

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: XP 181/2017

[2018] SCSC 1071

In the matter of

EX PARTE: ANNE MARIE KATHLEEN MARGARET BUTLER

Applicant

Counsel: Ms. K. Dick (for Mr. B. Georges) for Petitioner

Delivered: 15th November, 2018

ORDER

E. Carolus, J

- [1] The Applicant has made an application under Article 1026 of the Civil Code of Seychelles Act (Cap 33) seeking to be appointed as Executrix to the succession of her late husband, Sydney, Leon, Bryan Butler who died in India on 12th July, 2016 (hereinafter referred to as the Deceased).
- [2] The matter came up for the first time on 15th November, 2017, and the Court made an Order for the two children of the Deceased namely Sebrina Butler and Simon Butler to be served out of the jurisdiction with notice of the proceedings. On the next mention date, 28th February, 2018, Mr. Bryan Julie appeared on behalf of both Sebrina Butler and Simon Butler and stated that he had prepared a notice of motion for them to be granted leave to intervene in the proceedings but that he was still awaiting registration of the power of attorney of the person appointed to represent them in order to be able to file the motion.

- [3] On 21st March, 2018, Mr. Julie filed an answer to the Petition although no motion to intervene in the proceedings had been made. Ms Dick requested for time to amend the Petition to add one more heir of the Deceased who had been declared as his daughter. The amended Application was filed on 14th May 2018. Mr. Julie filed an amended Answer to the Application on 13th June, 2018, which essentially opposed the Appointment of the Applicant as sole Executrix but instead sought the appointment of the Applicant and Sebrina Butler and Simon Butler as joint executors or in the alternative of Sebrina Butler and Simon Butler as executors of the succession of the Deceased. The matter was set for hearing on 2nd August, 2018, with the agreement of Counsels for both Parties.
- [4] By letter dated 31st July, 2018, addressed to the Registrar of the Supreme Court, and received by the Supreme Court Registry on the same date, Mr. Julie informed her that his clients who both reside in the United Kingdom had planned to travel to Seychelles for the hearing of the matter fixed for 2nd August, 2018, but that due to work and family commitments they were unable to be in Seychelles on that date. Mr. Julie therefore prayed for a postponement of the hearing to the 3rd week of September or beginning of October 2018. On 2nd August, 2018, Mr. Julie made an Application to that effect to the Court which was vehemently objected to by Counsel for the Applicant on the basis that insufficient notice had been given for a postponement and that the witnesses for the Applicant were all present, two of them having travelled from La Digue. She further stated that the Applicant had been awaiting conclusion of the matter before travelling for medical treatment. Mr. Julie further informed the Court that his clients had also appointed someone under a Power of Attorney to represent them in Court which was in the process of being registered and that in the circumstances a new hearing date need not be too far in the future. After discussion, the Parties agreed for the hearing date of the 2nd August to be vacated. New hearing dates were fixed for the 4th October, 2018 for the whole day and 23rd October, 2018 for half a day.
- [5] On 4th October hearing of the matter did not take off as I was out of the jurisdiction and the Parties had been notified of the same. The matter was called before Master B. Adeline who informed the Parties that hearing date of 4th October would be vacated but that the hearing date of 23rd October was maintained. Mr. Julie drew the Court's attention to a letter dated

2nd October, 2018, addressed to the Chief Justice and signed by one Gilbert Servina the relevant parts of which are reproduced below:

“Case: Anne Marie Butler V/S Sebrina Oli nee Butler – **CS No: 181/2017**

Dear Chief of (sic) Justice,

I Gilbert Servina am the Power of Attorney of Sebrina Oli nee Butler. I am currently in the UK for medical treatment and am set to return to Seychelles 1st December, 2018.

I understand that the case is set to be heard before Judge Carolus on Thursday 4th October 2018. We also understand that Judge Carolus will not be available. I humbly ask that the above case be mentioned at a later date.”

