



[2023] JMSC Civ 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020 CV04089

BETWEEN	ROBERT THOMPSON (Executor of the estate of Elethia Thompson)	CLAIMANT
AND	JOHN THOMPSON (Executor of the estate of Elethia Thompson)	DEFENDANT

Mr. Conrad George and Mr. Andre Sheckleford, instructed by Hart Muirhead Fatta for the claimant/applicant.

Miss Carol Davis for the defendant/respondent.

Heard May 2, 2023; May 8, 2023, and June 1, 2023

IN CHAMBERS

Claimant filing suit in a representative capacity as executor of his mother's estate- death of the claimant prior to trial- devolution of office of executor on death where there is a surviving co-executor- inapplicability of the chain of representation- suitability of applying for administrator ad litem by executor of deceased claimant- applicability of CPR 19.3, 19.2(5) and 21.8

CORAM: JARRETT, J

Introduction

[1] The claimant and the defendant are the executors of the estate of Elethia Thompson, (deceased). Elethia Thompson was their mother. There is disagreement between them over the interpretation of aspects of her Will as well

as the proposed sale of land which the claimant contends forms part of her estate. The trial of the claim was scheduled for March 29, 2023, at which time the court was advised that the claimant, had died testate on February 10, 2023, having appointed his wife Charmaine Thompson as his executor. Before me is Charmaine Thompson's application to be appointed *administrator ad litem* to represent the estate of Elethia Thompson. An outline of the claim will put Charmaine Thompson's application in context.

The claim

[2] In an amended fixed date claim form filed on July 9, 2021, the claimant sought the following remedies: -

- 1) That the court makes an order vesting the parcel of land part of Negril in the parish of Westmoreland together containing by survey one acre three rods, thirty-seven perches and two-tenths of a perch of the shape and dimensions and butting as appears by Lots numbered One and Two on the plan thereof hereunto annexed and being the land comprised in certificate of title in the Register Book of Titles Volume 1284 Folio 710 ("the Property") in the claimant subject to the directions in the order sought at (4) below, and that the defendant be released of or disposed of any contingent right in the Property for these purposes.
- 2) That the court approves the sale of the Property as referenced in the order sought at (4) below or such other sale as the court may approve on future application.
- 3) That Gillian Mullings, attorney-at-law of 34-36 Old Hope Road, Kingston 5 in the parish of St. Andrew ("the Additional Trustee") be appointed trustee for the purposes of the transaction referenced in the order sought at (4) below.

4) Further to the relief sought at (1) above, and /or in the alternative, that the court do provide directions in relation to the Estate of Elethia Thompson (Deceased Testate) (“the Estate”) to wit:

a) that the claimant be entitled and be directed to execute and deliver as joint signatory along with the Additional Trustee on behalf of the Estate, the draft contract annexed hereto and marked Appendix 1 (“the Draft Contract”) between Estate Elethia Thompson and Patrick Marzouca and/or his nominee for the sale to the said Patrick Marzouca and /or his nominee (“the Purchaser”) of the Property for the sum of \$1,800,000.00 United States Dollars (“the Price”) to the Purchaser (the Draft Contract after such execution and delivery to be referred to herein as “the Contract”);

b) that the claimant be entitled and be directed to do all things reasonably necessary to bring about the completion of the Contract, including but not limited to:

- i. instructing and agreeing to remunerate reasonably on behalf of the Estate attorneys-at-law (Messrs. Naylor & Mullings) to act on behalf of the Estate in connection with the completion of the Contract);
- ii. along with the Additional Trustee, receiving and giving a good receipt on behalf of the Estate for the deposit payable under the Contract;
- iii. paying on behalf of the Estate all duties and taxes payable by the Estate in

connection with the Contract and/or the completion thereof;

- iv. answering on behalf of the Estate any proper requisitions on title received from the Purchaser or his attorneys in connection with the sale of the Land (“the Sale”);
 - v. along with the Additional Trustee, executing and delivering the transfer of the title to the Land to the Purchaser in accordance with the terms of the Contract, and doing any/all other things reasonably necessary to complete the Contract;
 - vi. along with the Additional Trustee, receiving and giving a good receipt on behalf of the Estate for the balance of the Price payable at completion of the Contract.
- c) That the net proceeds of the Sale (after the payment of all taxes, duties and reasonable legal fees and expenses properly incurred in connection with the Sale) be held in trust by the claimant and paid directly into the Client Account of the attorneys-at-law having conduct of the Sale and held there until further order of the Court.

