[2012] JMCA Civ 21

JAMAICA

SUPREME COURT CIVIL APPEAL NO 85/2011

BETWEEN	**DIAN MORAN**	**1ST APPELLANT**
	ENID MORAN	**2ND APPELLANT**
A N D	**ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Written submissions filed by Mrs M Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the appellants

24 May 2012

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules)

IN CHAMBERS

HARRIS JA

[1] Wesley Washington Moran died testate on 15 December 2007 at Irwin in the parish of Saint James. He appointed Dian and Enid Moran executrices of his will. Both executrices reside in New York in the United States of America.

[2] On 4 February and 12 February 2008, the executrices executed two powers of attorney in favour of Mrs Meg Georgia Gibson-Henlin, which was duly

recorded in the Island Record Office at Liber New Series, Volume 443 Folio 311 and Volume 443 Folio 315.

[3] On 9 January 2009, Mrs Gibson-Henlin made an application for probate in the deceased's estate. On 2 March 2009, the deputy registrar of the Supreme Court, by way of a requisition, informed her that the application made by her should have been for a grant of letters of administration with the will annexed and that the powers of attorney did not include a clause enabling her to take a grant of "probate". On 1 December 2009 a further requisition was sent, informing her as follows:

> "(1) Previous requisition remains outstanding. Applicant must apply for L/A with will annexed as per rule 68.23 of CPR.
>
> (2) Please obtain fresh power of attorney which confers a power to obtain Letters of Administration or grant of representation.
>
> NB: In light of foregoing, applicant should discontinue this application and make fresh application for LIA with will. Applicant may borrow will and death certificate from the instant file.
>
> *M. Kelly*
>
> DEPUTY REGISTRAR *(Ag)*
>
> SUPREME COURT"

Mrs Gibson-Henlin, having formed the view that the information contained in the requisitions was incorrect, on 29 December 2009, filed "an amended Oath of Executors" which was executed by the executrices. On 18 February 2010 a

further requisition was sent, stating among other things, that the application should be discontinued and that an application should be filed under a new suit "as the applicant has changed".

[4] On 6 December 2010 a further supplemental oath of executors was filed by the executors in the same application which had been filed by Mrs Gibson Henlin. On 16 February 2011 the appellants filed an application seeking the following orders:

> "1. That the Executors **DIAN MORAN** and **ENID MORAN** for the Estate of **WESLEY WASHINGTON MORAN** also known as **WESLEY MORAN** be substituted for the Attorney **MEG GEORGIA GIBSON-HENLIN** who initiated the probate proceedings herein.
>
> 2. That the Further Supplemental Oath of Executors filed on December 6, 2010 be permitted to stand as the relevant Oath in the probate proceedings herein."

The application was refused by the learned Master.

[5] The appellants now challenge the order of the learned Master and as a consequence, have filed the following grounds of appeal:

> "a. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing the application for substitution of parties which amounts to a miscarriage of justice:
>
> i. The honourable Master erred in giving a narrow and literal and/or litigious interpretation to the question of interest and proceedings [sic] r. 19 thereby failing to have due regard for the

"necessary modifications to non-contentious probate matters" in r. 68.3 and hence r. 68.

ii. Accordingly, the honourable Master omitted from her consideration the fact that by CPR rule 68.3 all the provisions of the CPR apply to non-contentious probate so that she erred when she found that the Appellants could not be substituted because the matter was commenced by their Attorney "who was not an executor". She also failed to consider in this respect r. 26.9 which confers on the court a general power to rectify matters where there has been a procedural error.

iii. The honourable Master thereafter fell into further error in failing to appreciate that the executors' titles derive from the will and not from the probate.

iv. Further, the executors' titles are not broken through an attorney nor are they finally broken even if applied for by an Attorney;

v. The only interest in the matter is the estate of the deceased Wesley Washington Moran. No estate is ever referenced by the names of the applicants so that a grave injustice has been visited on the estate by the ruling of the Registrar and subsequently that of the Master in directing the Appellants to start the proceedings in the same estate de novo without regard to the estate for the costs associated with the costs of recommencing the proceedings in the same estate as opposed to continuing."

