospect of successfully defending the claim
(ii) the defendant has a good explanation for the failure to file and serve her defence before April 24, 2012
(iii) the delay in filing the defence is not inordinate and as such will not prejudice the claimants

[3] The application is made pursuant to the Civil Procedure Rules, 2002, (the CPR) rule 10.3 (9) which permits a defendant to apply to the court for an order extending the time for filing a defence.

[4] The claimants are opposed to the application on the basis that the defence filed is unmeritorious, the defendant has no real prospect of successfully defending the claim and consequently it should not be allowed to stand.

BACKGROUND

[5] It is undisputed that Bernitta Brown (the deceased) died on December 17, 1995 and was the owner of a parcel of land located at Salem, Runaway Bay in the parish of St. Ann, registered at Volume 1030 Folio 316 of the Register Book of Titles (the land). It is also not disputed that the 1st claimant was raised by the deceased while the 2nd claimant was the deceased's step-daughter. It is not in issue that on March 25, 1998, the defendant obtained a grant of Letters of

Administration in the estate of the deceased from the Resident Magistrate's Court (RM Court) for the parish of Saint Ann. As a result of this grant the land was transferred in the sole name of the defendant on the 21st day of October, 2008. The defendant after obtaining this grant also commenced proceedings against the 1st claimant for damages for trespass, an injunction and recovery of possession in the Resident Magistrate's Court for the parish of St. Ann in November 2008.

[6] The claimants have alleged that it was only when the proceedings in the RM Court commenced that they became aware that the defendant had obtained a grant of Letters of Administration.

[7] As a result, the claimants on October 03, 2011 by way of a fixed date claim form initiated proceedings against the defendant seeking the following orders:

(a) that the grant of Letters of Administration obtained by the defendant be revoked because it was fraudulently obtained, the defendant having misled the court in the documents that she presented to the Resident Magistrate's Court for the parish of St. Ann and that she is not entitled to the grant

(b) a declaration that the transfer of lands from the deceased to the defendant was fraudulently obtained

(c) that the defendant ceases proceedings against the 1st claimant in the Resident Magistrate's Court for the parish of St. Ann under plaint number 103/08 for damages for trespass

(d) that the claimants be allowed to proceed with a grant of probate for the Estate of Bernitta Brown in relation to the deceased's will dated the 27th December, 1992

(e) that further or in the alternative that the name of the 1st claimant be substituted for the name of the defendant on the

grant of Letters of Administration for the estate of Bernitta Brown and the land comprised in the said certificate of title be transferred to the 1st claimant

(f) Costs

(g) Interest

(h) Further and other relief

[8] Paragraphs 5, 12, 14 and 16 to 22 of the particulars of claim which accompanied the fixed date claim form, which the court finds to be of some significance, state as follows:

> ‘’5. That by her Last Will and Testament dated the 27th of December, 1992 Bernitta Brown appointed the 1st Claimant as her Executor and devised her estate between the 1st Claimant and the defendant. Attached hereto and marked MW2 for identity is a copy of the Last Will and Testament of the Deceased.
>
> 12. That the 1st Claimant is informed and very believes that on or about the 25th of March 1998 the Defendant fraudulently obtained a Grant of Letters of Administration for the estate of Bernitta Brown. The defendant administered the said Estate and caused all the real estate to be transferred into her name contrary to Law and the wishes of the deceased.
>
> 14. That in obtaining a Grant of the said Letters of Administration the defendant lied when she declared under Oath that the said Bernitta Brown died intestate. That the deceased executed a Will dated the 27th of December, 1992. (the Oath of the defendant is exhibited)
>
> 16. That in obtaining a Grant of the said Letters of Administration for the estate of Bernitta Brown the defendant intentionally lied and deceived the said Resident Magistrate’s Court when she declared that she was the daughter of Bernitta Brown on the

said Death Certificate but swore under oath that she was the niece and only lawful relative and beneficiary of Bernitta Brown in her administration documents.