5) Liberty to apply.

6) Costs

- 7) Such further and /or other relief as this Honourable Court should deem fit.

The evidence in support of the claim

[3] The claimant filed an affidavit in support of the claim on October 23, 2020. He subsequently filed two affidavits in response to the affidavits of the defendant. For present purposes, the relevant evidence of the claimant is contained in his affidavit filed on October 23, 2020. The claimant states that he and the defendant are joint executors in their mother's estate. He exhibits a copy of her Will and the Grant of Probate. He says further that his mother devised to her six children certain realty forming a part of her estate, including a hotel and restaurant in the parish of Westmoreland which operated under the name Bar-b-Barn on land registered at Volume 1284 Folio 710 of the Register Book of Titles ("the Property"). Save for the defendant, all the beneficiaries wish to sell the Property to Peter Marzouca, a prospective purchaser at a price of U.S. \$1,800,000.00. The defendant has stated that he has an interest in the property which is greater than that granted to him in the Will, but he has not "substantiated or elucidated" such a claim. The defendant's objections put the estate in danger of losing the sale.

The defendant's response to the claim

[4] The defendant filed two affidavits in response to the claim. I will direct my attention only to the defendant's first affidavit in response filed June 3, 2021, as I consider that affidavit evidence, the only evidence relevant for purposes of the application before me. The defendant states that the gift of lands in Westmoreland upon which the family house stands and which is contained in paragraph 1 of Elethia Thompson's Will is void as the land on which the family house stands was not owned by her and therefore does not form part of her estate. In relation to the gift of the hotel and restaurant, contained in paragraph 2 of the Will, he says it requires

interpretation, but in any event, the normal interpretation of the gift does not bequeath the hotel and restaurant to Elethia Thompson's six children.

- [5] According to the defendant, the land in Negril, Westmoreland on which the hotel and the restaurant are built was transferred to Elethia Thompson with several outstanding mortgages on it. Bar-b-Barn Limited is a company registered in 1986, which, based on its Memorandum of Association, is owned to the extent of 9,000 shares by his mother; he owns 1,000 shares and Norman Thompson and James Thompson own 8,000 and 2,000 shares respectively. There was an agreement between Elethia Thompson and Bar-b-Barn Limited that she would transfer to the company, the land on which the hotel and restaurant operated. A transfer was signed but "did not proceed" due to his mother's lack of funds. Bar-b-Barn Limited however treated the land as belonging to it and paid the outstanding mortgages on the title.
- [6] Sometime in 2010, Scotia Bank threatened to auction the land as Elethia Thompson and used it as collateral for a loan she obtained from Rite Rate Car Rental. The defendant said that he paid off the Scotia Bank loan amounting to \$2,342,308.69, to "protect Bar-b-Barn's ownership of the said land". As a result, he believes that the gift in paragraph 2 of Elethia Thompson's Will of the Westmoreland property comprising a hotel and restaurant is her 9,000 shares in Bar-b-Barn Limited. None of his mother's 6 children, including himself, have any interest in the land registered at Volume 1284 Folio 710 of the Register Book of Titles. As co-executor he terminated the services of Ms Gillian Mullings to act on behalf of Elethia Thompson's estate, and he has been informed by the attorney-at-law for the proposed purchaser of the land, that the sale is no longer proceeding.

Charmaine Thompson's Application

- [7] In her Notice of Application filed on March 30, 2023, the following orders are being sought by Charmaine Thompson: -

1. That the Applicant Charmaine Thompson be appointed as administrator ad litem to represent the estate of Elethia Thompson herein.
2. Costs to be costs in the claim.
3. Such further relief as this Honourable Court may deem just in the circumstances.

