IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 256
CS 21/2018

BENTING CRISPIN — **1st Plaintiff**

NATHANIELLE CRISPIN — **2nd Plaintiffs**
(rep. by Serge Rouillon)

and

NOELLIN JEAN — **Defendant**

Neutral Citation:	*Benting Crispin and Another v Noellin Jean* (CS 21/2018) [2018] SCSC 256 (26th March 2019).
Before:	Vidot J
Summary:	Validity of Authentic Will and Acknowledgement of Child, section 15, 16 and 21 of Notaries Act and Article 971 and 973 of the Civil Code of Seychelles
Heard:	14 January 2019
Delivered:	26 March 2019

JUDGMENT

VIDOT J

Background

[1] The Plaintiffs who are brother and sister and the legitimate children of Jean Claude Spiro; deceased, sue the Defendant challenging a Will which they claim is null and void. The Will dated 05th March 2017, is that of Thomas Spiro ("the Deceased"). Pursuant to that Will the Deceased left and bequeathed his entire estate to the Defendant. At the time of his death the Deceased was the owner of land parcel V808, on which stood a house. The Defendant is also appointed executrix of the Deceased's estate.

[2] Thomas Spiro was the father of Jean Claude Spiro. The Defendant claims to be the child of the Deceased who by notarial deed (Acknowledgment of Child) acknowledged the Defendant as such. The deed (Exhibit D1) was executed before Mrs. A. Amesbury, Notary. The Deceased passed away on 11th April 2017 and was predeceased by this son Jean Claude Spiro who passed away on 15th March 1989.

[3] Despite the Acknowledgment of child document, on her birth certificate, the parents of the Defendant are recorded as Paulin Roucou and Vigilia Roucou (born Julie).

[4] Following the death of the Deceased, the Plaintiffs filed an Affidavit of Transmission by Death, claiming that they are sole heirs of Jean Claude Spiro and the Deceased. That was filed on 15th May 2015. The following day, the 16th May 2015, the Defendant filed of another Affidavit of Transmission by Death. The Registrar of Land refused to register either Affidavits until the matter as to who are the legitimate heirs of the Deceased is resolved.

[5] It is alleged that the Will is also not valid because Thomas Spiro, at the time of executing the Will was in poor heal

[6] The Plaintiffs seek the following reliefs from Court;

(i) A declaration that the Will in favour of the Defendant is null and void in law and for disinheriting the child of the late Thomas Spiro;

(ii) An Order compelling the Registrar to register the Affidavit of Transmission of the Plaintiffs and to have land TitleV808 registered in their names; and

(iii) An order that the Defendant pays for the cost of the suit.

[7] The Defendant however denies the Plaintiff's claim. She claims that the Will was genuine and that it was drawn up not at the hospital, but at the Deceased home when he was lucid. Therefore, the Will is valid.

Plaintiffs Evidence

[8] Mr. Benting Crispin testified that he first met the Defendant at his father's funeral. She approached him and the 2nd Plaintiff and introduced herself as their father's sister. However, when he asked the Deceased about it, he denied that the Defendant was his daughter. Nonetheless, the Plaintiffs discussed the same at their lawyer's office with the Defendant and she was asked whether she had any document to attest to that fact, but she did not produce any. He does not agree that the Defendant should inherit any part of the Deceased's estate.

[9] Ms. Nathaniele Crispin also confirming that the Defendant approached them at her father's funeral and she introduced herself as their aunt. She stated that nonetheless their grandfather, the Deceased, never mentioned the Defendant to them. She mentioned that she would not want to share the estate of the Deceased with the Defendant.

The Defence evidence

[10] The Defendant was adamant that she is the daughter of the Deceased. From a young age her mother would get her sister to bring her to his place. She acknowledges that on her birth certificate her father's name is recorded as Paulin Roucou, but that is because her mother was still married to the latter when she was born. She looked after him and during his final years particularly due to his illness. The Plaintiffs were not present to help and she never saw them at the Deceased's residence. She would do shifts with other members of the family in providing care. She provided exchange of emails from her workplace whereby she made application to work through her lunch hours and leave early to attend to him. She testified that she knew Jean Clause Spiro and that he acknowledged her as his sister. She further acknowledged that she is aware of the existence of the Plaintiffs as children of Jean Claude Spiro.

