

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 72/2012**

**[2013] SCSC**

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**NOELLA LUCETTE VOLCY**  
Plaintiff

versus

**TERENCE SERVINA**  
Defendant

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Heard: 15 May and 17 October 2013

Counsel: Alexia Amesbury for plaintiff  
Charles Lucas for defendant

Delivered: 27 November 2013

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**JUDGMENT**

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**Egonda-Ntende CJ**

[1] This is a dispute between executors. The plaintiff is executrix of a relatively complex estate involving two neighbouring parcels of land on which at least five houses have been built. There are numerous heirs, including the plaintiff. No steps have been taken to distribute the estate among the heirs. The defendant is executor of the estate of one of the heirs, who was his foster mother. He, like the plaintiff, has been living on the land for a long time and has constructed (or is constructing) several houses there. He is not an heir by descent but he claims to have inherited his foster mother's rights by will. She also gave him written permission to build on the site of her home.

[2] The plaintiff filed this case in her capacity as executrix, but she is not seeking the Court's assistance with distributing the estate between the heirs. Rather, she is seeking orders and damages against the defendant for denying the "real" heirs "the possibility of

enjoying their shares”. She wants a declaration that the defendant’s construction works are illegal, an order for their removal, and Rs 500,000 in damages. She is also asking for a declaration that the defendant did not inherit under his foster mother’s will.

- [3] The defendant says that the plaintiff’s case is time-barred, that she is estopped from challenging the validity of the will, and that there is no legal basis for attacking either the will or the defendant’s actions in (re)building on the land. He says that it has always been common knowledge that he inherited from his foster mother. He has counterclaimed for Rs 500,000 for severe stress and trauma caused by the plaintiff’s “malicious and frivolous” actions. He is also asking for a declaration that he is the lawful testamentary heir of his foster mother.
- [4] The defendant initially asked for a further order requiring the plaintiff to fulfil her obligations as executor by proceeding with subdivision and apportionment of the land. However Mr Charles Lucas, learned counsel for the defendant, withdrew this claim at trial, acknowledging that it would be more appropriate to file a separate petition for division in kind if this case is resolved in the defendant’s favour.
- [5] It has been obvious from the outset that a judgment in this case will not go far towards resolving the real issues between these parties. The main estate has to be properly administered and distributed. That is the responsibility of the plaintiff as executrix. It should be her priority. This claim is an unhelpful distraction.
- [6] In that regard I note that this is not the first case between these parties concerning this subject matter. In August 2010 Mrs Amesbury, learned counsel for the plaintiff, filed an application for a writ habere facias possessionem (CS 241/2010) in the plaintiff’s capacity as executrix. The grounds for this application were essentially the same (alleged errors in the will and permission to build, and an alleged mistake by a previous Court in appointing the defendant as executor of his foster mother’s estate). The defence was also essentially the same (prior admissions by the plaintiff that the defendant had inherited legitimately). The same counsel were involved. The same documents were produced. I dismissed that action with costs on the ground that the defendant had made out an arguable defence. The writ procedure was not the appropriate forum for testing the validity of his claimed interest in the land. It was sufficient that he was not obviously a

trespasser. That ruling was delivered on 19 November 2011. The present case was filed four months later. It does not seem that Mrs Amesbury advised her client to get on with the distribution of the estate in the meantime. That is unfortunate.

### **Analysis of the plaintiff's claim**

[7] After hearing the parties it remained quite unclear what the plaintiff really hopes to achieve. Mrs Amesbury insisted in closing submissions that the plaintiff is *not* challenging the will on which the defendant relies. Yet she maintains the pleading that this Court should order that the defendant's foster mother did not bequeath her estate to him in that will. The ground for this order is, she says, that "we do not know who the testatrix is" because the will refers to the deceased both by her own Christian name and that of her sister. The defence to the counterclaim goes further, alleging that "the Will under which he claimed his 'inheritance' is void ab initio ... and can therefore not confer any legal rights". That allegation is patently a challenge to the validity of the will. There is no way around it. Similarly, the plaintiff claims that the Court decision appointing the defendant as executor of his foster mother's estate was "wrong" and "misconceived". But Mrs Amesbury insisted in closing submissions that the plaintiff is not asking this Court to remove him as executor. She "just" wants him to demolish his houses and pay damages.

[8] There is only one ground relied on by the plaintiff that could possibly justify an order of this kind. That is the argument that the foster mother's will, and the signed permission to build, both refer to the C1514 land parcel, but the defendant has actually been living and building on the other parcel, C1520. The plaintiff says he has no right to be there.

