

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 60/2016

[2018] SCSC 204

**BILLY MUSSARD
MARISA BERTHE MUSSARD
BRENA MARIE MUSSARD
MAY ELIE MUSSARD
EDME MARVELINE RITA MUSSARD
JUDITH CLIVYDE PAOLA (nee MUSSARD)**

Plaintiff

versus

EDMA MARVELLE RITA MUSSARD

Defendant

Heard: 27th November 2017
Counsel: Mr. Bernard Georges for plaintiff
Mr. Guy Ferley for defendant
Delivered: 28 February 2018

JUDGMENT

Pillay, J

[1] The Plaintiff in this case seeks an order from the Court:

- (i) To revoke the appointment of the Defendant made by the Court on 8th of September 2003

(ii) to order the Defendant to render an account of her management of the estate of the two deceased

(iii) to award the Plaintiffs damages arising from the mismanagement of the estate of the two deceased.

[2] The Defendant admitted that she was appointed as executrix on 8th September 2003, to the estate of the two deceased, Edmond Bazil Mussard and Winnie Marie Mussard who both died intestate on 2nd February 2002 and 17th March 2002 respectively.

[3] The Defendant further admitted that the appointment was made on the consent of all nine heirs at the time and that the Plaintiffs are heirs of the two deceased.

[4] However the Defendant denied that she had mismanaged the estate as executrix. She averred that at all material times she acted lawfully and within the ambit of her powers as executor of the estate.

[5] The First Plaintiff, Billy Xavier Mussard, testified that the Defendant along with one Rit Marvelle Mussard, another sister, and got their share of the property and now the remaining property needs to be shared amongst the other heirs. He further testified that the Defendant had sold land to one Marston Ste-Ange and the Plaintiffs wanted an account of the sale.

[6] When questioned further regarding the management of the estate by the Defendant he stated that he had never got any account of the management of the estate from her. He also added that he had never received any list and inventory of the assets of the estate from the executrix.

[7] I take note of the evidence of the Plaintiff in cross examination at pages 17, 18 and 19 of the proceedings of 14th July 2017. The Plaintiff accepted that the plot that the Defendant had subdivided and taken for herself and the other sister Rit was in accordance with the deceased wishes.

[8] At page 18 this was the exchange:

“Q: So if I understand you correctly, if you are to abide by the wishes of your mother which you are saying to the Court you are willing at that time, the person that were to benefit from that property as per the wish of your mother, I am talking about the wish of your mother, would have been you, Danny, Clivy, Eddy and the twin?”

A: You are right. Initially they did not want a share but because of the way Rit has been acting as executrix now they want to come in and claim their share.”

[9] In answer to the above I note the evidence of the Defendant herself in cross-examination. At page 21 of the proceedings of 14th July 2017 she stated thus:

“Q: Why are you saying is that because you have finished paying the land, you are not going to distribute what is left in the estate to the other heir, is that what you are saying to us?”

A: I will give it to them on conditions.

Q: What conditions?

A: Because I was the one who finished payment on the land and they will see what to do.”

[10] At page 22 it went on as follows:

“Q: We do have the papers for LD10 situated at La Passe. And it is already in evidence who the heirs are; you have conceded these are your siblings and they are of course heirs to the estate of their parents. So you have a duty to give them what is left in the estate, will you do that?”

A: Yes

Q: When?

A: When I am ready.”

- [11] It may be so that the Defendant has not sold any land to anyone, which was the Plaintiffs' concern. However that in itself shows her failure to discharge her duty, in not providing an account of what she had done with the property, it leaves a lot of room for misunderstandings and misinformation.
- [12] Furthermore her answers showed a clear lack of understanding of the importance of the functions she discharges and an attitude of bitterness against her siblings for what is according to her their failure to help pay the debts of the estate. Her willingness to continue to act as executor, to my mind, is overshadowed by the negative approach she has taken in the discharge of her functions.
- [13] As the executor the Defendant is bound by the same duties as a fiduciary by virtue of Article 1028 which reads thus:
- “The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, in so far as they may be applicable.”
- [14] As such the Defendant is bound by Article 827 of the Civil Code of Seychelles provides that a “fiduciary is under a duty to render full and regular account of his management until such time as his functions are terminated.”
- [15] As such she is also subject to Article 829 which gives the Court wide powers to make orders relating to the appointment or dismissal of a fiduciary or to his management as it thinks fit. Such powers of course has to be exercised judiciously.
- [16] I find the following lines from the judgment of Twomey JA, in the case of **Suttie v David SCA 25/2015**, is of relevance, “it was also her duty to wind up the succession and to distribute it to the lawful heirs, which in this case are the siblings of the Deceased only. Should she fail to carry out these duties the Appellants or any person with an interest in the succession may then ask for her to account for her refusal to do so or to have her removed by the Court.” Twomey JA, went on to add that “an appointment and replacement of an executor is reviewable by the court. Until and unless the Respondent

acts in breach of her duties and obligations as an executor there is no valid reason why her appointment has to be revoked.”

[17] By her failure to wind up the succession after 13 years simply on the basis that she’ll do it when she is ready, which to my mind amounts to a refusal to distribute the remainder of the succession, the Defendant has left herself open to a valid request for removal as executor.

[18] After closing his case counsel for the Defendant raised a plea in limine that the action is prescribed in law, relying on the case of **Neddy Nourrice and Ors v Flora Nicette CS57/2015**, in that case the key was the date that succession opened, since the issue was when did the rights of the heirs accrue, which was of course upon the death of the deceased and that date of death fell “squarely within the prescriptive period”. It is clear that the scenario in the present case is quite different. The Plaintiffs are not so much claiming their rights to inherit as holding the Defendant to account with regards to her duties as an executor. Counsel confuses the issues when he submits that “the defendant, with the consent of the plaintiffs, has since 2004 subdivided the land (exhibit P13). They, only now some 13 years, later runs to the court to complain about the sub-division.”

[19] It is clear from the First Plaintiff’s evidence that the Plaintiffs have no issues with the sub-division. In fact all the siblings agreed to it because the two sisters, Rit and Rita did not have their own homes. The Plaintiffs’ concern is the remaining portion of land left over from the sub-division, LD1798 measuring 1478 square meters, which the Defendant is yet to distribute and which she is bound to distribute in accordance with Article 1025 of the Civil Code.

[20] I have to agree with Miss Louise for the Plaintiffs that the functions and powers attached to executors are of a continuous nature hence an executor is liable to answer for his management until such time that he is no longer the executor. Only when he ceases to exercise such functions can prescription run.

[21] In the circumstances the plea in limine has to fail.

[22] As regards the claim for damages there is no substantiation of this claim for which I give no consideration to the claim.

[23] In consideration of all the above circumstances I order as follows:

- (i) The order dated 8th September 2003 in CS 143/2003, whereby the Defendant was appointed as executrix is hereby revoked.
- (ii) The Defendant shall render an account of her management of the estate of the two deceased within 3 months of today's date.
- (iii) I award no damages to the Plaintiff.

[24] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on 28 February 2018

L. Pillay, J
Judge of the Supreme Court