

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. CV 427 of 2012**

IN THE MATTER of the Estate of Lilian Adele Smith, deceased and IN THE MATTER of the Administrative Justice Act, Cap. 109B of the Laws of Barbados.

**BETWEEN:**

**EDMUND R. KING**

**CLAIMANTS/APPLICANTS**

**CECIL E.A. SMITH**

**AND**

**MARVA CLARKE**

**DEFENDANT/RESPONDENT**

**Before the Hon. Madam Justice Kaye Goodridge, Judge of the High Court**

**2012: July 5**

**2013: June 28; July 5**

**October 24**

**Mr. Vernon O. Smith Q.C of Smith & Smith, Attorneys-at-Law for the Claimants/Applicants**

**Mrs. Deidre Gay-McKenna, Attorney-at-Law for the Defendant/Respondent**

## **DECISION**

### **Introduction**

[1] By way of a Fixed Date Claim Form filed on 12 March 2012, supported by the affidavit of Edmund R. King Q.C, (Mr. King, Q.C), the Claimants/Applicants sought the following relief under *section 4 of the Administrative Justice Act, Cap. 109B*:

- (a) a declaration that the costs of the public notice of the application for a grant of probate to the estate of Lilian Adele Smith, deceased, published in the Official Gazette and in the Nation daily newspaper are not chargeable to the estate or payable by the applicants;
- (b) a declaration that the administrative act that is to say the failure/refusal of the Defendant/Respondent to sign and issue the Letters Testamentary to the estate of the said Lilian Adele Smith, deceased, is unauthorized and contrary to law;
- (c) a declaration that the administrative act that is to say the failure/refusal of the Defendant/Respondent to sign and issue the letters testamentary to the estate of the said Lilian Adele Smith is an excess of her jurisdiction;
- (d) an order enjoining the Defendant/Respondent to sign and issue to them the Letters Testamentary to the estate of the said Lilian Adele Smith, deceased; and
- (e) costs.

[2] The grounds on which the relief is sought are that the administrative act or omission of the Defendant/Respondent, that is to say, her failure/refusal to sign and issue the Letters Testamentary to the estate of Lilian Adele Smith, deceased, applied for is:

- (a) contrary to law;
- (b) unauthorised;
- (c) a failure to observe established practice and the procedures required by law;
- (d) an unreasonable, irregular and improper exercise of jurisdiction;

- (e) a breach of duty; and
- (f) actuated by improper purpose and irrelevant consideration.

[3] The affidavit of Edmund Mitchell, Writ Server, filed on 13 March 2012 states that the Claim Form and supporting affidavit were served on the Defendant/Respondent and the Attorney General's Office on 12 March 2012. No affidavit was filed in response by, or on behalf of the Defendant/Respondent, but written submissions were filed on 3 July 2013 by counsel for the Defendant/Respondent.

### **The Background**

- [4] The circumstances leading to the application are set out in the affidavit of Mr. King, Q.C. He deposed that he is one of two executors appointed under the will dated 1 November 2002 of the deceased, Lilian Adele Smith, late of Angeliqne 3<sup>rd</sup> Avenue, Rockley New Road, Christ Church, who died in Barbados on 12 September 2010. The other executor under the will is Mr. Cecil E. A. Smith (Mr. Smith) of Congo Road, St. Philip.
- [5] Mr. King, Q.C. deposed that on 2 March 2011, he and Mr. Smith filed their application for a grant of probate of the will. The application was processed by the Probate Court, and on 4 March 2011, the Registrar of the Supreme Court (the Registrar) issued an account of the balance of fees which were to be paid before the grant of probate was issued (exhibit ERK1). Included in the account was the sum of \$416.28, being the costs of advertising the application for the grant of probate in the Official Gazette and the Nation newspaper. The Claimants have paid the balance of the fees, the recording of the order and the recording of the will as evidenced by the official receipt of the Registrar dated 14 November 2011. They have refused to pay the advertising fees.
- [6] By letters dated 26 July and 31 August 2011, the attorneys-at-law for the estate informed the Registrar that the advertising fees were not chargeable to the estate of the deceased as prescribed by Rule 59 of the **Supreme Court (Non-Contentious) Probate Rules 1959** (the Rules) and set out in the Schedule thereto. Rule 59 is reproduced in paragraph 21 of this decision.

- [7] In paragraphs 8 to 18 of his affidavit, Mr. King, Q.C. set out his understanding of the Rules and contended that no advertising fees have ever been charged to any estate simply because there is no statutory authority for the Registrar to charge or collect such a fee.

### **The Issue**

- [8] The issue for the determination of the court is whether the Defendant/Respondent has the legal authority to refuse to issue the grant of probate on the ground that the advertising fees have not been paid by the Claimants/Applicants.

