IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS66/2017

[2018] SCSC 671

SHIRIN MANCHAM
Plaintiff

versus

KATHERINE MANCHAM
Defendant

Heard: 24 May 2018

Counsel: Mr. Frank Elizabeth for plaintiff

Mr. Basil Hoareau for defendant

Delivered: 12 July 2018

JUDGMENT

Vidot J

The Plaintiff's Cause of Action

[1] The Plaintiff, Shirin Mancham is the niece of the late Anne Marie Isabelle Rose Mancham (hereafter "the Deceased") who died testate in Seychelles on 06th February 2017. She alleges that the Deceased *"purportedly"* made an authentic Will before Mr. Daniel Belle, Notary Public.She prays to Court to declare the Deceased's Will invalid, null and void and also seeks the following Orders;

(i) That the Defendant returns to the estate the sum of SR500,000/- bequeathed to her in the Will;

(ii) Cancel the appointment of the Defendant as testamentary executrix of the estate of the Deceased;

(iii) Order the appointment of the Plaintiff as executrix of the estate of the Deceased; and

(iv) Such other orders as the Court may deem fit.

[2] The Will is being challenged on the ground that it *"is contrary to law"* in that the deceased marked the Will with her thumb print and the Notary executing the Will failed to *"vouch that the mark is well and truly that of the testator."* It is further alleged that when the Will was prepared, the witnesses were not present, nor were they present when the deceased marked it with her thumb print and furthermore, the deceased did not mark the Will in the presence of the Notary, as required by law. It is also alleged that the notary failed to identify the nature of physical disability that prevented the deceased from signing. It is also averred that it was the Defendant who organized for the preparation of the Will and took it to the Notary after the deceased had allegedly marked it and that this did not conform with the provisions of law and therefore the Will is null and void.

The Case for the Plaintiff

[3] The Plaintiff was the sole person to testify on her behalf. She basically confirmed the averments in her Plaint. She produced and exhibited the last Will and Testament of Anne Marie Isabelle Rose Mancham (Exhibit P1), dated 14th January 2017. There is a thumb print mark on the Will and signature of 2 witnesses, namely; Rita Edwina Azemia and Margarita Despues. They were the caregivers of the deceased. The Notary signing the Will, Mr. D. Belle has also placed his seal of office thereon.

[4] The Plaintiff maintains that the Will did not conform to law as averred in the Plaint. She further testified that at the time that the Will was executed, the deceased was not of sound mind as she was suffering from cancer and was on morphine.

The Defence

[5] The Defence essentially denies the Plaint and maintained that the Will conformed to and was executed in pursuance with the law. It is averred that the Will was marked and subscribed to by the deceased and witnesses, in the presence of the Notary. The Defence further avers that the deceased was of sound mind at the time of making and marking the Will and that the notary read over and explained the Will to the testator prior to the signing of the same. It prays for dismissal of the Plaint with cost.

The Case for the Defendant

[6] The Defendant testified before Court and called Mr. Daniel Belle, the notary who prepared the Will to depone on her behalf. In essence, the Defendant refutes allegations that she influenced the deceased as to the manner that bequeaths of her estate should be made. She acknowledged advising the deceased to make a new Will as she was aware that in her previous Will drawn up before Mr. G. Maurel, notary, she had left her entire estate to the Defendant's husband. The latter was the brother of the deceased but he had predeceased her. Therefore, she believed that in the circumstances, that Will (Exhibit D1) was no longer valid. She maintained and confirmed by Mr. Belle that she was not present at the signing of the Will and refutes all allegations that she was the one who had taken the Will to the notary for signing only after the deceased had marked the same.

Further Findings on the Facts

[7] After careful consideration and analysis of evidence adduced, I find the following established;

a. The deceased was lucid and suffered no emotional or mental disability when giving instructions for and executing the Will;

b. The deceased identified the persons to witness the execution of her Will;

c. The deceased suffered a physical disability that affected her ability to sign;

d. The deceased marked her thumb print on the Will;

e. The contents of the Will was read over to her before execution;

f. The bequeaths and administration of her estate, as appeared in the Will represented fully the instructions and desires of the deceased

Objections to Pleadings

[8] In his submission Counsel for the Defendant strenuously objected to the pleadings by the Plaintiff and in particular that averments were not concise in order to permit the Defendant to fully appreciate the cause of action. While cross-examining the Defendant and Mr. Belle, Counsel for the Plaintiff challenged the Will in that it was lacking in form and in particular that requirements of Articles 971, 973 and 976 of the Seychelles Civil Code ("the Code") were not complied with in the preparation and execution of the Will.