- [6] Mr. Julie requested that both hearing dates be vacated and new dates set for hearing of the matter. He further stated that Mr. Gilbert Servina would produce his medical certificate upon his return and that the power of attorney authorising Mr. Servina to act on behalf of his clients had been registered and would also be produced the next time the matter was called.
- [7] Counsel for the Applicant objected to vacating the hearing date of the 23rd October and stated that since hearing of the matter could not proceed on the 4th then the hearing date of the 23rd October should be maintained. She reiterated that the Applicant also had to undergo medical treatment which she has been delaying pending determination of this matter, and that to delay the matter further would be prejudicial to her. She also stated that the matter should continue on that date whether the Respondents are present or not as the matter had been filed since a year ago and should not be delayed further.
- [8] Master B. Adeline adjourned the matter maintaining the date of the 23rd October for hearing at 1:30 p.m.
- [9] On 23rd October at 1:30 p.m. I was informed by the Court Orderly that Mr. Julie was not present in Court. The matter was called at 1:45 at which time Mr. Julie had still not made an appearance. Counsel for the Applicant moved the Court to proceed with the matter on the basis that an adjournment of the hearing was being sought by Mr. Servina whom the

Court had no proof was authorised to represent the Respondents, no power of attorney having been produced to the Court. She stated that the Application was filed in 2017 and that it was not acceptable for a case of that nature to take so long. She also stated that the property forming part of the succession of the Deceased was being vandalised. She stated that the request for an adjournment was only a delaying tactic which if granted would cause prejudice to the Applicant who has been postponing her medical treatment so that she could be present for the hearing. In that respect she stated that the Applicant as well as her witnesses from La Digue were present and that the hearing should therefore proceed.

- [10] The Court, having taken into account the failure of Mr. Julie to appear on the date and at the time fixed for hearing of the matter in spite of being aware of the same, the fact that no power of attorney authorising Mr. Gilbert Servina to represent the Respondents in this matter had been produced to the Court and that further no medical certificate had been produced in support of his letter requesting an adjournment, and that therefore there were no reasonable grounds to postpone the hearing, proceeded to hear the matter in the absence of the Respondents and their Counsel in accordance with sections 133 and 65 of the Seychelles Code of Civil Procedure.
- [11] Mr. Julie appeared in Court at 1:50 after the Applicant had started testifying. The Court informed him of its decision to proceed with the hearing in view of his absence and for the reasons stated at paragraph 10 above. Mr. Julie enquired whether the Court had taken into account the letter of Mr. Gilbert Servina to which I responded in the affirmative and informed him of the reasons for my decision and that I was maintaining my decision to proceed ex-parte. Mr. Julie made no application to Court and left the Court room, and hearing of the matter continued.
- [12] The testimony of the Applicant is as follows: She works as a District Nursing Sister and lives at Beoliere, Mahe. She married Sydney, Leon, Bryan Butler on the 28th February, 1995, and he died intestate in India on 12th July, 2016, at the Miot Hospital, Chennai, India.
- [13] At the time of his death the Deceased owned immovable property namely land parcel Nos. B1230, B456, and B1534. Certificates of Official Search dated 10th May, 2017 show that

the Deceased is the proprietor of Parcels B456, and B1534 and one of the co-owners of Parcel B1230 of which he is the Fiduciary.

[14] The Deceased also held the following bank accounts with Seychelles International Mercantile Banking Corporation:

- (i) Seychelles Rupee Account Number 01005-024092-00-3;
- (ii) United States Dollar Account Number 32001-024092-00-3; and
- (iii) Pound Sterling Account Number 07001024092018.

[15] He is survived by:

- (i) The Applicant herself as his wife;
- (ii) his first born daughter Eveline, Beverly Samantha Woodcock, the Deceased having been declared as her father by Order of the Supreme Court date 6th February, 2018;
- (iii) Sebrina Butler, his daughter from his 1st marriage; and
- (iv) Simon Butler, his son from his 1st marriage.

[16] I note that Eveline, Beverly Samantha Woodcock has consented to the appointment of the Applicant as Executrix to the succession of the Deceased.

[17] The Applicant stated that she is entitled to a 50 % share of the succession of the Deceased and that the remaining 50 % share is to be shared equally among his children, and that she therefore has the biggest share in the property left behind by her husband.

[18] She testified that she has been in a relationship with the Deceased for 27 years although they have been married for 23 years. During their marriage they lived both in the United Kingdom and in Seychelles. Because the Applicant worked in England, the Deceased would spend a few months of the year in England with her and she would also come to Seychelles to spend time with him.

