



THE COURT OF APPEAL

Ryan P.
Peart J.
Whelan J.

Neutral Citation Number: [2017] IECA 332

2017/390

IN THE ESTATE OF CELINE MURPHY (DECEASED, LATE OF GENAZZANO, KINGSWOOD, CLONDALKIN, DUBLIN 22)

AND

IN THE MATTER OF THE SUCCESSION ACT 1965

AND

IN THE MATTER OF S. 27(7) OF THE SUCCESSION ACT 1965

AND

IN THE MATTER OF AN APPLICATION BY MICHAEL COX

BETWEEN

MAJELLA RIPPINGTON, SHAUN RIPPINGTON AND EDEL BANAHAN

APPLICANTS/APPLICANTS

AND

MICHAEL COX AND MARY BUTLER

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of December 2017

1. By a notice of motion which issued on 31st July, 2017, the first and second named applicants, Majella Rippington and Shaun Rippington, ("the applicants"), litigants in person, sought an order extending time to file an ordinary notice of appeal against the order of O'Neill J., made in the High Court probate list on 23rd July, 2012. The motion is grounded upon the affidavit of Majella Rippington sworn on 31st July, 2017.

2. At the date of the making of the High Court order, O. 58, r. 16(1) provided that a notice of appeal to the Supreme Court was required to be served within 28 days from the perfecting of the order appealed against.

3. Both the Court of Appeal and the Supreme Court are empowered to enlarge the time fixed for the service of a notice of appeal pursuant to O. 86, r. 3 in the case of the Court of Appeal, and O. 58, r. 4 in the case of the Supreme Court.

Background

4. Celine Murphy (hereinafter "the deceased") died a single woman without issue on 15th March, 2011. Majella Rippington is a sister of the deceased. The applicants are husband and wife. Under the terms of a disputed will dated 8th March, 2011, the deceased's friend, the second named respondent, Mary Butler, is the sole beneficiary. Michael Cox, the first respondent, is sole executor.

5. On 16th September, 2011, some six months following the date of death of the deceased, the applicants instituted the above entitled will suit by way of plenary summons in the High Court seeking to have the alleged will of the deceased condemned as null and void. The applicants sought, *inter alia*, a declaration that the deceased died intestate and that her real and personal property fell to be distributed under the rules of intestacy to her next of kin. The first named respondent was sued as the named executor, the second named respondent as the "alleged sole and exclusive beneficiary of the purported will".

6. On 29th June, 2012, the first named respondent issued a motion in the plenary proceedings seeking an order pursuant to s. 27(7) of the Succession Act, 1965 granting administration *pendente lite* in the estate of the deceased to him. He also sought an order granting him liberty to discharge the mortgage on her apartment from the proceeds of a life policy. The motion was returnable in the probate list. The motion was grounded on the affidavit of Michael Cox sworn 25th June, 2012. It exhibited a draft schedule of assets and liabilities of the deceased. It deposed that the amount required to redeem the mortgages on the property of the deceased was €207,552.11. It appears that a life policy held by the deceased had not been assigned to the mortgagee. At para. 20, the affidavit states:-

"While the property of the deceased is let, the rental income therefrom is insufficient to discharge in full the monthly outgoings due to the said mortgage. Your deponent is anxious to maintain the assets of the estate of the deceased for the benefit of the beneficiaries and to discharge the debts of the estate in early course so that the value of the assets is preserved and the debts are not increasing thereon."

7. At para. 22, it continues:-

"Your deponent is, therefore, anxious that the Irish Life policy will be gathered in for the purpose of discharging the sums due to the ICS Building Society on foot of the aforementioned mortgages."

Hearing of the motion in the probate list

8. The motion came on for hearing in the probate list before O'Neill J. sitting in open court at the Four Courts on Monday, 23rd July, 2012. All three applicants were present in court having retained a firm of solicitors and were represented by counsel throughout the hearing. The first named respondent, who was the moving party in the application to the probate judge was also represented by solicitors and counsel. A transcript of the proceedings before O'Neill J. is available. Counsel for the applicant Michael Cox states:-

"Judge, there is agreement between us that Ms Anne Stephenson, solicitor, will be appointed pursuant to s. 27(7) for a *pendente lite* grant."

Counsel continued:-

"For the purpose of gathering in the assets and paying the mortgage once she gets in the assignment."

