IN REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 236 OF 2009

BETWEEN

MARTIN DE ROCHE

GILLIAN DE ROCHE

Appellants

AND

JOYCE CAMERON-FINCH (representing the estate of Dennis Cameron, deceased) (By order of the Court of Appeal made on November 2nd, 2012)

AND

JOYCE CAMERON-FINCH

Respondents

PANEL: A. Mendonça, J.A
G.Smith, J.A.
M. Rajnauth-Lee, J.A.

APPEARANCES: Ms. S. Lawson for the Appellants
Ms. N. Ihezue for the Respondents

DATE OF DELIVERY: November 2nd, 2012

JUDGMENT

Delivered by A. Mendonça, J.A

1. This is an appeal from the order of Best J made on the 6th November, 2009 upholding the will of Mabel Cameron (the testatrix) dated 15th April, 1999. The testatrix died on 12th October, 1999. The judge was of the opinion that the suspicions that clouded the execution of the will had been sufficiently answered.

2. In this case the Respondents, by their writ of summons, sought possession of all and singular that chattel house situate at Martinez Trace, Mausica, Arima against the Appellants. The Respondents contended that the testatrix by a will, purportedly executed on 15th April, 1999, devised and bequeathed the said chattel house to them. The Appellants in their defence contended that the alleged will was not duly executed according to the provisions of the Wills and Probate Act; that the testatrix neither knew nor approved of the contents of the said will and that the testatrix at the time of the purported execution of the will was not of sound mind, memory and understanding. The judge however found that the will was properly executed and that the testatrix was of sound disposing mind and with knowledge and approval of the contents of the will duly executed the will. However, the judge, for reasons that are not readily apparent, did not make any order for possession on the claim.

3. Before this Court the Appellants argued that the judge's conclusions on the question of the execution of the will were erroneous and against the weight of the evidence.

4. The statutory formalities for due execution of a will are provided for by section 42 of the Wills and Probate Act. This section states as follows"

> *"42. Save as hereinbefore provided, no Will executed after the commencement of this Act shall be admitted to probate or annexed to any letters of administration or be deemed to have any validity for any purpose whatsoever unless such Will is in writing and executed in manner hereinafter mentioned, that is to say,—it shall be made by a person of the age of twenty-one years or more, it shall either be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses of either sex competent to attest a Will according to the law of England, present at the same time, and such witnesses shall attest and subscribe the Will in the presence of the testator and of each other but no form of*

> *attestation shall be necessary. No person shall be a competent witness to any Will executed or purporting to be executed after the 16th of May 1921,who has attested such Will by making a cross or mark or otherwise than by his signature in his own proper handwriting."*

5. The Court has to be satisfied that the will was duly executed by the testatrix in accordance with the statutory requirements. Material to the due execution of the will is whether there were two attesting witnesses who signed in the presence of the testatrix and in the presence of each other.

6. Whether the will has been duly executed is a question of fact to be determined by the trial judge. It is well settled that this Court is slow to interfere with the trial judge's findings of fact primarily because, on issues such as those in this matter that turn on the question of credibility of the witnesses, the trial judge enjoys a position of advantage by having seen and heard the witnesses. The Privy Council in **Harracksingh v Attorney General and Another [2004] UKPC 3 (at paragraph 10)** cited the classic approach of an appellate court in reviewing the findings of fact of the trial judge formulated by Lord Sumner in **Owners of SS Hontestroom v Owners of SS Sagaporack [1927] AC 37** at 47:

> *'... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'*

7. The Privy Council went on to state at paragraph 11 that *"it is axiomatic that even where a case on paper would support a decision either way, the trial judge's decision ought not to be disturbed unless it can be demonstrated that it is 'affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong'*: see ***Watt v Thomas*** **[1947] 1 All ER 582** *at 590 per Lord Macmillan at page 491"*.

8. Thus this Court is entitled to interfere with the trial judge's findings of fact if satisfied that the trial judge did not properly use his advantage of having seen and heard the witnesses, such as where he failed to weigh in the balance or overlooked material evidence. It is with this in mind that we now look at the issue of the due execution of the will.

9. It should be noted that the principle 'omnia praesumuntur rite esse acta' that is, 'all things are presumed to have been done rightly' applies where the will is regular on the face of it, with an attestation clause and the signatures of the testator and witnesses in their proper places. It may be rebutted by evidence of the attesting witnesses or otherwise, but the evidence as to some defect in execution must be clear, positive and reliable, since the court ought to have the strongest evidence before it believes that a will, with a perfect attestation clause and signed by the testator, was not duly executed **(see 102 Halsbury's Laws of England (5th edn) para 895).**

10. On the face of the will it appears that it was witnessed by Zaheeda Ali and Dennis Cameron on the 15th April, 2009. A signature purporting to be that of Felix Bellamy, Commissioner of Affidavits, and who according to the evidence prepared the will, also appears at the foot of the will. Zaheeda Ali was not called as a witness. The Respondents relied on the evidence of two witnesses namely, Dennis Cameron and Felix Bellamy.

