

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 1998 E 556

BETWEEN CECIL PATRICK CLAIMANT
AND BASIL SAMMS 1ST DEFENDANT
AND EDNA ROBINSON 2ND DEFENDANT

Ms. Althea McBean instructed by Frater, Ennis & Gordon for the defendants.

Heard: 31st January 2006 and 27th July 2007

Campbell, J.

(1) On the 24th November 1998, the claimant filed a Writ of Summons, seeking declarations against the defendants as executors of the “alleged will” of Ira Patrick, deceased dated 17th day of June 1993, probate of which was granted to the defendants on the 22nd May 1998.

(2) The Declarations sought were:

(a) That the said will is invalid.

(b) That the claimant is entitled to a life interest in the land situate at Lot 106, Woodmere Avenue, Inglewood and if the will is valid the beneficiaries are trustees for the plaintiff in respect of the said life interest.

(3) The 31st January 2006 was the second trial date in this matter. The 1st defendant was present. The claimant was not in attendance, neither was he represented. Mr. Haughton Gayle, who had appeared for the claimant had been granted permission to remove his name from the record on the 21st November 2005.

(4) On the first trial date, 3rd October 2005, the claimant had been present, the trial was adjourned and costs were awarded the defendant plus the cost of the 1st defendant’s airfare from New York to Jamaica and return.

The absence of the core bundles is noted on the minute sheet of the 3rd October 2005. The claimant had the responsibility of preparing, filing and serving the core bundles by the 12th September 2005 to facilitate the trial.

(5) Ms. McBean's application, pursuant to Civil Procedure Rules 2002, Rule 39.5 (b), that the Court proceeds in the absence of the claimant, Mr. Cecil Patrick, was granted. As a preliminary issue an application was made that the claimant's case be struck out for non compliance with Orders 6, 7 and 8 that were made at Pre Trial Review as well as for failure to pay pursuant to the Orders for cost made on the 3rd October 2005 by McDonald J.

(6) The Pre Trial Review Orders with which the claimant failed to comply were made on the 15th July 2004 and were as follows;

- (a) Each Party should file and serve on the other a list of authorities on which each intends to rely at trial by 5th September 2005. (Order 6)
- (b) Each party to file and serve skeleton arguments by the 5th September 2005. (Order 7)
- (c) Claimant's attorneys to prepare and file core bundles of documents by the 12th September 2005. (Order 8)

(7) It was submitted that Rule 38.3 where appropriate to Parts 25 and 26 is applicable to Pre Trial Review as they do to Case Management. Rule 26.3 (1) (a) allowed the Court to strike out a statement of case, if there has been a failure to comply with any rule, direction or order given by a court.

(8) The non-attendance of the claimant would further delay the defendants in gaining possession of Lot 106 in accordance with the testator's proven intention. The claimant is not prejudiced by the delay. The defendants are however experiencing hardship. They are being deprived of enjoying the fruits of proving of the will by the Supreme Court.

The defendants had initiated an action for recovery of possession in the Resident Magistrates Court. That action was stymied by the claimant filing this action.

(9) The witness statement of the 1st defendant complains that the house is not being maintained and the taxes are not being paid. The defendant has had sole possession of the property for the last ten years without paying any rental. The will that the claimant challenges as fraudulent was drafted by an experienced and reputable attorney-at-law. The fact that the testator was aware and signed the will voluntarily is attested to by a justice of the peace and two witnesses.

Analysis

(10) The claimant has failed to date to obey the orders of the Court for more than eighteen months after the time for compliance, and after two court dates. His absence cannot be laid at the feet of his Counsel, the claimant was well aware of the date, yet choose not to attend, and has offered no explanation for his non attendance. The withdrawal of counsel on the record was as a result of the failure on the part of the claimant to properly instruct him. Neither has he engaged the services of an attorney-at-law as an indication that he is prepared to continue.

(11) In **International Hotels Jamaica Ltd. v New Falmouth Resorts Ltd.** SCCA 56/95/03, delivered 18th November 2005, the appellant had failed to comply with orders for disclosure made on 19th May 2003. The order would have expired on 19th June 2003 and the Statement of Case struck out by 20th June 2003.

