**BARBADOS.**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 13 of 2004**

**IN THE MATTER of an easement or right of way appurtenant to land situate at Breedy's Land, Silver Sands, Christ Church the dominant tenement now in the possession of Ronnie Kirton and formerly owned by Elnora Hinds, deceased, over adjoining lands owned by Agatha Bartlett the servient tenement.**

**BETWEEN:**

**JACQUELINE BARTLETT** **Appellant/Defendant**

**The proposed Administratrix**

**of the Estate of Agatha Bartlett,**

**deceased, of Breedy's Land, in**

**parish of Christ Church**

**AND**

**RONNIE KIRTON** **Respondent/Plaintiff**

**The land Owner by entitlement**

**and person in possession of**

**lands formerly owned by**

**Elnora Hinds**

**BEFORE: The Honourable Justice Frederick L. A. Waterman, Chief Justice (Ag.), the Honourable Justice Peter D. H. Williams and the Honourable Justice John A. Connell, Justices of Appeal.**

**2006: July 11, 12, and 20**

**2008: June 8 and September 25**

**2009: March 31**

**Mr. Amilcar Branche for the Appellant/Defendant**

**Mr. Orville A. Durant and Miss Karen Thornhill for the Respondent/Plaintiff**

**JUDGMENT**

***Introduction***

**CONNELL J.A.:** This is an appeal from an Order of **Moore J.** made on 13 January 2004, in which he held that Ronnie Kirton, the plaintiff in the High Court proceedings was entitled to a right of way along the road between points marked "A" and "B" on a plan annexed to the Originating Summons filed on 19 April 2001 and coloured yellow, and back over the said way for himself, his servants and licensees on foot and with motor vehicles and other conveyances at all times and for all purposes.

[2] The plaintiff's claim was successful against Agatha Bartlett, the defendant. She appealed and was therefore the appellant/defendant in this appeal (prior to her death). The plaintiff became the respondent/plaintiff. For clarity we will generally refer to the parties as Kirton and Bartlett.

***Facts***

[3] In dispute between the parties was the existence of the right of way referred to above which ran from the property formerly owned by Kirton's mother, Elnora Hinds, south across the eastern portion of land of Bartlett and thence in a westerly direction across the land of Kathlene Nurse and the said Bartlett to Round Rock Road, in the parish of Christ Church.

[4] In his evidence Kirton stated:

> "I reside at Breedy Land, Silver Sands, Christ Church. I am 36 years old. I am the son of Elnora Hinds (née Kirton). She is not alive. She died on 18 September 2000. I am not aware if she left a will. My mother – she was living at Breedy Land. Samuel Bartlett was owner of the land. She was the reputed wife of Samuel Bartlett. Samuel Bartlett died on 10 May 1979."

Kirton under cross-examination by the then Attorney-at-law for Bartlett, stated:

> "When my mother died she did not leave a will. I have not been appointed by the Court as the personal representative of my mother's estate. No one applied for Letters of Administration to my mother's estate. No document has been given to me to say that I represent my mother's estate."

[5] At paras. [15] and [16] of his judgment the Learned Trial Judge stated:

> "[15] The plaintiff is not resident on the land in respect of which he claims the easement. The land was owned by the plaintiff's mother, and he claims an interest in the land. In his closing speech Mr. Abrahams for the defendant argued that the plaintiff has to prove, by

producing a will made by the plaintiff's mother or Letters of Administration taken out by the plaintiff to his mother's estate, that the plaintiff is entitled to an interest in the land. That point was not pleaded and the Court did not have the benefit of full argument of counsel upon it. I therefore make no determination as to how it should be answered.

[16] This case turns entirely on fact..."

***Grounds of Appeal***

[6] Notice of Appeal was filed on 20 April 2004 and the grounds of appeal set out in the Notice were as follows:

"1. The Learned Judge failed to exercise the inherent jurisdiction of the Court to prevent abuse of its process, in that, notwithstanding the evidence of the Respondent/Plaintiff that no Letters of Administration were taken out on behalf of Elnora Hinds, deceased owner in fee simple of the land situate at Breedy's Land, Silver Sands, Christ Church, the Learned Judge went on to hear and adjudicate upon the matter; generally the evidence of the Respondent/Plaintiff does not support the pleadings in terms of ownership and possession of the lands formerly owned by Elnora Hinds;

