



[2021] JMSC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2019 CV04070

BETWEEN	ELLETA MCCROBIE-WALKER (Administratrix of the Estate of Violet McCrobie	CLAIMANT
AND	ELAINE MCCROBIE	1ST DEFENDANT
	FRANCELLA MCLEOD-HUGGINS (Administratrix of the Estate of Laban McLeod)	2ND DEFENDANT

Orane Nelson for the claimant

Raymond Samuels instructed by Samuels and Samuels for the defendants

HEARD: 20th October & 29th November 2021

Application to enter default judgment - application to strike out claim or alternatively for extension of time to file defence - preliminary objection - rule 21.7 of the Civil Procedure Rules - whether claim which was commenced after the death of the defendant without a personal representative for the deceased's estate being appointed is valid - whether representative for deceased defendant's estate can be appointed under rule 21.7 after the filing of the claim.

MASTER C. THOMAS (AG.)

Introduction

[1] This is my decision on a preliminary objection that was made by counsel on behalf of the defendant on 20th October 2021. On that day, two applications were before

me for hearing: the claimant's application for entry of judgment in default of acknowledgment of service or defence; and the defendant's application for the claim form and particulars of claim to be struck or alternatively, for service to be set aside.

- [2] The claim concerned land located at Kitson Town in the parish of St Catherine ('the land'). The 1st claimant (who is the administratrix for the estate of Violet McCrobie) and the 2nd claimant (who is the sister of the 1st claimant and niece of the deceased Violet McCrobie) brought the claim against the defendant in the defendant's capacity as "the personal representative/administratrix of Laban McLeod, deceased". The claimants aver that Violet McCrobie first came into possession of the said land subsequent to the death of her grandmother who resided on the land in open, undisturbed and quiet possession for approximately 35 years and that the land remained unregistered during that period. The deceased Laban McLeod, it is averred, resided with Violet McCrobie's grandmother as a child. It is further averred that in or around October 1977, Laban McLeod applied and "fraudulently" caused the land to be registered in his name, knowing that he was not the proprietor and that Violet McCrobie had been residing on that land four years prior to his application to be registered as proprietor. The claimants aver that Violet McCrobie registered in June of 1989 and it was the subject of a bequest by her. As an alternative, the claimants claim a "possessory right" to the land by way of adverse possession.
- [3] The claim was served on Isedora McLeod, the sister of the defendant, by way of an order for specified service. As a result of a divergence in the evidence of Ms McLeod and the process server, both of them were present at court on 20th October 2021 for cross-examination.

The preliminary objection

- [4] Mr. Samuels' preliminary objection was that the claim ought not to be allowed to proceed as it suffers from two defects. On his submission, the first defect is that

there is no proper defendant before the court as there is no estate of Laban McLeod and there is no personal representative appointed on behalf of the estate. He argued that the capacity that the defendant was sued in does not exist.

- [5] Relying on rule 21.7 of the Civil Procedure Rules (CPR), he submitted that the rule mandates that where there is no personal representative, one should be appointed and where no personal representative has been appointed, no further step should be taken.
- [6] Mr. Samuels also relied on *Administrator General v Glen Muir* [2016] JMCA Civ 47 for his submission that the claim was not properly before the court as there is no person in existence, natural or artificial, recognised by the law. The claim was therefore a nullity, he argued, and should therefore be withdrawn and the necessities done in order for the claimants to bring a proper claim before the court.
- [7] In respect of the second defect, Mr. Samuels submitted that the grant of probate in the estate of Violet McCrobie revealed that there were two executors and only one executor has filed this claim. It is trite law that in a situation such as this, both executors would have to act jointly unless the court is provided with a reason as to the absence of the other executor and none was provided.
- [8] Mr. Nelson in response did not seek to deny that no appointment had been made on behalf of the estate of the deceased defendant, Laban McLeod. He submitted that it was disingenuous for the defendant to be submitting that there was no estate or representative of the estate of Violet McCrobie in circumstances where prior to the claim being brought, the claimants had received a letter from a paralegal service indicating that it was acting on behalf of the defendant who had obtained “a certificate from the Administrator General of Jamaica in her parents’ estate”. The letter also indicated that the defendant had “instructed them to proceed to have her parents’ estate completed” and to have the lands which the claimants occupy (and which appear to the subject of this claim) subdivided into lots. No explanation had been proffered as to how the document came into existence, he

argued. He, however, conceded that the letter was not proof of a grant being obtained in the estate.