[9] Counsel for the Defendant submitted and objected to the Plaintiff raising such matters on the grounds that they have not been pleaded. Counsel relied on Section 71 of the Seychelles Code Civil Procedure (SCCP) which requires inter alia that pleadings be a concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.

Counsel further relied on **Gallante v Hoareau [1988] SLR 122**, wherein it was held that *"a plaint ought to contain a plain and concise statement of the facts and circumstances constituting the cause of action"* and *'that the purpose of pleadings was to give a defendant a fair notice of the case which had to be met."*

[10] Counsel for the Plaintiff responded that the issues raised pertaining to form of the Will are covered by paragraph 3 of the Plaint which reads as follows;

"The Plaintiff avers that the Will is contrary to law in that it was marked by the thumb print of the deceased but the notary did not vouch that the mark is well and truly that of testator"

[11] Counsel for the Plaintiff submitted that the Plaint (paragraph 3) averred that the Will was "*contrary to law*". He further referred to paragraph 5 whereby it is stated that the Will was not executed in a manner *"required by law*". He too referred to **Gallante v Hoareau** (supra) wherein it is stated that *"the function of pleadings is to give fair notice of the case*

which has to be met and to define the issues on which Court will have to adjudicate in order to determine the matters in dispute between the parties."

[12] In his additional submission in writing, Counsel for the Plaintiff argued that court in England have taken a liberal approach to *"technical errors"* made by a party which does not cause real prejudice to the other party. He cited **Hannigan v Hannigan [2000] 2 E.C.R 650 CA**, wherein it was stated that "*it was disproportionate and unjust to strike out a claim made on the wrong form when the defendant had been given all information required to understand what the claimant was seeking"*

[13] Rules of procedure like any rules of court have to be observed. Section 71 of the SCCP has to be adhered to. If courts are to allow procedural irregularities to continue, the rule of law will be hurt. It is important that courts do not permit prosecution by ambush. However, though I find that the Plaint was somewhat lacking in that some of averments were not concise, in most part the cause of action was sufficiently clear, save that I find no averments that sufficiently support the contention alleging that Article 976 was not followed. That section deals with sealing of secret wills. The Plaintiff has challenged the fact that the Will in issue had been sealed. Counsel argued that only secret wills should be sealed. I don't subscribe to that argument. That section provides specifically for the sealing of secret will but does not preclude notaries from sealing other forms of wills. That issue that shall be discussed no further herein. I further note that the Defendant managed to file a defence without making a Request for Further and Better Particulars. This leads me to believe that on the whole the cause of action was understood. Therefore, this case will not be dismissed on grounds of inadequacy of the pleading of the Plaint.

Admissibility of Unchallenged Evidence

[14] One of the Plaintiff's bone of contention was that the will was lacking in form and formality; in particular that Mr. Belle failed to observe certain legal requirements in ensuring that the Will was prepared and executed in conformity with the law. Two of the most pertinent failures raised by Counsel for the Plaintiff are that there were no witnesses present when the deceased marked her thumb print on the Will and that the Will was not marked in the presence of the notary. Counsel for the Defendant argued that since

Counsel for the Plaintiff did not challenge the Mr. Belle on these averments in cross-examination, it is therefore admitted that there were witnesses present when the will was executed and that the will was signed in the presence of the notary

[15] Counsel for the Defendant referred to Adrian Keane's "Modern Law of Evidence" 4th Edition (p153) where it is stated that a *"party who fails to examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence in chief or impeach his credit by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witnesses' evidence on that matter. A cross-examiner who wishes to suggest to the jury that the witness is not speaking the truth on a particular matter must lay a proper foundation by putting that matter to the witness so that he has an opportunity of giving any explanation which is open to him."*

[16] Counsel for the Plaintiff admitted that he had failed to cross-examine Mr. Belle on these issues and therefore they are deemed admitted.

Wills

[17] The law, as provided for under Article 969 of the Civil Code of Seychelles ("the Code") recognizes 3 forms of Will, namely; holograph, authentic and secret will. This case is concerned with an authentic Will.