2. The Learned Judge erred in law in finding that a right of way existed over the property owned by the Appellant/Defendant for the benefit of the land allegedly owned by the Respondent/Plaintiff in that no easement of necessity existed over that property for the benefit of the land which the Respondent/Plaintiff claims to own;

3. The Learned Judge erred in law in failing to find that other lands appurtenant to the land claimed to be owned by the Respondent/Plaintiff are servient to the land allegedly owned by the Respondent/Plaintiff;

4. That the finding of fact that the Respondent/Plaintiff is entitled to a right of way along the road between points marked "A" and "B" on a Plan annexed to the Originating Summons filed on the 19 April 2001 and coloured yellow, and back over the said way for himself, his servants and licensees on foot and with motor vehicles and other conveyances at all times and for all purposes; is wrong, in that

(a) It goes against the weight of evidence;

(b) The Learned Judge failed to take into account that the lands subject to this Appeal were at once entirely land locked and as such the evidence in the case had to be directed to how the original owner gained access to and from the said lands;

(c) The Learned Judge in accepting the plan prepared by Mr. Andrew Bannister, Land Surveyor, and certified the 1 February 1989 and the fact that this plan showed an access across the Appellant/Defendant's land failed to take account of the fact, that the said Andrew Bannister did not explore the possibility of other existing accesses to and from the said lands;

(d) The Learned Judge failed to accept the plan prepared by Mr. Compton Fraser, Land Surveyor, and certified on the 29 October 1968 as being the true plan to determine the existence of any rights of way over the lands of the Appellant/Defendant."

[7] The appellant Bartlett sought the following order:

"1. That the Respondent/Plaintiff is not entitled to a right of way along the road between points marked "A" and "B" as annexed to the said Originating Summons and coloured yellow, and back over the said way for himself, his servants and licensees on foot and with motor vehicles and other conveyances at all times and for all purposes.

2. That the subject land being that of the Respondent/ Plaintiff is not land locked so as to give the said Respondent/Plaintiff a right of way over the land of the Appellant/Defendant.

3. That a new trial be ordered as the Respondent/Plaintiff had no locus standi before the court below as the said Respondent/Plaintiff is neither the owner of the legal estate to the land nor in possession;

4. That the Respondent/Plaintiff pay to the Appellant/ Defendant her costs of this Appeal and those of the Court below."

[8] After the Notice of Appeal was filed and before the hearing of the appeal, Bartlett died on 15 March 2006. An application was made by Jacqueline Bartlett, the proposed administratrix to the Estate of Agatha Bartlett, for an Order that the proceedings be continued between Jacqueline Bartlett and Kirton and that she be substituted as the appellant in this appeal. An Order in terms of the application was made on 19 May 2006.

***Ground 1- Issue 1***

[9] As stated above, Elnora Hinds died on 18 September 2000. Kirton in his evidence was not sure if his mother left a will. However, a will was found between the dates of hearing by the judge on 26 September and 19 November 2002. The judge was informed by Mr. Durant, counsel for the respondent, of the existence of a will, but the will was not produced or probated. The judge's note at page 27 of the transcript is as follows:

"MR. DURANT

Since last hearing a will made by [Elnora] Hinds has been discovered. Will says that Ronnie Kirton is executor. Will not probated."

[10] On 20 July 2006 at the hearing before us, Mr. Durant confirmed that the will was not produced and stated:

> "the matter was referred to the attorney for the defendant and it was decided that we would proceed, but I made the will available. I gave notice of the existence of a will, I made it available and waited the direction..."

We should add that Mr. Branche did not represent Bartlett in the High Court proceedings.

[11] The will dated 1 February 1993 was eventually probated but three years after the trial and after the hearing of the appeal was concluded on 20 July 2006. On 13 March 2007 Letters Testamentary were issued to Kirton. A copy of the Letters was made available to this Court. We should add that Kirton was the executor and trustee of the will and Elnora Hinds bequeathed her chattel house to her husband and her real estate to Kirton to hold in trust for her grandson. Kirton was not therefore "the land owner by entitlement" and he took no direct benefit under the will.

[12] The first issue in this ground is the locus standi before the court below of Kirton. It was not in dispute that Kirton was neither the owner of the legal estate to the land nor in possession of it. He had not been appointed by the Court as the personal representative of his mother's estate. Further, he filed the Originating Summons solely in his individual capacity.

[13] The validity of acts done by an executor and by an administrator before a grant of probate or administration has been obtained is considered in Chapter 8, "Action before Grant - Action without Grant", of ***Williams, Mortimer and Sunnucks "Executors, Administrators and Probate", Nineteenth Edition (2008)***. Para. 8-01 states:

> "[A]n executor derives his title from the will of the testator and probate is merely the necessary evidence of that title. By contrast, an administrator derives his title only from the grant."

