(41)

IN THE SEYCHELLES COURT OF APPEAL

JANE DOROTHY WESTERGREEN APPELLANT

Versus

SUZANNE WHITING & ORS RESPONDENTS

Civil Appeal No: 9 of 1998

[Before: Goburdhun, P., Silungwe & Ayoola, JJ.A]

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Mr. P. Boulle for the Appellant
Mr. R. Valabhji for the Respondents

JUDGMENT OF THE COURT

(Delivered by Ayoola J.A)

The six appellants were the children of one Mr Harry Savy ("the testator") who died testate on the 15th day of March 1994. The testator left the Appellants who claimed to be his legitimate children and three of the Respondents who were said to have been born of a relationship between the testator and one Mrs. Murielle Hoareau, who is also a respondent, during the subsistence of his marriage to the mother of the Appellants. The testator by a will dated 7th August 1987 gave, devised and bequeathed to Murielle Hoareau the disposable portion, that is one-quarter share, of all the movable and immovable property whatsoever and wheresoever, which he shall leave at the time of his death; and to his named children and a grandchildren, (eleven in all) the remainder, that is, the three-quarter portion of the said movable and immovable property, to be shared among all of them in accordance with the laws of the Republic of Seychelles. The testator appointed one Mr Suketu Patel as Executor of his will. By his letter dated 13th January 1997 Mr Patel refused the appointment. By their

petition dated 6th March 1997, the appellants prayed the Supreme Court for an order appointing one Mr. Frederick Savy as executor of the estate of the testator. The respondents to this appeal were put on notice. By their answer the respondents objected to the appointment of an executor on the grounds that the succession was devoid of immovable property and that they were opposed to the appointment of Mr. Savy as executor.

The matter came before Bwana, J. who heard the evidence of the first appellant, Mrs. Westergreen, who testified among other things that although she knew that the testator had land at La Misere which he had sold, she did not know if he had any other land; and the evidence of two of the appellants one of whom represented three of the appellants. The respondents did not call any evidence.

The learned judge having listened to the address of counsel for the parties dismissed the appellants' petition on 20th January 1998. This appeal is taken from the decision dismissing the petition.

The grounds on which the learned judge dismissed the petition were broadly, (i) that an executor should be appointed by all the heirs and the consent of those having interest not having been obtained the petition must fail; (ii) that the remedy sought by the appellants was not clear and specific, because the appellants were not aware what kind of movable property was left by the testator; and the testator left no known immovable property.

The general question on this appeal is whether those two grounds were valid grounds for refusing the appellants' application. The arguments pressed on us by counsel for the appellants had proceeded on the footing that the appointment of the executor must be assimilated to the appointment of a fiduciary under the Civil Code. Several articles of the Civil Code ("the Code") were cited in argument.

It is necessary to refer to a few of them, even though they cannot be said readily to provide a direct answer to the question of appointment of an executor by the court when one appointed by the testator had declined the appointment.

Article 833 provides that:

> "When an executor is appointed by Will or upon testacy, the provision of Chapter V Section VIII of Title II of Book III of this Code relating to the appointment of executors shall also be applicable to the provisions of this Chapter."

It is difficult to see how this article offers any assistance since Chapter V section VIII of Title II of Book III deals with Revocation and Nullity of Wills. Article 774 provides that:

> "A succession consisting of immovable property only or of both movable and immovable property shall devolve upon an executor who shall act as a fiduciary as laid down in Article 724 of this Code."

Article 724(1) of the Code provides for the vesting of property, rights and actions of the deceased as of right in the legitimate heirs the natural children and the surviving spouse if the deceased leaves no immovable property. Article 724(4) provides that:

> "If any part of the succession consists of immovable property, the property shall not vest as of right in any of his heirs but in an executor who shall act as fiduciary. In respect of such fiduciary the rules laid down in Chapter VI of Title I, and Chapter V Section VIII of Title II, of Book III of this Code shall have application."

Chapter VI of Title I of Book III deals with Co-ownership and Returns. Article 828 of that Chapter relied on by Mr. Boulle, provides as follows:

> "If the consent of a person to be appointed fiduciary has not been obtained, or if he dies or is imprisoned for a crime or becomes insolvent or subject to some incapacity or resigns or refuses to act prior to entering into his functions, or if any of the aforementioned circumstances occur after he has assumed the office of fiduciary, the co-owners may agree to appoint another. Failing such agreement the court, at the request of an interested party shall make such appointment as it considers fit and proper."

