THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CIVIL

DOMHCV2014/0016

BETWEEN:

FARAH JACKIE THEODORE

Claimant/Applicant

AND

JACQUELINE THEODORE

(As Personal Representative of Ferdinand Theodore)

Defendant/ Respondent

Appearances:

Mr Henry Shillingford for the Claimant/Applicant
Mr Lennox Lawrence for the Defendant/Respondent

2016: January 15th

March 14th

DECISION

[1] **THOMAS. J.:[Ag]** On 11th December 2015 the claimant/applicant filed an application seeking certain orders against the defendant/respondent with respect to the Estate of Ferdinand R. Theodore, deceased.

[2] On 15th January 2016, the defendant/respondent gave Notice of Preliminary Issues for determination prior to the hearing of the application. In the notice three issues are detailed:

Issue No.1: That the notice of application is irregular and accordingly should be struck out.
Issue No.2: That the relief sought is not relief available to the applicant under the present application as filed
Issue No. 3: That the notice of application is an abuse of the process of the court.

[3] Arguments and submissions were heard with respect to both issues which may be classified as procedural and substantive law.

Issue No1.

That the notice of application is irregular and accordingly should be struck out.

Submissions

[4] Mr. Lennox Lawrence for the defendant/respondent submitted that:

a. That the application is irregular as it is not accompanied by an affidavit whose contents are not in accordance with Rule 30.3 of CPR 2000 in that there are opinions and conjecture.
b. The format or form of the application is not in accordance with Form 6 of CPR 2000
c. The application should be struck out because the affidavit does not comply with Part 30 of CPR 2000 and the notice is not in the format of Form 6 of CPR 2000.

[5] Mr. Henry Shillingford, learned counsel for the claimant/applicant contends that the other side is in contempt and the points are not preliminary and further that the other side does not have a right to be heard.

Reasoning

[6] In addressing the issues the court considers it necessary to look at the overriding objective of CPR 2000 and its import.

[7] The overriding objective of the Civil Procedure Rules, 2000 are set out in Rule 1.1 thereof. But Rule 1.2 goes further to address the application of overriding objective by the court. It is in these terms:

> "1.2 . The court must seek to give effect to the overriding objective when it
>
> a. Exercises any discretion given to it by the Rules; or
>
> b. Interprets any rule."

[8] Learned counsel for the respondent contends that the application filed by the claimant/applicant should be struck out for the reasons cited above. This warrants an examination of the impugned parts of the instruments filed.

[9] It is common ground that the matter of affidavits is regulated by the many prescriptions of Rule 30.3 of CPR 2000. In particular, Rule 30.3 (1) which states that: " The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge."

[10] The submissions regarding the applicant's affidavit in support must now be examined in the face of the prescriptions of such an affidavit as set out in Rule 30.3 of CPR 2000, and the import of the overriding objective. As noted before, the court has been asked to strike out paragraphs 7, 8 and 9 of the applicant's affidavit in support.

[11] In so far as paragraph 7 is concerned, the affiant refers to an order of the court directed at the defendant regarding payments to her and the circumstances of the payments. The affiant goes on to say that: " That said money has been under the control and management of the said Lennox Lawrence." This last sentence has not been substantiated or proven by the affiant from her own knowledge, and as such offends against Rule 30.3 and is struck out.

[12] With respect to paragraph 8, the contention is that it is steeped in conjecture and should be struck out. In this paragraph the affiant speaks about her four children and the further contention that one such child is being held unlawfully and that the person holding the said child is being "aided and abetted" by her attorney Lennox Lawrence and with it the basis upon which can build a life for her children. The affiant goes on to "demand at minimal that the court order that I be paid interest on the money ordered to be paid from January 27th 2014 until the date paid." Costs of $50,000.00 is also sought.

[13] This offends against Rule 30.3 in that the applicant has not proven to the court the contention that Lennox Lawrence aids and abets any person with respect to the unlawful holding of her child. Also it must be improper to place a demand on the court. And it must be unusual to ask for costs in an affidavit rather than by way of a prayer in the application itself. Paragraph 8 is accordingly struck out.