Authentic Will

(i) Vouching the authenticity of Testator thumb Print Mark

[18] Article 971 of the Civil Code of Seychelles (hereafter "the Code") provides as follows;

> *1. An authentic will shall be received by a single notary. However, if the testator is unable, either from ignorance or physical incapacity to sign his or her name, the presence of a second notary or of two witnesses able to sign their names shall be necessary both for the reading and for the signing of the will.*

2. *The testator shall be bound to make his mark on the will and the notary and witnesses or of the 2 notaries, as the case may be, shall vouch that the mark is well and truly the mark of the testator affixed in the presence. If the testator is unable to make a mark the aforementioned notary and witnesses or two notaries shall vouch for that physical incapacity."*

[19] Article 973 provides thus;

"This will shall be signed by the testator in the presence of the notaries or of the witnesses and the notary if the testator declares that he cannot or does not know how to sign, the declaration shall be expressly mentioned in the will as well as the cause which prevented from signing."

[20] Counsel for the Plaintiff submitted that there were 2 failures on the part of the notary in the preparation and execution of the Will that renders it invalid and should therefore be declared null and void. These are that the notary failed to state in writing that he has vouched that "*the mark is well and truly the mark* [underline mine] *of the testator"* and that the notary failed to state the exact nature of the disability. The issues to be considered therefore are whether words "*well and truly"* have to be written down in the Will and whether there is need to identify what the disability specifically is.

[21] In the Will the following is recorded; *"this Will has been read back to the said Anne Marie, Isabelle, Rose Mancham and she has, with her left thumb printed in my presence ..... We, the undersigned, do hereby attest that Ms. Anne Marie Mancham who is known to us suffers a physical disability whereby she is unable to sign....."*

[22] Article 971(2) provides that the notary "*shall vouch that the mark is well and truly the mark of the testator"* Does the notary have to use these exact wordings or anything that gives intent to requirement suffice? I disagree with Counsel for the Plaintiff that the words "*well and truly*" have to be absolutely included in the declaration. Words that would give effect to the fact that acknowledge or vouch that the marking is indeed that of the testator would in this Court's opinion suffice.

[23] In fact as submitted by Counsel for the Defendant, the Code does not provide a prescribed form as to how Wills should be drafted, unlike a transfer document under the Land Registration Act. Article 1156 of the Code provides that in *"the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words ....."* When interpreting a Will, I believe that as much as possible the intention of the testator must be observed and honoured. I find that it will be wrong, unfair and unjust to defeat the testator's wishes by declaring the Will null and void just because the notary, in the absence of a prescribed form, did not use specific words or terminologies.

(ii) **Inability to Sign Due to Infirmity**

[24] The Deceased did not sign the Will. She marked it with her left thumb print. In the Will it is stated that the deceased who is the known to the notary and witnesses *"suffers a physical disability whereby she is unable to sign"*. Counsel for the Plaintiff insists that the notary should have identified the specific nature of the disability. Counsel refers to Article 973 of the Code which provides that *"the Will shall be signed by the testator in the presence of the notaries or of the witnesses and the notary; if the testator declares that he cannot or does not know how to sign, the declaration shall be expressly mentioned in the Will as well as the cause which prevented him from signing."*

[25] Dalloz Code Civil (1990 – 1991) refers to Article 973 of the French Code provides;

"Ce testament doit être signé par le testateur en presence des témoins et du notaire; si le testateur declare qu'il ne sait ou ne peut signer, il sera fait dans l'acte mention expresse de sa declaration, ansi de la cause qui l'empêche de signer."

1. Empêchement du testateur de signer et l'indication de la cause de cet empêchement .....(infirmité non precise explicitement par le testateur, mais apparent –et connu de son entourage, notamment des témoins)...."

.....

3. Si le testateur lettré ne peut signer, c'est de lui seul qui doit émaner la declaration de cette impossibilité, avec indication de sa cause....."

[26] Counsel for the Defendant in supporting his submission that the notary conformed with Article 973, cited the following from Juris Classeur (967 – 1100);

82. "Déclaration de l'impossibilité. Cette declaration doit émaner du testateur lui-même, elle ne pourrait être faite en son nom par une autre persone quelle qu'elle soit, pas plus témoin que notaire....."

83. "La declaration n'a pas de forme sacramentelle. Elle resulte suffisamment de toute énociation du testateur affirmant l'impossibilité dans laquelle il se trouve de signer."

