IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS62/2015

[2016] SCSC

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1. Camille René Hoareau — Plaintiffs
2. Calixted'Offay
3. Jennifer Payet
4. Joseph Percy Hoareau

versus

The Estate of Émile Serge Hoareau — Defendant
Represented by its Executrix
Francoise Savy

Heard: 21st January 2016

Counsel: Nicole Tirant-Ghérardi for plaintiffs

Kieran Shah for defendant

Delivered: 12th February 2016

JUDGMENT

M. TWOMEY, CJ

The Pleadings

[1] The Plaintiffs are the heirs of Émilie Julina Hoareau and the Defendant is the

Estate of the late Émile Serge Hoareau (the deceased) who was also an heir of Émilie Julina Hoareau.

[2] The deceased died without issue or spouse on 25th July 2010 and at the time of his death was a co heir with the Plaintiffs of land at Anse Aux Poules Bleus, Mahé, having inherited the same from their grandmother, Émilie, Julina Hoareau.

[3] On his death on 25th July 2010, the deceased left a document purporting to be his last Will and Testament in which he bequeathed his entire property to one Léon Kim Koon.

[4] On 8th July 2015, the Plaintiffs filed a Plaint in which they claimed that the purported last Will and Testament of the deceased was deficient in form and content so as not to constitute a valid holograph Will.

[5] The deficiencies alleged by the Plaintiffs can be summarised as follows:

1. The Will was drawn up in the form of a letter.

2. The wording in the Will set out conditions precedent indicating a prospective contractual and business relationship and not a Will.

3. The subject matter of the Will, namely the property bequeathed cannot be verified as it indicated property over and above what was owned by the deceased.

4. The purported Will is signed by both the deceased and the beneficiary which does not indicate that it was intended to be a Will.

[6] The Defendant in its Statement of Defence stated that the document in issue was the holograph Will of the deceased which had been transcribed in Volume 85 No. 149 of the Register of Transcriptions.

[7] It averred that the document met the conditions of a holograph Will and was valid in that:

1. A holograph Will did not have to be in any specific form and could be drawn in the form of a letter and dated numerically.

2. There were no conditions precedent contained in the Will, the provisions of which were clear and unequivocal.

3. There was no ambiguity in terms of the property bequeathed as the deceased bequeathed his share in undivided property.

4. Whether the Will is signed by the deceased and the beneficiary is insignificant as this fact does not affect the validity of the Will.

The Evidence

[8] The fourth Plaintiff testified. He stated that the deceased was his cousin and they shared a common grandmother, Julina Hoareau née Isnard who had died in 1962. He stated that she had had eight children and they were all deceased. He produced a family tree in which he depicted as being the son of Michel Hoareau and the deceased as the son of Émile Hoareau, grandchildren of Julina Hoareau. They had both inherited shares in undivided land through their respective fathers from their grandmother.

[9] The fourth Plaintiff insisted that he had never seen the Will of the deceased, Émile Serge Hoareau.

[10] Francoise Savy, the Executrix of the Respondent Estate testified. She stated that she had known the deceased for over thirty years and that she had witnessed him writing and signing his Will. She stated that the beneficiary of the Will, Léon Kim Koon was her partner. She explained that Léon Kim Koon had also signed the Will to reassure the deceased that he would indeed pay for his funeral after his death.

[11] She testified that Léon Kim Koon had arranged for the funeral of the deceased, bought flowers and had honoured the deceased's wishes apart from erecting his grave which she stated hadn't been done as the ground was still unstable. She stated that the deceased wanted to give his property to Léon Kim Koon as he had no family. She stated that he had been concerned that his family should getnothing from him as when he was sick no one from his family had visited him. She added that none of his family came to his funeral.

[12] She stated that she knew where his land was as she had often driven him home. She also stated that the deceased had wanted to marry her but when she told him she had a partner in Léon Kim Koon he told her he would give his land to him instead as they had been friends for some time. She explained that despite the Will mentioning that a book would be kept recording payments from Léon Kim Koon to the deceased, this had not been done as there was no necessity for the money to be paid and entered in the book. She stated that it was sufficient that her partner had the money and would pay for the funeral. She agreed that she did not know the extent of the deceased's land and as Executrix had not ascertained that fact.

The Issues

[13] At the start of the trial both parties agreed that the issue to be decided by the Court was whether the document written and signed by the deceased on 6th October 2003 constituted a holograph Will and if so was it valid, in effect whether there was a valid Will.