[14] It has been held that an executor can take some steps which are incidental to his office without the grant e.g. levy distress for unpaid rent, see ***Whitehead v. Taylor (1839) 10 Ad. & E. 210***; pay and release debts and receive payments, see ***Woolley v. Clark (1822) 5 B. & A. 744***. An executor may commence an action before probate, and may continue the same but once it becomes necessary to prove title the grant must be obtained: ***Williams, Mortimer and Sunnucks*** at para. 8-07.

[15] The facts at the time of trial were that no will was produced or probated. The legal position is stated in ***Williams, Mortimer and Sunnucks*** at para. 8-02:

> "Where an executor is appointed by a will, he derives title from the will, and the property of the deceased vests in him from the moment of the testator's death, so that probate is said to relate to the time of the testator's death. Thus, while an executor cannot rely on

his title in any court without producing the grant of probate, that grant is merely the authenticated evidence of his title."

[16] In the title to the proceedings Kirton described himself as "the land owner by entitlement and person in possession of lands" formerly owned by his mother; he similarly described himself in paragraphs 8, 9 and 10 of his affidavit in support of the Originating Summons. This description was inaccurate in view of the content of the will that was subsequently found, and because Kirton was not in actual possession of the land. The land in question was occupied by Kirton's stepfather, Lionel Hinds, and his brother, Victor Kirton (paragraphs 8 and 10 of the said affidavit).

[17] However, an executor cannot generally maintain an action before probate; the legal position is stated in ***Williams, Mortimer and Sunnucks*** at para. 8-06:

> "An executor cannot maintain actions before probate except those founded on his *actual* possession. This is because, where he sues in his representative character, the claim form must refer to his capacity being that of executor and, unless that capacity is admitted by the defendant, the executor may be compelled to produce the probate at the trial or possibly at an earlier stage of the action. Even where an executor sues in his individual capacity (i.e. not pleading as executor), but relying on his *constructive* possession as executor, it will generally be necessary for him to prove himself executor, which he can only do by showing the probate. Thus, for example, where an executor sues in trespass or for wrongful interference with goods in respect of an act that occurred during the lifetime of the testator and relying on the possession of the testator, he must necessarily describe himself as executor in his pleadings, and as such he may be required to prove his title."

[18] In this case the existence of the right of way was in dispute. As Kirton commenced the proceedings in his personal capacity, it was necessary for him not only to show that he was entitled to sue, but to establish his title to the right of way. However, he could only do this in a representative capacity, as the Executor of a will or as the Administrator of the Estate. "The principle is that an easement is no mere personal right; it is attached to the dominant land for the benefit of that land": see ***Gallagher v. Rainbow (1994) 174 CLR 512, 516.*** The person who claims such must have the land to which it is 'appendant'. Kirton therefore needed to show some real connection with the land which would have enabled him to bring the action, as a personal representative or an owner.

[19] In his written submissions Counsel for Bartlett relied mainly on the case of ***Ingall v. Moran (1944) 1 K.B. 160 C.A.*** In that case the plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out Letters of Administration until nearly two months after the date of the writ. It was held, that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the relation back of an administrator's title, on obtaining a grant of Letters of Administration, to the date of the intestate's death could not be invoked so as to render the action competent.

[20] We quote the following excerpt from the judgment of Goddard L.J. at page 170:

> "An intestate's property, including choses in action, formally vested on death in the ordinary, and now, by virtue of the Administration of Estates Act, which in this respect re-enacts earlier statutes, vests in the President of the Probate Division till he grants letters of administration to someone. The difference in the position of an executor and administrator in this respect was authoritatively stated by Lord Parker in delivering the advice of the Judicial Committee in *Chetty v. Chetty [1916] 1 A.C. 603, 608.* He said: 'It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of actions, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the Rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled.'"

[21] We also quote from the judgment of Luxmore L.J. at page 167 to 169:

> "It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor…there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ…It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of the intestate's estate, and can obtain in a proper case interim relief by the appointment of the receiver pendente grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required."

[22] Mr. Branche's submissions, in accordance with the authority set out above, were to the effect that it is necessary to constitute a personal representative of the deceased to enable legal proceedings in connection with the Estate to be begun as the real and personal Estate of the deceased vested in her personal representative: ***section 3*** of the ***Succession Act, Cap. 249***. Further, Kirton could seek a declaration and an injunction in the circumstances of this case only in his capacity of a personal representative of the Estate and not in his personal capacity.