- [19] She testified that while the Deceased was alive, he and the Applicant were in contact with Samantha but not with Sebrina and Simon who have had no relationship with their father for the past 25 years up to just before his death and only contacted him when he was on his death bed. The Deceased's wife from his previous marriage who is also the mother of Sebrina and Simon had prevented him from seeing the two children when they were about 4 and 10 years respectively and even after they became adults his efforts to contact them were rebuffed. He was never invited to Sebrina's wedding, never knew of the existence of his grandchildren until just before his death and was never invited to any of their christenings, birthdays or First Holy Communions. The pictures of his grandchildren only arrived on the day he died and he never got to see them.
- [20] The Applicant testified that she accompanied her husband to India for his medical treatment and paid for his air fare, the cost of his treatment, all associated costs and expenses of the trip, and when he died, the cost of repatriating his body to Seychelles and funeral costs and expenses. The children made no contribution to the same.
- [21] The Applicant denied that the children had been to visit their father on many occasions since he left England as averred in the Reply to the Application. She stated that they never saw their father, they did not even know the house or the place where he lived or how he lived. They were not in his life. She stated and that when they came for the funeral they asked to see where he lived but since she was busy with the funeral arrangements she could not take them and by the time she realised it, they had left without even saying goodbye or leaving a forwarding address. She stated that they attended the funeral just like anyone else and did not contribute to it.
- [22] The Applicant testified that she and her husband did not have any relationship with his two children but that they loved them and found out from family and friends how they were doing. She also said that when the Applicant and the Deceased were in London they would sometimes see the children at parties or funerals and it would break her husband's heart because she could not talk to them.
- [23] The Applicant explained that although the Deceased used to work as auditor for a brewery, he never worked during the time that they were together and that she was the sole provider

for both of them. She had two jobs in England working as a full time nurse from Monday to Friday and doing another nursing job on Friday and Saturday nights. It was a joint decision that the Applicant would be the sole breadwinner as the Deceased had health problems and also had to check on his parents as well as the house which would have made working in England difficult. The Applicant produced as exhibit a letter from the SRC stating that the Deceased was never in employment and never paid any taxes in Seychelles.

- [24] The Applicant testified that her earnings were used for the upkeep of both of them, and to build their house in Seychelles, manage and maintain the estate and pay the workers. She also covered the costs of his airfares when he came to visit her in England and paid for their car in Seychelles.
- [25] The Applicant stated that they also started construction of a house on Parcel B1254, the bigger plot registered in the name of the Deceased. Construction was however not completed.
- [26] The Applicant stated that she and her husband were very close and consulted each other about everything including their finances and property and that consequently she was very familiar with and had good knowledge of the properties that he owned.
- [27] The Applicant testified that the Deceased's wish was for his property to be left to his wife and children. She stated that she had thought that matters relating to the property of her husband would be straightforward but that this did not prove to be the case and that she finds herself at a stand point two years after his death because of the delay being caused by the Deceased's children in the present Application. She further stated that other members of the family are also affected as the house in which he has a 1/8th share cannot be sold or rented until an Executor is appointed to the succession of the Deceased.
- [28] The Applicant stated that she knew what the duties of an Executor are, that is to make an inventory of the Deceased's assets, pay the debts of the succession if any, give an account of whatever she spends and is left over, and to distribute the property in accordance with the law. In that respect she stated that she has already done part of the Executor's work in that she has listed all her husband's assets including his bank accounts and is managing the

Deceased's estate. She stated that she does not see how the appointment of herself and the Deceased's children as joint executors will help in any way especially as they are living in England. She also stated that she applied to be appointed as sole Executor because she had anticipated that they would be difficult and object to everything that she proposed to do and consequently delay distribution of the estate. She further stated if they were appointed as joint Executors together with her they would make performance of her functions difficult as communicating with them is difficult, they never respond to emails on time, and as shown in the present case they and their representative have failed to appear in Court when required throughout this case.