### **The Submissions**

- [9] Mr. Vernon Smith, Q.C., counsel for the Claimants/Applicants, submitted that Rule 7 of the Rules mandates the publication of an application for probate or letters of administration by way of one notice in the Official Gazette and two notices in a local daily newspaper. Rule 59 sets out the fees to be paid by a party who requires any duty to be performed or any process to be executed by the Registrar. He contended that those fees do not include or refer to any fees for publication or advertisement. Accordingly, the Defendant/Respondent has no statutory authority to collect or charge advertising fees.
- [10] Mr. Smith also referred to the Rules Committee of the Supreme Court (the Rules Committee) which is established by *section 82 (1) of the Supreme Court of Judicature Act, Cap. 117A (the Act)* and which is empowered by *section 82 (1) (e)* to make rules with respect to the practice and procedures of the High Court in non-contentious probate matters. He submitted that the Rules Committee has the power under *section 82(1)(a)(v)* to make rules with respect to the pleadings, practice and procedures in or affecting and the forms used in connection with any proceedings before the High Court or any division, office, judge, officer of either such court or any person appointed by or to assist it, including costs. Costs as defined in *section 2* includes fees, charges, disbursements, expenses or remuneration.
- [11] It was his further submission that the Rules Committee has never prescribed any rule for the payment of the costs of the public notice referred to in Rule 7, nor has any such

- rule ever been published in the Official Gazette as required by *section 83 of the Act*. Consequently, the Defendant/Respondent has no legal authority to impose fees for advertising. He asked the court to grant the Claimants/Applicants the relief sought.
- [12] Mrs. Deidre Gay-McKenna, counsel for the Defendant/Respondent, submitted that, in order to successfully apply for and obtain a grant of probate or letters of administration, certain actions must be taken by the applicant, which in turn then trigger the performance of any duty or any process to be executed by the Registrar.
- [13] Counsel submitted that the role of the Registrar is not to advertise and give public notice of an application for the grant of probate or letters of administration. Rule 7 clearly states that after the notices are advertised in the prescribed manner, it is only then that an application is submitted to the Supreme Court Registry not less than fourteen days afterwards.
- [14] Mrs. Gay-McKenna also submitted that, in the past, the practice had developed where the Registration Department advertised the notices for the applicants. This however, was done as a matter of convenience and not out of any legal obligation. The Department was not reimbursed these sums on completion of the process. The Registrar therefore took the position in 2010 to recoup these sums by notifying the Bar Association that this reimbursable expense would be recouped.
- [15] Mrs. Gay-McKenna submitted that not only is it the applicant's responsibility to pay for the advertisement of the notices, but that such advertisements are to be done prior to the application being submitted to the Registration Department in order for the Registrar to perform any duty or execute any process required of her. It is therefore not necessary for advertising fees to form part of the Schedule of fees as set out in the Rules.
- [16] It was counsel's further submission that, since the advertising fees do not form part of the fees in the Schedule because these fees are fees which should have been paid by the applicant prior to the submission of the application, then the Registrar's involvement in the process begins at the time of the submission of the application and after the application has been advertised.
- [17] Counsel submitted that there is no legal basis for the practice adopted by the Registration Department and the Registrar is within her legal right to recoup these

sums from an applicant. In this case, the Claimants/Applicants, having not reimbursed the Registrar these sums, cannot now argue that the Registrar was wrong in law to refuse to sign and issue the letters testamentary.

### **The Rules**

[18] The Rules govern applications for grants of probate or letters of administration. These Rules were made under *section 46 of the repealed Supreme Court of Judicature Act, Cap. 117*, which was replaced by **the Act**.

[19] The Rules provide that an application for a grant of probate or letters of administration shall be made at the Registry. The application may be made through an attorney-at-law, by the propounder of the will or by a proposed administrator in person, and must be in the prescribed form, with supporting documentation.

[20] Rule 7 provides:

Public notice of an application for probate or for letters of administration shall be given by one notice in the Official Gazette and two notices in a daily newspaper. From the date of the notice in the Official Gazette and from the date of the second notice in a daily newspaper not less than fourteen days shall elapse before an application is submitted to the court.

[21] Rule 59 states:

The fees set out in the Schedule hereto shall be received and taken by the Registrar in respect of proceedings mentioned therein, and shall be paid by the party requiring any duty to be performed, or any process to be executed, by the Registrar.

[22] The Schedule of fees provides as follows:

Fees to be taken by the Registrar on application for Probate or Administration, and to seal Commonwealth Probates.