[14] The challenge to paragraph 9 is that it embodies speculation. In this paragraph the affiant deposes as to the incorporation of a company on behalf of the respondent. The company is Jaco Feeds and Fertilizer Ltd incorporated according to the affiant, on March 30th 2015.

[15] The further contention in the said paragraph is that the purpose of the incorporation was for "avoiding the effect of the Freezing Order of this court against the defendant."

[16] It is common ground that the initial proceedings were filed 17th January 2014 when the incorporation had yet to be undertaken. As such, the court agrees that the said paragraph 9 is premised on speculation and is struck out.

[17] It is the determination of the court that even in the face of certain paragraphs being deleted, it still survives for the purposes of the application. This is subject to the courts determination regarding the content of the application.

ISSUES Nos. 2 &3

Issue No. 2: That the relief sought is not relief available to the applicant under the present application as filed.
Issue No. 3: That the notice of application is an abuse of the process of the court.

[18] With respect the second issue the submissions on behalf of the respondent are as follows:

1. The act in issue was to be completed by 27th January 2015.
2. The order was not for the appointment of the respondent as Executor of the Estate of Ferdinand Theodore.
3. The grant of probate has been issued to someone and there is a procedure for the removal of the Executor and appointment of someone else.
4. There is no application for the revocation of the grant of probate. Two grants cannot exist.
5. Being an estate matter only one of the beneficiaries filed an affidavit. The other beneficiaries should have filed also for the following reasons:
   a. There must be cogent evidence to show non-compliance with the wishes of the testator.
   b. These are contentious probate proceedings. When the executor is being removed all beneficiaries should be served as their interest will be affected
   c. The application is an abuse of process of the court. The application for the removal of the executor for non-compliance with the Order of 27th January 2014. The action of the claimant obtaining a prohibitive injunction freezing all the accounts have made it impossible to comply with paragraph 3 of the Order. Any action would be in breach of the prohibitive injunction. There is concern about payment but no request for the lifting of the prohibitive injunction. The application should have proposed a manner in which it is possible.
   d. In paragraph 3 of the application Jaco's Feeds is brought in. In 1995 when the probate was granted the company was not part of the Estate. There is no relationship between the two- the Estate and the company.

[19] In response Mr. Henry Shillingford tendered the following:

1. Rule 43.6 is an enforcement procedure.
2. Paragraphs 7 and 8 of the affidavit are valid as information and beliefs can exist.
3. The application is an exact opportunity for the application of Rule 43.6
4. This is an enforcement procedure and Rule 43 (6) is available for these issues so as to remove the trustee.

[20] The following issues well advanced by Mr. Lennox Lawrence in rebuttal:

1. The application is for the Executor to be substituted. It is a contentious probate proceeding.
2. The **Administration of Estates Act** governs the issue.
3. The order cannot be greater as it is not an appropriate case for the granting of such orders.
4. The will that was probated has no declaration of trust and the Respondent was not made a trustee.
5. Rule 43.6 does not remove someone as a judgment debtor.
6. The power of the Respondent are derived from the grant of probate.
7. If an Executor is to be removed there is a procedure under the **Administration of Estates Act** whereby the court can be asked to remove the executor.

Reasoning

[21] The reasoning with this issue falls within a very narrow compass having regard to section 11 of the **Eastern Caribbean Supreme Court (Dominica) Act**[1] which receives into the Laws of Dominica, the law and practice relating to probate, *inter alia*, as of 1st June 1984, as administered in the High Court of Justice in England.

[22] This let in the **Administration of Estates Act 1925**[2] of section 4 concerns summons to executor to prove and renounce." This provisions was later repealed and replaced by section 159 of the **Supreme Court of Judicature (Consolidation) Act 1925**[3] which reads thus:

[1] Chap: 4:02
[2] 15 and 16 Geo.5. C.25
[3] 15 and 16 Geo.5. C.49

"The High Court shall have power to summon any person named as executor in a will to prove or renounce probate of the will, and to do such other things concerning the will as were customary before the commencement of this Act."