17. That Bernitta Brown had no sisters and one brother Joseph Stephenson and that this brother had one daughter Carol Stephenson. That the defendant lied to the Honourable Resident Magistrate's Court when she swore under oath in the said administration documents that she was the niece of Bernitta Brown.
18. That Bernitta Brown had no natural children and that the Claimant and the Defendant were informally adopted by Bernitta Brown. That the Defendant lied when she declared under oath that she was the daughter of Bernitta Brown.
19. That in her Supplemental Oath the Defendant intentionally lied and deceived the said Resident Magistrate's Court when she stated that the Deceased's name was Bernitta Morrison. Attached hereto and marked MW9 for identity is a copy of the Supplemental Oath of Juliette Morrison.
20. That the Deceased was never named Bernitta Morrison. That her maiden name was Stephenson and that she acquired the name Brown upon her marriage to Clifton Brown. Attached hereto and marked "MW10" for identity is a copy of the Deceased's Marriage Certificate.
21. That in doing so the Defendant wrongfully and deliberately misled the Honourable Resident Magistrate's Court.
22. That the 1st Claimant paid all the funeral and burial expenses of Bernitta Brown and the Defendant lied when she swore under oath that she paid these expenses in the Revenue Affidavit sworn to by Juliette Morrison."

[9] It is clear that the Particulars of Claim raises serious allegations of deception and fraud against the defendant concerning the manner in which she obtained the grant of Letters of Administration in the deceased's estate in the court below.

[10] The affidavit of service reveals that the defendant was served on November 15, 2011 and an acknowledgement of service was filed on December 23, 2011, more than fourteen days after service (see rule 9.3 (1) of the CPR) but before any application was made to the court, by the claimants for default judgment.

[11] Rule 10.3 (1) of the CPR states that the general rule for filing a defence is forty-two (42) days after the date of service of the claim form. Since the fixed date claim form was served on the defendant on November 15, 2011 her defence ought to have been filed on December 28, 2011. It was filed almost four (4) months later on April 24, 2012. These circumstances prompted the defendant's application for leave to allow her defence that has been filed out of time to stand.

THE PROCEEDINGS IN THE RM COURT

[12] It is perhaps useful at this stage to briefly outline what took place in the court below. It is undisputed that the defendant applied for and was granted Letters of Administration in the estate of the deceased. Subsequent to the grant, all of the deceased's real estate has been transferred to the defendant only. There has been no further distribution of the estate of the deceased. In her Oath of Administrator, she swore that she was the niece and only lawful relative and beneficiary of the deceased. She also swore that she would distribute the estate of the deceased according to Law.

[13] The Resident Magistrate's Courts share concurrent jurisdiction with the Supreme Court in Probate and Administration proceedings. (See section 108 of the Judicature (Resident Magistrates) Act). Appendix E rule 18 of the Rules and Forms of the Resident Magistrate's Court provides that where administration is

applied for by one or some of the next of kin or heir at law and there are others (next of kin or heir at law) equally entitled to make a similar application, the Judge (or Resident Magistrate in this case) may require proof by affidavit that notice of such application has been given to such other next of kin or heir at law as the case may be. In other words, when an application is made for administration, all the beneficiaries of the estate must be notified of the proceedings. In practice, it is common to see a document termed "Consent of Beneficiary" filed along with the other relevant documents in these circumstances.

[14] The Intestates' Estates and Property Charges Act makes provision in its Table of Distribution that where a deceased dies intestate leaving no living spouse, natural children or parents then the brothers and sisters of the whole blood, or the brothers and sisters of the half blood of the intestate would take the residue of his/her estate absolutely. Where the deceased is predeceased by his/her siblings, whether of the whole or half blood, then their children (nephews and nieces of the deceased) would be entitled to the residue of the estate.

[15] The defendant has stated in her defence that the deceased "**died leaving** two brothers, Joseph Stephenson who had two daughters, Carol and Gene Stephenson and my father Rupert Morrison who had about thirteen children." (Emphasis supplied) It would seem to me therefore that the two brothers of the deceased would be entitled to a grant of administration in priority to the defendant. Yet there was no evidence before the learned Resident Magistrate that notice of the defendant's application had been given to them. Their consent was not obtained and exhibited by defendant in the proceedings below. Therefore, even if the defendant had locus standi in the matter, she did not comply with Appendix E rule 18 of the Rules of the RM Court.

[16] It is my view that the procedure in the court below was irregular, since it breached both the law and rules relating to administration and inevitably has

brought the locus standi of the defendant, to apply for and obtain a grant, into question.

[17] It is within this context that I now address the other issues in this matter.

