

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-00374

IN THE MATTER OF PART 71 OF
THE CIVIL PROCEEDINGS RULES 1998

AND

IN THE MATTER OF THE ESTATE OF POLLY GANGA
DECEASED WHO DIED ON THE 6TH JUNE, 2001

BETWEEN

VERNON GANGA

CLAIMANT

AND

STEPHEN GANGA
OPHELIA GANGA
STELLA JAMUNA
JOAN GANGA

DEFENDANTS

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Manwah, instructed by Mr. Dowlat
For the 1st, 3rd and
4th Defendants: Mr. Harrikisson, instructed by Mr. Gopaul
For the 2nd Defendant: Mr. G. Mungalsingh, instructed by Mrs. S. Mungalsingh

Date of Delivery: 29th July, 2011

JUDGMENT

BACKGROUND

[1] The parties to this action are the five (5) children of Polly Ganga (“the Deceased”) who died on the 6th June, 2001. The Deceased published her Last Will and Testament on the 20th May, 1986 wherein she appointed the Claimant and the First-named Defendant as the Executors (“the Executors”). The Deceased devised the entirety of her estate to her five children aforesaid in the following terms:

“I give devise and bequeath all my property real or personal of whatsoever nature and wheresoever situate to my children STELLA GANGA, VERNON GANGA, STEPHEN BRIAN GANGA, JOAN GANGA and OPHELIA GANGA for their own use and benefit.”

The Executors applied for and obtained probate of the Deceased’s Will on the 8th March, 2002.

- THE CLAIM

[2] The Claimant contends that the Deceased was registered as the holder of a sawmill license for a sawmill operated by himself and the Deceased. Upon her death, he made enquiries as to how this license could be transferred into his name but was informed that the Grant of Probate in the Deceased’s estate must be produced. As a result of this, the sawmill was included in the inventory of the estate of the Deceased.

[3] In order to reduce the registration and legal fees payable, the Claimant and the First-named Defendant agreed to reduce the value of the estate by omitting several items therefrom as well as under-valuing its worth. Accordingly, they instructed their Attorney-at-Law, applying for probate of the Deceased's Will to assign a value of \$220,000.00 to the entirety of the Estate; this was done as appears in the inventory filed in the Application for Probate of the Deceased's Will.

[4] After the Deceased's death, new bank accounts were opened:

- i. in the joint names of Claimant and the Third-named Defendant; and,
- ii. in the joint names of the Claimant and the First-named Defendant.

The sawmill continued in operation as before and all the money derived therefrom was deposited into the foregoing accounts; this arrangement continued for two (2) years without incident. However, the Claimant alleges that the First and Third-named Defendants began to make substantial withdrawals from the accounts for their own benefit and upon his objection discontentment arose between them. This quickly escalated into the other siblings questioning the interpretation and distribution of the Deceased's Will.

[5] Consequently, on or about the 29th May, 2004 four of the beneficiaries - the Claimant, the First, Third and Fourth Defendants - convened a meeting for the purpose of deciding upon the distribution of the family property. The Claimant alleged that the Second-Named Defendant appointed the Fourth-

named Defendant as her agent. It was agreed among them that the following items constituted “family assets” for such distribution:

- i. Sawmill Bank Account at Republic Bank Limited, Penal Branch;
- ii. Joint Bank Account between the Deceased and the Third-named Defendant;
- iii. Joint Bank Account held in the names of the Deceased and the Second-named Defendant;
- iv. Joint Bank Account at Unit Trust held in the names of the Deceased and the First-named Defendant;
- v. Joint Bank Account at Clico Investment Bank held in the names of the Deceased and the Fourth-named Defendant;
- vi. Joint Bank Account at Republic Bank, Penal Branch held in the names of the Claimant and the First-named Defendant;
- vii. Mondock Estate, approximately 42 acres of land in Morgua; and,
- viii. Sawmill equipment, vehicles, stocks, current debts together with the tenancy rights to the two acres of land upon which the sawmill is located.