Counsel for the applicants stated:-

"I understand that the funeral expenses are outstanding, Judge, and I would ask that the order be amended to include the payment of the funeral expenses... and the mortgage."

Counsel for the first named defendant stated that:-

"The funeral expenses, the bill was recently provided and they are about to be paid."

The order

9. At the behest of the applicants' counsel, it had been proposed that an independent administrator would be appointed. The judge proceeded to make the order appointing Anne Stephenson, solicitor, as administrator *pendente lite* and the judge expressly acquiesced in the request of the applicants' counsel regarding payment of funeral costs, stating:-

"In case there is any doubt about it, I will direct that she pay the funeral. And what about other debts?"

The probate judge proceeded to make an order granting the independent administrator leave to retain her costs from the estate:-

"The costs to be taxed in default of agreement, her reasonable costs"

There was a contest regarding the costs of the moving party, Michael Cox, with the applicants' counsel opposing the costs application and requesting that they be reserved. However, the trial judge came to a view that the first named respondent, as the moving party, was entitled to the costs of the motion.

10. Thereafter, in correspondence opened to the court by the applicants, their counsel confirms having held a consultation with the three applicants before the hearing of the motion:-

"I explained the nature of the motion to them and the probability that the Court would grant it as it stood before it and as we did not want Archbishop Cox to be given permission to get a limited grant in any circumstances (as the validity of his appointment under the purported will was being challenged) that we should seek the appointment of an independent person to obtain a limited grant of administration."

The note continues:-

"While the other plaintiffs were immediately happy with this course, Majella Rippington did not agree at first but when the matter was fully explained to her and after some remonstrations with her by the other applicants, she agreed that the course being recommended was the appropriate course in the circumstances."

The said counsel further states in his letter that after the name of an independent solicitor, Anne Stephenson, was proposed:-

"I brought the three plaintiffs out of the Court and explained what was proposed and they all agreed to this course and requested that I ask the Court to include in the order a provision that the administrator appointed would also pay the funeral costs of the late Celine Murphy. I was attended during these consultations by Ms Kay Manning, Legal Executive, from your office."

11. The details of the proceedings set out by counsel in his correspondence faithfully reflect the transcript of the hearing of the motion. The note continues:-

"I note that Majella Rippington is now unhappy with the decision and wants to appeal it. As you are aware this order was on consent and the question of an appeal is not open to the parties."

The letter concludes:-

"I am disappointed that matters have come to this, not least by the fact that the case is in reality ready for hearing."

By the end of July, 2012 it would appear that the applicants' legal team had ceased to act for them.

12. On 8th August, 2012, an application was made by the first named applicant as a litigant in person on behalf of all the applicants at a vacation sitting of the High Court when Hedigan J. presided, seeking a stay on the order of 23rd July, 2012 of O'Neill J. Hedigan J. refused the application for a stay. Thereupon the applicants appealed the refusal of the stay to the Supreme Court. When the applicants filed their appeal they then proceeded to also file a motion in the Supreme Court seeking a stay on the orders of O'Neill J. pending the hearing of their appeal against the refusal of a stay by Hedigan J. The latter motion came on for hearing in the Supreme Court on 5th October, 2012 where they refused the application for a stay on O'Neill J.'s order pending the hearing of their appeal against the order of Hedigan J.

13. The substantive appeal on the refusal of a stay was never progressed before the Supreme Court. It appears that the appeal from Hedigan J.'s order refusing a stay has recently been resuscitated by the applicants and is due for mention in a list of fix dates in this

Court on 14th December, 2017.

14. On 8th October, 2012, letters of administration *pendente lite* issued to Anne Stephenson without the will annexed. It is clear from the face of the grant that it issued as follows:-

"For the purpose of gathering in and preserving the assets of the deceased, paying the debts of the deceased including the funeral expenses of the deceased and discharging the mortgage on the property of the deceased located at 8 Brownsbarn Court, City West, Saggart, Co. Dublin."

15. Having discharged her obligations pursuant to the grant of administration *pendente lite*, the said grant of letters of administration was revoked at the request of the administrator *pendente lite* by order of Baker J. in the High Court probate list on 21st July, 2014. The applicants appealed to the Supreme Court seeking to set aside the said order of Baker J. It appears the Supreme Court dismissed the applicants' application to set aside the High Court order revoking the letters of administration *pendente lite*. The order of the Supreme Court was perfected on 11th November, 2014.