Discussion

[14] The word "holograph" is derived from two Greek words meaning "whole"(*holós*)and "to write" (*graphos*). Hence Article 970 of the Civil Code provides:

> "a holograph will shall only be valid ifit is wholly written, dated, and signed by the hand of the testator; it shall be subject to no other form"

[15] It is important at this stage to set out the contents of the Will as contained in the document produced before the Court. It states:

> "In the name of the Holy Father, Son and Holy Ghost. Herewithmy Will. In full mental health and healthy individual. I bequeath my house and all its contents and freehold to Mr. Léon KimKoon on the day of my death. He will take possession of my belongings; he will start paying me the sum of Rs. 1500 monthly. Abook will be kept, same endorsed by the solicitor Mr. Kieran Shah- when the land deeds will have been settled and my share of 3.45 hectares of land divided and beacon marked by qualified surveyors- He will also inherit my share of the land- when the case willhave been settled in court and valid certificate of Inheritance

secured; a secondsupplementary Will - will be made, Mr. Kim Koon will start paying me sum of Rs. 3000 monthly until my death-If I die before eight years have elapsed it will be his responsibility for the cost of my funeral and building my gravestone two and a half years later."

Signed by Mr. Serge Hoareau

Signed by Mr. Kim Koo (sic)

Endorsed by solicitor and stamp date.

* All the other relevant and unsettled details will be included in the second Will + signed

[16] There is a signature entered next to where it is written "signed by Mr. Serge Hoareau" and a different one where it is stated "signed by Mr. Kim Koo" on the document. The Will was presented to Court on 26th August 2010 by Léon Kim Koon in the presence of his Counsel Mr. Kieran Shah. The learned judge, Mohan Burhan, marked the envelope and the Will "Ne Varietur" and directed that it be registered. This was duly done and transcribed by the Registrar General on 30th September 2010 in Registration Volume 1755 No. 3182.

[17] Mrs. Tirant-Ghérardi for the Plaintiffs has made several submissions in relation to the validity of the Will. She has submitted firstly that it is incumbent on the party claiming the Will to be valid to prove its validity.

[18] French*jurisprudence constante*is to the effect that where a testator dies without issue and any reserved heir (*héritierréservataire),* the universal legatee having been seized of the property by virtue of Articles 1006 - 1008 of the French Code Civil is therefore in its possession.

[19] Article 1006 of the French Civil Code provides:

"Lorsqu'audécès du testateuriln'y aura pas d'héritiersauxquelsune quotité de sesbienssoitréservéepar la loi, le légataireuniversel sera saisi de pleindroit par la mort du testateur, sans êtretenu de demander la délivrance."

Article 1008 of the French Civil Code provides

> "Dans le cas de l'article1006, si le testament estolographeou mystique, le légataireuniversel sera tenu de se faire envoyer en possession, par uneordonnance du président, mise au bas d'unerequête, à laquelle sera joint l'acte de dépôt."

[20] Since the universal legatee is therefore in possession of the property it is therefore not up to the possessor but rather up to the heir who wants to dispossess him to prove that the Will is not valid. See Henri Capitant, Alex Weill and Francois Terré, "Les GrandsArrêts de la Jurisprudence", 7eedition, P 1016 and (Req. 10 jan, 1877, D.P.77.1.159, S.77.1. 303; 21 avr.1902, D.P. 1.310,S. 1902.1.340; 29 mai1904,D.P.19041.311;28 fév. 928,D.P.1928.1.8.

[21] Mrs Tirant-Ghérardi has relied on the cases *of Didon v Gappy*(1947) SLR 1936-1955 148 and *De Speville and anor v Pillieron*(1939)SLR 1936-1955 52, for authority that the French jurisprudence doesnot apply toSeychelles specifically because Articles 1006-1008 had been repealed and also because of the provisions of Articles 1322, 1323 and 1324 of the Civil Code of Seychelles which shifts the burden of proof on to the person claiming to benefit from a document under private signature.

[22] The case of*Barbier and anor v Barbier*(1966) SLR 236 confirmed this position. I am however not persuaded by these authorities given the fact that there is no distinction in Seychelles in *saisine*of the estate between heirs and legatees. Once the inheritance or legacy is transcribed or inscribedas the case may be and registered at the Registry of Land in the prescribed form and an Executor appointed if required, the beneficiary of the Will has *saisine*of the property albeit through an Executor in some circumstances.The position that obtains in Seychelles is similar to a regime operating through Articles 1006-1008 of the French Civil Code.