[23] Mr. Durant's submissions in response were that the point was not raised by Bartlett and that many of the related issues were being raised for the first time. Further, in the affidavits filed on behalf of Bartlett in response to the Originating Summons there was no challenge to Kirton's right to sue, nor did Bartlett raise this matter as a preliminary point prior to the trial as provided for by the Rules. Kirton's counsel advanced the further argument that where a person has a substantial interest he had a right to protect that interest by court action and that given the circumstances of this case and the interest of Kirton, the only reasonable and legitimate means he had of protecting his rights in

the property were to appeal to the courts. It was further contended that Kirton's action was not based on an attempt to carry out a routine administrative function, but on an emergency requiring action to be taken to protect a fundamental right of the Estate and his own entitlement thereunder. There are instances where persons who have a beneficial interest in the estate take action to protect estate property such as perishable goods before the appointment of a qualified administrator: actions in trespass to land can be brought where there is no administrator. Counsel suggested that the Court will allow a party to amend the capacity in which he or she sues to administrator or administratrix after the grant of administration even though this may take place after the issue of the writ.

[24] The right of Kirton to commence these proceedings without first qualifying as administrator of his mother's estate has been contested as the first ground of appeal. There is no doubt that proceedings begun in the manner of this case are a nullity in the light of the Privy Council decision of ***Chetty v. Chetty (1916) A.C. 603*** and a line of decisions which followed it such as ***Ingall v Moran (1944) K.B. 160*** and also ***Finnegan v. Cementation Co. Ltd [1953] 1 Q.B. 688 CA***, where a writ was set aside on application because the administratrix who initiated the claim had a grant in Ireland but not for the purpose of the English proceedings. Interlocutory proceedings could have been taken which would have allowed the case to be stayed pending Kirton obtaining Letters of Administration or probate of the will. This was not done. We therefore hold that the proceedings were a nullity.

***Ground 1 – Issue 2***

[25] The second issue is whether the procedural defect can be remedied at the appeal stage and the proceedings saved so that this Court can still make a determination of the substantive issue. The Learned Trial Judge was aware of the issue. However, he received little help from counsel in resolving it. It was first raised in the cross-examination of Kirton by counsel for Bartlett. It was also the subject of counsel's address. However, counsel for Kirton did not take any procedural action to correct the problem. But it was not a matter to be left quietly alone. It raised the vital question whether the trial, even at that stage, was a nullity.

[26] ***Odgers on High Court Pleading and Practice,*** by ***D. B. Cason, Twenty-Third Edition (1991),*** at page 179 states:

> "Demurrers were abolished in 1883. But it was desirable, and indeed necessary, to preserve some form of objection in point of law, otherwise parties might incur great expense in trying issues of fact which, when decided, would not determine their rights. So it was provided that any party should be entitled to raise by his pleading any point of law (Order 18, r. 11). In some cases this is better left to be disposed of by the judge at the trial."

Although there are no pleadings in an originating summons, objection can be taken to the proceedings by way of affidavit or a summons to dismiss or strike out the plaintiff's claim. Examples of cases where objection was taken on the ground that the plaintiff had no locus standi were ***Re Caines (deceased) [1978] 2 All ER 1*** and ***Booth & Co. (International) Ltd. v. National Enterprise Board [1978] 3 All ER 624***.

[27] The authorities cited for the statement are ***Everett v. Ribbands [1952] 2 Q.B. 198 CA*** and ***Carl Zeiss Stiftung v. Herbert Smith & Co. [1969] 1 Ch. 93 CA***. The facts quoted below are taken from the headnote of the latter case. It should be noted that though they are not the same as those of the instant case, the legal issue was the same:

> "A plaintiff brought an action against solicitors for an account and payment of all moneys they had received and were to receive from defendants in respect of fees, costs and disbursements in defending a passing-off action still proceeding in which the plaintiff claimed, as the solicitors admittedly knew, that all the assets of the defendants were and always had been the plaintiff's property; considerable fees, costs and disbursements would be incurred in future in defending the passing-off action preceding and during trial to establish matters in issue between the plaintiff and the defendants. In the action against the solicitors the plaintiff averred matters which were in issue in the passing-off action, and the solicitors moved for an order for the trial as a preliminary issue of the question whether the solicitors would be accountable to the plaintiff, for the moneys admittedly received, if the plaintiff established the matters averred."