ISSUES

[18] The ultimate issue to be decided is whether the defence filed out of time should be allowed to stand. It must be determined whether:

(a) The affidavit supporting the application discloses any plausible excuse for the defendant's failure to file the defence in time

(b) The delay in filing the defence was inordinate

(c) The proposed defence is meritorious

THE LAW

Enlarging the time for the defence

[19] The case of **Fiesta Jamaica Ltd. v. National Water Commission** SCCA 19/2009 (26.02.2010) is instructive as it sets out the principles that are applicable when considering an issue of this nature. These principles are:

(1) Does the affidavit supporting the application contain material which is sufficiently meritorious to warrant the order sought? That is, does the affidavit disclose any plausible excuse for the defendant's failure to adhere to rule 10.3 (1) of the CPR and whether the proposed defence has merits.

(2) In making this assessment the court should pay special attention to:

i. the length of the delay
ii. the explanation for the delay
iii. if there is any prejudice to the other party
iv. the merits of the case
v. the effect of delay on public administration

vi. the importance of compliance with time limits since they are to be observed
vii. the resources of the parties which might be relevant to the question of prejudice
viii. whether the proposed defence, when examined, discloses an arguable defence to the claim, that is whether the proposed defence raises any triable issues worthy of a defence.

ANALYSIS

[20] The length of the delay in filing the defence was a few days short of four (4) months, and paragraphs 4 and 5 of the affidavit of Marion Rose-Green, attorney-at-law, in support of the notice of application for court orders purport to give a reason for the delay.

[21] Miss Rose-Green deposes that the documents that were used to ground the application for the grant of Letters of Administration in the Resident Magistrate's Court were prepared by the defendant's former attorney-at-law, Mr. Bill Salmon who is now deceased. As a result it was very difficult for her to get certain pertinent information from that office as regards the allegations that were made by the claimants in order to prepare the defence on behalf of the defendant. She also states that it took her some time to receive the requisite information and instructions that would have enabled her to prepare and file the defence to the claim.

[22] The court will need to determine if this explanation discloses 'any plausible excuses for the defendant's failure to adhere to rule 10.3 (1) of the CPR.'

[23] An examination of the defence filed shows that the defendant is alleging that she is the lawful niece of the deceased. This assertion is also being challenged by the claimants who are alleging that the defendant was informally adopted and raised by the deceased. The defendant further states that she has

lived with the deceased since she was three years old until the time of her death. She denies that the deceased died testate. She also denies that she fraudulently obtained the grant of letters of administration because she had given her late attorney, Mr Salmon, all the information that was requested of her to apply for the grant which included all the information about the deceased's other relatives and later when she was given certain documents at Mr Salmon's office she signed them without reading their contents.

[24] The defence further reveals that the deceased while being able to sign her name, which she did as Bonitta Brown, was unable to read and that it was the defendant who read and wrote letters and other documents for the deceased from she was twelve years old. In short, the defendant is alleging that the deceased's correct name was Bonitto Brown, she signed her name as Bonitta Brown, was unable to read and write and as a result could not have written the purported will and the signature on that document was therefore not hers. The defendant intends to prove this at trial by relying upon the signature of the deceased that is in her passport.

[25] In summary, the defendant is also alleging that the will that the claimants are asserting was executed by the deceased is a forged and fraudulent document.

[26] Having examined the proposed defence, it must now be determined whether it 'discloses an arguable defence to the claim, that is, whether the proposed defence raises any triable issues worthy of a defence.'

[27] The claimants in this matter have not yet received judgment. The matter is yet to be determined on its merits. I am of the view that the delay of approximately four months for the making of the application is not inordinate. In the **Fiesta Case** approximately six months had elapsed before the application to

file the defence out of time was made. Harris JA at paragraph 21 of the judgment had this to say:

> *... I would not regard the delay in making the application inordinate ...*

[28] The explanation that has been given for the delay, I also find, discloses a plausible excuse for the defendant's failure to adhere to rule 10.3 (1) of the CPR. It is undisputed that the attorney who filed the application for the grant of Letters of Administration has died. It would be expected, given the allegations that have been made by the claimants, that certain enquiries would have been made of his office. It is plausible that this could have taken much longer than anticipated and could have affected the timely preparation and filing of the defence.

[29] I now turn to the merits of the proposed defence. The defendant states that she had given all the information requested of her by her attorney Mr Salmon and that she had also told him about the other relatives. Later, when presented with documents to sign, she did so without reading them.

[30] It is difficult to reconcile how this aspect of the defence answers the claim that she misled the learned Resident Magistrate in the documents she presented and was not entitled to obtain the grant (the locus standi issue).