[11] Mrs. Vigilia Roucou, mother of the Defendant was a witness for the defence. She testified that the Defendant is the daughter of the Deceased. She had already left her husband when she got pregnant by the Deceased but since she was still married she entered the name of

Paulin Roucou as the Defendant's father on her birth certificate. She says that the Defendant received maintenance from the Deceased and she visited him regularly

[12] Mrs May Malcouzane, sister of the Deceased also testified that she was made aware by his brother that the Defendant was his daughter and confirmed that the Defendant was always at his father's house. She added that when the Deceased was sick the Defendant spent a lot of time caring for him.

Objection to the Plaint

[13] Firstly, Counsel for the Defendant prayed that the Plaint be dismisses as it raises several causes of action, one of which is fraud, although fraud was not particularised. A plaint may raise different causes of action. Obviously one cannot raised contract and tort in the same plaint. However, this is not of such nature. The causes of action raised are permitted to be raised in one plaint. In any case, I believe that if the Defendant wanted to adopt such argument, it could have been raised in a plea in limine litis. As to the lack of evidence on matters pleaded, particularly expert or otherwise on the documents, particularly the deed of Acknowledgment of Child and the Will, these are matters that may be addressed by counsels since they are technical legal issues. Evidence from the witnesses would not have added anything to the technical legal matters.

[14] The Plaintiffs have not lead any evidence as to why the Will (Exhibit D3) should be declared null and void. However, they did mention that they do not agree with the Will and that the estate should have been left to them. Again as I have stated before, I take it that the question as to whether a Will is lawfully valid is a legal issue to be argued by Counsels. The other issue to be considered is the Acknowledgment of Child document. I shall deal with this first.

The Acknowledgement Of Child

[15] Counsel for the Plaintiff submitted that that deed falls foul of the requirements of sections 15, 16 and 21 of the Notaries Act and relied on **Diana Jean v Debora Banane SCA 19/2015** (delivered on 07th December 2017).

[16] Section 15 of the Notaries Act reads thus;

Subject to this Act –

(a) ……..

(b) the schedule shall have effect with regards to the manner of drawing up of deeds and the content of deeds drawn up by a notary.

Section 16 provides;

(1) A deed drawn up by a notary containing -

(a) ……

(b) ……

(c) ……

(d) An acknowledgement of a natural child

(e) ……..

Shall be drawn up in the presence of a second notary or shall , subject to this section otherwise comply with the schedule

\Section 21(2) read as follows;

A deed to which section 16(1) applies and which fails to comply with Section 16(1) and (2) is void.

[17] The Schedule referred to sets out the manner of drawing up and contents of deeds. This is set out in Clause 1(1) which provides that

"Subject to this Act and any other written law, every deed drawn up by a notary shall contain –

(a) The full name and address of the place of business of the notary drawing up the deed

(b) The full names, national identity number or the party is not a Seychellois or resident in Seychelles, the nationality and number, place and date of issue of the passport or other document of identity and the address of the place of residence of every party and witness to the deed

Clause 1(5) (b)(ii) of the Schedule prohibits the witnessing of a deed drawn up by a notary by a clerk or servant of the notary or a party to the deed.

[18] The deed of Acknowledgement of Child falls foul of most of the above referred sections of the Notaries Act. In particular the national identity number of the declarant and the witnesses are missing, the address and place of residence of the witnesses are missing and at least if one not both of the witnesses was a clerk or servant of the notary at the time of signing of the document. To my knowledge both were.

[19] The Plaintiffs argued that Acknowledgement of Child document cannot be accepted in view of Article 336 of the Civil Code of Seychelles ("the Code") which states that *"the recognition by the father without any reference to and an admission by the mother shall only have effect with regard to the father"*. On her birth certificate Paulin Roucou is already named as the father. This poses more difficulty to the Defendant. Therefore, due to the deed not being in conformity with the Notaries Act and provisions of the Code, I am left with no option but to disallow the Acknowledgement of Child.