Chapter V Section VII of Title II of Book III of the Code deals with executors. Article 1025 thereof provides that any executors appointed by a testator shall act as fiduciaries with regard to the rights of the persons entitled under the Will, as provided by this Code, and also with regard to the distribution of the inheritance, and, that the appointment of such executors shall be confirmed by the Court. Article 1027 of the Code prescribes the duties and functions of an executor as follows:-

> "The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the Will, as the case maybe."

By virtue of Article 1028 of the Code the executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in the Code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, in so far as they may be applicable.

In so far as an executor is also a "fiduciary to the succession", for want of direct and express provision in the Code, article 828 of the Code may be relied on as source of the power of the Supreme Court to appoint an executor in place of one appointed by the testator when the testator's appointee refuses to accept the appointment. Quite apart from article 828 of the Code, it stands to reason that where a testator has appointed a testator who refuses to act, the court should exercise a jurisdiction on the application of a person interested, to appoint an executor whose main function is to administer the Will.

The particular questions which arise in this case are whether before the jurisdiction of the court to appoint an executor in replacement of one appointed by the testator is exercised by the Supreme Court it must be shown (i) that all beneficiaries consent, and, (ii) what the succession consisted of. The first question can readily be answered in the negative, there being nothing in the Code which makes it incumbent on a party interested who applies for the appointment of an executor to obtain the consent of all other parties interested in the succession. The second question presents some difficulty.

Several articles of the Code suggest, at the first blush, that appointment of an executor depends on what the succession consists of. Such articles are article 774 which states succession which must devolve on an executor, article 724(4) which makes it mandatory for immovable property which forms part of the succession to devolve on an executor; and article 1026 which empowers the court to appoint an executor if the succession consists of immovable property, or of both immovable and movable property if the testator has not appointed a testamentary executor, or if an executor so appointed has died or if the deceased has left no Will. Practice Direction No. 1 of 1989 provides that documents that shall be submitted to the Registry together with the petition of a party or attorney applying for appointment of an executor under article 724 of the Civil Code or a fiduciary under article 820 shall include (inter alia) the conveyance, deed of title or other document showing the entitlement of the deceased to ownership of immovable property and the bank statement, savings book or certificate of deposit showing ownership of

any movable assets of the deceased, consisting of money, cash or securities.

There cannot be any doubt that where the appointment of an executor is sought under article 724(4) or, of a fiduciary is sought under article 820 the requirements of the Practice Direction must be complied with. Where also the purpose of seeking appointment of an executor is to effect the vesting of property in terms of article 774, 724(4) and 1026 the court may rightly insist on specification of the nature and identity of the property or properties concerned. Where, however, there is a Will and the testator has, as in this case, given, devised and bequeathed his entire movable and immovable to stated beneficiaries, albeit in proportions specified in the Will, and the testator has named a testator, a different consideration should apply in an application to replace a testamentary executor who refused to accept the appointment as executor. The chief functions of an executor appointed by the testator are to ensure compliance with the provisions of the Will by preparing an inventory of the succession in terms of article 1027 of the Code; and, also in terms of that article, by distributing the properties comprised in the succession in accordance with the terms of the Will. Where the succession is devoid of properties, movable or immovable, it may appear a futile exercise to replace an executor who has refused to accept the appointment, but where there is nothing conclusive as to what the succession may actually consist of other than the possibility that it may have consisted of some properties in terms of the contents of the Will though not yet ascertained or known, it is safer not to speculate as to the futility of the replacement of the executor who has declined to act.

For these reasons, we hold that the grounds upon which the learned judge refused to grant the appellants' request are not valid. There is no sufficient ground for holding that the appointment of an executor will be in vain. The mere possibility that the executor may not find any properties cannot be a valid ground for refusing to replace an executor who has refused to accept the appointment.

However, we cannot proceed to grant the appellants' prayers since all parties interested have not been served with the appellants'

application. In the result, the appropriate order to make is to remit the petition to the Supreme Court to be re-heard upon service of the petition on all parties interested in the succession. At such re-hearing the appellants shall be at liberty to amend their petition and the respondents shall also be at liberty to file fresh or amended answers.

For these reasons, the appeal is allowed and the order dismissing the petition is set aside. The petition is remitted to the Supreme Court to be re-heard by another judge of the Supreme Court with specific direction, for avoidance of doubt, that issues already determined in this judgment be not reopened in any way.

Dated at Victoria, Mahe this ...13th... day of ***August*** 1998.

H. GOBURDHUN **A.M. SILUNGWE** **E.O. AYOOLA**

PRESIDENT **JUSTICE OF APPEAL** **JUSTICE OF APPEAL**