[31] The defendant is alleging that the responsibility for the preparation of the documents and any errors or misrepresentation in them is the fault of the attorney. Blame has been assigned to her attorney. However, the defendant had a clear duty to ensure that **her evidence** that was to be presented to the court was accurate and since the requirement is that all affidavits are to be sworn to and signed before a Justice of Peace, I am unclear as to how this could be successfully raised as an issue that is worthy of a defence.

[32] It is uncontroverted that the evidence before the learned Resident Magistrate that the defendant was the only lawful relative and beneficiary of the

deceased runs contrary to what has been pleaded in the defence. It is my view that since the deceased died leaving two brothers, the defendant was not entitled to the grant and certainly could not take her estate absolutely as was done when she had all the real estate previously owned by the deceased transferred solely to her. It is clear to me that the averments in the defence support the claim that the evidence before the learned Resident Magistrate was misleading.

[33] I cannot help but observe that although the defendant was aware that there were other lawful relatives and beneficiaries, she nonetheless transferred the parcel of land in issue to herself solely in 2008 and to date has not distributed the residue of the deceased estate 'according to law'. It is of course irrelevant that the deceased had during her lifetime declared in the presence of 'other relatives and members of the community' that everything she has was for the defendant and there was no objection from them. Once the deceased died intestate, as the defendant claims, then her estate must be administered according to the law governing intestacy.

[34] Consequently, I am of the view that what has been pleaded in the defence does not raise an answer to the claim that the defendant was not entitled to the grant and that she misrepresented certain facts to the learned Resident Magistrate in her application to obtain the grant.

[35] While I agree that the case has not yet been decided upon its merits, that the explanation given for the delay offers a plausible excuse, that the delay in filing the defence has not been inordinate and the claimants have not suffered any prejudice as a result, it is my view that a close examination of the defence reveals that it is lacking in merit and the defendant does not have a real prospect of successfully defending the claim.

[36] Rule 27.2 (8) of the CPR states that the court may treat the first hearing of a fixed date claim as the trial of the claim if it is not defended or if the court

considers that the claim can be dealt with summarily. In light of the foregoing I am of the opinion, given the rather curious circumstances of this matter, that this is a case that can be dealt with summarily. I also bear in mind the overriding objectives of the rules of the court to deal expeditiously and justly with the matters before it.

[37] As a result, the defence filed on April 24, 2012 is struck out and the grant of letters of administration made to the defendant on March 25, 1998 by the learned Resident Magistrate for the parish of St. Ann is revoked.

[38] Consequently, the transfer registered on October 21, 2008 to the defendant is declared null and void. The defendant is ordered to surrender the duplicate certificate of title for lands located at Salem in Runaway Bay in the parish of St. Ann and registered at Volume 1030 Folio 316 of the Register Book of Titles to the Registrar of Titles who is ordered to cancel the said transfer.

[39] This however is not determinative of the matter. The claimants have alleged that the deceased died testate and are seeking an order that they be allowed to proceed to probate her purported will dated December 27, 1992. The grant having been revoked the claimants can now pursue probate of this will and the defendant who has challenged its authenticity may also contest those proceedings.

[40] In paragraph 24 of the defence the defendant admits that she has brought two actions against the 1st Claimant in the Resident Magistrate's Court. The first is for damages for trespass and an injunction to restrain the 1st Claimant from building or remaining on the land. The second is for an order for recovery of possession. Given the orders made above and in the best interest of justice, the proceedings in the court below are to be discontinued.

[41] Costs to the claimants to be agreed or taxed.

ORDERS

1. Defence filed on April 24, 2012 is not allowed to stand and is struck out.

2. Letters of Administration granted to the defendant Juliette Morrison by the Resident Magistrate for the parish of St. Ann on March 25, 1998 is revoked.

3. Transfer Number 1563099 made on October 21, 2008 to the defendant Juliette Morrison in regard to property located at Salem, Runaway Bay in the parish of St. Ann and registered at Volume 1030 Folio 316 of the Register Book of Titles is declared null and void.

4. The defendant is ordered to immediately surrender to the Registrar of Titles the duplicate certificate of title for the said property and the Registrar of Titles is ordered to cancel the said transfer.

5. The Claimants are allowed to probate the purported will of the deceased Bernitta Brown dated December 27, 1992 and the defendant may contest those proceedings.

6. In the interest of justice, the proceedings instituted by the defendant against the 1st Claimant in the Resident Magistrate's Court for the parish of St. Ann for damages for trespass, an injunction and recovery of possession are to be discontinued forthwith.
7. Costs to the claimants to be agreed or taxed.