[8] These are the grounds upon which she relies:-

- a) The Claimant Robert Thompson (deceased) brought the proceedings herein as an executor in the estate of Mrs Elethis (sic) Thompson (deceased).
- b) The named claimant herein died on February 10, 2023.
- c) The Claimant's widow, Mrs Charmaine Thompson, being the Applicant herein, is the named executor in the Claimant's will.
- d) The Applicant intends to apply for a grant of probate of the Claimant's will.
- e) The process of the application for and grant of probate is likely to be a relatively protracted one.
- f) The Applicant wishes to continue the proceedings issued by the late Claimant.
- g) The overriding objective.
- h) The interests of justice.

Submissions on behalf of the Applicant

[9] Mr Conrad George for the applicant, submitted that the CPR recognises that the death of a party to a claim does not operate as a bar to the proceedings continuing. He cited CPR 21.8 which gives the court the power to give directions to enable proceedings to be carried on after the death of a party; as well as CPR 19.2(5) and 19.3 which deal with the adding and substitution of parties. Learned counsel made the following arguments in his written skeleton submissions: -

- a) The Court has a broad discretion under CPR 19.2, 19.3 and 21.8 to enable the continuation of proceedings where it is just to do so, with a particular provision (broad in their scope) to enable the continuation of proceeding on the death of a party.
- b) If the Defendant's argument was to be accepted, claims between co-executors would automatically die on the death of one co-executor. This would naturally be a gateway to gross injustice, as the claims between co-executors usually arise from disputes concerning the management of the estate.
- c) Nothing arises to take the situation in the present case outside of the ordinary principles of the appointment of administrator ad litem, a long-recognized notion, to enable the continuation of proceedings where a perceived wrong is taking place. The proposed grant to Mrs. Thompson is a grant limited to the continuation of the proceedings and does not give Mrs. Thompson the power to do anything outside of the scope of these proceedings.

[10] Counsel further argued that the claimant's claim also rests on his status as a beneficiary under Elethia Thompson's estate and by virtue of section 64(2) (c) of the Trusts Act, he is entitled to bring the claim himself. In his personal capacity as a beneficiary, the devolution of office issue does not arise.

Submissions on behalf of the Defendant/Respondent

[11] Counsel Miss Carol Davis on behalf of the defendant, objected to the application. She argued that the application is inappropriate on the facts of this case, as Robert Thompson, now deceased brought the claim in a representative capacity as executor of his deceased's mother's estate, and that on his death, that office devolved to the defendant, the sole surviving executor of the estate of Elethia

Thompson. The chain of representation, argued counsel, is inapplicable in this case.

- [12] Counsel relied on the following extract from **Volume 17, 4th Edition, Halsbury's Laws of England:-**

“An executorship cannot be assigned at common law because it is an office of personal trust. It can only devolve by operation of law. On the death of one of several representatives, the office, with its incidents, duties and powers, and the estate and interest in all the property vested in the representatives by virtue of their office, devolve upon the survivors or survivor. On the death of a sole executor, or of the last survivor of several executors, the office devolves upon the executor of the sole or last surviving executor who has proved the will and so long as the chain of representation is unbroken, the last executor in the chain is the executor of every preceding testator.”

- [13] Miss Davis further argued that the office of Robert Thompson as executor of Elethia Thompson is no longer extant. His widow is seeking to be appointed administrator ad litem for Elethia Thompson's estate, but her affairs can only be dealt with by persons appointed by her. In this case on the death of Robert Thompson, the defendant by operation of law now have responsibility for the estate of Elethia Thompson.
- [14] As to the argument that Robert Thompson brings the claim in his capacity also as beneficiary, Miss Davis argued that an examination of the claim will reveal that it was brought by Robert Thompson only in his capacity as executor under his mother's Will. She posited that, if, which is denied, the claim is successful, it would result in persons who are not executors under the estate, acting against the one remaining executor appointed by Elethia Thompson to be responsible for her affairs.

