

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN PROBATE
SUIT NO. P 071 OF 1999

IN THE MATTER of the Construction of the Will of
JOHN ELISHA MCTERNAN deceased
AND
IN THE MATTER of Section 532 (G) of the Judicature
(Civil Procedure Code) Law

BETWEEN HAROLD CAMPBELL
(Executor Estate John McTernan deceased) PLAINTIFF
AND CLAUDETTE ROBINSON 1ST DEFENDANT
AND DERECK MCTERNAN 2ND DEFENDANT
AND DONALD MCTERNAN 3RD DEFENDANT
AND JOAN MCTERNAN 4TH DEFENDANT
AND JACQUELINE MCTERNAN 5TH DEFENDANT
AND MAYO MCTERNAN 6TH DEFENDANT
AND ALVIN RANGLIN
(Executor of the Estate John Elisha McTernan) 7TH DEFENDANT

Mr. Patrick Brooks and Mrs Camile Busby-Earle instructed by Nunes Scholefield DeLeon and Co. for Plaintiff.

Mr. H. Haughton-Gayle and Miss Camile Bennett for 1st, 6th, and 7th Defendants.
No appearance entered on behalf of the 2nd, 3rd, 4th, and 5th Defendants.

Heard May 4, 9, 18, 2000

IN CHAMBERS

HARRISON J

The Application

By his last will and testament, the deceased, John Elisha McTernan made the following devise:

“ I direct that Claudette Robinson shall have the right to reside rent free for the rest of her life in my premises at 14 Ritchie Avenue aforesaid on the

understanding that she pays all outgoings on the premises. Should she wish to remove and rent the premises she must obtain the consent of my four children Derek McTernan, Donald McTernan, Joan McTernan and Jacqueline McTernan and should my said four children wish whenever they happen to visit Jamaica be permitted to stay at the premises without charge. SUBJECT to the above direction I GIVE DEVISE AND BEQUEATH all my estate of whatsoever nature whether real or personal as to fifteen percent thereof to my daughter MAYO OPAL MCTERNAN and as to the remaining eighty-five percent to be divided equally among my four children Derek McTernan, Donald McTernan, Joan McTernan and Jacqueline McTernan."

The plaintiff, who is one of the Executors of the will, is uncertain as to the interest created in favour of Claudette Robinson and how the estate is to be distributed so, he seeks firstly, a determination of the true construction of the will and in particular whether:

(a) Clause 4 of the will devises to Claudette Robinson a life interest in respect of 14 Ritchie Avenue, Kingston 8, St. Andrew.

(b) If no life interest has been created what is the nature of the bequest to the said Claudette Robinson.

© Upon the sale by the executor of the said land what interest if any would the said Claudette Robinson have in the net proceeds of sale.

He also seeks:

2. An Order that the Executors to be directed to recover from Claudette Robinson the duplicate Certificate of Title registered at Volume 1025 Folio 487 of the Register Book of Titles and deliver same to Messrs Nunes Scholefield Deleon and Co., Attorneys at Law.

3. An Order that the premises known as number 14 Ritchie Avenue, Kingston 8 in the Parish of Saint Andrew be sold by Public Auction or Private Treaty and that the Registrar of the Supreme Court be empowered to sign any Agreement for Sale, Instrument of Transfer or other such documents as are required to give effect to this Order should any of the Executors refuse so to do.

4. An Order that all monies advanced to the estate by the abovementioned Harold Campbell be repaid to him with interest at the rate of twenty-two percent (22%) per annum.

5. An order that the remaining proceeds of sale be divided among the beneficiaries of the estate in accordance with the terms of the said will as well as the directions of this Honourable Court deems just.

6. An order that the payment of the costs of this application be made from the estate.

..."

Summary of the Affidavit Evidence

Probate of the will was granted to the plaintiff on the 18th day of April 1997, with power reserved for the other named Executor, Alvin Ranglin, to come in and apply for a similar grant. The co-executor did apply for and secured grant of a double Probate on the 18th day of January, 1999. The records disclose that the Originating Summons seeking the abovementioned orders, was filed on the same date that Ranglin obtained the double grant of Probate. This is the reason therefore, why the application has been made by the plaintiff alone.

The Ritchie Avenue property is the only asset in the deceased's estate and the plaintiff deposes that the estate has no cash to defray testamentary expenses. Some of the expenses have been met by one of the beneficiaries, Jacqueline McTernan and himself and he has had to borrow monies in order to meet them. Interest is payable on the sums loaned.

