



[2020] JMSC Civ 67

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 00930

BETWEEN	VERONICA FLEMMINGS	CLAIMANT
AND	EVERALDO CARGILL	DEFENDANT

IN CHAMBERS

Ms Sherica Taylor instructed by Bertram Law Attorneys-at-law for the Applicant

Ms Keisha Spence holding for Mrs Tameka Jordan Attorney-at-law for the Respondent

Heard: March 19, 2020 and April 6, 2020

Civil Procedure - Application to amend Re-Issued Fixed Date Claim Form – Locus standi – Civil Procedure Rule 19 and 20

MASTER T. MOTT TULLOCH-REID

BACKGROUND

[1] On March 2, 2010 the Claimant, Veronica Flemmings, pursuant to a Power of Attorney, filed a Fixed Date Claim Form seeking a declaration that Theresa Flemmings, her mother, is the beneficial owner of all that parcel of land part of Hampton Court in the parish of Saint Thomas containing by estimation four and one half squares more or less. The Affidavit in Support of Fixed Date Claim Form also filed on March 2, 2010, alleges that Theresa Flemmings came to be the owner of the property by way of a gift to her and her husband Thaddeus Flemmings, from Leonard Harris by his last will and testament. Leonard Harris, is alleged to have

been the owner of the property through a gift from Elizabeth Laing by her last will and testament. Unfortunately, the last will and testament of Elizabeth Laing did not conform to section 6 of the Wills Act as it was only attested to by one witness, when the Wills Act requires attestation by two witnesses, both of whom must be present at the time when the testatrix is executing the document. It means therefore that the gift to Leonard Harris would have failed and Mrs Laing's estate would have devolved on an intestacy.

- [2]** A Re-Issued Fixed Date Claim Form was filed on October 13, 2010 seeking the same declarations as those sought in the Fixed Date Claim Form. I am not sure why this was done.
- [3]** The Applicant's attorneys-at-law having come to the realisation that Mrs Laing's last will and testament did not meet the requirements of section 6 of the Wills Act have applied to the Court 10 years after the Fixed Date Claim Form was re-issued to have it amended. The application was made by Veronica Flemmings, on March 4, 2020 for an order that the Re-listed Fixed Date Claim Form filed on October 13, 2010 be amended. The Re-listed Fixed Date Claim Form is to be amended to include a declaration that Leonard Harris, who is now deceased, be declared to have been in undisturbed occupation and possession of all that parcel of land part of Hampton Court in the parish of Saint Thomas containing by estimation six (6) squares more or less in excess of 12 years since 1961. The application is supported by the Affidavits of Mildred Buckley and Clemento Flemmings both filed on March 4, 2020 which are aimed at establishing that prior to Thaddeus and Theresa Flemmings, coming into possession or ownership of the property, it was owned by Leonard Harris, who had occupied the premises undisturbed for upwards of 12 years.
- [4]** Counsel for the applicant has submitted that the amendment is necessary to show that the Flemmingses acquired the property lawfully and are the true owners. If they are unable to benefit by virtue of having received the gift from Leonard Harris, because the gift to him was void because of the invalid last will and testament of

Elizabeth Laing, Leonard Harris still was able to gift the property to the Flemmingses by virtue of the fact that he had adversely possessed the property and had lived on it undisturbed for upwards of 12 years. She argues further that the amendment

“is essentially seeking to capture the entire circumstances of the case thereby signalling to the Court that in light of purported evidence to be led [sic], the Claimant’s case is particularly pleaded to allow the Court to make the most suitable declaration, in the interest of justice.” (See paragraph 20 of Claimant’s submissions filed on March 23, 2020).

- [5] Although this is an application for the Re-Issued Fixed Date Claim Form to be amended, I am forced to consider whether the applicant has *locus standi* to make the application. Counsel for the Defendant submits that the claim was brought by Veronica Flemmings by way of a Power of Attorney. She argues that the Power of Attorney did not give Veronica Flemmings the authority to bring the claim. Ms Taylor in rebuttal argues that

“the general clause instructing the donee (Veronica Flemmings) to ‘do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given’ is to be given a liberal interpretation which would in effect extend to allowing the Claimant to institute proceedings to have Theresa Flemmings to be declared as the owner, beneficial or otherwise, of the said land in question.” (see paragraph 6 of Submissions filed on March 27, 2020)

I do not agree with Ms Taylor. Powers of Attorney cannot be general in nature they must be specific (see the case of ***Tobin v Broadbent [1948] 1 ALR 25; Lloyd Michael Pommels v EW Lewis Investments & Finance Ltd [2013] JMCC Comm 10***). Any general statement noted in the Power of Attorney must be related to a specific term in the Power of Attorney. None of the powers set out in the Power of Attorney on which Ms Veronica Flemmings sought to rely would have enabled her to file a claim on her mother’s behalf.