16. The will suit of the applicants came on for hearing in the High Court on 21st, 22nd, 23rd and 24th July, 2015. The respondents counterclaimed to have the will admitted to probate in solemn form of law. Judgment was delivered by Noonan J. on 30th July, 2015 dismissing the applicants' claims and admitting the will of the deceased dated 8th March, 2011 to probate in solemn form of law. That judgment and orders is the subject of a separate appeal to this Court which was heard on 13th October, 2017. Judgment was reserved.

17. Of relevance to this is appeal is that, in a notice of appeal filed on 24th August, 2015 from the judgment and orders of Noonan J. dated 30th July, 2015 in the will suit, the applicants further sought to appeal the whole of the order of O'Neill J. dated 23rd July, 2012. The ground advanced in support of this stated:-

"Because of the fact that in his order and judgment do not relate to the true factual background or the true facts of the matter and for this reason that his order and judgment lie and when an instrument of law lies then they are fraudulent instruments of law as seen in the Forgery Act 1913 and the Forgery and Counterfeiting Act 1981."

18. On Friday, 13th November, 2015, the management of the applicants' appeal came before this Court and Kelly J., as he then was, ordered as follows:-

"That the appeal insofar as it purports to appeal against the orders of the High Court made on 30th July, 2014 and 23rd July, 2012 be struck out."

That order was never appealed against.

Respondents' position

19. The respondents oppose the application to extend time. They rely on five separate grounds as follows:-

(i) No good grounds are shown as to why the matter was not appealed in July, 2012.

(ii) An appeal at this time would be entirely moot in that the grant *pendente lite* was revoked over three years ago on 21st July, 2014.

(iii) The applicants do not disclose how the order of O'Neill J. appointing an administrator *pendente lite* on 23rd July, 2012 was bad.

(iv) The respondents allege that this application is a collateral attempt to reopen, contest and reargue aspects of the plenary will suit the subject of the judgment of Noonan J. 31st July, 2015, which is the subject of an entirely separate appeal.

(v) This Court has previously determined that the appeal was out of time and ordered it to be struck out on 13th November, 2015.

This appeal

20. The applicants, Majella Rippington and Sean Rippington, issued this notice seeking an extension of time to appeal on 31st July, 2017, over five years after the making of the order in the probate list by O'Neill J. It is noteworthy also that this appeal is brought two years after the High Court had pronounced on the validity of the will and in circumstances where the applicants' appeal in relation to Noonan J.'s order was due to come on for hearing before this Court.

21. Many of the proposed grounds of appeal appear to be directed towards other orders made in the High Court including sundry orders made by Baker J. in the probate list in relation to the revocation of the grant of letters of administration *pendente lite* and the costs of various parties including the administrator *ad litem* and the notice party Michael Cox, the executor named in the last will. Some of the proposed grounds of appeal appear to be directed in part towards issues arising in the substantive appeal of the will suit. It is necessary to extrapolate out the grounds of appeal that could in any way fairly be said to pertain to the order of O'Neill J. dated 23rd July, 2012 appointing Anne Stephenson as administrator of the estate *pendente lite*.

22. The tenor and tone of the notice of appeal is abrasive, replete with obscure solecisms and gratuitously antagonistic, for instance, referring to the administrator *pendente lite* as "an impersonator" and alluding to the executor named in the will of the deceased as "an executor *de son tort*". The purported notice of appeal, together with the grounding affidavit and the supporting submissions, embody serious assertions alleging, *inter alia*, fraudulent misrepresentation before the court, concealment of material facts, that there was no motion lodged grounding the application in the probate court, that the applicants were refused an opportunity to file a replying affidavit to rebut "flawed statements and misrepresentations", that the motion was "not grounded or the reasons given for the reliefs sought", that the application was made with ulterior motive in effect to "admit a homemade will to proof without adjudication and without the executor *de son tort* being called upon to explain himself as the propounder of the document", that the applicants were kept in ignorance of the application and in a "serious deceptive process, denied advices". Dishonesty, deception and exploitation are generally alleged, along with the falsification of "the true facts and the motives".