On the 16th day of July, 1998 the plaintiff filed a plaint in the Resident Magistrate's Court for the Corporate Area, in order to recover the duplicate certificate of title for the premises 14 Ritchie Avenue, from Claudette Robinson. However, as a result of the grant of double Probate, the plaint against Claudette Robinson was adjourned sine die. He also deposed that as a result of the instructions from his co-executor to Robinson regarding the delivery up of the title to him, he felt obliged to apply to the Court for guidance regarding administration of the estate. The court was informed by Counsel for the defendants that the title was now in the possession of Ranglin.

The plaintiff said he had kept Claudette Robinson informed all along that he would make this application to the Court and although he had spoken to her about it, he had not sought the permission and consent of Robinson and the other beneficiaries to commence the proceedings.

Alvin Ranglin deposed inter alia, that he was advised by his Attorney at Law, on a number of issues which included the executors' commission, the value of the estate, and the proposed claim against the estate for Attorneys fees to be paid for the preparation of an Assent to devise and register the beneficiaries. He was further advised by his Attorney at Law that the proposed work was wholly unnecessary and that there was "great hurry to pile up costs" against the estate. He felt that having regards to the foregoing matters, it was prudent for him to be joined as a defendant in order to protect the estate and the deceased's children interests.

Submissions

Mrs. Busby-Earle submitted that the Court would have to decide whether the clause in the will created a life interest or a mere licence. She argued that at Common Law, a gift that requires personal residence on the premises merely gives a licence to occupy and did not confer a life interest. She referred to and relied upon the case of May v May (1881) 44 Law Times 412. During the course of her arguments however, she agreed that upon a proper construction of the will, Claudette Robinson would be a tenant for life for the purposes of the Settled Land Act (Jamaica). Accordingly, the testator would have created a settlement although he had expressed two conditions that is, if she wishes to remove and rent the premises she must obtain the consent of his four children and secondly, that should the said four children wish whenever they happen to visit Jamaica they are to be permitted to stay at the premises without charge.

She further submitted that the Court should have no difficulty with respect to paragraph 2 of the Summons (that is, recovering the Title for the property at Ritchie Avenue) since it has been brought to light that the executor Ranglin, now has the Title. He should therefore be ordered to deliver up same to the Registrar of the Supreme Court.

In relation to paragraph 3 of the Summons Mr. Brooks submitted that there is no asset in the estate other than the real property and this has not been refuted. There were insufficient funds to defray the expenses of the estate, so this asset should be sold to cover the expenses.

In relation to paragraph 4 of the Summons that is, repayment of money with interest advanced by the plaintiff, Mr. Brooks submitted that the plaintiff stands in the position of a creditor of the estate and as such he is entitled to claim moneys advanced by him and to be repaid that money with interest. See the cases of Tait and Lyle v Greater London Council and Another (1981) 3 All E.R 716, Peter Williams and Ors v United General Ins. Co. SCCA 82/97 [30.11.98] and British Caribbean Ins. Co. Ltd v Perrier SCCA 114/94 [20.5.96].

In relation to paragraph 5 of the Summons he argued that the Court should order that the property be sold and the proceeds of sale be divided amongst the beneficiaries or as the Court deems it just.

Mr. Haughton-Gayle said on the other hand, that since Mrs. Busby-Earle conceded that Claudette Robinson is a life tenant under the Will, it would be quite un-necessary for him to address the court on this issue suffice it to say, that the cases of In re Boyer's Settled Estates (1916) 2 Ch 404, Binions and Another v Evans (1972) 2 All E.R 70, In re Baroness Llanover's Will, Berbert v Freshfield (1903) 2 Ch 16, In re Carne's Settled Estates (1899) 1 Ch. 324 and Bannister v Bannister (1948) 2 All E.R 133 support the creation of a life tenancy under the Will. He submitted that her interest should be registered by the Executors in order for her to properly execute her powers.