86. "Mention par le notaire de la declaration d'imposibilité et de la cause de l'impossibilité - le testateur ayant déclaré ne savoir ou ne pouvoir signer; le notaire doit mentioner cette declaration ansi que la cause qui empêche le testateur de signer; en revanche, l'article 973 n'exige pas que le testateur declare lui-même la cause qui l'empêche de signer...;Il lui suffit de declarer ne pouvoir ou ne savoir signer; c'est ensuite au notaire de s'assurer de la cause de cette impossibilitê.

[27] It is clear from the above that the mention pertaining to the testator's inability to sign should preferably emanate from the testator and from no other person.This suggest that words to the effect that *"the testator declares (or has declared) that she is unable to sign due to physical inability"* would have in the circumstances been appropriate. That would have satisfied requirement that *"la declaration d'imposibilité et de la cause de l'impossibilité"* is made by the testator. So was the absence of a declaration in that suggested form fatal to the point that would render the Will null and void, especially since there was allusion to the fact that the deceased had signed a previous Will (Exhibit D1), though from the signature it is clear that the testator of that Will had difficulty in signing?

[28] From evidence adduced it is clear that there is no dispute that the deceased suffered physical disability in that one arm was not functioning whilst the other had very limited movement, which explains why the signature on Exhibit D1 was hardly legible. The Plaintiff does not deny this disability. I am of the opinion that in such circumstances the mention of a physical disability as was done in the Will was sufficient. A full description of the physical disability would on the other hand have been necessary had it been that it was unknown that the testator was suffering from a physical disability and the same was recorded in a Will. A full description would have been necessary in such circumstance as a safeguard against fraud.

[29] Mr. Belle testified that the deceased was known to him and he had known of her physical disability and had queried about whether she was capable of signing and having been informed of the inability to sign he had recommended that witnesses are identified. The witnesses were named by the deceased. The notary came to the deceased's home with an ink pad to ensure that the marking could be done in the presence of the notary and the witnesses. It was in the circumstances prudent and sound that the notary sought confirmation that the testator suffered a physical disability, as that the law states that "*cette declaration doit émaner du testateur lui-même*". From a reading of the Will, it appears that the notary and witnesses made a declaration as did the deceased. In fact it is stated in the Will that "*she declared that she assented thereto by appending her left thumb print...*" . My reading of this statement was that she was declaring to her disability and to accuracy of the contents of the Will as drawn up. I do believe that more precise wordings could have been used but I don't believe that there the manner of drafting was so fatal that it did not give effect to the requirements of Article 973 of the Code. I am satisfied that the deceased made a declaration regarding her disability. Had she disagreed with such statement she would not have executed the Will. I further note that I don't find any evidence of coercion, pressure or undue influence exercised on the deceased at preparation and execution of the Will.

[30] As has been mentioned above that impossibility and the cause of that impossibility does not have to take any specific form. Juris Classeur Civil (967 – 1100) at paragraph 88 states that "*cette mention n'ayant pas de forme sacrementelle doit être redigée de*

manière a ne laisser subsister aucun doute sur le fait de la declaration par le testateur lui meme" Unless there is a declaration sufficiently close to what has been suggested above then the Will will be declared null and void, but Juris Classeur goes on to state at paragraph 94 *"de ces différentes decisions il résulte surtout que les juges ont pouvoir souverain pour apprecier si les declarations et mentions respondent bien au voeu de la loi.*

[31] Having considered the Will, I have in interpreting the declarations also considered whether after thorough evaluation of evidence adduced whether the wishes of the deceased have been met. As already stated it will be unjust and unfair to defeat the wishes of the deceased in the disposition of her estate simply on declaration that the notary drawing up a Will does not use certain specific terms, especially when the law does not provide for a prescribed form . As long as there is compliance with pertinent legal relevant provisions, as in this case, the Court then assesses whether that is sufficient in order to administer justice.

Conclusion

[32] Apart from making viva voce submissions, Counsel for the Plaintiff filed additional written submission. I have considered the same as far as it addresses issues already addressed when viva voce submissions were made. The submission however also deals with new issues which I find difficult to consider herein as Counsel for the Defendant would not have had the opportunity to respond to. Nonetheless, I thank both Counsels for their well-researched submissions.

[2] Finally, I declare the Will valid and dismiss the Plaint with cost.

Signed, dated and delivered at Ile du Port on 12 July 2018

M. Vidot
Judge of the Supreme Court