11. In his witness statement, Dennis Cameron stated that on the 15th April, 1999 the testatrix visited him at the Red House, where he worked, and asked him to accompany her to the office of Felix Bellamy to make a will, which he did. However in his oral evidence he indicated that when the testatrix came to him on the 15th April, 1999 at the Red House and asked to accompany her to Mr. Bellamy's office, he did not go the same day but on another occasion, a few days later. The judge accepted at paragraph 8 of his judgment that what Dennis Cameron was saying was that he went with the testatrix some days after the 15th April, 1999 to Mr. Bellamy to prepare and witness the will. It should be noted that on the face of the will it is executed on 15th April, 1999. The fact that, according to the evidence of Dennis Cameron, the will was not executed on the 15th April, 1999, being the date on which the will appears to be duly executed, is a material contradiction which was required to be addressed by the trial judge when assessing the evidence of due execution of the will and the credibility of the witnesses.

12. Furthermore, when one looks at the evidence of Mr. Bellamy who prepared the will, he indicated that he knew the testatrix very well but stated that she appeared to him to be a person in her thirties. At the time of the execution of the will, the testatrix was a person of 80 odd years and it is difficult, if not impossible, in this Court's view, that he could have confused a person of 80 years, who he said he knew, with a 30 year old. This raises doubt as to whether it was the testatrix who

was in fact before Mr. Bellamy, and impacts on the credibility of his evidence. This issue was not dealt with by the judge and it is a matter that required consideration.

13. These issues bring into focus the conclusion of the judge that the will was duly executed as they cast doubt on whether the will was executed by the testatrix at all or in the manner required by section 42, but it is not apparent from the judgment that they were considered. The assessment of the credibility of the witnesses is the task of the trial judge, but in the light of the issues highlighted, this Court is left to wonder what was the basis on which the judge accepted the evidence of both of the Respondents' witnesses. For this Court to be satisfied that the trial judge did not waste his advantage of having seen and heard the witness, such matters, which bear so strongly on the credibility of the witnesses, had to be specifically addressed and adequately explained.

14. The Appellants also challenged the validity of the will on the basis of lack of testamentary capacity. The burden of proof in relation to testamentary capacity is subject to the following rules:

i. The burden begins with the propounder of the will to establish capacity, where the will is duly executed and appears rational on its face, the court will presume capacity;

ii. In such a case the evidential burden shifts to the objector to raise a real doubt about capacity;

iii. If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity.

(See the cases of **Key and another v Key and others [2010] EWHC 408** and **Ledger v Wootton and another [2007] ALL ER (D) 99**)

15. The Appellants contended, inter alia, that the testatrix was feeble and was not of sound mind, memory and understanding, alleging that the testatrix was suffering from senile dementia and that the Respondents took advantage of the testatrix's unstable state. The Respondents' evidence contradicts these assertions of the Appellants.

16. The judge at paragraphs 24 and 25 of his judgment stated that "upon a comparing and contrasting of the evidence presented herein, I have come to the conclusion the challenge to the will was reasonable and genuine. Further, I have seen the witnesses herein and I have concluded that

honesty prevailed in their testimony". This Court is further troubled by these statements as the judge is saying that he regarded the evidence of all the witnesses, that is to say the witnesses for all parties to the action, as honest. If the Appellants' witnesses were honest, their evidence of the physical and mental condition of the testatrix contrast significantly with that of the Respondents and also cast doubt on the credibility of the Respondents' evidence in support of the due execution of the will and the capacity of the testatrix. With such clear contradictions, the function of the judge was to properly assess the evidence and the , credibility of the witnesses. We cannot say this was done in this case.

17. In the premises, the conclusions of the judge are difficult to support having regard to the lack of proper analysis of material contradictions in the evidence. They might have been capable of being resolved on a proper assessment of the evidence and of the credibility of the witnesses. That task was not properly carried out by the trial judge. In the circumstances, the appropriate course, in our judgment, would be to set aside the orders made by the judge and have the matter retried. The appeal therefore is allowed and the matter is remitted before another judge of the High Court.

18. With respect to the costs, the costs in the court below are to be costs in the cause. In relation to the appeal, there is no reason that costs should not follow the event and they are to be determined at two-thirds of the costs which on the prescribed scale would otherwise be allowed (see the **Civi**l **Proceedings Rules 1998**, rule 67.14). The Respondents shall, therefore, pay the Appellants the costs of the appeal in the sum of $ 9,600.00.

Dated the 2nd day of November, 2012.

A. Mendonça
Justice of Appeal

G. Smith
Justice of Appeal

M. Rajnauth-Lee
Justice of Appeal