[9] The problem with this argument is that the foster mother (Leona Kilindo) is acknowledged to have inherited interests in both C1514 and C1520. I refer in that respect to the order of Perera J dated 29 February 2008 (in CS 354/2007) which appointed the plaintiff as executor of the main estate. The precise wording of the bequest in Leona Kilindo's own will is "all my movable and immovable property I may have at the time of my death and my entitlement under the estate of the late Mrs Mesidor Quilindo *more particularly my interest in C1514*" (emphasis added). I do not regard the italicised words as excluding her interest in C1520. In any event, it was common ground at the

hearing of this case that the defendant has been living and building on the site of his foster mother's former home, which was and has always been on C1520, *not* C1514. This must have been obvious to the plaintiff (who can actually see the site from her own house) – making her reliance on an apparent typographical error somewhat disingenuous. For example, a letter written by an attorney (Ms Pool) on the plaintiff's instructions on 8 May 2008 states that:

Mrs Leona Kilindo who is an heir of Mesidor Kilindo, left her interest in title C1514 to you in a Will dated 31 May 1997. I believe that you are aware that the bequest consists of a tiny share in title C1514 and a house thereon. I am informed that you have unlawfully constructed a house on land that was not bequeath [sic] to you in Leona Kilindo's Will and which, consequently does not belong to you.

- [10] The first point to note about this letter is that the validity of the will in favour of the defendant is clearly admitted. The second point is that paragraph 8 of the current plaint claims that the plaintiff only became aware of the will in 2010. Given the date of this letter, that claim is obviously untrue. The third point is that it appears that Ms Pool was not accurately informed by her client about the location of Leona Kilindo's original house.
- [11] A subsequent letter to the defendant dated 13 July 2009, also from Ms Pool, reiterates that "under the terms of the Will you are entitled to occupy the house of Leona Kilindo", and alleges that the defendant is failing to comply with her request "to restrict your occupation to your entitlement".
- [12] I consider that Mr Lucas is entitled to rely upon this statement (and the earlier one) as supporting the submission that there is no genuine dispute about this defendant's status as an heir to the main estate. Mr Lucas emphasised in this regard that his client is not seeking any more than his fair share. He is happy for the estate to be distributed in accordance with law – indeed, that was the order he initially sought in his counterclaim.
- [13] I agree with Mr Lucas that the plaintiff's position in this case is fundamentally untenable. On the limited evidence before me I do not accept that the defendant's inheritance can have come as a shock to the other heirs. His entitlement under Leona Kilindo's will has been formally acknowledged by the plaintiff in the past (in circumstances inconsistent

with the claims about timing made in the plaint). It is also expressly recognised in the judgment of this Court in CS 30/2003, dated 14 May 2003, which appointed the defendant as executor of his foster mother's estate. That judgment, which is of course a public document, includes the following finding by Chief Justice Allear:

I am satisfied on the documentary evidence adduced ... that Leona Marengo born Kilindo died testate but without issue on the 22<sup>nd</sup> January 2003 ... leaving as her only heir, Terrence Servina, the Applicant.

- [14] Neither the will itself nor the defendant's appointment as executor on the strength of that will have ever been challenged directly, and I am not prepared to take up Mrs Amesbury's invitation to make orders which undermine them indirectly.
- [15] Whether the defendant has taken more than his fair share of land, or otherwise over-reached, is not a question which can be answered while the estate remains in indivision. And the person responsible for this ongoing state of uncertainty is the plaintiff, not the defendant.
- [16] For completeness, I record that I would not, by a narrow margin, have been prepared to find that this claim is time-barred by article 2271 of the Civil Code. I am satisfied on the basis of the plaintiff's own evidence that she became aware of the defendant's interest in Leona Kilindo's estate, at the latest, at some point in 2007 (contrary to the averments in the plaint). She quite freely admitted under cross-examination that this was the motivation for filing CS 354/2007, the application to appoint her as executor of the main estate. However, the defendant did not produce evidence of the actual filing date of CS 354/2007. Given the number "354" it is probable that the case was filed late in 2007. The present proceeding was filed in March 2012. While there is considerable evidence suggesting that the plaintiff knew about the will much earlier than 2007 (perhaps as early as 1997, when it was made), I do not regard that evidence as sufficient to enable me to find on the balance of probabilities that this claim could have been filed before March 2007.

## **Decision**

- [17] The plaint is dismissed in its entirety.

[18] In the absence of evidence or submissions specifically directed to the counterclaim for damages, I dismiss that head of counterclaim (paragraph (a)).

[19] I grant paragraph (b) of the counterclaim to the extent of declaring (for the avoidance of doubt) that the defendant is the lawful testamentary heir of Leona Marengo born Kilindo. That declaration is to be taken into account by the plaintiff in performing her duties as executrix of the main estate.

[20] As noted above, paragraph (c) of the counterclaim was withdrawn at trial.

[21] The defendant is entitled to the costs of the proceeding.

Signed, dated and delivered at Ile du Port on 27 November 2013

F M S Egonda-Ntende  
**Chief Justice**