Analysis and discussion

[15] On the morning that the trial of the claim was scheduled to begin, Mr George asked that Mrs Thompson be appointed to continue the proceedings on behalf of her deceased husband, under the chain of representation as she is his widow and the executor appointed under his will. I indicated to learned counsel that the appropriate application needed to be made to allow Mrs Thompson to be substituted as the claimant and that that application along with an application for her to be appointed *administrator ad litem* needed to be made. For the reasons which follow in this judgment, I am now of the view, after very careful thought, that the applicant is not entitled to be appointed as *administrator ad litem* of the estate of Elethia Thompson to enable her to continue this claim .

[16] There is no escaping the plain fact that the claimant named in this claim is: “Robert Thompson, Executor of the Estate of Elethia Thompson”. There is one claimant, and he appears in a representative capacity as an executor of his mother’s estate. A review of the claim itself, likewise, makes it plain, that this is a claim in which one of two executors is seeking the court’s direction and orders in relation to the administration and distribution of the estate over which they both have responsibility.

[17] In **Jamaica Redevelopment Foundation Inc v Max Eugene Lambie (as Administrator of Estate Elaine Tully, deceased)**, [2012] JMCA Civ 12, Morrison JA (as he then was), said this in relation to the chain of representation: -

“It is a well-known principle of the law of succession that the executor of a sole or last surviving executor of the testator’s estate becomes the executor of the testator in the event of the original executor dying without having completed administration of the testator’s estate. This is the principle of the chain of representation”.

- [18] But where, as in this case, the claimant was not a sole or last surviving executor of his mother's estate, the chain of representation does not apply. It is settled law that on the death of one of two executors, the office of the deceased executor, with its attendant rights and responsibilities and estate and interest vested in him because of his office, pass to the surviving executor. The extract from **Halsbury's** (supra), relied on by Miss Davis makes this clear. In this case then, the office of executor of the estate of Elethia Thompson, held by Robert Thompson passed on his death to the defendant, John Thompson. Charmaine Thompson, the executor appointed by Robert Thompson in his Will, has no standing to be appointed *administrator ad litem* of Elethia Thompson's estate once John Thompson continues to hold the office of executor of that estate.
- [19] I fully accept that CPR 19.2, 19.3 and 21.8, give the court wide discretionary powers to substitute parties to a claim and to give directions for the continuation of proceedings on the death of a party. But these powers cannot be exercised in a vacuum. The rules of court must be applied and interpreted with full regard being had to substantive law. Under CPR 19.2(5), the court can substitute a party to a claim where an existing party's interest or liability has passed to a new party. CPR 19.3 sets out the procedure to be adopted. But, in this case, by virtue of the law of succession, on the death of Robert Thompson, his interest as executor of Elethia Thompson's estate, passed to the defendant by virtue of the law relating to the devolution of office on death of one of two executors. The interest as executor, which Charmaine Thompson's husband had in the estate of his mother, has not passed to her. *A fortiori*, she cannot successfully apply to be appointed *administrator ad litem* in that estate once the defendant retains his office as executor of that estate. So, while CPR 21.8 empowers the court to give directions for proceedings to continue upon the death of a party, in exercising that power, the court must have regard to the law of succession.
- [20] I agree with counsel Miss Davis, that an examination of the claim reveals that it is brought by the claimant solely in his representative capacity as executor. I see

nothing in the fixed date claim form or the affidavit in support, which speaks to Robert Thompson pursuing the claim in his personal capacity as beneficiary under the estate of Elethia Thompson. As observed earlier, being one of two executors of Elethia Thompson's estate, on the death of Robert Thompson, his office as executor devolved to his brother, the defendant. Unless the defendant is removed or substituted as executor of Elethia Thompson's estate, it is my view that he is the only person who has the legal authority to act on behalf of that estate.

Conclusion

[21] Having regard to the forgoing, I make the following orders: -

- a) The application is refused.
- b) No order as to costs