These items were valued at the agreed sum of one million six hundred thousand dollars (\$1,600,000.00). It was also agreed among the beneficiaries that the distribution of the assets was to be effected as follows:

- i. To the First-named Defendant the undisclosed sum of money held jointly with the Deceased at the Unit Trust; and the sum of two hundred and one thousand seven hundred and eighty four dollars

and fifty three cents (\$201,784.53) which the Claimant would transfer to him from an account at Republic Bank Limited, Penal Branch;

- ii. To the Second-named Defendant the undisclosed sum of money held jointly with the Deceased, together with a parcel of land comprising forty two acres at Moruga known as Mondock Estate;
- iii. To the Third-named Defendant the undisclosed proceeds of the joint account which she held jointly with the Deceased, together with one half of the proceeds of the sawmill operating account which at the time stood at two hundred and seventy nine thousand four hundred and eleven dollars and forty cents (\$279,411.40);
- iv. To the Fourth-named Defendant the undisclosed sum of money which she held jointly with the Deceased at Clico Investment bank, together with the remaining half of the sawmill's operating account which at the time stood at two hundred and seventy nine thousand four hundred and eleven dollars and forty cents (\$279,411.40) as well as the sum of eighty thousand dollars (\$80,000.00);
- v. To the Claimant the sawmill inclusive of all the machinery, equipment, vehicles, stock and current debts which had not been quantified together with the tenancy to the lands on which the sawmill stood. The value of the sawmill was agreed at the sum of four hundred thousand dollars (\$400,000.00).

[6] Thereafter, the Claimant on the 29th May, 2004, in his personal capacity as well as Executor, did all that was necessary to give effect to the foregoing agreement, including closing two accounts which were operated as the

sawmill accounts and which were held jointly by the Claimant and the First and Third-named Defendants, respectively.

[7] The sawmill was licensed in the name of the Deceased and after her death, in the names of the Claimant and the First-named Defendant. Consistent with the agreement made among the parties, the sawmill was licensed in the sole name of the Claimant from the year 2004 onwards. The Claimant registered the sawmill as "Vernon Ganga Sawmill". In November, 2004, the Claimant obtained the Board of Inland Revenue Income Tax File Number, the PAYE Employer File Number and the National Insurance Board Registration Number for the Sawmill business. Since 2004, all insurance policies including Workmen's Compensation, public liability, fire and peril have been paid by Vernon Ganga Sawmill. The electricity bill is in the name of the Claimant.

[8] The Claimant alleges that on or about the end of 2006, the First-named Defendant, in breach of the agreement, began demanding from him the additional sum of one hundred and fifty thousand dollars (\$150,000.00), which the latter contends is the value of his share of two vehicles, TAT 929 and TN 6728, part of assets of the sawmill. The First-named Defendant's claim is also based on the fact that he is one of the owners of the said vehicles.

[9] The Claimant further alleges that the First-named Defendant threatened on several occasions to disrupt the operation of the sawmill; that in furtherance of the said threats, he wrote to the Director of Forestry and objected to the renewal of the sawmill license that was in the name of the

Claimant. As a result of the objections and/or complaints made by the First-named Defendant, the Claimant has not been able to obtain timber concessions as he did in the past and the sawmilling operation is almost at a standstill.

[10] Consequently, on the 4th February, 2009 the Claimant filed a Fixed Date Claim Form seeking the following reliefs:

- i. A declaration that the estate of Polly Ganga, deceased, comprised assets of an agreed value of \$1,600,000.00;
- ii. A declaration that the share of each of the children of Polly Ganga in the estate of Polly Ganga was agreed by her children in the sum of \$320,000.00;
- iii. A declaration that the Claimant's share, valued at \$320,000.00, in the estate of Polly Ganga, deceased, was agreed amongst her children as comprising the sawmill and all its equipment and vehicles used in the day to day running of the sawmill;
- iv. A declaration that the chattels, namely vehicles TAT 929 and TN 6728, held in the name of the Claimant and the First-named Defendant and which are used in the daily operation of the sawmill was part of the entitlement of the Claimant pursuant to the agreement aforesaid;
- v. An order that the First-named Defendant do transfer to the Claimant motor vehicles TAT 929 and TN 6728; or,
- vi. In the alternative, an order that the sum transferred to the First-named Defendant of two hundred and one thousand, seven

hundred and eighty four dollars and fifty three cents (\$201,784.53) by the Claimant be returned;

- vii. An injunction restraining the First-named Defendant by himself or his servants and or agents from making representation to the Director of Forestry in respect to the grant of a sawmill license to the Claimant;
- viii. An order directing the First-named Defendant to remove and rescind all and every representation made to the Director of Forestry against the granting of a sawmilling license to the Claimant, and to join with the Claimant as executors of the estate of Polly Ganga to request the Director of Forestry to issue a sawmill license to the Claimant.