[9] Mr. Nelson also argued that based on the language of rule 21.7(1) of the CPR, particularly the use of the words “appears” and “was interested”, if in fact there is no personal representative at the commencement of a claim against the estate of a deceased, the claimants could apply for a representative to be appointed for the purposes of continuing the claim. Therefore, the claim would still be valid. He argued that there are different stages to proceedings and once a claim is filed, the matter would have commenced. So, the deceased’s interest would arise once a claim has been issued. He also submitted that when rule 21.7 is juxtaposed with rule 21.8, it can be seen that the former contemplates a situation where the deceased against whom a claim was brought dies prior to the filing of the claim and the latter contemplates a situation where the proceedings were commenced before the defendant died.

[10] With respect to the second defect, Mr. Nelson argued that an executor’s power arises from the will of the deceased so that the executors can take action even prior to securing the grant and if there is more than one executor, one need not act in concert with the other for his action to be recognized as valid.

Discussion and Analysis

[11] There appears to be no dispute that at the time of the commencement of these proceedings, there was no personal representative of the estate of the deceased Laban McLeod in existence nor was anyone appointed by the court to represent the estate. The first ground of Mr. Samuels’ preliminary objection brings into issue the legal effect of this state of affairs, the resolution of which turns on the interpretation of rule 21.7 of the CPR. Rule 21.7 states:

21.7 - (1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the

court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.

- (2) *A person may be appointed as a representative if that person -
 - (a) *can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and*
 - (b) *has no interest adverse to that of the estate of the deceased person; and**
- (3) *The court may make such an order on or without an application.*
- (4) *Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.*
- (5) *A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate.*

[12] It cannot be disputed that rule 21.7 of the CPR allows for the appointment of a representative for a deceased defendant in proceedings that are in train. This was the situation in the ***Glen Muir*** case where the claim had been commenced and

served on the defendant who died some ten days after service. Morrison JA (as he was then) stated that rule 21.7(4) “makes it explicitly clear that upon the claimant becoming aware of the defendant’s death, no further step in the proceedings ought to have been taken other than to apply for an order appointing someone to represent his estate.”¹

[13] The critical issue that arises in this case is whether in circumstances where a deceased person would have been a defendant prior to his death and a claim is brought against his estate without first obtaining an order for the appointment of a representative for his estate, rule 21.7 of the CPR empowers the court to appoint the representative after the commencement of the claim, as has been argued by Mr Nelson. In other words, given that pursuant to rule 8.1(2) of the CPR, proceedings are commenced when a claim form is filed and not when a claim form is **filed and served**, does rule 21.7 allow for the claim to be filed against the deceased person’s estate prior to the appointment of a representative for his estate but require that the claimant take “no step in the proceedings” including service of the claim until the representative has been appointed?

[14] The law as set out in the Law Reform (Miscellaneous Provisions) Act is clear that where there was a cause of action subsisting against a person, upon the person’s death, the cause of action survives against his estate. The law as established by the decided cases is equally clear that the natural personality of a deceased person comes to an end at his death (per **Morrison JA in Administrator General v Muir**, citing with approval the dictum of the Court of Appeal in **Piggott v Aulton, deceased** [2003] EWCA Civ 24).² The case of **Piggott v Aulton** is also authority for the principle that the estate of a deceased has no legal personality. It is also a well-established principle that a claim commenced by or against a non-existent person in law is a nullity. It follows from these legal principles that if there is no

¹ See paragraph [18] of judgment

² See paragraph [15] of the judgment

personal representative of a deceased's estate, a representative of the estate must be appointed. The pertinent question is: must this person be appointed prior to the filing of the claim against the estate?