The Will

[20] The law recognizes 3 forms of Will; holograph, authentic and secret, as per Article 969 of the Code. This case deals with an authentic will.

[21] Counsel for the Defendant cited Article 971 of 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 their presence. If the testator is unable to make a mark the aforementioned notary and witnesses or two notaries shall vouch for that physical incapacity."*

[22] Counsel for the Defendant submitted that the Will has satisfied the provisions Article 971 and therefore the Will is not flawed and neither defective and should be admitted. Article 971 cannot be read in isolation. It has to be read with Article 973 which reads 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."

[23] Dalloz Code Civil (1990 – 1991) refers to Article 973 of the French Code, which is largely similar to our Article 973 and which 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....."

[24] Firstly following from Article 971of the Code there is a need since the testator (the Deceased) only placed his mark on the Will that the Notary and witnesses to have vouched that the mark was well and truly that of the testator (the Deceased) and neither is it indicated

whether the mark was affixed in the presence of the witnesses. There was also the need for the Notary and the witnesses to have vouched about the incapacity of the testator to sign.

[25] Furthermore, there should be an express declaration from the testator or the notary that the testator (the Deceased) cannot sign and the reason for that inability. That was not stated in the Will that the Defendant sought to produce. There is no mention from the testator (the Deceased) *la declaration d'imposibilité et de la cause de cette impossibilité* That declaration must come from the testator and no other person. Juris Classeur (967 – 1100) expounding on Article 973 states that;

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 imposibilite.*

It is true that a Will does not have a *"forme sacrementelle"* but it is clear that the Will did conform to the provisions of Article 971 and 973 of the Code. It omitted certain declaration that had to be made.

[26] I am not one to reject a Will as invalid merely on some technicality or omission caused by a notary. I think it is important to give effect to the wish of the testator. But when omissions are serious and challenged then I have to consider such objections. It is submitted by Counsel for the Plaintiffs that similar objections to the admissibility of the

Acknowledgement of Child, that the Will breached of the Notaries Act. Counsel raised the same objection`s as was raised in respect of the Acknowledgement of Child. In particular he relied on sections 15 and 21(2) of the Notaries Act. The Will did not satisfy the Schedule as to what a deed should contain. In particular I note that the name of the second witness is not recorded. The national identity number and addresses of both witnesses are not recorded. The Will is bad in form.

[27] On the other hand the Will of the 25th March 2015 (Exhibit P8) produced by the Plaintiff, though conforming to a greater extent to Article 971 and 973 of the Code, nonetheless does not make any declaration that the testator that he is unable to sign and the cause of this impossibility. Therefore, technically that Will is bad in form as well. However, the Affidavit of Transmission by Death of the Plaintiffs make no mention of the Will and therefore may be admitted and registered by the Registrar of Lands. That Affidavit clearly makes mention that the Plaintiffs are entitled to the estate of the Deceased because they are the children of Jean Clause Spiro, son of the former.

[27] It pains me that I have to decide this case on technical issues only. I am bound by the law and can only do justice as to what the law provides though I am not insensitive to the fact that this case the law may have supressed justice. I hope that the parties find it in their hearts and conscience to do what will be just and fair. I note that in both Affidavits of Transmission by Death both parties make declarations which they are aware to be false. The Plaintiffs declare that to the best of their knowledge, information and beliefs they are the sole heirs to the Deceased's estate. The Defendant equally declares that she is the sole heir and yet she gave evidence that at Jean Claude Spiro's funeral she had approached the Plaintiffs and introduce herself as their aunt. She had talked to the Deceased about the Plaintiffs. I also note that the 2nd Plaintiff has an uncanny resemblance to the Defendant.

[28] I seriously urge the Plaintiffs not to be consumed by greed, anger and bad faith. If anything think of the time that the Defendant spent caring and looking after the Deceased. She gave him love and attention particularly during his final days. The Plaintiffs were away as they were not living in Seychelles. That should be worth something at least.

[29] I find in favour of the Plaintiffs and order the Land Registrar to register the Affidavit of Transmission by Death dated 15th May 2017.

[30] I make no order as to cost.

Signed, dated and delivered at Ile du Port on 26 March 2019

Vidot J