

**Calixte v Nibourette
(2002) SLR 35**

Bernard GEORGES for the Plaintiff
Frank ALLY for the Defendant

Judgment delivered on 14 November 2002 by:

KARUNAKARAN J: The Plaintiff in this suit Master Jean-Christophe is a minor natural child. One Miss Maryse Roberts is his mother and one late Mr Vilner Calixte hereinafter called the "deceased" was the deceased has acknowledged paternity of the Plaintiff by virtue of a notary dated 15 September 1997. The deceased has also acknowledged paternity in respect of two other natural children namely, Anne Sophie Calixte and Jean-Philippe Calixte, whose mother is one Miss Maryse Nibourette, who is the Defendant in this matter.

On 21 January 2000, before he died the deceased made an authentic will in terms of Article 971 of the Civil Code whereby he made dispositions bequeathing all his properties in favour of his own parents, Defendant and her two children without making any provision or disposition in favour of the Plaintiff. The Plaintiff claims that in law, although the deceased was obliged to leave an equal share to the Plaintiff along with the other two natural children he left nothing in the said Will for the Plaintiff to inherit. Following the death of the deceased, the Court appointed the Plaintiff as the executrix to the estate of the deceased in order to effect distribution of the legacy presumably, as per the testament of the deceased. In the circumstances, the Plaintiff has now come before this Court for an order that:

- a. the dispositions made in the Will of the deceased be changed to add a bequest to the Plaintiff of an equal share, along with the other two children of the deceased; and
- b. the Defendant to give effect to the changed dispositions in the Will.

On the other side, the Defendant despite several adjournments failed to appear and failed to file her defence. The Court therefore granted leave for the Plaintiff to proceed ex parte in this matter. The mother of the Plaintiff testified and produced a number of documents, in support of the case for the Plaintiff. The Learned Counsel for the Plaintiff Mr B Georges also filed his written submissions on points of law bringing to the notice of the Court the relevant provisions of the Civil Code. The Learned Judge in this particular case has been of much assistance to the Court to assist in the distribution of the disposable portion of the property by Will. On the strength of the evidence on record, I find the following facts have been proved more than a preponderance of probabilities to my satisfaction.

one Nathanael Calixte is the Plaintiff's guardian whereas the deceased was his father. In fact, the deceased made a declaration before a notary acknowledging paternity in respect of the Plaintiff and Jean-Philippe Calixte, non-else than the Defendant.

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- a. the dispositions made in the Will of the deceased be changed to add a bequest to the Plaintiff of an equal share, along with the other two children of the deceased; and

- b. the Defendant to give effect to the changed dispositions in the Will.

On the other side, the Defendant despite several adjournments failed to appear and failed to file her defence. The Court therefore granted leave for the Plaintiff to proceed ex parte in this matter. The mother of the Plaintiff testified and produced a number of documents, in support of the case for the Plaintiff. The Learned Counsel for the Plaintiff Mr B Georges also filed his written submissions on points of law bringing to the notice of the Court the relevant provisions of the Civil Code. The Learned Judge in this particular case has been of much assistance to the Court to assist in the distribution of the disposable portion of the property by Will. On the strength of the evidence on record, I find the following facts have been proved more than a preponderance of probabilities to my satisfaction.

The Plaintiff is a minor natural child of late Mr Vilner Calixte, the deceased.

1. The Defendant is the executrix of the estate of the deceased for having been appointed by this Court.
2. The deceased left an authentic Will made on 21st January 2000, in which he made bequests to the Defendant and to his natural children Anne Sophie Calixte and Jean-Philippe Calixte by the Defendant.
3. In the said Will the deceased made no bequests in favour of the Plaintiff.
4. In law the deceased was obliged to leave Plaintiff an equal share of his estate along with the other two children of the deceased in terms of Article 913 of the Civil Code, which reads thus:

Gifts inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children. There shall be no distinction between legitimate and natural children except as provided by Article 915-1.

In view of the above provision in law, it is obvious that the deceased, who had three children, could dispose of only one quarter of his estate by Will to whoever he wanted. This is the only disposable portion, which the Plaintiff is entitled to bequeath in his Will. Since he deliberately left out the Plaintiff from his will, the deceased must have wished his disposable portion of one-quarter to be left to his parents or anyone he wanted leaving the remainder, the three-quarter intact. This remainder in accordance with Article 745 of the Civil Code should have obviously gone to his three children including the Plaintiff. Therefore, as I see it, the only way to achieve an equitable distribution is to bring all the assets of the estate into the hotchpotch and distribute the value among the heirs, including the Plaintiff. This should be carried out by the executor, the Defendant herein who has the duty under Article 1027 of the Civil Code, to distribute the succession in accordance with the rules of intestacy.

Wherefore, the Court makes the following declaration and orders:

1. The Plaintiff being a legal heir of the deceased Vilner Calixte he is entitled to inherit a $\frac{1}{3}$ (one-third) share of the estate after deduction of the $\frac{1}{4}$ (one-quarter) disposable portion.
2. The executor, the Defendant herein should distribute the estate of the deceased in order that the Plaintiff obtains $\frac{1}{3}$ (one-third) of the value of the estate after deduction of the $\frac{1}{4}$ (one-quarter) disposable portion.

Accordingly, I enter judgment for the Plaintiff and make no order as to costs.

Record: Civil Side No 122 of 2000