He further submitted that the testator's will did not create a trust for sale and that the plaintiff has no power of sale. On the other hand, it was for the tenant for life to exercise the power of sale. Furthermore, he said that even if the trustees had a power of sale (which is denied) the tenant for life's power of sale is unfettered and the trustees "shall not sell" without her consent. He said her power to mortgage is also contained in section 21 of the Settled Land Act (Jamaica). He referred to the case of In re Clifford Scott v Scott (1902) 1 Ch. 87 pages 89 and 90. In respect of section 11 of the English Settled Land Act Buckley J said at page 90 "where money is required for the purpose of discharging an incumbrance on settled land or part thereof the tenant for life may raise the money so required". (Section 11 is identical to the section 21 of the Jamaican Act). He further submitted that even if there was any present basis for selling the property (which is denied) the remaining proceeds of sale would be capital money and expendable as required by sections 24(2) and 25 of the Settled Land Act.

Although the Summons sought an Order that the Executors be directed to recover from Claudette Robinson the certificate of title he had no objection to the executor Ranglin, handing over the Certificate of Title in respect of the property to the Registrar of the Supreme Court provided "that there be a direction to the Registrar not to part with or use the title without an order of the Court unless both executors consent in writing".

He advised the Court that the 1st, 6th and 7th defendants were not in opposition to the claim in paragraph 4 of the Summons.

On the question of costs, he submitted that as a general rule costs may be awarded to the Plaintiff out of the estate only to the extent, if any, that he has succeeded on any issues adjudicated on in the Summons. He said that even if the plaintiff was a trustee for sale (which is denied) he would be under a duty to consult with the beneficiaries and so far as consistent with the general interest of the trust, to give effect to their wishes or the wishes of the majority according to the value of their combined interests. He further submitted that the evidence of the plaintiff in cross-examination disclosed that no such consultation took place with the beneficiaries. Further, a trustee who without the sanction of the Court commences or defends an action unsuccessfully does so at his own risk as regards the costs even if he acts on counsel's opinion. See In re Beddoe Downes v Cottan (1893) 1 Ch. 547 at 557. In these circumstances, he says that the plaintiff has disabled himself from obtaining an order for costs.

He submitted finally, that as far as the Court is concerned, since the plaintiff had filed the suit without first obtaining the leave of the Court and consent of the beneficiaries, the suit ought not to have been brought and it should be dismissed.

Mr. Brooks submitted in reply that Executors are always entitled to apply to the Supreme Court for a declaration under section 532 of the Judicature (Civil Procedure Code) Law if they are of the view that they need the guidance of the

Court unless all the beneficiaries being sui juris and between them absolutely entitled determine the matter by agreement. See Halsbury's Laws of England, 4th Edn. Volume 17 paragraph 1454. He submitted that the 6th Defendant is a Minor, and would have been unable to give her consent. In the circumstances, it was therefore necessary for the Plaintiff to have sought the Court's assistance.

The Court's Findings and Conclusion

Let me say at the very outset that it is for the Court to consider the context in which the right to occupy was granted before determining the legal consequences as to whether it created a settlement under the Settled Land Act.

In Re Carne's Settled Estates [1899] 1 Ch. 324 by a settlement a mansion house and certain lands were vested in trustees upon trust in the first place to allow the plaintiff (a widow) to occupy the mansion house and lands free for as long as she might wish to continue to do so. North J held that such words constituted the plaintiff a life tenant within the meaning of the Settled Land Acts 1882 to 1890, even though it would have been contrary to the intention of the settlor that the mansion house and lands in the middle of the larger estate could be sold. The case is therefore authority for the proposition that a right to occupy rent free for as long as the occupant might wish to do so will constitute a tenant for life under the Settled Land Act 1882-1890 (England) although not necessarily so under the Settled Land Act 1925 (England).

In Re Boyer's Settled Estates [1916] 2 Ch. 404 by his will the testator devised his leasehold interest in a house called "The Grange" to his Trustees upon trust to permit his wife during her life to occupy it paying all rents etc and after her death the trustees were to hold the Grange upon trust to permit 'such one or more of my children who shall for the time being be unmarried, and shall desire to live in the Grange to occupy the Grange'. The case is also authority that in the context of a will which expressly creates certain trusts, the words 'right to occupy' will create a tenancy for life in the case of the wife or confer the powers of a tenant for life in the case of the children as persons beneficially entitled under a settlement to possession of the land.