[23] Learned counsel for the claimant/applicant has made no mention of this provision, and has instead cited Rule 43.6 (1) of CPR 2000. It states as follows:

"If-

a. the court orders a party to do an act; and
b. the party does not do it;
c. the judgment creditor may apply for an order that
    i. the judgment creditor, or
    ii. some person appointed by the court

may do the act."

[24] To begin with, Part 43 of CPR 2000 is concerned with "Enforcement General Provisions and with the enforcement of judgment and orders."

[25] In the application before the court, the applicant is before the court in her capacity as a beneficiary under her father's will of which probate was granted to her mother.

[26] The court therefore agrees with the submissions on behalf of the defendant that there is a special procedure under the **Administration of Estates Act, 1925** and the **Supreme Court of Judicature (Consolidation) Act 1925** which deal with the issue. As such, the application in placing reliance on Part 43.6 of CPR 2000 is nugatory.

Impact of the overriding objective?

[27] In the text on **Commonwealth Caribbean Civil Proceedings**, the learned authors[4] in seeking to explain the overriding objective write as follows:

[4] Gilbert Kodilinye and Vanessa Kodiliyne (3rd ed.), pp 5-6

> "Dealing with cases justly is exemplified by the principle that the litigant should not be prevented from pursuing his claim merely because he is technically in breach of a procedural rule. Doing justice means that the courts ought to decide claims as far as possible on their merits, and not subject them on grounds of procedural default. Thus, for instance where a party commences with the wrong statutory provision, or makes an error in quantifying his claim so that the amount claimed is a serious understatement of his loss, permission to amend should readily be given especially where the defendant has not been misled by the errors. Ensuring that the parties are on an equal footing has been held not to justify the court in intervening to prevent a more affluent party from instructing lawyers of his choice, where the other party could not afford such expensive attorneys. It has been further stated that if a party wishes the court to inhibit the activities of another party, with a view to achieving greater equality, the party making the application must show that he is himself conducting proceedings so as to minimise expense."

[28] It is patent that the learning addresses matters procedural so that by definition, it cannot assist the applicant in this context where the relevant procedure was not cited to the court. This is substantive or enabling law.

[29] The court therefore also agrees that the application was an abuse of process, being a step that should not have been taken without reference to the substantive law dealing with the removal of an executor. In any event, Rule 43.6 speaks to judgment creditor and judgment debtor.

[30] Costs shall be in the cause.

[31] In the circumstances the Order of the court is as follows:

ORDER

UPON the application filed on 11th December 2015 coming before the court on 15th January 2016 for the hearing of certain preliminary points on the said application, filed by the defendant;

AND UPON the court hearing arguments and submissions on behalf of the defendant and the claimant;

AND UPON the court considering the arguments and submissions together with the relevant substantive and procedural law.

IT IS HEREBY ORDERED AND DECLARED as follows:

1. Subject to the court's determination on the submissions regarding the application itself, the affidavit in support is valid and survives despite the deletion of certain paragraphs therefrom.

2. The application seeking the removal of the executor of the Estate of Ferdinand R. Theodore is nugatory since applicant failed to cite the relevant provisions of the **Administration of Estates Act,** 1925 and the **Supreme Court of Judicature (Consolidation) Act 1925**, or at all, which are the relevant statutes received and applicable to Dominica by virtue of the reception provision in the **Eastern Caribbean Supreme Court (Dominica) Act**, being section 11 thereof;

3. The **Administration of Estates Act 1925** and the **Supreme Court of Judicature (Consolidation) Act, 1925** are the enactments which give the court jurisdiction to remove and executor upon application, and as such Rule 43.6 being purely procedural, and concerning judgment creditor and judgment debtor, has no immediate relevance to the application;

4. In all the circumstances the application by the claimant/applicant is an abuse of process of the court.

5. Costs shall be in the cause.

Errol L. Thomas
High Court Judge