

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 52 OF 2009

BETWEEN:

ADINA GARNES
DENNIS HADAWAY
(Executors of the Estate of David Gumbs deceased)

Claimants

V

BEATRICE GUMBS

Defendant

CONSOLIDATED
NO. 53 OF 2009

ADINA GARNES
DENNIS HADAWAY
(Executors of the Estate of David Gumbs)

Claimants

V

JOHN GUMBS

Defendant

Appearances: Mr. S. Williams for the Claimants
Mr. S.E. Commissiong for the Defendants

2010: November 16
2011: August 10

JUDGMENT

[1] THOM, J: David Gumbs died intestate on 26th March 1995. By his Will dated 1st November 1991 he appointed Adina Games, Dennis Hadaway and Christa Kirby as Executors.

- [2] Probate was granted to the three executors on the 7th July 1995.
- [3] There are ten beneficiaries named in the Will of David Gumbs. Part of the Estate comprise 21½ acres of land at Very Vine in the State of Saint Vincent and the Grenadines.
- [4] John and Beatrice Gumbs are husband and wife. John Gumbs admitted that he is in possession and cultivates approximately 8 acres of land at Very Vine that forms part of the estate of David Gumbs.
- [5] Adina Gumbs and Dennis Hadaway in their claim alleged that John Gumbs occupies the land on a share crop basis. The agreement being that he would pay 40% of all crops reaped to the estate of David Gumbs. He having failed to do so he was given notice to quit by letter dated 16th January 2008. Beatrice Gumbs who also occupies and cultivates a portion of the land at Very Vine was also given notice to quit by letter dated 16th January 2008.
- [6] After notice to quit was issued John Gumbs paid a total of \$500.00 to Mr. Arthur Williams for the benefit of the estate of David Gumbs.
- [7] John and Beatrice Gumbs not having vacated the land these proceedings were instituted and the Claimants sought inter alia the following reliefs:
- (a) An Order that the Defendants do forthwith give up possession of the land situate at Very Vine.
 - (b) An injunction restraining the Defendants from remaining on the land; and
 - (c) An Order that the Defendants do give an account to the Claimants for crops reaped during the period the Defendants cultivated the land.
- [8] The Defendants in their defence admit that the land at Very Vine forms part of the estate of David Gumbs but alleged that Dennis Hadaway gave John Gumbs a licence to occupy the

land, and that Beatrice Gumbs is not in occupation of any land at Very Vine. They also alleged that Dennis Hadaway and Christa Kirby did not consent to the claim being instituted.

EVIDENCE

- [9] The evidence on behalf of the Claimants is that John Gumbs had an agreement with Adina Games to work the land and pay 40% of the proceeds of all crops reaped to herself or Dennis Hadaway on behalf of the estate. John Gumbs cultivated the land but paid no part of the proceeds to herself or to Dennis Hadaway. On the 16th day of January 2008 John Gumbs was given notice to quit. On the 24th day of April 2008 and the 13th day of June 2008 John Gumbs paid \$200.00 and \$300.00 respectively to Learned Counsel Mr. Arthur Williams for the estate of David Gumbs. Copies of the receipts were exhibited.
- [10] Beatrice Gumbs without permission from any of the Executors is in occupation of another portion of land at Very Vine which forms part of the estate of David Gumbs on which she has planted several crops. On 16th January 2008 she was given notice to quit. Despite the notice to quit, both John and Beatrice Gumbs remain in possession and continue to cultivate the land at Very Vine.
- [11] Under cross-examination Adina Games admitted that she does not know how Dennis Hadaway came to be a Claimant in the matter. Her relationship with him broke down in 2006, that is before the claim was filed. The other executor Christa Kirby has been living in the United States of America and has taken no interest in the administration of the estate. Adina Games also agreed that she did not know when John Gumbs went into possession of the land but she saw him there in 2003. She had a discussion with himself and Ruby Richardson who is a beneficiary of estate of David Gumbs. Ruby Richardson requested for John Gumbs to be given a chance to cultivate the land. She agreed for him to cultivate an area equivalent to Ruby Richardson's entitlement which is approximately 2½ acres and should he occupy any other portion payment would have to be made to the estate of David Gumbs.

