

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

(CIVIL) DOMHCV2020/0217

BETWEEN:-	AGNES ROBERTS	Claimant
	and	
	TESSA VALDA ROBERTS	Defendant

Before: The Honorable Justice M E Birnie Stephenson

On the written submissions of:

Cara Shillingford Marsh of Cara Shillingford Chambers for the Claimant

Kathy Buffong Royer of Pinnacle Law Chambers for the Defendant

2021: October 8th

2022: January 20th

ORAL RULING

(With written reasons)

- [1] **Stephenson J.:** By Fixed Date Claim filed on the 22nd October 2020, the claimant seeks an order of court declaring that she is the executrix of the last will and testament of the late Sylvester Roberts and that the will of Sylvester Roberts was lawfully executed and is valid. The claimant also seeks an order that probate be granted to her and for an injunction preventing the defendant and any other person from entering onto and remaining on the property located at Lot 30, Great Marlborough Street, Roseau Dominica which property was devised to the claimant in the said will.

[2] There are two interlocutory applications before the court for ruling, one brought by each party and both applications are opposed by the other side. The first application is brought by the defendant, for leave to add the estate of Theresa Roberts as a party to the proceedings and the second application is for leave to file the reply on behalf of the claimant out of time and for relief from sanctions. It is noted that the reply has been filed and therefore the court will consider this application to be one to deem the reply filed out of time properly filed.

[3] The applications will be dealt with in the order that they were filed.

I. Application to add the Estate of Theresa Roberts as a defendant

[4] Sylvester Roberts was the husband of Theresa Roberts and the father of both parties in the case at bar. Theresa Roberts predeceased her husband Sylvester Roberts who died on the 16th July 2018 leaving a will appointing the claimant as executor.

[5] On the 17th July 2018, the day after her father's death, the defendant lodged a caveat on her father's estate so that no grant could be sealed in the said estate without notice to her. Tessa Valda Roberts ("the defendant") has refused to remove the caveat despite being warned to do so.

[6] Agnes Roberts ("the claimant") brought suit against the defendant seeking a declaration that the will of Sylvester Roberts ("the will"), has been duly executed and is valid, for an order of probate and for an injunction restraining the defendant and any other person from entering on or remaining on the property located at 30 Great Marlborough Street without the claimant's permission which property, was devised in the will to the claimant

[7] The defendant who is the administrator of the estate of Theresa Roberts (the deceased wife of Sylvester Roberts) challenges the validity of the will. The defendant has applied to this court to add the estate of Theresa Roberts to the cause on the ground that this will enable the court to resolve all matters in dispute which are connecting the two estates, as there are issues involving the estate of Theresa Roberts.

[8] The defendant contends that the property located at 30 Great Marlborough Street in Roseau (the devised property) was the matrimonial property of Sylvester Roberts and his wife. Theresa Roberts

and the estate of Theresa Roberts seek to claim an equitable interest of Theresa Roberts to one half share of the said property pursuant to the section 22 of the Married Women's Property Act¹.

[9] The claimant opposes the defendant's application to join the estate of Theresa Roberts as a party to the proceedings. Essentially, the claimant states that the application by the defendant is without merit and should not be granted.

[10] Part 19 of the Civil Procedure Rules (CPR 2000) makes provision for the adding of parties to matters before the court. A party to a matter may apply to the court for permission to add a party².

[11] A new party may be added to proceedings if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or there is a issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.³

[12] Counsel for the defendant contends that the nature of the proceedings in this case, justifies the joinder of the estate of Theresa Roberts based on the defendant's contention that the purported will of Sylvester Roberts is invalid and that in the face of the invalidity of the will, the estate of Sylvester Roberts falls into intestacy.

[13] Counsel Buffong Royer submitted that the estate of Theresa Roberts is a beneficiary of the estate of Sylvester Roberts on intestacy on the grounds that Theresa Roberts was the wife of Sylvester Roberts and even though she predeceased him, her estate, pursuant to section 22 of the Married Women's Property Act is entitled to a share therein as if she were living.

[14] Counsel cited and relied on the cases which establish the equitable interest of a wife to share in matrimonial property and submitted that entitlement of the estate of Theresa Roberts, through this route, clothes the estate with an interest in the estate of Sylvester Roberts and should accordingly be added to the case at bar.

