

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
Port of Spain**

Claim No. CV 2017-03869

BETWEEN

AVRIL HAYNES

Claimant

AND

SHIRLEY THOMPSON-HAYNES

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: February 25, 2019

APPEARANCES:

Ms. Tempu Nefertari Attorney at law for the Claimant

Ms. Rachele Lamont-Charles and Ms. Marvo Harper Attorneys at law
for the Defendant

RULING

1. The claimant has brought proceedings for the revocation of the grant of letters of administration to the defendant and the grant of probate of what is alleged to be the last will and testament of Vernon Haynes, the deceased.
2. The defendant has brought an application to strike out the claimant's statement of case as disclosing no grounds for bringing a claim. The defendant alleges that the claimant's failure to plead sufficient particulars to identify the will that she seeks to propound, or to

annex a copy of the will to the statement of case, is fatal to the proceedings.

3. The deceased was the father of the claimant and the husband of the defendant. On 6 January 2017, the defendant was granted letters of administration of the deceased's estate, having represented in her application that the deceased died intestate and that no will or other testamentary disposition by him was found to exist.
4. The claimant asserts that the deceased died testate and that his last will and testament is dated 2002. The claimant states that she is the sole executor named in the will and denies that the defendant has an interest in the deceased's estate by virtue of intestacy.

THE ARGUMENTS

5. Counsel for the defendant argues that the claimant's failure to sufficiently identify the will that she seeks to propound or to provide details of the persons who prepared the will or witnessed its execution is in breach of Part 8.6(1) of the Civil Proceedings Rules (the Rules), under which a claimant must include in his claim form or statement of case a short statement of the facts on which he relies.
6. Counsel argues further that the claimant's failure to annex a copy of the will to the statement of case is in breach of Part 8.6(2), which requires a claimant to identify or annex a copy of any document that the claimant considers necessary to his case.
7. Counsel contends that the claimant's failure to describe the deceased's will with sufficient particularity or to annex a copy of it to her statement of case is fatal to the proceedings as, in the absence of the relevant identifying details, it cannot be confirmed that the will mentioned in the statement of case, is in fact the will that the

claimant seeks to propound. Counsel contends that the claimant's omissions render the statement of case liable to be struck out as disclosing no grounds for bringing the claim¹ or for non-compliance with the Rules.²

8. Counsel argues further that the claimant has failed to file an affidavit of testamentary script or to lodge the original will with the court in keeping with the procedures of Part 72.5 and that the failure to so comply is fatal to the claim. In support of her argument, Counsel relies on the following dicta of Mme. Justice Jones, as she then was, in ***Hugh Lee King v Leo Martinez and Veronica Lambert*** CV2012-03303:

“In my opinion the claimant’s failure to comply with Part 72.5 of the Rules is fatal to his claim to have the Will probated. The effect of such a failure is that the Will is not before the Court. In my opinion the absence of the Will prevents the making of an order directing that the Registrar issue a grant of probate of it. Neither, unfortunately, can the Claimant seek an order for a copy of the Will since a copy of the Will has not been placed before me and in any event to do so would require evidence as to the unavailability of the original. There is no such evidence. The Claimant’s right to pursue all of the reliefs sought by this action hinges on his ability to propound the Will. In my opinion therefore the absence of the Will is fatal to the claim.”

9. In response, Counsel for the claimant argues that the claimant has complied fully with Part 72 and that she is entitled to bring the proceedings having regard to her interest as sole executor of deceased's will. Counsel argues that the proceedings were brought

¹ CPR Part 26.2(1)(c)

² CPR Part 26.2(1)(d)

against the defendant, as the person to whom letters of administration were granted, based on the assertion that the deceased died intestate and that the defendant was the only person entitled to the deceased's estate.

10. Counsel argues further that there is no requirement to plead detailed particulars of the will, as the statement of case identifies the will on which the claimant relies and the will was lodged with the court within the extended deadline that was granted for the filing of an affidavit of testamentary script.
11. Counsel argues that the defendant is precluded from inspecting the claimant's affidavit of testamentary script and the will that was lodged with the court as a result of the defendant's failure to file her own affidavit of testamentary script.³ Therefore, the defendant is thereby unaware of the terms of the will.