- [29] She requested the Court to dispense with the consent of the two children of the Deceased, Sebrina and Simon Butler and to appoint her as the Executrix of the succession of Deceased. She stated that she does not have any children of her own and that she considers her husband's children as her own. As a result she will not take anything that is theirs and although Samantha was closer to them than Sebrina and Simon, she and her husband were always well intentioned towards them. She further stated that had she wanted to, she could have convinced her husband to sell the property which at some point he wanted to do, and they could have spent the money on themselves but that she did not do so. On the contrary they decided to keep the property for the children. She stated that she has no reason not to love these children and to deprive them of their share of their father's property which would be defrauding them and unlawful.
- [30] Finally the Applicant stated that she suffered from no impediment which would prevent her from acting as Executrix to the succession of the Deceased and confirmed that she was willing to be so appointed.
- [31] Mr. Frank Kenneth Worth of Anse Severe, La Digue, also testified at the hearing of the Application. He is the brother in law of the deceased having married his sister. He testified that he has known the Deceased since approximately 32 years ago and met the Applicant a few years after that. He stated that initially when he and his wife were living in the United States they travelled regularly to Seychelles and stayed with his wife's and the Deceased's parents and the Deceased who lived with them at the time. Seven years ago he and his wife

moved permanently to Seychelles to live on La Digue. Since moving to Seychelles he has been staying at the Deceased's home twice and sometimes three times a month when they would have dinner together and talk. He stated that he had a "really great relationship" with the Deceased and was in constant contact with him either in person or by phone when he was on La Digue, up to and even on the day he passed away.

- [32] Mr. Worth confirmed the Applicant's testimony in certain material respects. He stated that he met Sebrina and Simon when they were still children and they visited him and his wife in the United States with their father. He stated that they had had no contact with the Deceased for the past 25 years, that the Deceased talked to him about this and that it was painful to the Deceased. He further said that the only photographs that the Deceased had of the two children were the ones that he had of them as children. He also stated that none of the children shed a tear at their father's funeral.
- [33] He testified that he watched the Applicant and the Deceased build their house at Beoliere and that the Deceased made the bricks to build the house himself. He stated however that the Deceased never worked to create an income and that the Applicant paid for everything including a road on the property for some future development.
- [34] He testified that the Deceased's intention was for the Applicant to have the property with the house thereon and for the rest to be shared between his children and siblings but that he was not able to do that because he passed away before doing it. He also testified that the Deceased wanted the Applicant to be the Executrix of his estate because "she knew all the ins and outs of the property". On the other hand the two children have no knowledge of their father's property and have never been to the house where their father lived until the day of the funeral. According to Mr. Worth they asked the Applicant to show it to them but she told them that she would do it after the funeral and when they were invited to a "wake type reception" at the house on the day following the funeral they refused to attend.
- [35] I am satisfied on the uncontroverted testimony of the Applicant which has been confirmed in material respects by the testimony of Mr. Worth, that the Applicant is not only willing but also able to be appointed as Executrix to the succession of the Deceased and to carry out the duties of Executrix as laid down by law and more particularly under the Civil Code

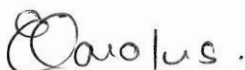
of Seychelles Act. She not only knows what those duties are but has already started carrying them out. Her testimony, which I believe, shows that she is also familiar with and has knowledge of the Deceased's properties and their functioning and management which will be invaluable in carrying out the duties of Executrix. I am also satisfied that she is not subject to any legal incapacity to be so appointed.

[36] On the other hand there is no evidence before this Court tending to show that the children of the Deceased more particularly Sebrina and Simon Butler have any knowledge of the properties forming part of their father's succession, not having had a relationship with him for much of their lives. I note moreover that they live in the United Kingdom and the properties are in Seychelles and I find that it would be more practical and convenient for the Applicant to carry out Executor's duties in respect of such properties. In that respect I take into account the difficulties that they have had in this case to appear in Court personally or by proxy.

[37] I also note that there appears to be a certain degree of bad feelings between the Applicant and the two children which in my view, would more probably than not hinder the performance of their duties if they were appointed as joint executors. Having had the benefit of hearing and observing the Applicant I am also of the view that she will not take any decisions which would be adverse to the interests of the children of the Deceased.

[38] In the circumstances I dispense with the consent of Sebrina Butler and Simon Butler to the appointment of the Applicant as Executrix to the succession of the Deceased and appoint the Applicant Anne, Marie, Kathleen, Margaret Butler as Executrix to the succession of the Deceased Sydney, Leon, Bryan Butler.

Signed, dated and delivered at Ile du Port on this 15th November, 2018.



E. Carolus
Judge of the Supreme Court