

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA),A.Fernando (J.A),J. Msoffe (J.A)]

Civil Appeal SCA11/2016

(Appeal from Supreme Court DecisionCS 62/2015)

Camille Rene Hoareau

Calixte D'offay

Jennifer Payet née D'offay

Joseph Précý Hoareau

Appellants

Versus

The Estate of Emile Serge Hoareau

Sole surviving heir of Emile Selmour
Hoareau

Rep. by its executrix Françoise Savy

Respondent

Heard: 04 August 2017

Counsel: Mr. Guy Ferley for the Appellants

Mr. Kieran Shah for the Respondent

Delivered: 11 August 2017

JUDGMENT

F. MacGregor (PCA)

Facts

[1] This is a case contesting the validity of a Holographic Will made by a testator who had no issues of his own bequeathing all his properties to a person outside the lineage of descendants and ascendants of his family.

[2] A Holographic Will is one wholly in writing, derived from the Greek word “Holos” meaning whole and “Graphos” meaning written and is provided for in law in article 970 of the Civil Code which reads:-

“A holograph will shall only be valid if it is wholly written, dated and signed by the hand of the testator; it shall be subject to no other form.”

History

[3] The deceased testator, Serge Hoareau owned a share of undivided property at Baie Lazare, Mahé and was desirous of making a Will to pass it on to one Mr. Kim Koon. Mr. Kim Koon was apparently an old friend of his, at the same time the *de cujus* felt estranged from his own relatives, hence his preference to pass on the property to the person he thought closest to him.

[4] The Will was made in 2003 as per the document. The testator died in 2010. Thereafter the Will was presented in court formally, its contents recorded and an order made for its registration. Consequently an appointment of the executorship of the estate was made and a Mrs. Francoise Savy was appointed the Executrix. It was only in 2015 that the Appellants sued the Respondent claiming that the Will was deficient, on four grounds, namely:-

“(a) The will, purporting to be a holograph will, was drawn up in the form of a letter with the maker’s name, address and telephone number set out at the top right-hand margin along with a date purporting to be 6/10/03;

(b) The wording used throughout the purported will discloses and sets out conditions precedent that indicate the intention of setting up a contractual business relationship between the said Emile Serge Hoareau and Leon Kim Koon, evidence that the document could not have been and was not meant to be a will;

(c) The purported will refers to subject matter that cannot be verified having regard to the reference to unidentified properties and a fundamental error in the extent of the

property allegedly bequeathed in referring to “3.45 hectares” which the testator did not possess and could not bequeath;

- (d) The purported will is signed by both Serge Hoareau and Kim Koon, indicating that it could not have been intended to be the last will and testament of the said Emile Serge Hoareau.”

[5] The Defendant (Respondent) responded in his Defence, at paragraph 4 as follows:-

“4. Each and every allegation in paragraph 9 of the Plaintiff denied. The Defendant avers that:

- (a) a holograph Will can be drawn up in the form of a letter and can be dated numerically, thus 6/10/03 would mean 6th October 2003;
- (b) there are no conditions precedent between the Testator and Mr. Leon Kim Koon under the Will. He inherited the house contents and land in clear and unequivocal terms namely “I bequeath my house + all its contents + free-hold to Mr, Leon Kim Koon on the day of my death. He will take possession of all my belongings”;
- (c) the reference to 3.45 hectares of land must be read in the context of the Will which states “when the land deeds will have been settled plus my share of 3.45 hectares of land divided, beacon marked by qualified surveyors.” The Testator did not purport to bequeath 3.45 hectares of land but his share therein after division in kind;
- (d) if which is denied, that the Will is signed by both the Testator and the Beneficiary, it does not affect the validity of the holograph Will.”

Issues

[6] In court the parties agreed that the issues in this case were the form and content of the Will although later in the sittings of the court below Appellant Counsel whilst answering

a question from the court to identify the issues, specially at page 6 of the record, states as follows:-

“Court: You are not arguing therefore that that the Will is not wholly written, dated or signed but you are going according to what you have told me, going on the form of the Will itself.

Mrs.Tirant-Gherardi: We are to an extent going on the form. However there is also the question of whether the Will is in fact signed.”

The Testimony and Evidence in the Trial

- [7] In the testimony and evidence at the trial the Appellants’ main witness Joseph Hoareau went no further than to testify that he was unaware of the Will and did not know anything about it.
- [8] In contrast, the Respondent and her witness clearly testified as to the handwriting of the Testator, Serge Hoareau, in that he wrote it and signed it in front of her. This complies literally with article 970 where it says “by the hand of the testator.”
- [9] Her evidence was neither contested, challenged or shaken in anyway. It was established in our view beyond a balance of probabilities.
- [10] Of further pertinence and significance is the fact that she was a close friend of the Testator, and later became the Executrix of the Estate of the Testator, appointed by the Supreme Court and not contested.