DISCUSSION

12. In seeking the grant of probate of what is alleged to be the last will and testament of the deceased and the revocation of the grant of letters of administration to the defendant, the claimant's proceedings fall within the definition "probate proceedings"⁴ and are governed by the procedures of Part 72.
13. Probate proceedings are instituted by issuing a fixed date claim endorsed with a statement showing the nature of the interests of the claimant and the defendant in the estate of the deceased.⁵ The claimant must also file a statement of case with the claim form.⁶

³ CPR Part 72.5 (4)

⁴ Part 72.1(2)

⁵ Part 72.2(1), (2)

⁶ Part 72.2(3)

14. Where a defendant's interest in the deceased's estate is in dispute, a claimant must plead in his statement of case, a denial of the defendant's interest.⁷ Where the defendant's entitlement to a grant of letters of administration is disputed, the claimant must plead his entitlement to an interest in the estate.⁸
15. The claimant's fixed date claim form states that she brings the claim as sole executor of the last will and testament of the deceased and that the claim is brought against the defendant as the person to whom letters of administration of the deceased's estate were granted.
16. The claimant's statement of case sets out the factual background against which the claim is made and continues as follows:
 - “6. The claimant seeks a revocation of the said grant on the ground that the deceased died testate.*
 - 7. The last will and testament of the deceased is dated 2002.*
 - 8. The claimant is the sole executor named in the last will and testament of the deceased.*
 - 9. The claimant denies the interest of the defendant in the estate of the deceased by virtue of an intestacy as claimed in her application for the grant of letters of administration.”*
17. The above paragraphs show that the claimant has stated her interest in the deceased's estate, has denied the defendant's interest in the estate and has stated that basis on which the defendant's interest is denied. Therefore, the statement of case meets the requirements of

⁸ Part 72.8(2)

Part 72.8. The claim form states the respective interests of the claimant and the defendant in the estate and, similarly, meets the requirements of Part 72.2.

18. Counsel for the defendant's argument that the claimant's non-compliance with Part 8.6 is fatal to the proceedings fails to address the provisions of Part 72.1(1) which state specifically that although other provisions of the Rules apply to probate proceedings, those provisions are subject to Part 72. In this regard, to the extent that the provisions of Parts 8.6 and 72 cannot reasonably be read together, the provisions of Part 72 must prevail. There is no requirement in Part 72 to annex a copy of a will to a statement of case, nor can such a requirement reasonably be inferred in circumstances where the parties to probate proceedings are required to file affidavits of testamentary scripts and to lodge any testamentary script referred to therein with the court. An affidavit of testamentary script must similarly be filed where a party knows of no testamentary script.⁹

19. "Testamentary script" is defined to mean a will, draft will, written instructions for a will and any document purporting to be evidence of the contents, or a copy, of a will which is alleged to be lost or destroyed.¹⁰ Where a testamentary script is not in the possession or under the control of the deponent, the affidavit must give the name and address of the person having such possession or control or state that the deponent does not know the name or address of the person.¹¹

⁹ Part 72.5(1)

¹⁰ Part 72.5(5)

¹¹ Part 72.5(1)(b)

20. The affidavit must be filed, and the testamentary script lodged, no later than 14 days after the defendant enters an appearance or, if no defendant enters an appearance and the court does not otherwise direct, before the first hearing.¹²
21. When claimant's claim first came on for hearing, no affidavit had been filed by her describing the will or testamentary script of the deceased. In this regard, the claimant failed to comply with Parts 72.5(1)(a) and 72.5(2) of the Rules. As a result of such non-compliance, the defendant took objection to the proceedings and indicated an intention to strike them out. Directions were given for the filing of the required application by the defendant and written submissions by the parties.
22. Prior to the filing of the defendant's application to strike out the statement of case, the claimant applied for and was granted an extension of time to file an affidavit of testamentary script. The claimant's affidavit was filed and the will lodged with the court within the extended deadline that was granted by the court pursuant to Part 72.5(1)(a).
23. Further, the decision of Mme. Justice Jones' in *Hugh Lee King*, on which the defendant relies, was made in an entirely different context from the present case. In *Hugh Lee King* the claimant, having pleaded in his statement of case that he was in possession of an original will naming him as executor, failed to file an affidavit of testamentary script or to lodge the will with the court. The claimant annexed a copy of the will to his statement of case and gave evidence at the hearing that he had given the original will to the deceased's Attorneys after the death of the deceased.

¹² Part 72.5(2)

24. The court rejected the assertion that the annexure of a copy of the will to the statement of case had the effect of putting the will into evidence. The court held that it was the filing of an affidavit of testamentary script and the lodging of the will with the court that served to bring the will sought to be propounded before the court.
25. The claimant in these proceedings has filed an affidavit of testamentary script and has lodged with the court the will that is the subject of these proceedings. Therefore the circumstances of this case are distinguishable from those in *Hugh Lee King*.
26. Counsel for the claimant is correct in her assertion that the defendant is denied access to the claimant's affidavit of testamentary script and the will that is lodged with the court by virtue of the defendant's failure to file an affidavit of testamentary script. It is true that at the date of first hearing of the claim no testamentary script had been filed by the claimant. However, the defect was cured at least a month before the defendant filed an application to strike out the proceedings on the ground that the statement of case did not sufficiently describe the will or have a copy of the will annexed to it.
27. The will is now before the court and its provisions are consistent with the limited description of it that is given in the statement of case. The claim form and statement of case are also consistent with Part 72 of the Rules. In the circumstances, the defendant's application to strike out the statement of case is without merit and is hereby dismissed.

Jacqueline Wilson

Judge