[23] In this case the Will was presented to the Court and all formalities completed at the Registry of Land. An Executrix was appointed. This suffices to give *saisine* to the legatee and it is my view therefore that the onus of proving the authenticity of the Will lies with the Plaintiffs.

[24] In any case even if this is incorrect it was not contested that the Will was made by the *de cujus*. Indeed, if I understand the case for the Plaintiffs it is rather that the Will has a number of deficiencies going to form and substance (see paragraph 5 above).

[25] Mrs. Tirant-Ghérardi for the Plaintiffs has submitted that the Will is in the form of a letterMr. Shah for the Defendant has cited from Jurisprudence Genéral, Code Civil on article 970, note 22 as follows:

> "Une letter missive écrite, datée et signee par celui qui l'afaitepeutêtreconsidéréecomme testament olographe."

As is evident from the second limb of Article 970 supra, no specific form is prescribed for a holograph Will. It could be written on stone tablets in bullet points and still be valid. This submission therefore fails.

[26] Mrs. Tirant-Ghérardi has also submitted that the wording of the Will sets out conditions precedent indicating a prospective contractual and business relationship and not a Will. Mr. Shah has countered this argument by submitting that the Will contains a clear and unequivocal bequest to Léon Kim Koon. I tend to agree with Mr. Shah for the Defendant in that a fair reading of the Will lends more to the view that this was a layman not versed in the more sophisticated wording of an authentic Will making provisions for his friend who had evidently promised to look after his burial. In any case the evidence of Francoise Savy who witnessed the making of the Will was unchallenged.

[27] I am also unable to agree with the Plaintiffs that the property bequeathed cannot be verified. It is common in Seychelles for people to have shares in undivided property. It is clear to me that the deceased was indicating that he wanted his share of the property whenever it was partitioned to be given to Léon Kim Koon.

[28] The Plaintiffs are even on weaker ground in their averment that since the Will has been signed by both the testator and the beneficiary, the indication therefore is that it was not a Will. In the case of an authentic Will, a beneficiary cannot witness the Will being drawn up (see Article 975 of the Civil Code). There is no such condition as far as a holograph Will is concerned. Hence a holograph Will can contain several signatures as long as that

of the testator is clearly indicated. This is supported by the authority of Jurisprudence Genéral, Code Civil on article 970, note 22 which states:

> "Le simple fait de la presence sur un testament d'ailleursrégulier de signatures ne saurait par lui-même le vicier de nullité."

[29] Of the issue as to why the beneficiary of the Will did not complete the construction of the tombstone within two and half years of the death of the testator as had been promised, I am inclined to believe the explanation of the Executrix. I do not in any case see any evidence to conclude that the legacy should be revoked on grounds of non-fulfilment of charges imposed on the legatee.

[30] Similarly, although much is made of payments set out in the Will and not honoured by the beneficiary, its significance is not pursued by the Plaintiffs in terms of invalidating the Will. The Executrix explained that the money specified was to be accumulated to pay for the funeral costs of the deceased. She went on to state that since the beneficiary had enough money for this undertaking, there was no need to make this monthly payment or to have it recorded in a ledger.

[31] It must be noted that some legacies are *sub modo.*This is in circumstances where

> "…the legatee who takes this legacy must take it either subject to the burden of performing some act or making payment indicated by the testator.(F. H. Lawson, A.E. Anton and L. Neville Brown in Amos and Walton's "Introduction to French Law" (3rd ed) OUP, 1966, 327-328).

This however does not invalidate the Will but rather the court will consider if the acts or payments might not be discharged without invalidating the Will. In any case as has been submitted by Mr. Shah since the testator has himself impliedly waived its application, the non-discharge of the payment cannot in any way invalidate the Will.

[32] The court has itself raised the issue of whether the document grants a sale on a *renteviagère.* I am grateful to both Counsel for their submission on this issue. I am persuaded that the document does not amount to such an agreement mainly since as

pointed out by both Counsel it would have run afoul the provisions of the Land Registration Act.

Decision

[33] I am of the view that the Will is valid and its provisions are clear and unambiguous. I find on the evidence that the testator willed his property to his friend Léon Kim Koon on certain conditions, namely that the latter would provide for his funeral and erecthis tombstone.

[34] In the circumstances and for the reasons set out extensively above I have no hesitation in dismissing this action with costs.

Signed, dated and delivered at Ile du Port on 12th February 2016.

M. TWOMEY
Chief Justice