¹ Chapter 35.60 of the Laws of the Commonwealth of Dominica

² CPR 2000 Part 19.3(2)

³ Ibid.

[15] Counsel further submitted that to add the estate of Theresa Roberts is desirable as it would allow the court to resolve all issues connected to the estate of Sylvester Roberts.

[16] The claimant argues that the application by the defendant is without merit and that the issue for consideration by the court in the case at bar is the determination of the validity of the will of Sylvester Roberts.

[17] The claimant submits that the proceedings in the case at bar was filed pursuant to part 68 of the CPR 2000 which applies to probate causes. That the claim is a probate claim within the meaning of part 68.1⁴ to obtain a grant of probate of the last will and testament of Sylvester Roberts.

[18] Counsel Mrs Shillingford Marsh submits that the only issue to be determined is the validity of the will and that the defendant has failed to properly set out her case for the court to determine how adding the estate of Theresa Roberts would assist in the determination of these matters. Further, that the interest of the estate of Theresa Roberts is in the ownership of a portion of land and not in the validity of the deceased's will.

[19] Counsel Shillingford Marsh submitted that the proceedings before the court is contentious probate proceedings which does not seek to determine the ownership of property which is the quest of the estate of Theresa Roberts and to accede to the application of the defendant would be improper as to add the estate of Theresa Roberts would only serve to unnecessarily complicate and cause delay to the administration of the estate of Sylvester Roberts which is not in the best interest of justice.

[20] It is clear to the court, that the proceedings as commenced by the claimant fall to be considered as "contentious probate proceedings" in that she is seeking the pronouncement of the validity of the will⁵. Traditionally this action would be termed an action for the pronouncing of a will in solemn form.

⁴ Part 68.1 (2) of CPR 2000 provides "probate claim" means a claim for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious or common form probate business;"

⁵ See Part 68.1 (2) of CPR 2000 op cit

[21] In actions under this classification, the action can be brought by an executor for the determination of the court as to whether the will is or is not in whole or in part a valid testamentary instrument.

[22] Parties to proceedings such as the case at bar, would be persons who have an interest in upholding or disputing the validity of the testamentary document and they can be properly joined as a party. The intended defendant in the case at bar based on the statement of case filed does not have an interest in upholding or disputing the validity of the will.

[23] The issue which would therefore fall to be determined is whether or not the will of Sylvester Roberts is valid. In her defence as filed in the substantive case, the defendant quite properly raises the issues for consideration by the court that is:

- a. Whether the will is invalid because the testator did not know and approve of the contents of the will and or did not understand the nature and effect of the document which he signed;
- b. Whether the execution of the will was obtained under the undue influence of the claimant.

II. Application relief from sanctions and deem the reply filed out of time properly filed

[24] The second application before the court is for relief from sanctions and for an extension to file and serve the reply to defence. The application filed on the 9th June 2021 states,

“The Claimant Agnes Roberts, Store Supervisor of Salisbury in the parish of St Joseph in the Commonwealth of Dominica applies to the Court for an order that :–

1. the time for filing and serving of the reply be extended;.
2. the reply filed herein on the 9th June 2021 be deemed properly filed;
3. the claimant be relieved from any and all sanctions for the failure to file the reply within the prescribed time; and
4. there be no order as to costs.”

[25] The claimant seeks the relief on the ground that Counsel with conduct of the matter was duly out of state seeking medical attention during the period that the reply was due to be filed and served and in the circumstances she was unable to instruct counsel in this regard.

[26] This application is being opposed by the defendant.

[27] Counsel Mrs Shillingford Marsh on behalf of the claimant relied on part 26.1(2)(k) of CPR 2000 which provides,

“... (2) Except where these rules provide otherwise, the court may –

...

(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;” ...

[28] Counsel Mrs Shillingford Marsh submitted that the court has to exercise its discretion in considering the application and is to be guided by the overriding objective of the CPR which will enable the court to deal with cases justly and expeditiously.