- THE DEFENCE

- THE FIRST, THIRD AND FOURTH-NAMED DEFENDANTS

[11] The First-named Defendant swore to an affidavit on behalf of himself and the Third and Fourth-named Defendants in which their defence to the Claim was outlined as herein stated.

[12] After the death of the Deceased, the sawmill business continued to be run as a family business and the responsibilities were shared among the Claimant, the Third-named Defendant and First-named Defendants. The profits derived from the business were placed in a joint account held in the names of the Claimant, the Third-named Defendant and First-named Defendants and were used for the operation of the business.

[13] Disagreements arose during the operation of business because of the impulsive buying and spending by the Claimant; thereafter, the Claimant started to treat the business as his own and deprived the First-named Defendant of access to the vehicles used in the company. It is denied by the First and Third-named Defendants that they queried the terms and effect of the Deceased's Will, as its provisions were clear.

[14] The family meeting was held on the 30th May, 2004 and not on the 29th May, 2004; the purpose was not to distribute the assets of the Deceased's estate as alleged by the Claimant but merely to sort out differences among the siblings.

[15] The Second-named Defendant was aware of the meeting but did not consent to it nor did she appoint the Fourth-named Defendant as her agent. The Second-named Defendant's position was that as she had already received money from the Deceased and the gift of Mundock Estate in Moruga, she did not want any further share of the Deceased's estate.

[16] It is denied that there was any agreement that all the monies derived from the business would be included in the distribution of the Deceased's estate, as monetary gifts were given to all the siblings during the lifetime of their parents. Hence, these sums of money were never regarded as belonging to the estate of the Deceased or held in trust for the estate. The only assets which are considered to be held by the family are as follows:

- i. The sawmill business account at Republic Bank Limited, Penal in the joint names of the Claimant and the Third-named Defendant;

- ii. The joint account at Republic Bank Limited, Penal in the names of the Claimant and the First-named Defendant; and,
- iii. The sawmill equipment and stock.

[17] At the meeting, it was decided that the estate should be divided among the Claimant, the First and Third-named Defendants as follows:

- i. The sawmill was valued at \$200,000.00 and thirty (30) truck loads of teak logs, along with other lumber stock, were valued at over \$200,000.00, giving a total of over \$400,000.00;
- ii. The Claimant was to be given the sawmill to run and the stocks, however he was to pay to the Fourth-named Defendant the sum of \$80,000.00 from the sum of \$400,000.00;
- iii. This sum of \$80,000.00 was added to the joint accounts held by the Claimant, the First and Third-name Defendants giving a total of \$561,610.81. This figure was divided equally between the First, Third and Fourth-named Defendant with each receiving the sum of \$187,203.00; and,
- iv. The vehicles that were in the joint names of the Deceased, the Claimant and the First-named Defendants were to be shared equally between the Claimant and the First-named Defendant.

[18] The First-named Defendant contends that the Claimant did not have the money to pay him for his interest in the vehicles and in the interim, it was decided that he would have use of the vehicles to execute private contracts. Further, it was decided that an Attorney-at-Law should formally

draw up the agreement but the Claimant refused despite the repeated requests of the First and Third-named Defendants.

[19] Thereafter, the Claimant took complete control of the business and began treating it as his own. Further, from or about the 7th May, 2005 the Claimant refused to allow the First-named Defendant to use the vehicles; as result the Third-named Defendant was eventually forced to leave the said business on our about the 5th February, 2006.

[20] The First-named Defendant asserts that it was never part of the agreement that the sawmill licence would be in the Claimant's name alone after 2004. When he discovered this was the case, he caused his Attorney-at-Law to write to the Forestry Division on the issue. Upon receipt of this Attorney's correspondence the Forestry Division rectified this irregularity. With respect to the issuance of the licence in the Claimant's name, the Forestry Division discontinued the practice. The First-named Defendant asserted however, that he was willing to cooperate with the Claimant in order to obtain new timber concessions from the State.