Judgment of the Court below

- [11] After hearing submissions from both sides that also went beyond the Plaintiff adding the issue of burden of proof and seisin the trial judge concluded that the Will was valid.

The Plaintiffs then appealed against the said judgment on the following grounds:-

The Appeal

[12] 1.1 The Learned Trial Judge erred in fact and in law in finding that the provisions contained in the will were clear and unequivocal having failed to consider the pre-conditions included in the will that disclosed a business transaction between the parties that could not be explained only as providing for his funeral expenses and erecting his tombstone.

1.2 The Learned Trial Judge failed to give due and proper consideration to the conflict created by her interpretation of the will and its conditions precedent that the legatee would pay specified sums upon specified events until the end of this life and that in addition to these sums, the legatee would be responsible for the cost of his funeral and building a gravestone two and a half years later if he died before eight years had elapsed.

1.3 The Learned Trial Judge erred in law and in fact in finding that the will was signed and written in the hand of the late Emile Serge Hoareau and that the burden lay on the Appellants to prove the handwriting was not that of the deceased.

1.4 The Learned Trial Judge erred in law in finding that the Respondent, as universal legatee, had been 'seized of the property' as the said property remains in indivision and has not been sub-divided to date.

1.5 The Learned Trial Judge failed to consider the effect of the late Emile Serge Hoareau bequeathing a specific amount of land that he did not possess and could not possess even at some future date."

[13] The Appellant further detailed and made submissions on the above grounds in his Heads of Argument.

[14] The Respondent has submitted that the testator started his WILL with a solemn and religious declaration and expressly stated his state of mind and body and that he was writing his WILL in which he bequeathed all his worldly assets to Leon Kim Koon and expecting from him to pay the funeral expenses and the cost of tombstone, full details of

which he had given to the Respondent plus Mr. Kim Koon. Like a cautious person he wanted money put aside for these expenses, and he waived the condition when he was assured that the Respondent had the financial means to meet this moral and religious obligation, and asked the Respondent to sign the WILL to confirm. (Page 24 of the record).

[15] Viewed in its entirety, this was not a business transaction but a bona fide disposition by the Testator expecting in return that the costs of his burial expenses and tombstone be paid by him the beneficiary.

[16] The unchallenged evidence of the Respondent is to the effect that the reason the Testator wanted a monthly sum paid was to cater for his funeral expenses, and he had indicated to her and Mr. Kim Koon the type of funeral and tombstone he wanted. Had he died say, a month after writing the WILL, clearly R1500/- would not have been sufficient to meet these expenses. Hence, if death occurred within eight years, he expected the Respondent to pay for his burial and so on. We see no conflict.

[17] The Learned Trial Judge was correct in acting on the unchallenged evidence of Ms Savy that the WILL was written, dated and signed by the Testator in her presence (Page 17 and 18 of the record). It is otiose as on whom lay the burden of proof.

[18] Whether or not the legatee had been seized of the property in indivision does not affect the validity of the WILL. The test remains, as to whether Mr. Kim Koon inherited under the WILL or not.

[19] As the land had not been partitioned amongst all the heirs, none of them would know the exact area in square metres for each heir. It is not every square metre of land that has the same monetary value, and, therefore, two plots of the same size would not have the identical monetary value, the exact extent of each plot partitioned amongst the heirs would be determined by a land surveyor appointed as an appraiser. If after partition, the Testator's share is less than 3.45 hectares, it would not affect the validity of the WILL because it is trite that the greater includes the lesser, as the intention was to give his share in the land not yet partitioned. At page 25 of the Record the testimony of the Respondent

is as follows “It would be the surveyor that would know what portion. I would not know”.

[20] In the submissions of the Appellants in the court below and in the present appeal it is noted some parts contradict each other and are not consistent, starting from the deficiencies pleaded in paragraph 9 of the Plaintiff to the written submissions of the Appellants in the trial below, to the drafted grounds of appeal and of eventually the Heads of Argument. In particular paragraph 9(d) of the Plaintiff reads;

“The purported will is signed by both Serge Hoareau and Kim Koon, indicating that it would not have been intended to be the last will and testament of the said Emile Serge Hoareau.”.

This is clear admission of signature and Counsel is bound by his pleadings and an attempt cannot be made to contest the signature of the deceased testator.

[21] The last paragraph of the written submission of the Appellant in the court below at page E 12 of the record actually entitled “Conclusion” reads;

It can, at best, be interpreted as a proposal for an agreement, which the late Serge Hoareau envisaged when he spoke of a “second supplementary will” to be drawn up when the land was subdivided and he was allocated his share. Looking critically at the intention of the parties, this interpretation would seem the most logical under the circumstances.

That statement in reference to a second supplementary will implicitly concedes that there was a first and original will, and the second implicitly by its very title “supplementary is to supplement the first one.