- [6] Mrs Theresa Flemmings having died on January 31, 2012, the Power of Attorney also died but things went back on track when an order was made by Master Lindo (as she then was) on February 21, 2012 substituting Jacqueline Baldie and Carl McCurrin, the executors named in Theresa Flemmings’ last will and testament as

the Claimants in the matter in lieu of Veronica Flemmings. The documents filed subsequent to the order of Master Lindo did not however name the executors as the Claimants in the claim. Ms Taylor submits at paragraph 11 of her submissions in response filed on March 27, 2020 that it was unfortunate that the order of Master Lindo had not yet been complied with. It is indeed unfortunate that eight years subsequent to the order being made, it has not been complied with and this will be the downfall of the application. Had the substitution been done on paper, perhaps this would have prompted the applicant's attorneys-at-law to make the application in the executors' name and not in Veronica Flemmings' name. Veronica Flemmings is not a party to the proceedings. She is merely a beneficiary in the estate of her late mother. Further, as it relates specifically to the application to amend the Re-Issued Fixed Date Claim Form to speak to the acquisition of the property by Leonard Harris, Ms Flemmings has not shown any connection between herself and Mr Harris' estate. The persons who were appointed executors in Mr Harris' estate are Boysie Rosegreen and Yvonne Anthony. Veronica Flemmings is not so named.

- [7] This brings us to the issue that I have to resolve before I can even consider making the order to amend the Re-Listed Fixed Date Claim Form. I must consider whether Veronica Flemmings had the authority or the *locus standi* to make the application as it relates to the declaration being sought in relation to her mother's estate and also as it relates to the declaration being sought in relation to Leonard Harris' ownership of property.
- [8] Ms Veronica Flemmings, the Applicant, is a beneficiary along with her siblings in the estate of her mother. The issue is whether a beneficiary can make an application on behalf of the estate of the deceased person. The case of ***Commissioner of Stamp Duties (Queensland) v Livingston [1964] 3 All ER 692*** as referred to in the case of ***George Mobray v Andrew Joel Williams [2012] JMCA Civ 26*** is helpful. In that case, Harris JA (now retired) at paragraph 24 of her judgment said that

“the Privy Council established the principle that in an unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate.”

At paragraph 25 she quoted from Viscount Radcliffe in the **Commissioner of Stamp Duties (Queensland) v Livingston** case

“the assets as a whole [in an unadministered estate] were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be.”

In **Re Leigh’s Will Trust [1969] 3 All ER 432** Buckley J at page 434 referred to the **Commissioner of Stamp Duties (Queensland) v Livingston** case and said that

“the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased’s legal personal representative for the purposes of administration without any differentiation between legal and equitable interests...”

[9] In **Winston O’Brian Smith and anor v Constantine Scott and ors [2012] JMSC Civ 152** Mangatal J as she then was, at paragraph 14 of her judgment made it clear that

“the true status of a beneficiary under a will or intestacy is that he has a chose in action to have the deceased’s estate properly administered.”

She further stated that

“A beneficiary under a will or on an intestacy has no legal or equitable proprietary interest in the unadministered assets of the deceased’s estate.”

[10] It is clear that the Applicant, Veronica Flemmings has no standing as a beneficiary in the last will and testament of Theresa Flemmings to make the application for amendment. The application ought rightly to be made by the executors in the estate of Theresa Flemmings. If the executors are not performing their roles, then Veronica Flemmings could approach the Court, with the consent of the other beneficiaries, to apply to the court for a limited grant - one for the purpose of bringing the claim or in this case making the application. She has not done so and

as such she is not properly before the Court as an applicant with standing. The only person or persons with standing in any claim are the parties themselves or any person who the Court by way of an Order allows to intervene in the proceedings. I therefore cannot hear Veronica Flemmings' application and her application is refused.

[11] I now order as follows:

- a. The Applicant's application filed on March 4, 2020 is refused.
- b. The Applicant, Veronica Flemmings, is to pay the Defendant costs in the application in the amount of \$47,000.00
- c. The Case Management Conference is adjourned to June 24, 2020 at 11:00am for one half ($\frac{1}{2}$) hour.
- d. The Applicant's attorneys-at-law are to file and serve the Formal Order.