[21] The parties however had not arrived at an agreement with respect to the tenancy rights on the land on which the sawmill was situate. It was further agreed that the following items were to be held in the joint names of the Claimant and the First-named Defendant until such time as the Claimant could purchase the First-named Defendant's interest in the items:

- i. Mitsubishi Fuso winch truck, TAT 929;
- ii. Ford winch truck, TN 6728;

- iii. Cat Log Skidder, TAE 8849;
- iv. Cat Log Loader, TW 5563; and,
- v. Ford winch tractor.

However, to date the Claimant has not purchased the First-named Defendant's interest in the said vehicles and has deprived the latter from use of the said vehicles.

○ THE SECOND-NAMED DEFENDANT

[22] The Second-named Defendant admits that she initially waived her one-fifth share of the Deceased's estate and stated that it should be shared equally among her four siblings. However, in light of the recent contention, she has changed her mind and now wishes to have her rightful share in the Deceased's estate.

[23] The Second-named Defendant denies that the sawmill, the equipment and machinery associated with it belong to the Claimant, rather that it formed part of the Deceased's estate and should be equally distributed among the five beneficiaries in accordance with the Deceased's Will. She further denies naming the Fourth-named Defendant as her agent at the family meeting that was held. She contends that she was entirely unaware that such a meeting was to have taken place and therefore was not party to the agreement arrived at among the other parties.

[24] The Second-named Defendant also asserts the property referred to as "the Mondock Estate" was held on a joint tenancy between the Deceased and

herself, and upon the death of the Deceased the property automatically passed to her; as such it does not form of the Deceased's estate. In support, she produced the Certificate of Title No. 20 of 1945 (Vol. 1214, Folio 181), which showed that the land was transferred to her on the 8th August, 2002.

ISSUES

[25] The following issues are for determination by the Court:

- i. Whether the Second-named Defendant can at a later stage retract her initial disclaimer to her entitlement under the Deceased's estate;
- ii. Whether the Court can give effect to the agreement made among the siblings for the distribution of the Estate of the Deceased; and,
- iii. Whether there is an onus on the Executors to distribute the estate in accordance with the terms of the Deceased's Will.

LAW AND ANALYSIS

Whether the Second-named Defendant can at a later stage retract her initial disclaimer to her entitlement under the Deceased's estate

[26] It is not in contention that the Second-named Defendant originally disclaimed her entitlement under the Deceased's Will. A disclaimer may

be made in the case of a person *sui juris* by informal acts as well as by deed.¹ In Townson v Tickell², Abott CJ opined:

“The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however he is the best judge, and it if turns out that the party to whom the gife is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift.”

[27] A disclaimer by a person *sui juris* is in general final and cannot be retracted but where the rights of other parties are not prejudiced and they have altered their position on the faith of the disclaimer, and the disclaimer has been made without consideration, a disclaimer may be retracted^{3,4} In Re Cranstoun⁵, Romer J. opined:

“... a beneficiary should not be obliged to take what might be a onerous burden but a natural corollary of the principle is that, if anyone acted on the faith of his renunciation and altered his position to his detriment in consequence thereof, the beneficiary would not be allowed to retract his renunciation. Where, as here, no one has altered his position, I cannot see why the claim to retract should not prevail.”

¹ Williams on Wills, Vol. 1, 18th Edition, p. 500, para. 46.1

² (1819) 3 B & Ald. 31 at p. 36

³ *Ibid.*

⁴ Williams on Wills, Vol. 1, 18th Edition, p. 502, para. 46.4

⁵ (1949) 1 All. E.R. 871 at p. 874

[28] Since none of the beneficiaries has altered his/her position as a consequence of the Second-named Defendant's disclaimer (as the estate of the Deceased is yet to be distributed) the Second-named Defendant can retract her disclaimer and obtain her one fifth share in the estate as provided for by the Deceased in her Will.

[29] Further, the land referred to as Mondock Estate does not form part of the estate of the Deceased as it was transferred to the Second-named Defendant by virtue of the right of survivorship upon the death of the Deceased.

[30] Issues (ii) and (iii) are so closely intertwined that I propose to deal with them together.