[28] Pennycuick J. refused to order the trial of the preliminary issue. The defendants appealed on the following grounds:

> "(1) That the judge erred in the exercise of his discretion ... and alternatively, misdirected himself in that he failed to give any or any sufficient weight to the special and unusual circumstances of the case; (2) that the judge misdirected himself in holding that justice did not require the preliminary issue to be tried and in further holding that there were objections to the making of the order sought, alternatively, in failing to direct himself that such objections were not outweighed by the advantages of making the order; (3) that the decision was wrong in principle and ought to be set aside..."

[29] In allowing the appeal Denning M.R. said at page 98:

> "I am afraid that I cannot agree with the judge's decision. These solicitors ought to know where they stand. They should be able to conduct the litigation without having a sword suspended over their heads. It is not a hypothetical issue. It is a practical issue of urgency. It is very desirable that it should be decided as soon as possible before many further costs are incurred.
>
> I know that it has been said on one or two occasions that a preliminary issue should be ordered only when, *whichever way it is decided,* it is conclusive of the whole matter. That was said by Lord Evershed M.R. in *Windsor Refrigerator Co. Ltd v. Branch Nominees Ltd.;* and Harman L.J. in *Yeoman Credit Ltd. v. Latter.* I do not think that is correct.
>
> The true rule was stated by Romer L.J. in *Everett v. Ribbands:*

> 'Where you have a point of law which, *if decided in one way,* is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings.'
>
> I have always understood such to be the practice."

[30] We therefore agree that there is merit in ground 1 of the appeal. That ground effectively disposes of the appeal.

**Resolution**

[31] The main issue in this case for determination is the existence or otherwise of a right of way which allegedly affects entry and egress to and from lands which were formerly owned by Elnora Hinds. On the basis of the decision in **Chetty** *(supra)* and the line of cases which followed it, it was open to this Court simply to declare the High Court proceedings a nullity and make an award of costs. This would have left the parties in a worse position than when the proceedings were originally commenced.

[32] On 8 June 2008, the Court therefore summoned counsel and the parties and informed them that the panel had formed the preliminary view that the respondent had no locus standi to commence the proceedings. In the circumstances, the Court suggested that it would be in the best interest of both parties to explore the possibility of resolving the matter. It seemed to us that this was especially possible in view of the fact that the two protagonists in the dispute had both died; Elnora Hinds in 2000 and Agatha Bartlett in 2006. We therefore invited the parties with the assistance of their counsel to consider engaging the services of a surveyor with expertise in right of way disputes to try to arrive at a consent order in an effort to minimise further expenditure and costs.

[33] On 25 September 2008 the Court again summoned counsel and the parties. Counsel informed the Court that the parties had been unable to reach any agreement. Nevertheless, the Court was not invited, with the consent of the parties, to determine the substantive issue of the existence of the right of way nor was the Court invited to take any other action other than to give its decision. It is therefore with regret, to adopt the hallowed word used in similar circumstances that we have to dispose of the appeal on what should have been taken as a preliminary point at a very early stage of the High Court proceedings. We express no view on the substantive issue and make it clear that our decision is made without prejudice to the parties' right to bring any future proceedings for the determination of the substantive issue which they may wish to take.

[34] The appellant is obviously entitled to her costs. However, she is entitled only to costs that are just in the circumstances. The appellant should have taken early objection to the respondent's originating summons. It follows that the appellant should not recover her full costs but should be

deprived of a percentage of her costs taking into account her failure to make an application to have the originating summons struck out or stayed pending the grant of letters testamentary. In the circumstances, a just amount to award the appellant would be half her costs of the High Court proceedings.

[35] The respondent in this Court persisted in defending his right to bring a personal claim at a time when his locus standi was a live issue. We would add that the respondent is, of course, personally liable for the costs; he should have sued in a representative capacity and made a Beddoe application for leave to take proceedings and for indemnity from the estate: ***Re Beddoe, Downes v. Cottam [1893] 1 Ch. 547 CA***. He should therefore pay the costs of the appeal, but again these costs should take into account the appellant's failure to limit the respondent's liability. We therefore order that the appellant should also recover only half her costs in this Court.

[36] We allow the appeal and reverse the order of the trial judge. The respondent is ordered to pay half of the appellant's costs here and below to be agreed or taxed.

Chief Justice (Ag.)

Justice of Appeal

Justice of Appeal