[12] John and Beatrice Gumbs filed a joint witness statement. The first five paragraphs name the executors of David Gumbs' Will; the beneficiaries, the date of death of David Gumbs, the date of the probate of the Will and that the estate has not been administered and some beneficiaries are using the land. The remaining four paragraphs of the witness statement state as follows:

"6. Two of the three executors are out of the State and Dennis Hadaway is the only one who has remained in Saint Vincent and the Grenadines to deal with the estate. As matters stand Adina Games has left the other beneficiaries and others "to do their own thing". At one time she used to get money and produce from us without any protest from her at all that is why I was surprised when this claim was served on us. On the other hand Dennis Hadaway, who has always been here, quite properly asked us to continue to cultivate a part of the land and share the produce with them and that we have done and are still doing. Dennis Hadaway has as much right to do so as the other executrices. In that case we are not trespassers on the land of David Gumbs. We are there with the consent of two of the executors. The Claimant cannot override the authority of two other executors.

7. Adina Games has 8 acres of the lands belonging to the Testator's estate rented out. She does not account to any of the other beneficiaries nor executors for the rent she receives. Rather she keeps it for herself.

8. Christa Olive Kirby has been living in Boston, USA for over 20 years. She has asked us to stay on the land until she gets her share.

9. Adina Games, executrix, has expressed no wish to come home anytime soon. If Dennis Hadaway has taken the initiative to keep the land cultivated, we do not understand what it is that Adina would like to do. A look at the reliefs claimed by Adina Games, having regard to her own position, is a little unfair. She is doing exactly what Dennis Hadaway is doing. All of the executors should ensure that they honour the wishes of the Testator or else renounce their rights as executors."

[13] Under cross-examination John Gumbs testified that he occupies approximately 8 acres of land belonging to the estate of David Gumbs at Very Vine. He has been in possession of the land since 1998. He was given permission by Christa Kirby to cultivate her share of the land which is approximately 2 acres. He denied that he received a notice to quit. He was asked to stay on the land by Dennis Hadaway.

[14] Under cross-examination Adina Games denied that she was in occupation of land at Very Vine belonging to the estate of David Gumbs. She also denied that she had received a

notice to quit. She testified that she visits the land and she assists her husband on some occasions.

SUBMISSIONS

- [15] Learned Counsel for the Claimants submitted that based on the evidence of Adina Games, John Gumbs had an agreement with Adina Games to cultivate the land and pay 40% of the proceeds of crops to the estate of David Gumbs. He only paid the sum of \$500.00 in 2008 after notice to quit was served on him. Beatrice Gumbs is in occupation without the consent of the executors.
- [16] Learned Counsel also submitted that Adina Games in her capacity as executor, was entitled to institute these proceedings, she did not need the consent of the other Executors to do so. Learned Counsel referred the Court to Section 30 of the Administration of Estates Act Chapter 486 of the 2009 Revised Edition.
- [17] Learned Counsel for the Defendants submitted that there is no evidence that Dennis Hadaway consented to being a Claimant in these proceedings. Adina Games admitted that no consent was obtained from Christa Kirby. Adina Games has no lawful authority to institute proceedings without the consent of the other two proving executors. Learned Counsel referred the Court to Section 18 of the Trustees Act Chapter 494 of the 2009 Revised Edition. John and Beatrice Gumbs are occupying the land with the consent of Dennis Hadaway and that consent has not been withdrawn.
- [18] Learned Counsel further submitted that there are several options which could be pursued to administer an estate where the executors have been delinquent in their duties as in this case. The options include appointing a receiver at the request of the beneficiaries - see **Middleton v Dodswell** ARE [1803 - 1813] pp. 659 at 660. Also Adina Games could have asked the Court to remove all three executors and appoint a receiver - see **Lettersstedt v Broers** [1884] A.C. 371 at 386 - 387, and **Chelleram v Chelleram** [1985] 1 Ch. 425.

FINDINGS

- [19] It is not disputed that the land in question forms part of the estate of David Gumbs. The only difference in the testimony of the parties is that John and Beatrice Gumbs testified that they had the permission of Dennis Hadaway and Christa Kirby to remain on the land, while Adina Games testified of an arrangement made at the home of Ruby Richardson.
- [20] Having reviewed the evidence I believe the testimony of Adina Games. The testimony of Adina Games that there was a meeting with herself, John Gumbs and Ruby Richardson at Ruby Richardson's home was not denied by the Defendants. If there was no such arrangement as described by Adina Games, John Gumbs would not have made two payments of money to Adina Games' Attorney as evidenced by the receipts. Further John and Beatrice Gumbs in their witness statement at paragraph 6 stated "At one time she used to get money and produce from us without any protest from her at all".
- [21] John and Beatrice Gumbs in their defence pleaded that Dennis Hadaway told them to remain in possession of the land. No mention was made of Christa Kirby. Also they gave no details of when permission was granted to them whether before or after these proceedings were instituted. In their testimony they used the words "remain in possession", and "continue in possession". They gave no evidence of who authorised them to take possession of the land.
- [22] I also believe the testimony of Adina Games that Beatrice Gumbs is also in occupation of land at Very Vine belonging to the estate of David Gumbs. While Beatrice Gumbs in her defence pleaded that she was not in possession of any land at Very Vine, in her joint witness statement with her husband she stated at paragraph 8 "Christa Olive Kirby has been living in Boston, USA for over 20 years. She has asked us to stay on the land until she gets her share". Also at paragraph 6 she stated "In that case we are not trespassers on the land of David Gumbs. We are there with the consent and authority of two of the executors".