[6] Mrs Gibson-Henlin placed great reliance on part 19 of the Civil Procedure Rules (CPR) which deals with the addition or substitution of parties after the commencement of proceedings. She submitted that part 19 is applicable and that the learned Master confined her reasoning to a limited interpretation of the word "proceedings", in that, she restricted the word to its ordinary and natural meaning within the context of litigious proceedings. The learned Master, she submitted, failed to consider the word within the framework of rule 68.3 of the CPR which prescribes that "the provision of the rules apply, with any necessary modifications, to non-contentions probate matters" and as a result, she failed to pay due regard to the flexibility of the rules as well as the court's powers to rectify procedural errors where no sanctions are imposed.

[7] The critical issue in this matter is whether the appellants are entitled to be permitted to proceed with the application filed by Mrs Gibson-Henlin by being substituted in place of her.

[8] The powers of attorney given by the executrices confers on Mrs Gibson - Henlin general as well as specific powers. It has been observed, as rightly indicated by the deputy registrar, that a power to apply for a grant of representation has not been stipulated therein. The fact that Mrs Gibson-Henlin sought to have obtained a grant of representation on the strength of the power of attorney, the conferral of such a right ought to have been expressly stated. Although a power does not expressly include an application for representation in

the estate of the deceased, if the general terms are wide enough to confer on a donee a right to apply, it may be accepted as giving the specific power under which the donee acts: See ***Re Banks Goods*** [1891] p 251. Despite this, it is for the registrar to determine whether the general powers given by the executrices, were acceptable. The deputy registrar's requisition of 2 March 2009, shows that she was not satisfied that the general powers contained in the document were sufficiently broad to enable Mrs Gibson-Henlin to obtain a grant.

[9] Rule 68.23 (1) and (3) of the CPR stipulates that a person, resident outside the jurisdiction, who has a right to make an application for a grant of representation and appoints an attorney to obtain such grant, the grant may be made limited until further representation is made. The rule states:

> "(1) Where the person entitled to apply for a grant resides outside Jamaica, grants of administration for the use and benefit of that person may be made to his or her attorney acting under a duly recorded Power of Attorney
>
> (2) ...
>
> (3) A grant to an attorney may be limited until a further grant is made or in such other way as the registrar may direct."

[10] Where a person dies testate and the executor appoints an attorney, the grant to the attorney is made for the use and benefit of the executor and takes the form of letters of administration with will annexed. In ***Cassidy's Goods*** 4 Hag Ecc 360 letters of administration with the will annexed was granted to the executor's attorney as the executor, at the time, was resident abroad. On his

return, the executor, wishing to obtain probate of the will, sought a declaration that the letters of administration with the will annexed granted to the attorney, had ceased and expired and that probate be granted to him. The court declared that the letters of administration with the will annexed had ceased and expired and that all future grants should be limited for the executor until he shall come in and apply for and obtain probate - see also ***Webb v Kirby*** (1856) 7 De GM & G 376, 26 LJ Ch 145 and ***Rainbow v Kittoe*** [1916] 1 Ch 316.

[11] In view of the authorities, Mrs Gibson-Henlin would not have been clothed with the right to have made an application for a grant of probate. Her application would have been restricted to a grant of letters of administration with the will annexed. However, the executrices are now desirous of making an application for a grant of probate. They could not proceed by continuing Mrs Gibson-Henlin's application for a grant of probate, as, she would not have been authorized to apply for or obtain such grant. The fact that the executrices propose to apply for probate, the correct procedure would be that the pending application should be discontinued and a proper application be made by them for the grant of probate.

[12] Unfortunately, I am constrained to say that Mrs Gibson-Henlin misconstrued the rules. The procedure which she sought to adopt does not accord with the rules. Such procedure cannot be classified as continuing proceedings falling within the purview of Part 19 of the CPR. Clearly, the

application which was initiated by Mrs Gibson-Henlin, could not have proceeded by the method which she endeavoured to pursue. Accordingly, it could not be said that the learned Master was wrong in refusing to make an order for the substitution of the appellants in the application for probate made by her.

[13] The appeal is dismissed.