

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. T022 OF 2020

CIVIL CLAIM NO. CV 2018-01804

Between

**IN THE MATTER OF THE WILLS AND PROBATE ACT
CHAPTER 9:03 OF THE LAWS OF TRINIDAD AND TOBAGO**

**IN THE MATTER OF THE ESTATE OF SYLVIA CELESTINE
also known as SYLVIA CALLENDER**

ANTHONY CALLENDER

ESTHER CHARLES

APPELLANTS/DEFENDANTS

And

MONICA CALLENDER

MARCUS JOSEPH

RESPONDENTS/CLAIMANTS

PANEL:

PEMBERTON JA

LUCKY JA

ABOUD JA

Date of Delivery: 29th April 2022

Appearances

For the Applicants: Ms S Lawson instructed by Mr M Peters

For the Respondents: Mr M George instructed by D Bartholomew

JUDGMENT

1. This is an application by the Respondents/Claimants (now 'Applicants') for conditional leave to appeal to the Judicial Committee of the Privy Council ('JCPC'). We read the submissions by both Counsel and are grateful for them, albeit they were belatedly filed. We have decided to deny the application for conditional leave on the ground that there is no genuinely disputable case which should be forwarded to the JCPC. We now give our reasons.

FACTS

2. The Applicants' Fixed Date Claim sought *inter alia* to have the Court pronounce against the validity of a Testatrix's will and last testament. They in effect sought by that declaration, for the estate to fall into intestacy, with the consequent incidents of distribution to the next of kin. Other relief was sought, including exclusionary orders and injunctive relief in relation to the property comprised in the will.
3. The Appellants/Defendants (now 'Respondents') filed a Defence and Counterclaim. The Defence stated that at the date of execution, the Testatrix was of sound mind and possessed the requisite testamentary capacity. The Counterclaim asked the Court to pronounce in favour of the validity of the Will and that it be propounded to probate in solemn form.

4. The Applicants were successful at the trial court. That success was short lived, as the court of appeal reversed the trial judge's findings, decisions and orders and spoke for the will's validity and the wishes of the Testatrix. The Applicants, being dissatisfied with that defeat, now apply to take the matter to the apex court.

LAW AND ANALYSIS

5. There is no dispute that the jurisdiction of the JCPC may be invoked, only upon the grant of leave or permission of the court of appeal. The court of appeal therefore acts as a filter for matters to be taken to the apex court, and necessarily so. The reasons for same are not important for present purposes as they are well known, but it is a function that is germane to the court of appeal.
6. There are two stages. The applicant must satisfy our local court that leave ought to be granted. This is subject to certain stated conditions. Once those conditions are fulfilled, then the court of appeal is able to grant final leave to appeal to the apex court.
7. Our **Constitution** at **section 109 (1) (a)** sets out the filtering criteria which must be satisfied for granting conditional leave. A further condition is set out in **section 109(2)(a)** but that is not relevant for present purposes. The criteria are as follows:
 - a. That the decision is a final decision;
 - b. That the matter is a civil matter;
 - c. That the value of the matter is upwards of TT\$1,500.
8. It is not enough that these three criteria are satisfied. The applicant must also show that there is something to go forward for the JCPC's consideration,

namely, that there is a genuinely disputable issue to be determined by the JCPC. Although not stated in the **Constitution**, this makes complete sense and is an important duty placed on the filtering court, which it observes with all due seriousness.

9. How does one therefore assess whether there is a genuinely disputable issue? As a starting point, we are reminded of the strictures laid down by the JCPC itself on matters coming forward for its consideration. They include,
 - a. That appeals relating to procedural issues are best left to local courts¹;
 - b. On appeals relating to concurrent findings of pure fact by the High Court and the Court of Appeal in very limited circumstances².

10. In this appeal, there is a bit of a hybrid situation. Whilst both Courts found that the Testatrix validly executed the will, the two courts parted company in this way. The trial judge found that though the will was validly executed in that all of the formalities were met, the circumstances surrounding the execution were such as to excite suspicion. The court of appeal disagreed. The court did not find that the circumstances taken into account by the trial judge were sufficient to arouse suspicion such as to cast doubt on the validity of the execution by the Testatrix. The appeal was therefore largely based on the treatment of evidence led in the court below. A further question is whether the trial judge was entitled to come to the decisions that he arrived at on a proper construction of the evidence?

¹ See **The Caribbean New Media Group Limited v Ingrid Isaac CV S 209 of 2013** per Bereaux JA

² See **Lares v Lares (2020) ULPC 19** and **Presidential Insurance Company Limited v Twitz and Anor (2020) UKPC 20**.

11. As we indicated above, this court is merely a filter to determine whether conditional leave is to be granted to the Applicants. This is not therefore, a rehearing of the appeal. The questions to be addressed are as follows:
 - a. Does the above satisfy the two criteria we have set out, in light of the fact that there was a concurrent finding that the will was validly executed?
 - b. Will the differing constructions of the evidence on suspicious circumstances surrounding the execution be sufficient to allow the case to go forward?
 - c. If so, is there a genuinely disputable case to place before the JCPC?

12. In order to answer the first issue, one needs to look at the reasoning and the basis for the decisions of the two courts. The Panel is of the view that even though there was a concurrent finding of fact that the will was validly executed, there were different findings on tangential issues as to whether the evidence was sufficient to cast suspicion on its execution. The trial judge considered the following evidence to conclude that its suspicions was excited:
 - i. Conversations between the claimant and the Testatrix during the Testatrix's lifetime;
 - ii. The presence of an unexecuted copy of a 2015 will;
 - iii. The whereabouts of the executed will which was presented to be admitted to Probate after the Testatrix's death; and
 - iv. The absence of a witness to the execution of the subject will at the trial even though the affidavits of due execution were produced at the trial.