[22] In summary both in the court below and on appeal the Appellants contested the Will for the following deficiencies:-

1. That it was in the form of a letter
2. It was in the form of a contract

3. The extent of property to be bequeathed was not known
4. There were two signatures on the purported Will
5. The Testator did not have seisin of the property to be bequeathed
6. The burden of proof in providing the Will was not met
7. The Land Registration Act was not complied with.

The first five deficiencies are clearly met by the said article 970 which requires three conditions for a valid holographic will i.e. “that they are only valid if they are wholly written, dated and signed by the hand of the Testator and shall be subject to no other form.”

- [23] The material word is that it is “only” and “subject to no other form.” Hence whether it is in the form of a letter, a contract, a prayer, a poem or a song, as long as the three conditions are met, the Will remains valid.

The issue of the seisin is also not a bar to validity, and is also met by the lawful executorship of the estate of the deceased testator.

- [24] On the burden of proof we find the Respondent’s evidence of the Will was neither challenged, contested or shaken and in fact went even beyond the balance of probability to prove convincingly the Will.

On application of the Land Registration Act, we make a distinction between the Law of Succession which deals with Wills as opposed to the Land Registration Act which deals with the registration of land and not succession. In this case the Law of Succession prevails. Further and quite convincingly the holographic Will was suffused with vocabulary characteristic of a Will.

Further Observations of the Document Held as a Will

- [25] For a document written by a layman, it is more than clearly manifest, that *de cujus* wanted to make a Will, for the following telling reasons and expressions:-

- 1 - The language and expression in that Will are clearly consistent and characteristic of Wills.
- 2 - He uses the word "Will" and states "herewith my Will" and underlines it. This is clear emphasis.
- 3 - The words "Full Mental Health" and "Healthy individual" again are characteristic of a Will where the Testator generally and it is common practice declaring he is of sound mind, etc.
- 4 - "Bequeath" is definitely the language of a Will. And is a word used when you give somebody your personal belongings by a Will.
- 5 - The Bequeathing, it reads, should be on the day of my death.
- 6 - Reference to his death.
- 7 - Take possession of all my belongings and underlines that word.
- 8 - Inherit my shares.
- 9 - Inheritance.
- 10 - 2nd Supplementary Will - clearly implies a Will already in existence and the 2nd one in its own words supplementary obviously to a first one.
- 11 - Again reference to Death and Dying.
- 12 - Funeral.
- 13 - Gravestone.
- 14 - Comment on "it shall be subject to no other form as per article 970 of the Civil Code.

[26] Hence it could have been in the form of a prayer, a poem, a song, a contract, as long it satisfies the three main conditions of article 970, wholly written by the hand of the Testator, dated and signed it is valid.

[27] Obviously, this document is abound and characterised by the normal language and vocabulary of a Will. The intentions here could not be clearer.

[28] In our analysis we have had guidance from the following authorities:-

- Civil Code of Seychelles, Article 1322, 1323 & 1324
- Dalloz, Jurisprudence General on Article 970 at notes 22, 41 & 42

“Note 22: “Une lettre missive écrite, date et signée par celui qui l’a faite peut être considérée comme testament olographe”

“Note 41: (specialement est valubles comme testament olographe) “ces expressions, je donne, donation, employées exclusivement dans l’act sous seing privé contenant des dispositions au profit d’un individu, et specialement dans l’act par lequel une femme declare disposer en toute propriété en faveur de son marie, de tous les biens meubles et immeubles qu’elle possède, á la charge de rentges viagères au profit de tiers, ou dans lequel elle lui donne l’option de s’en tenir aux clauses du contract de mariage, n’empechent pas cet acte, s’il écrit, date, et signé, par la femme, d’être qualifié testament olographe, a raison de la nature meme des ses dispositions.”

Note 42: “A plus forte raison, le mot donner, ou un autre equivalent indique une disposition, testamentaire, quant il s’y joint, des termes qui se referent expressément a la mort du disposant.”

- Amos & Walton 3rd Edition, notes 3, 4, 5, & 6, at p.318 on Holographic Wills.
- Moliere Vs Rault MR 1938 at 219
- De Speville Vs Pillieron SLR 1939 at 52

- Corgat Vs Lemarchand MR 1961 at 210
- Barbier Vs Barbier SLR 1966
- Hoareau Vs Michel SLR 1974 at 90
- Vandagne Vs Amesbury SLR 1979
- Tirant Vs Krekman SLR 1982
- Appasamy Vs Appasamy SCA 1988
- Didon Vs Gappy SLR 1994 at 148
- Tree Sword Vs Puciani SCA 2014
- Shree C Vs Boniface SCA 2016

Conclusion

[29] Accordingly after having analysed all the grounds, arguments, authorities and evidence, we find all the grounds are without merit, and hence this appeal is dismissed with costs.

F. MacGregor (PCA)

I concur:. A.Fernando (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017