I am constrained to accept the submissions of both Mrs. Busby-Earle and Mr. Haughton Gayle that the words used by the testator in the instant case, that is, "I direct that Claudette Robinson shall have the right to reside rent free for the rest of her life in my premises at 14 Ritchie Avenue aforesaid on the understanding that she pays all outgoings on the premises..." would create a life tenancy under the Settled Land Act of Jamaica. I further hold that the conditions referred to in clause 4, that is "... Should she wish to remove and rent the premises she must obtain the consent of my four children Derek McTernan, Donald McTernan, Joan McTernan and Jacqueline McTernan and should my said four children wish whenever they happen to visit Jamaica be permitted to stay at the premises without charge..." are void pursuant to section 57(1) of the Settled Land Act which states:

"57. (1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void". [Emphasis supplied]

Paragraph 1© of the Summons asks the question: " Upon the sale by the executor of the said land what interest if any would the said Claudette Robinson have in the proceeds of sale"? Paragraph 3 also seeks an order for the sale of the premises and for the necessary steps to be put in train where sale is concerned. In my view, both questions can properly be dealt with together.

Donaldson et al v The Stamp Commissioner (1945) 4 JLR 259 (CA) is authority for the proposition that where the terms of a settlement are contained in a Will they are effective on the death of the testator and the property comprised in the settlement is settled property at that moment of time. It is my considered view therefore, and I do hold that it would be the tenant for life who holds the power of sale once a settlement is created. This power of sale may override and defeat the intentions of the settlor and under such a settlement, it is the tenant for life who would have the powers of sale of the property. The proceeds of such sale becomes capital funds under the Settled Land Act and is held upon trust for the remaindermen.

Should Claudette Robinson exercise her power of sale she would therefore be empowered to re-invest the proceeds, either in the purchase of more land or for example, in shares and receive the income therefrom.

The provision in the Will which reads: "...SUBJECT to the above direction I GIVE DEVISE AND BEQUEATH all my estate of whatsoever nature whether real or personal as to fifteen percent thereof to my daughter MAYO OPAL MCTERNAN and as to the remaining eighty-five percent to be divided equally among my four children Derek McTernan, Donald McTernan, Joan McTernan and Jacqueline McTernan" would have to be postponed by the Executors/Trustees due to the settlement created in favour of CLAUDETTE ROBINSON under the will.

I now turn to the issue of Costs. It was argued that the plaintiff should not have commenced this application since no leave was obtained and he did not obtain

the consent of the respective beneficiaries. I do agree with Mr. Brooks that an Executor is entitled to apply to the Supreme Court for guidance under section 532 of the Judicature (Civil Procedure Code) Law. At paragraph 1454 of Halsbury's Laws of England Fourth Edition, the learned authors state:

"Where questions of difficulty arise in the administration or distribution of an estate, the personal representatives are entitled to have those questions determined by the court unless all the persons concerned, being sui juris and between them absolutely entitled, determine the matter by agreement. The costs of such an application to the court are normally payable out of the estate. The court's jurisdiction to determine such questions cannot be excluded by the terms of the will or otherwise."

It has been brought to the attention of the Court that the sixth defendant is a minor and this has not been challenged, hence she would be unable to give the required consent. In addition, it is the considered view of the Court that having regards to the plaintiff's uncertainty as to the construction to be placed upon clause 4 of the aforesaid will, I do agree with Mr. Brooks that the plaintiff has acted correctly in making this application to the Court. Furthermore, the statement supra, by the learned authors of Halsbury's Laws of England, fortifies the Court's position.

Order of the Court

1. The answer to the question at paragraph 1(a) of the Summons is in the affirmative. Clause 4 of the Will of the said JOHN ELISHA MCTERNAN devises to Claudette Robinson a life interest in respect of premises at 14 Ritchie Avenue, Kingston 8 in the Parish of St. Andrew. The questions asked at paragraphs 1(b)(c) therefore, become un-necessary in the circumstances.
2. It is hereby ordered that the seventh defendant (Executor Alvin Ranglin), do hand over the duplicate certificate of title registered at Volume 1025 Folio 487 of the Register Book of Titles to the Registrar of the Supreme Court within seven (7) days of the date hereof, and same shall be kept in safe custody of the Registrar until further Order.
3. It is further ordered that all monies advanced to the estate by the plaintiff Harold Campbell be repaid to him with interest thereon at the rate of twenty-two per cent (22%) per annum.
4. No order is made with respect to paragraphs 3 and 4 of the summons having regards to the conclusion arrived at in paragraph 1 above.
5. Costs of this application is to be paid from the estate of John Elisha McTernan and it is to be taxed if not agreed.