- [23] The issue to be determined is where there are several proving executors whether all of the proving executors must consent to the institution of legal proceedings to recover property belong to the estate.
- [24] I find that the various ways of how the estate could be administered as suggested by Learned Counsel for the Defendants is not relevant to determine whether the Claimants are entitled to the reliefs which she seeks being inter alia possession of the land, and an injunction restraining the Defendants from remaining on the land.
- [25] While Dennis Hadaway did not file a written statement, nor did he attend Court, no evidence was led to show that Dennis Hadaway did not consent to being a Claimant. In any event it is not disputed that Christa Kirby the third proving executor did not consent to these proceedings being instituted.
- [26] Learned Counsel for the Defendants relied on Section 18 of the Trustees Act Chapter 494 of the 2009 Revised Edition, in support of his submission that the consent of all of the executors were required before legal proceedings could be instituted. Section 18 reads as follows:
- "18(1) Where a power or trust is given to or vested in two or more trustees jointly then, unless the contrary is expressed in the instrument, if any creating the power or trust, the same may be exercised, or performed by the survivor or survivors of them for the time being.
- (2) This section applies only to trusts constituted on or after, or created by instruments coming into operation on or after the 3rd June 1897."
- [27] I agree that the powers of personal representative are given to them as trustees. However this section deals with devolution of powers. It is not applicable to the issue in this case whether all proving executors must consent to the institution of legal proceedings.
- [28] Learned Counsel for the Claimants relied on Section 30 of the Administration of Estates Act Cap. 486 2009 Revised Edition, which reads as follows:
- "30. Right of proving executors to exercise powers -**
Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others to prove, all the powers

which are by law conformed on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if the persons named as executors had concurred therein.”

[29] The effect of Section 30 is that where there are two or more executors and only one or some of the executors have proved the Will then the executor who has proved the Will; or all executors who have proved the Will may exercise all of the powers of an executor as if all the other executors concurred. In other words the concurrence of those executors who have not proved the Will would not be necessary. In my opinion this section is not applicable in this case since all of the executors have proved the Will.

[30] In my opinion the matter is dealt with under Part 8.5 of CPR 2000 which reads as follows:

“8.5(1) The general rule is that a claim will not fail because a person

(a) who should have been made a party was not made a party to the proceedings; or

(b) was added as a party to the proceedings who should not have been added.

(2) However -

(a) where a claimant claims a remedy to which some other person is jointly entitled, all persons jointly entitled to the remedy must be parties to the proceedings, unless the court orders otherwise; and

(b) if any such person does not agree to be a claimant, that person must be made a defendant, unless the court orders otherwise.

(3) This rule does not apply in probate or administration proceedings.”

[31] Where more than one executor is appointed, all proving executors are jointly entitled to administer the estate. The estate is vested jointly in all of the executors. They are jointly entitled to gather in the property of the estate. All of them must be made claimants in an action to recover property belonging to the estate. If some refuse then they must be made defendants.

[32] Indeed the position is the same in relation to administration claims under Part 67.2 paragraphs (1) and (2) which read as follows:

“67.2 (1) An administration claim or a claim under rule 67.4 may be brought by

any -

- (a) executor or administrator of the relevant estate;
- (b) person having or claiming to have a beneficial interest in the estate of a deceased person or under a trust; or
- (c) trustees of the relevant trust.

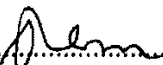
- (2) Any executor or administrator of the relevant estate or trustee of the relevant trust who is not a claimant must be a defendant to the claim."

[33] In this case all three of the executors proved the Will. All three of them must be claimants, or if one or two refuse to be claimants then they must be made defendants. Christa Kirby was not made a Claimant, nor was she named a Defendant. The evidence shows that she did not consent, indeed she showed no interest in the administration of the estate. The Claimants in these circumstances were required to make her a defendant in these proceedings.

[34] In view of the above I find that the Claimants are not entitled to the reliefs sought.

[35] It is ordered that:

- (a) The consolidated claim is dismissed.
- (b) By consent the Claimants shall pay the Defendants costs in the sum of \$4,000.


.....
Gertel Thom
HIGH COURT JUDGE