McCalla J.A., after noting that Civil Procedure Rule 2002, Rule 26(3)(1) empowers the Court in addition to any other powers under the CPR to strike out a Statement of Case or part of a Statement of Case for failure to comply with an order said:

“The learned Judge could therefore have exercised his discretion under the above Rule. I am in agreement with Ms. Davis for the Respondent that there had been ample opportunity to seek an extension of time for compliance with the relevant orders or to seek relief from sanctions as there had been no application to extend time for compliance with the orders made on 19th May 2003 by 20th June, the applicant’s Statement of Case stood as being struck out.”

(12) One month was considered ample opportunity to seek an extension of the orders; in the instant case, the orders had been made on the 15th July 2004 and should have been complied with by the 3rd September 2004, in respect of orders 6 and 7; and by the 12th September 2004 in respect of order 8. There had been no application to extend time for compliance more than seventeen months later, at the second trial date on 31st January 2006.

The non-compliance of the orders had already contributed to the rescheduling of the first trial date when costs were awarded to the defendants.

Lack of Merit

(13) Although, as noted, the claimant’s non-compliance is sufficient to dispose of the case, the claimant’s case is, on the evidence contained in the witness statements, singularly lacking in merit.

(14) Among the issues agreed by the parties to be relevant for determination were the following;

(a) Whether the deceased encouraged the claimant to give up his job and with his son to live with the deceased in return for which the deceased would buy for the claimant and his son whatever they needed and give them the right to live rent free at Lot 106 Woodmere Avenue until the claimant’s death, whereby the claimant would acquire a life interest and equitable interest in the said property.

(b) Whether the said will was duly executed or that at time of execution, the deceased knew or approved of its contents and whether the execution was obtained by undue influence or fraud of the first named defendant.

(15) The claimant's witness statement deals with his allegation of fraud by side wind. His story that he was promised a life interest was contradicted by the affidavit of a former housekeeper of the deceased, Patrick. In any event, the will predates the oral promise, if one was made. And I find that no such promise was made. If the testator had intended for the claimant to get a life interest he would have made a new will.

(16) **Section 15 of The Wills Act** sets out the requirement for a revocation of a will. Other than marriage, it must be done by another will or codicil executed under the Act or by some writing declaring an intention to revoke the previous will.

(17) Section 18 states that no conveyance or other act done subsequent to the execution of a will, relating to any real or personal estate in it, except revocation, shall prevent the operation of the will with respect to that property.

(18) On the claimant's case, the oral promise made to him by the deceased would have the effect of revoking the will or altering it to give the claimant a life interest.

(19) Ms. McBean submitted that such an oral promise would not entitle the claimant to an interest in the property where there is a will in existence. Sections 17 and 18 of the Wills Act require a re-execution of the will in accordance with the provisions of the Wills Act before the testators' will, having been revoked, could be revived to bequeath an interest to the claimant.

The lack of any real prospect of success in the claimant's case, leads to the inference that his absence and non-compliance are intentional.

(20) In **International Hotel Jamaica Ltd**, the appellant had stated its readiness at trial to proceed, despite request that time be granted to allow for location of documents and had applied for the trial date to be vacated.

McCalla J:

“The CPR requires the Court to maintain a firm control over the matters coming before it. Litigants must obey the time limits stipulated by the Court. The Court is required to strike a balance and deal with cases justly.”

(21) The claim of the claimant is struck out for non compliance with orders at the Pre Trial Review and McDonald, J’s order to pay cost.

Judgment for the defendants on the counterclaim;

The Court makes the following declarations:

- (a) That the will of Ira Matthais Patrick, dated the 17th June 1993 is valid.
- (b) The claimant is not entitled to a life interest in Lot 106 Woodmere Avenue, Inglewood, Clarendon, registered at Volume 1064 Folio 447 and the defendants do not hold the land on trust for him.

The Court orders:

- (1) The claimant is to vacate and deliver up possession of property at Lot 106 Woodmere Avenue, Inglewood, Clarendon to the executors forthwith.
- (2) That the claimant pays the sum of \$1.8M for use and occupation of the said property being \$30,000 per month for five (5) years being the fair letting value for the property from which the defendants have been excluded.
- (3) That the claimant pays to the defendant costs of the trial; costs awarded on the 3rd October 2005, costs on case Management Conference and Pre Trial Review. All cost to be paid before the claimant be permitted to take any further step in these proceedings.