1. Where the estate does not exceed \$1,500	- 25
2. Where the estate exceeds \$1,500 but does not exceed \$10,000	- 50
3. Where the estate exceeds \$10,000 -	
(a) fee on application	- 30
(b) fee on issue of or on resealing grant on gross value of estate -	
(i) exceeding \$10,000 but not exceeding \$50,000	- 150
(ii) exceeding \$50,000 but not exceeding \$100,000	- 250
(iii) exceeding \$100,000	- 500
4. On entry of caveat	- 20
5. On renewal of caveat	- 10
6. On issue of warning to caveator	- 10
7. On issue of citation	- 20
8. On other document to be filed	- 3
9. For searching probate file	- 10

### **Discussion**

[23] It is a requirement of the Rules that any application for the grant of probate or letters of administration must be advertised prior to its submission to the court. Although not expressly stated, it is clear that the advertising of the application gives notice to the public that an application has been made, so that any person interested in the estate of the deceased may, if he so desires, object to the issue of a grant. Any objection is done by way of the filing of a caveat as provided for in Rule 42.

[24] It is not stated in the Rules who is responsible for the advertising, but it has been the practice that the notice for publication is prepared and advertised by the Registration Department. Before the order is made for the issue of the grant, the Deputy Registrar certifies that there has been due publication of the application in accordance with the Rules and that no caveat has been lodged.

- [25] An examination of the Rules discloses that, while the Defendant/Respondent is authorised by Rule 59 to collect fees as specified in the Schedule, no express provision has been made for the charging and collecting of fees by the Registrar for the advertisement of applications.
- [26] Interestingly, under the *Probates and Letters of Administration (Resealing) Act, Cap. 247*, it is the applicant who is required to publish the application for the resealing of a grant of administration of the estate of any deceased person. The advertisement must be approved by the Registrar.
- [27] An examination of the practice of other countries of the Caribbean in this area has revealed the following: In the Republic of Trinidad and Tobago, Rule 40 of the Non-Contentious Probate Rules, Chp. 9:03 provides that applications for probate or administration shall be advertised in one of the local daily newspapers and once in the Gazette. However, the rule is silent as to the payment of fees.
- [28] In Guyana, according to Rule 4 of the Deceased Persons Estates' Administration Rules Chp. 12:01, notice of the application for the grant must be advertised. Such notice is signed by the Registrar and forwarded for publication in the Official Gazette. No reference is made to the payment of publishing or advertising fees.
- [29] By way of contrast, in the Commonwealth of The Bahamas, applications for grants of probate are not advertised, but applications for grants of administration must be advertised in accordance with Rule 11 of The Probate Rules, and an advertising fee of 14¢ is payable. The notice is prepared in the Registry and signed by the Registrar.
- [30] It was Mrs. Gay-McKenna's submission that there is no legal basis for the Department's practice of advertising applications and that the Defendant/Respondent is entitled to recoup these advertising costs. There is a flaw in this argument. If there is no legal basis for this practice, how can the Defendant/Respondent be within her right to recoup the funds without legislative authority to do so? This argument, advanced by the Claimants/Applicants, has not been addressed by the Defendant/Respondent.
- [31] The Rules Committee is the body charged with the power to make rules with respect to the practice and procedures of the High Court in non-contentious probate matters and

to determine costs/fees. The power to determine costs may not be exercised without the concurrence of the Minister responsible for Finance.

[32] The Rules are silent as to who pays for the advertising of applications. There have been no amendments made to the Rules by the Rules Committee to specifically provide for the payment of fees in respect of the advertisement of applications for the grant of probate or letters of administration. There is therefore no statutory provision giving the Defendant/Respondent the power or authority to charge the advertising costs to the applicants or the estate of the deceased. In the absence of express legislative provision, it is my opinion and I hold that the Defendant/Respondent has no legal authority to insist that an applicant bear the costs of advertising an application for probate or letters of administration which are incurred by the Registration Department.

[33] However, there is merit in Mrs. Gay-McKenna's submission that it is the applicant who is responsible for the advertisement of any application under the Rules. If it is intended that the Defendant/Respondent should be responsible for the advertisement of applications for grants of probate or administration, then specific provision should be made in the Rules for this, and for the payment of an appropriate fee by the applicant, if deemed necessary. Until any amendments are made to the Rules, the onus is on an applicant to satisfy the Registrar that Rule 7 has been complied with, so that the application could be submitted to the court.

[34] In the circumstances of this case, the basis upon which the Defendant/Respondent refused to sign and issue the letters testamentary is without legal foundation. The Defendant/Respondent is obligated to sign and issue the letters testamentary to the estate of Lilian Adele Smith, deceased, as long as the Claimants/Applicants have complied with all the other requirements of the Rules.

### **Disposal**

[35] It is therefore ordered as follows:

- (1) The declarations and order sought by the Claimants/Applicants at paragraphs (a) (b) and (d) of the Application are granted;
- (2) The relief sought at paragraph (c) of the Application is refused;

- (3) The parties are to file and exchange written submissions on the issue of costs no later than 7<sup>th</sup> November 2013; and
- (4) The matter is adjourned for further hearing on the issue of costs to 21<sup>st</sup> November 2013.

**KAYE GOODRIDGE**

Judge of the High Court.