[15] It is significant that in **re Amirteymour, deceased** [1979] 1 WLR 63 and **Piggott v Aulton**, which were cited with approval by Morrison JA in **Glen Muir**³, the actions against the deceased persons' estate, in each case, were commenced after the deceased had died and subsequently orders were obtained for the appointment of a representative of the estates.

[16] In **re Amirteymour, deceased** subsequent to the filing of the writ, the claimant obtained an order appointing the Official Solicitor as representative of the deceased's estate for the purpose of service of the writ. The court stated that there must be in existence some person natural or artificial and recognised by law, as a defendant against whom steps in an action can be taken and "if and so long as there is no such person, the action, though it may abate, cannot be continued". In light of this dicta of the court, it would seem that the commencement of the claim prior to obtaining the grant would have been contrary to the law. However, it is to be noted that in that case, there were statutory provisions which permitted the plaintiff to take the course that she did. Specifically, section 20 of the Proceedings Against Estates Act provided as follows:

'Rules of court made under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 or section 102 of the County Courts Act 1959 may make provision:

*(a) for enabling proceedings to be commenced against the estate a **deceased** person (whether by the appointment of a person to represent the*

³See paragraph [15] of judgment

estate or otherwise) where no grant of probate or administration has been made;

- (b) for enabling proceedings purporting to be commenced against a person who has died to be treated as having been commenced against his estate; and*
- (c) for enabling any proceedings commenced or treated as commenced against the estate of a **deceased** person to be maintained (whether by substitution of parties, amendment or otherwise) against a person appointed to represent the estate or, if a grant of probate or administration is made, against the personal representatives.'*

[17] Section 20 was subsequently reproduced in section 87(2) of the Supreme Court Act 1981 of the United Kingdom ('UK'), which reads:

Rules of court may make provision -

- (a) for enabling proceedings to be commenced in the High Court against the estate of a deceased person (whether by the appointment of a person to represent the estate or otherwise) where no grant of probate or administration has been made;*
- (b) for enabling proceedings purporting to have been commenced in that court against a person to be treated, if he was dead at their commencement, as having been commenced against his estate, whether or not a grant of*

probate or administration was made before their commencement; and

- (c) *for enabling any proceedings commenced or treated as commenced in that court against the estate of a deceased person to be maintained (whether by substitution of parties, amendment or otherwise) against a person appointed to represent the estate or, if a grant of probate or administration is or has been made, against the personal representatives.*

[18] Pursuant to section 20 of the Proceedings Against Estates Act, rule 6A of the Rules of the Supreme Court Order 15 of the UK, which was applied in **re Amirteymour, deceased**, in so far as material, provided:

- '(1) *Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased ...*
- '(4) *In any such action as is referred to in paragraph (1) ... (a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings ...*
- '(5A) *Where an order is made under paragraph (4) appointing the Official Solicitor to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the Court, with the consent of the Official Solicitor, directs that*

the appointment shall extend to taking further steps in the proceedings ...

[19] In ***Piggott v Aulton, deceased*** the claimant had filed a claim against the estate of the deceased as a result of injuries she had sustained in a road accident involving the deceased. The deceased died shortly after from his injuries. Proceedings were issued against the “personal representative of the estate” of the deceased. No steps were taken to appoint a representative and no service was effected. The claim was subsequently discontinued and new proceedings issued. An order was then obtained appointing a representative underwriter of the deceased’s insurers to represent the estate; proceedings were then served on the insurers. The issue in that case did not concern the propriety of the actions of the claimant in filing the claim prior to the appointment of a representative of the deceased’s estate but concerned an issue that is not for present purposes relevant. However, it is significant that Arden LJ observed that the course of action taken by the claimant was permitted by rule 19.8 of the Civil Procedure Rules, which state as follows:

- “(2) *Where a defendant against whom a claim could have been brought has died and*
 - (a) *a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;*
 - (b) *a grant of probate or administration has not been made*
 - (i) *the claim must be brought against 'the estate of' the deceased; and*

(ii) *the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.*

(3) *A claim shall be treated having been brought against 'the estate' of the deceased in accordance with paragraph (2)(b)(i) where*