Whether there is an onus on the Executors to distribute the estate in accordance with the terms of the Deceased's Will and whether the Court can give effect to the agreement made among the siblings for the distribution of the Estate of the Deceased

[31] An executor is one appointed, ordinarily by the testator by his will or codicil, to administer the testator's property and to carry into effect the provisions of the will.⁶ In **Re Hayes Will Trust**, Thomas J. opined:

"It is well established that ... a personal representative ... has fiduciary duties with regard to it and their performance will be secured by the court; and he may be made liable for breaches of his fiduciary duties ... Those

⁶ Halsbury's Law of England, Vol. 17, 4th Edition, p. 373, para. 347

functions are to get in the testator's estate preserve its properties, discharge its liabilities and distribute the resulting net assets. The legal representatives would in due course be concerned to obtain a proper discharge for the net assets and thus to ascertain who are entitled to them and to ensure that the assets were distributed to those entitled."

[32] It is worth mentioning that the Claimant and the First-named Defendant obtained probate for the Deceased's estate over eight (8) years ago and yet never sought to distribute the estate; it is only when disagreement arose among the parties that distribution was sought. **SECTION 87(1)** of the **SUCCESSION ACT, CHAP. 9:02** provides:

"The personal representatives of a deceased person shall distribute his estate as soon after his death as reasonably practicable having regard to –

(a) the nature of the estate;

(b) the manner in which it is required to be distributed;

(c) all other relevant circumstances... "

The Claimant and First-named Defendant, as executors, did not seek to distribute the Deceased's estate in a timely manner; and while this Section also makes provision for proceedings to be brought against the personal representative, after the expiration of one year, for failure to distribute the estate, none of the beneficiaries took this course of action.

[33] Further, in the failed attempts to distribute the estate of the Deceased, the parties sought to distribute the estate as they saw fit rather than in accordance with the terms of the Deceased's Will; this amounts to a clear

breach of the fiduciary duties of the Claimant and the First-named Defendant as the executors of the estate.

[34] The Court cannot in the circumstances give effect to the agreement made among the parties since it would be in clear breach of the provisions of the **SUCCESSION ACT** as well as against the weight of the evidence. Even if the Court were able to give effect to the agreement, the Second-named Defendant was not a party to the agreement and therefore, the agreement could not have been upheld without her presence and consent to it.

[35] The Court therefore finds that there was an onus on the Claimant and the First-named Defendant, as executors, to distribute the Deceased's estate in accordance with her Will, which they have failed to do.

[36] A corollary issue is whether the sawmill and the land upon which it is situated, associated equipment, machinery, bank accounts and stocks form part of the estate of the Deceased to be distributed in accordance with the Will.

[37] The evidence before the Court, both documentary and *viva voce*, points to the fact that the sawmill business was always operated as family business; as all the parties testified that they started working therein at a very young age doing odd jobs until they were older and able to take on greater responsibilities. However, it is clear from the evidence that the Deceased was the driving force behind the business upon the death of her husband and retained full control despite the involvement of the parties.

[38] The Court accepts the evidence of the Defendants to that of the Claimant that the business was always meant to be a family business and was never promised to the Claimant to have as his own upon the Deceased's death. If this was the intention of the Deceased, she could have easily transferred the business to the Claimant during her lifetime, if as he alleges, he was the one handling the affairs of the business years prior to the Deceased's death.

[39] In the circumstances, the Court finds that the sawmill and the lands upon which it is situate forms part of the estate of the Deceased. The machinery, equipment, bank accounts and stocks associated with the business are also to form part of the estate, exclusive of the following items:

- i. Mitsubishi Fuso Winch Truck TAT 0929;
- ii. Ford Winch Truck TN 6728;
- iii. Head Rig Band Saw Brenta 6";
- iv. Circular Saw;
- v. Cross Cut Saw 16";
- vi. Sharpener; and,
- vii. Three sheds.

The remainder of the vehicles – namely, the Cat Log Skidder TAE 8849, the Cat Loader TW 5563 and the Ford Winch Tractor – for which no documentary evidence was put before the Court as to ownership, will be deemed to form part of the sawmill business and therefore, forms part of the estate of the Deceased.

CONCLUSION

[40] In the circumstances, the Court makes the following orders:

- i. The inventory of the Deceased's estate is to be amended to include the foregoing assets which the Court has deemed to form part of the estate;
- ii. The Executors are to distribute the estate of the Deceased within one year from the date of judgment;
- iii. Any additional expenses incurred in the distribution of the estate are to be borne personally by the Executors, which but for their dawdling management of the Deceased's estate would not have been incurred; and,
- iv. The costs of this action is to be borne out of the estate of the Deceased.

JOAN CHARLES

JUDGE