The transcript

23. The applicants furnished a transcript of proceedings at the hearing of the motion on 23rd July, 2012 in the probate list. This serves to substantially undermine the contentions advanced by the applicants. It is clear that the applicants were fully legally represented. The orders made by the court were in substance made by consent. It is apparent from the face of the order itself that the first named respondent issued a notice of motion and a grounding affidavit in accordance with the normal rules that obtain in the probate list. Various procedural points being raised by the applicants have no substance. The applicants have failed to identify any "flawed statements" or "misrepresentations" of a material nature. Additionally, the applicants have furnished a document supplied by their own counsel who was retained by them at the time which clearly demonstrates the integrity of the process and the reasonableness of the conduct of both parties to the application and the appropriateness of the order made by the learned High Court probate judge in the circumstances that obtained.

24. The proper matters for the consideration of the court in determining whether time should be extended for bringing an appeal scarcely warrant repetition. It was adumbrated by the Supreme Court in *Eire Continental Trading Co Ltd v. Clonmel Foods Ltd* [1955] IR 170 and requires that a bona fide intention to appeal has been formed within the permitted time prescribed, the existence of something akin to mistake and mistake as to procedure not being sufficient and an arguable ground of appeal must be demonstrated to exist.

25. It is noteworthy that in one of the proposed grounds of appeal, namely (h), the applicants state:-

"The estate was insolvent at the time of the application save for any encashment from policies that would return the estate to nominal solvency."

It would thus have been remiss of the executor named in the last will of the deceased to have failed to take the necessary step of making the application in the probate list and I am satisfied, based on having perused all the papers, that the application was prudent, appropriate, proportionate and necessary.

26. No reasons are identified as to why the applicants failed to lodge an appeal within time from the date of the order being 23rd July, 2012. It is clear particularly that they were engaged in the process of appeal around the refusal of a stay and accordingly there is no evidence that they formed an intention to appeal the substantive order within time. Indeed, all the indicators are to the contrary.

Conclusions

27. The applicants have failed to show that they had formed a bona fide intention to appeal within the permitted time as specified in the Rules. All the indications are that the applicants were aware that the order had been made on 23rd July, 2012 by consent in the probate list. No explanation has been offered as to why the orders were not appealed within time. Since the grant of administration *pendente lite* issued in October, 2012 and was subsequently revoked by order of the High Court on 21st July, 2014, seeking to appeal the order of O'Neill J. at this time is entirely wasteful of costs and could serve no meaningful purpose and the application is thus moot. The applicants have failed to show the existence of something akin to mistake or any other legitimate basis to justify enlarging time for the proposed appeal.

28. All the evidence confirms that the application brought in the probate list in July 2012 by the named executor was wholly warranted at the time for the purposes of preserving the estate of the deceased and discharging a mortgage liability. The grounds of appeal being proposed appear in large measure to amount to a collateral attempt to reopen yet again aspects of the plenary action whereby the applicants sought to impugn the last will and testament of the deceased. The proposed notice of appeal fails to articulate any arguable ground of appeal. The propositions being advanced are substantially unstateable and include broad allegations of dishonesty, deception, misrepresentation and fraud asserted in a generalised way against unspecified individuals commingled with unpersuasive legal heresy. The submissions amount to little more than a self-serving articulation of disgruntlements and outbursts of capricious invective on the part of the applicants at the decision of the deceased not to benefit them under the terms of her will. What would appear to matter most in the eyes of the applicants is not so much to acquire this now significantly depleted estate but rather to deny possession of even one cent of the deceased's estate to the beneficiary named in the will.

29. If the applicants had wished in July 2012 for any legitimate reason to vary the order made by consent, they ought to have applied to O'Neill J. in the probate list to have it set aside. That court had discretion to relieve a party of the obligations imposed by a consent order for good and sufficient reason. No explanation whatsoever has been offered for their omission and failure to make such an application at any time.

30. Finally, it is clear from its terms and the submissions filed that this motion is in effect an attempt to reopen a decision already made by this Court on 13th November, 2015 when Kelly J., as he then was, ordered to be struck out such aspects of the appeal as concerned the orders made by O'Neill J. on 23rd July, 2012. That order was never appealed against.

31. Accordingly, the application to extend time to file an ordinary notice of appeal has not been made out on any ground known to the law and should be dismissed.