(a) *the claim is brought against the 'personal representatives' of the deceased but a grant of probate or administration has not been made; or*

(b) *the person against whom the claim was brought was dead when the claim was started. . .”*

[20] It can therefore be said that in **re Amirteymour, deceased** [1979] 1 WLR 63 and **Piggott v Aulton**, there were express rules of court which left no room for doubt that a claim against the estate of a deceased could be commenced prior to the appointment of the representative of the estate. In the case of rule 21.7, there are no such provisions. It is my view, therefore, that rule 21.7(1) does not empower a court to appoint a person as the representative of a deceased person's estate in a claim that was commenced against the deceased after his death. In other words, it does not allow for the appointment of a representative of a deceased person's estate to operate retrospectively. Rule 21.7(1) is therefore confined to circumstances where proceedings were commenced against a defendant while he was alive and at some stage during the proceedings, the defendant dies. I find support for this conclusion in **Daneshia Artwell v Advantage General Insurance Company & anor; Kavin Reid v Advantage General Insurance Company &**

anor [2020] JMSC Civ 119. In that case, the court had to consider an issue similar to that which is under consideration in the present case. Barnaby J (Ag) (as she was then) stated:

*The proceedings having been issued after the death of Mr. Melbourne, in the absence of a personal representative of his estate, are invalid and of no effect. The invalidity cannot now be cured by the appointment of any person as administrator ad litem to continue those proceedings.*⁴

[21] I am also of the view that given the legal principles as to the status of the natural personality of the deceased, the status of the legal personality of his estate and the requirement that there must be a person recognisable in law against whom action can be taken, rule 21.7 could not empower the court to make an order for the appointment of a representative of the estate of the deceased defendant after the claim was filed in circumstances where the deceased died prior to the commencement of the claim. To do so, in my view, would empower the court to endorse the bringing of an action against a non-existent, non-recognisable person in law, which would run counter to the well-established principle that a claim brought against a non-existent person in law is a nullity. If rule 21.7 were to be interpreted in this way, it would amount to the procedural rules of court overriding or attempting to alter the substantive law and it is trite law that rules of court cannot have this effect (see **Best Buds Limited v Garfield Dennis** [2012] JMCA Civ 1; **Beverly Levy v KenSales & Marketing** [2008] UKPC 6. Significantly in **re Amirteymour** and **Piggott v Aulton**, there was in place a statute which authorised the rules of court that allowed for the claim to be filed prior to the appointment of a representative of the deceased's estate.

⁴ See paragraph[61] of judgment

[22] It seems to me that it was in recognition of the lack of a legally recognisable person in law existing upon the death of a defendant and the consequential invalidity of actions taken on behalf of the deceased that rule 21.7 provides that no step may be taken until a personal representative is appointed. If rule 21.7 had contemplated that upon the death of the defendant, a person who was not the deceased defendant's personal representative nor was appointed by the court had the legal capacity to take actions in the proceedings, the provision would not have mandated that no step be taken until a representative is appointed.

[23] It is also my view that interpreting rule 21.7 in the way that I have does not render rule 21.8 of the CPR unnecessary as rule 21.8 is much broader than rule 21.7 in that rule 21.8 empowers the court to give directions which may well include but are not limited to an order similar to that which may be given under rule 21.7; and it may be invoked or utilised upon the death of the defendant as well as the death of the claimant.

Conclusion

[24] I have therefore come to the conclusion that rule 21.7 of the CPR does not permit the appointment of a representative of a deceased defendant's estate in circumstances where a claim was filed after the death of the deceased and before the application for the appointment of the personal representative. It naturally follows from this that the claim filed herein is invalid for want of a proper defendant at the time of its commencement, as was submitted by Mr Samuels. I am of the view that this is sufficient to dispose of the preliminary objection and ultimately the claim and that it is therefore unnecessary for me to consider the merits of the objection in relation to the executors.

Accordingly, I make the following orders:

1. The preliminary objection as to the invalidity of the claim is upheld. The claim herein is struck out.
2. Costs to the defendant to be taxed if not agreed.