

IN THE SUPREME COURT OF SEYCHELLES

Mr Jimmy Basset

1st Plaintiff

V/s

Mrs Anne Figini born Basset

1st Defendant

Miss Lisette Basset

2nd Defendant

Miss Sheila Basset

3rd Defendant

Civil Side No 145 of 2011

Mr Rouillon for the Plaintiff

Mr George for the 1st, 2nd and 3rd Defendants

JUDGMENT

DODIN J

The Plaintiff is a son of the late Mrs. Anais Basset hereinafter referred to as “the deceased”, who died testate in Seychelles on the 6th February 2011. At the time of her death the deceased was the registered owner of land Title V7506 and other

movables and possibly money not yet identified. The deceased left the following notarial will dated 4th September 2008 and registered on 12th April 2011.

“ Last Will and Testament of Anais Basset of La Louise On the Fourth day of the month of September in the year Two Thousand and Eight, before me Bernard Georges of Port Victoria, Mahe, Republic of Seychelles, Notary, Undersigned, **Personally came and appeared Anais Basset, nee James**, of La Louise, Mahe, Republic of Seychelles, who, being of sound mind, has dictated to the undersigned Notary her last Will and Testament as follows: I give devise and bequeath all I shall leave at my death, movable or immovable, wherever situate, including my land with the house thereon, to all my children in equal shares, save that my daughter Sheila, who had already received her share of the land, and my son Jimmy who has already received money in lieu, will not inherit any share of the land and house now bequeathed to my other children. I hereby revoke all former Wills I may have made. The undersigned Notary has had the said Will typed exactly as dictated. Made and passed in simple minute at the Chambers of the undersigned Notary, Port Victoria, Mahe, Seychelles, on the day, month and year first above written. The Testator and the said Notary have signed the Will after having had the Will read over and explained to the Testator. (Signed) A. Basset (Signed) B. Georges (Seal). Certified duly collated and a true copy of the original.....”

The Plaintiff moves Court to declare the said bequest contrary to law since the said will excludes him altogether. The Plaintiff avers that it was with the permission of the deceased and using funds provided by himself and the deceased’s contribution of Euro 15,000/- that he rebuilt the house on land Title

V7056 completely without any assistance from any other Defendants. The Plaintiff maintains that the legacy should be reduced whereby the legal heirs of the Deceased receive an equal share of the legacy according to law.

The Plaintiff testified that the deceased had lived in Italy for over 30 years and that once when he was on a visit there, the deceased gave him €20, 000 out of which €5000 he was to give to Sheila and the rest, that is, €15, 000, he was to rebuild the dilapidated house that was on the property. He testified that the money was not enough and he had to source and contributed to the construction of the house. He took a loan of Rs.250, 000 from the HFC, his concubine gave him Rs.50, 000, he sold his car and invested the money together with the €15, 000 given by his mother into the project in order to complete the construction which cost about Rs.700/-, 000 as he had to demolish the old house to rebuild the new one. Her sister Lisette, the 2nd Defendant also built a house on the part of the property which has now been transferred to her whilst he had been forced to vacate the property.

In cross-examination the Plaintiff maintained that he did not use only the €15, 000 to build the house and that the deceased agreed later to pay off the remainder of the loan which by then he had paid Rs 88,000. That was at the time the deceased came back and asked him to move out of the house. The Plaintiff denied that he squandered the money given to him. At the time one Euro was at about Rs.8/- and €15, 000 would amount to about Rs. 120, 000/-.

Learned counsel for the Defendants submitted that the will itself is not invalid but it is the deposition in the will that is being challenged. Hence the Court must determine whether a testator in a will can leave out one or more of her children. In this case as the Plaintiff has been left out should the court bring him in the will and give him his share. Learned counsel agreed that the testator must leave a reserve which should be divided by the children and argued that as long as the testator leaves a reserve, the testator can leave out her children. He submitted that the reason given by the testator for leaving Sheila and Jimmy out is that one already has been given a house and land and the Plaintiff has been given money.

Learned Counsel submitted that in this case, the reserve was 3 quarters to leave to her children and the other quarter she could give to anybody else. If one or two persons are left out they can be brought back to succeed in the reserve.

Learned counsel nevertheless submitted that Article 745 of the Civil Code applies only to intestate succession and Article 745 exception does not apply in this case which is testate succession hence so long as the testator leaves a reserve Article 745 is not applicable as Article 1075 allows the testator to partition properties to heirs and legatees. He argued that only where there is no reserve can the court reduce the disposable portion to bring back to the reserve.

Learned Counsel also rightly noted that the Plaintiff does not only seek a share of the property but is claiming his investment in the property and for that he has to take an alternative course of action, not under the will since he cannot put both claims in the same suite. He therefore moves Court to find that the will is proper as it is and to dismiss the Plaintiff's claim.

Learned Counsel for the Plaintiff admitted that the Plaintiff is also asking for the contribution he made and left it to court to determine whether such claim should be in separate action.

Learned Counsel submitted that as regards the will Article 745 of the Civil Code states that each child should inherit equal shares and that when the law wishes a person to be excluded, it states so clearly such as Article 943 does.