The amalgam of the above led the trial judge to conclude that the Applicants *"failed to establish a prima facie case by proving due execution"*, since they did not produce the witnesses to the execution for cross examination.

13. The court hearing the appeal included the Hon. Chief Justice who delivered the court's judgement. The Chief Justice welded these into what were termed the issues left for consideration on appeal. They were the following:
 - a. whether there was sufficient cogent evidence upon which the trial judge could reasonably conclude that there were suspicious circumstances surrounding the execution of the purported will that would warrant refusal to propound in its favour; and
 - b. Costs

14. The court of appeal examined four issues to come to its conclusion. They were as follows:
 - a. The non-execution of the draft 2015 will;
 - b. The deceased's state of mind at the time of the execution;
 - c. The alleged collusion between witnesses and belated correction of testimony on the date of trial; and
 - d. The missing witness at the trial.

15. As far as the non-execution of the draft 2015 will is concerned, the court of appeal found that the trial judge adverted to immaterial and irrelevant evidence, the non-execution of a draft will, to determine the salient question, namely, whether the will was validly executed and whether the circumstances surrounding the execution on the relevant date, 17th February 2017, were sufficient to excite suspicion. This, according to the court of appeal, tainted the findings of fact.

16. It is instructive to note that on the most obvious and necessary evidence to assess testamentary capacity and moreover whether suspicions may be aroused on execution of the Will, the trial judge had this to say:

“The court finds at this junction it is worth mentioning that (the doctor’s) medical report holds no probative value in determining whether at the time of executing the purported will, the deceased had the requisite capacity to do so. It is pellucid that [the doctor’s] assessment of the deceased was done subsequent to the purported will and that [the doctor] cannot speak to the deceased’s testamentary capacity on the day of the execution of the purported will. Further, her testimony makes it clear that the mental state of such persons may fluctuate from time to time therefore in the court’s view, it would be inappropriate to draw any inference as to the mental capacity of the deceased some 5 days later.”³

17. This conclusion did not find favour with the court of appeal. The trial judge’s judgment was therefore overturned.

18. We must advert to the fact that medical evidence of testamentary capacity is time sensitive. The court of appeal found the complete ‘dismissal’ of the medical evidence to be ‘unwarranted’. The court of appeal, looking at the evidence, found that *“the doctor’s report does not seem to support a state of advanced senile dementia”* as suggested by the Applicants. We must refer to the finding on what would have been the most crucial evidence. We make the comment since the Applicants did not bring any medical evidence to prove lack of testamentary capacity and the evidence presented by the Respondents did not honour the imposed stricture that any medical evidence of capacity must directly speak to the date and time of execution,

³ See para. 163 of the trial judge’s judgment.

there was no evidence at the trial of lack of testamentary capacity.⁴ That too begs the question, whether there is a genuinely disputable case to admit to the JCPC's consideration.

19. The court of appeal found that the trial judge laid too much store on an error in the witness statements, namely the location where the will was found after the Testatrix's death. The court of appeal opined that the evidence disclosed a genuine error on the part of the witness. In any event, this evidence was not crucial to the central issue to the case. After looking at the case as a whole, we fail to see the decisive relevance of the physical location of the Will after the Testatrix's death to the question of whether there were suspicious circumstances such as to properly arouse the court, surrounding the execution of the will sufficient to have its validity comprised. We therefore fail to see a triable issue warranting onward passage to the JCPC.

20. Further, the fact that an execution witness was not called to testify:
 - a. in circumstances where the affidavit of due execution was not impugned in anyway, and
 - b. to give evidence of circumstances which existed after the due execution of the Will,cannot give life to an inference that circumstances existed to excite the court's suspicion such as to impugn the due execution of the will in the circumstances of the case. This evidence was not crucial to the determination of the issue before the court. Where therefore is the triable issue if this issue had no bearing on the case?

⁴ See *Kenward v Adams*, where Lord Templeman held that the making of a will by an aged or seriously ill testator ought to be witnessed or approved [emphasis added] "*by a medical practitioner who satisfies himself of the mental capacity and understanding of the testator, and records and preserves his examination and finding.*" *Kenward v Adams*: ChD 29 November, 1975; Times 29-Nov-1975 CLY 3591 England and Wales

21. This Panel cannot say with any degree of conviction that the variances between the trial judge's view of the evidence and that of the court of appeal are such as to raise in our minds any genuinely disputable issue to advance to the JCPC.
22. There are other submissions mentioned by the Applicants, but in the Panel's view, these are not critical to determine the existence of a genuinely disputable case in an appeal based on facts.

COSTS

23. Try as we might, we do not think that the issue of costs raises a genuinely disputable case to advance to the JCPC.
24. In the premises, as indicated above, we must refuse the Applicants' application for conditional leave to appeal to the JCPC.

Costs of the appeal

25. This matter touches and concerns an estate. In the usual circumstances, costs will follow the event. In this case, the estate will normally have to pay the costs of the action. We however we see no reason to saddle the estate with the costs of this application. In the exercise of our discretion, we make no order as to costs.

PEMBERTON JA

I have read the judgment of Pemberton JA. I agree with it and I have nothing to add.

LUCKY JA

I have read the judgment of Pemberton JA. I agree with it and I have nothing to add.

ABOUD JA