[29] Counsel also made reference to the decision of **KMG International NV –v- DP Holding SA**⁶ and contended that it was held that ,

*“Where no sanction has been expressed for failure to comply with a rule, order or practice direction, the regime set out in CPR 26.8 for applying for relief from sanctions does not apply. The CPR makes no room for implying sanctions and none should otherwise be implied in any case (see [24], [28], below). **A-G v Matthews** (2011) 175 CL&J 645 considered.”*

[30] This court pauses to note that this was not part of the *ratio decidendi* of the court but as noted by the editors of the judgment, that it was an observation of the court.

[31] Counsel submitted that the application before the court is not one for relief from sanctions as was suggested by the respondents in their affidavit in opposition, which counsel submitted has

⁶ (2019) 94 WIR 244

erroneously invited the court to consider the relevant relief from sanction applications.⁷ Counsel however submitted on the relevant factors to be considered by the court.

[32] Part 10.9 (1) of the CPR 2000 makes specific provisions for the filing of a reply and states “A claimant may file and serve a reply to a defence –

- (a) 14 days after the date of service of the defence; or
- (b) At any time with the permission of the court.

[33] There is no provision for consequence of failing to file a reply out of time therefore there is no sanction and I do agree with Counsel Mrs Shillingford Marsh that this application ought not to be one for relief from sanctions and will therefore not consider the submissions in that regard .

[34] It is important that litigants filing applications remind themselves of the provisions of the CPR 2000 that govern their applications. The rules and principles applicable to the application at bar is not susceptible to any doubt. The principles and practice have been set out exhaustively by many decisions emanating from within and without our jurisdiction. The court has wide case management powers which include the power to extend or shorten the time for compliance with any timeline set down by CPR 2000.

[35] In exercising its discretion, the court is to be cognisant of the well established principles in our jurisprudence and to keep its eyes on the overriding objective of the CPR 2000. The court is required to consider the following factors⁸ which include:

- a. The length of the delay;
- b. The reasons for the delay;
- c. Any prejudice to the respondent; and
- d. The chances of success.

⁷ See paragraph 6 of the claimants submissions filed on the 1st July 2021

⁸ Re: Carleen Penberton –v- Mark Brantly [2011] ECSCJ no 229

[36] I think it is important to draw the following to the parties' attention regarding the reply. A reply to a defence is often not really required as a claimant who does not file a reply to a defence will not be taken to admit the matters raised in the defence.⁹

[37] I have examined the reasons given for the failure for the filing of the reply and I am satisfied that the factors identified show that the claimant had a good reason for her failure to file the reply and that the defendant in any event would not have been in a position to take any step against the claimant such as to seek judgment in default given the fact that the statement of case being filed is a reply which is entirely optional. There is no sanction attached to the late filing of the reply or even failure to file a reply.

[38] The court has a clear discretion to grant the extension of time. To grant the extension as sought by the claimant would be in keeping with the administration of justice that permission be given to file this document late though it be. In looking at this application, I am therefore satisfied, that the claimant is entitled to the relief as prayed, that is to deem the reply filed out of time properly filed.

[39] It is noted further that, the directions hearing of this matter has not yet been undertaken and the granting of this application in no way interferes with that schedule. Further, no trial date was set thus; the delay that occurred was solely on the part of the claimant. This court also notes that there is no prejudice inflicted on the defendant.

[40] This court has taken into consideration all of the factors presented and is of the opinion that the reply filed out of time is should be and is therefore deemed properly filed.

[41] The two applications in this matter are therefore disposed of as follows:

- a. The application made by the defendant to add the Estate of Theresa Roberts is not granted at this time as the issues concerning the application does not touch and concern the substantive contentious probate issue arising in the claim at bar;
- b. The reply filed by the defendant out of time is duly deemed properly filed; and
- c. The costs of these two applications shall be the costs in the cause.

⁹ Re: Atkins Court Forms Volume 14(1) at paragraph 284

[42] I wish to thank counsel for their submissions made in this matter and wish to say that I have taken account of all the arguments made by each party in coming to my conclusions. It is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. With the greatest respect to counsel on both sides, it was not necessary in this court's view, to discuss all the submissions made in order to resolve or to decide the main issues in the case at bar.

M E Birnie Stephenson

High Court Judge

BY THE COURT

REGISTRAR