Learned Counsel submitted that in terms of freedom to give property to whomever a person wishes, the case of Exparte Mondon No. 4 (1969) SLR page 197 decided otherwise, maintaining that where more than the disposable portion of the property is given by will, the Court would intervene to reduce the portion disposed of to within the lawfully allowed disposable portion. Learned Counsel submitted further that under Article 1048 the testator can dispose of a portion of the property but that disposal is subject to Article 745.

In terms of the facts of this case, Learned Counsel submitted that there is the uncontroverted evidence of the Plaintiff who admitted that €15, 000 was given to him to repair or construct the property which is now valued at Rs.1.4 million and that all the money and additional monies were raised by the Plaintiff to complete the construction of the house. Therefore it cannot be said that he is being excluded from the will because he received money from the deceased. Learned Counsel submitted that the deceased transferred half of her property to one daughter who is excluded but the deceased did not give a similar gift to the

Plaintiff and even the repayment of the loan was not in favour of the Plaintiff because she only paid a small portion of it and got him to move out.

Learned Counsel hence moved the Court to:

- a. declare the said will contrary to law and to revoke or amend the same;
- b. in the alternative to declare that the Plaintiff has a share in the deceased's estate. declare each heirs share in the legacy according to law whether in terms of buildings or assets or the monetary value thereof paying particular attention to the contribution to the estate by each heir;
- c. make any order that may be just and equitable in the circumstances.
- d. all with costs to be paid by the Defendants

As stated by Learned Counsel for the Defendants, at this stage the court should not consider valuation and apportionment of the estate of the deceased but whether the will as drawn up is valid, null and void or can be amended by the Court.

Article 1075 of the Civil Code of Seychelles states as per argued by Learned Counsel for the Defendants that;

“Any person shall be entitled to make a distribution or partition of his property among his heirs and legatees.”

However, Article 1075 must be interpreted in the light and with the qualification imposed by Article 1076 which states:

“These partitions may be made by an act inter vivos or by will, subject to the same forms, conditions and rules as for gifts inter vivos or by will.”

Article 1078 is also pertinent and states;

“If the partition is not made amongst all the children at the time of the death and the descendants of those children who have pre-deceased, it shall be null only if that partition cannot be amended or supplemented. The amendment, if feasible, or otherwise a new partition, shall be made at the instance of the children or descendants, whether they have received anything or not.”

Article 913 of the Civil Code which determines the disposable portion of a testator’s property states that:

“Gift 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.

Nothing in this Article shall be construed as preventing a person from making a gift inter vivos or by will in terms of Article 1048 of this Code”

Article 1048 refers to dispositions permitted in favour of grandchildren of the donor or the children of his brothers and sisters and is not applicable to this case.

The obvious conclusion that can be reached from the above provisions of law is that although a person can dispose of part of his property by way of gift inter vivos or by will, a portion of the same must be reserved for the children depending on the number of children or the children's surviving successors if the child has predeceased the testator.

The mode of distribution of succession devolving upon descendants is found in Article 745 of the Civil Code which states;

“Children or their descendants succeed to their father and mother, grandfathers and grandmothers or other ascendants without distinction of sex or primogeniture, even if they are born of different marriages.

They take in equal shares, per head, if they are all of the first degree and inherit in their own right; they take per stirpes when all or some of them inherit by representation.”

This provision applies to all successions and not only to intestate succession as argued by learned counsel for the Defendants. For intestate succession this provision applies to the entire property of the deceased whilst for testate succession the provision applies to the distribution of the reserve portion if the partition is not made amongst all the children at the time of the death and the descendants of those children who have pre-deceased.

Consequently, the circumstances of this case show that the deceased made a gift inter vivos of part of her property to Sheila Basset, the 3rd Defendant. Whilst the making of the gift itself is not unlawful, what might be unlawful is if the gift made to her exceeded the disposable portion of her property which in this case should be one quarter. Should the bequest to the 3rd Defendant be more than one quarter upon evaluation, then it should be reduced to represent the disposable portion as per article 913 of the Civil Code.

With regards to the exclusion of the Plaintiff, I find that the money given to the Plaintiff was not a gift to the Plaintiff but that it was given for the specific purpose of reconstruction of the house which undertaking was fulfilled by the Plaintiff. Consequently there was no gift inter vivos made to the Plaintiff and therefore it was unlawful for the deceased to exclude the Plaintiff as a successor to her estate. The dispute about whether the Plaintiff is owed money or if the Plaintiff did not spend the money on the house construction are matters which should be determined in separate proceedings.

Nevertheless, after considering the whole will and making the above findings, I do not find it necessary to declare the will null as the defect *vis-a-vis* the Plaintiff's right to the succession can be cured by deleting the words "*and my son Jimmy who has already received money in lieu,*" so that the Plaintiff is now included as per the provision of article 1078 as read with article 745 of the Civil Code.

Consequently, I enter judgment for the Plaintiff and declare part of the said will contrary to law and amend the same by deleting the words "*and my son Jimmy who has already received money in lieu,*" so that the Plaintiff is now included as an heir to the succession of the deceased.

The executors may now proceed to partition the deceased's estate in accordance with the provisions of the Civil Code of Seychelles.

Cost for this application is awarded to the Plaintiff.

C.G. DODIN

JUDGE

Made on this 31st day of October, 2012