[2023] JMSC Civ. 70

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

PROBATE DIVISION

CLAIM NO. SU2022ES00014

IN THE ESTATE of **ORVILLE ANTHONY LARMAN** also known as **ORVILLE LARMAN,** late of 30 Amethyst Drive, Golden Acres, Red Hills in the parish of Saint Andrew, Businessman, Testate.

BETWEEN	**JUDITH LARMAN** (Beneficiary of the Estate of Orville Anthony Larman, deceased)	**APPLICANT**
AND	**ANTOINETTE DESIREE LARMAN** (Executrix of the Estate of Orville Anthony Larman, deceased)	**RESPONDENT**

IN CHAMBERS

Ms. Marjorie Shaw instructed by Brown & Shaw for the Applicant.

Ian P. Davis and Tirshatha Russell instructed by I.P. Davis & Co. for the Respondent

Heard on: 9 December 2022 and 27 January 2023

ADMINISTRATION OF ESTATE – PROBATE - ADMINISTRATION WITH WILL ANNEXED – WHETHER THE COURT HAS THE POWER TO CLARIFY, VARY OR ALTER A PREVIOUS COURT ORDER OF A JUDGE OF CONCURRENT JURISDICTION WHICH HAS BEEN PERFECTED – ERROR AND OMISSION IN

PREVIOUSLY MADE ORDER – RULE 42.10(1) - INTENTION OF THE COURT IN PREVIOUS ORDER – CIRCUMSTANCES ASSOCIATED WITH THE APPLICATION – SUBSTANTIAL DELAY IN ADMINISTRATION OF DECEASED'S ESTATE – INTERPRETATION OF THE WORDS "PERMITTED TO PROCEED" – ORDINARY MEANING OF WORD/PHRASE – REMOVAL AND SUBSTITUTION OF PERSONAL REPRESENTATIVE – RULE 68.61- WHETHER TO CLEAR OFF PERSONS ENTITLED IN PRIORITY – RULE 68. 11

REID, ICOLIN J.

Background

[1] The late Orville Anthony Larman (hereinafter referred to as 'the deceased') died on July 4, 2010. He was the husband of Judith Larman (hereinafter referred to as 'the Applicant'), the father of two children: Antoinette Desiree Larman (hereinafter referred to as 'the Respondent') and Damian Larman, and the brother of Wayne Larman.

[2] The deceased executed his last Will and Testament dated May 11, 2006, and named the Respondent and Wayne Larman as the executors of his estate. The parties, in this case, are named in the said Will as beneficiaries, with the Respondent and Damian Larman also being the residuary beneficiaries.

[3] Since the deceased's death, the Will is yet to be probated. Wayne Larman had renounced executorship on April 3, 2013, and he subsequently died. In 2014, the Applicant filed a citation to accept or refuse probate (claim number P 01232/2014). This citation was intended for the Respondent but was served on Damian Larman via an Order granting substituted service. On February 17, 2016, the Applicant filed a Notice of Application with a supporting Affidavit exhibiting the deceased's last Will (filed under P 01232/2014) seeking an Order to be permitted to apply for a Grant of Letters of Administration with the Will annexed.

[4] When the application came up for hearing on July 10, 2018, the learned judge ordered that the Respondent should file all documents required for a grant of

Probate on or before September 10, 2018. The Court further ordered that if the Respondent failed to do so, then the Applicant would be permitted to file an Application for Letters of Administration.

[5] On September 4, 2018, the Respondent applied for a Grant of Probate of the deceased's estate (suit number P 01642/2018), and a requisition was issued by the Probate Registry dated September 24, 2018. On April 1, 2019, the Applicant filed an application for a Grant of Administration (in SU2019ES00587). At that time, the Respondent had not complied with the requisition. On July 2, 2020, the Applicant filed another Notice of Application for Court Orders and sought to have the application for grant of Probate filed by the Respondent struck out and for permission to proceed with the Application for the Grant of Letters of Administration with Will Annexed.

[6] On November 6, 2020, the application was heard, and the learned judge ordered that the application for Grant of Probate filed by the Respondent should be struck out. The learned judge also ordered that the Applicant's application for a grant of probate of the estate of the deceased was permitted to proceed. Regarding the Applicant's application for the grant of Letters of Administration, a requisition was issued by the Probate Registry on September 13, 2021, requesting that the persons entitled in priority be cleared off. It is against this background that the Applicant sought the assistance of the Court by filing another Notice of Application to formally clear off the Respondent and Damion Larman as persons entitled in priority.

The Application

[7] The Applicant, by a Notice of Application filed on January 5, 2022, sought the following orders:

> *"1. Antoinette Larman, be cleared off in her capacity as:*
>
> *a. one of the Executors, named in the Last Will and Testament of Orville Anthony Larman, dated the 11th*

day of May, 2006 entitled in priority to a Grant of Probate.

b. one of the residuary legatee and devisee, named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 entitled in priority to a Grant of Letters of Administration with the Will annexed.

2. Damian Larman be cleared off as a residuary legatee and devisee named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 entitled in priority to a Grant of Letters of Administration with the Will annexed.

3. Judith Opal Larman the devisee named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 be appointed the person in priority to apply for, and proceed with, the Grant of Letters of Administration with the Will annexed bearing Suit No.SU2019ES00587, which was allowed to stand.

4. Cost to be cost to the Estate.

5. Such further or other relief as this Honourable Court thinks fit."

[8] The grounds on which the Applicant sought those orders are as follows:

"a. The said Orville Anthony Larman also known as Orville Larman made and executed his Last Will and Testament on the 11th day of May, 2006;

b. Rule 68.61 of the Civil Procedure Rules, 2002 allows for the removal of a personal representative.

c. The other named executor Wayne Larman renounced his executorship on April 3, 2013 leaving Antoinette Larman as the remaining named Executor.

d. On November 6, 2020, this Honourable Court struck out the application made by Antoinette Larman for Grant of Probate due to the inordinate delay on her part and the "unless" Order previously made.

e. Rule 68.11 of the Civil Procedure Rules, 2002 lists the Order of priority for grant where the deceased left a Will.

> f. *Antoinette Larman and Damian Larman are the residuary legatees and devisees named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 and are entitled in priority to a grant of Letters of Administration with the Will annexed.*
>
> g. *By Orders of the Court dated July 10, 2018 and November 6, 2020, the application by Judith Larman for an application for Grant of Letters of Administration with the Will annexed was permitted to proceed.*
>
> h. *Clearance by this Honourable Court is necessary for the perfection of the Orders previously made in favour of Judith Larman."*

The Evidence

[9] The Applicant's evidence was contained in an affidavit filed on November 25, 2021.

[10] The Respondent relied on the evidence contained in three affidavits; two she swore to filed on May 19, 2022, and May 27, 2022, and the other, by Damion Larman, filed on May 19, 2022, in response to the Applicant's Notice of Application.

Applicant's Case

[11] The Applicant contended that the remaining executor, the Respondent, had defaulted in taking steps to apply for or complete an application for a Grant of Probate in the deceased's estate. As a result of her inaction and the passage of time since the death of the deceased in 2010, the Applicant filed a Citation to Accept or Refuse Probate, a Notice of Application for substituted service, and an Affidavit in Support of the Notice of Application on August 18, 2014, to have the estate administration's process commenced.

[12] The Applicant states that permission was granted by an Order of the Court dated December 8, 2014, to serve the said Citation and all other subsequent documents relevant to the application on Damian Larman. She further states that the Respondent, having been notified of the application, did not take any steps to administer the said estate. As a result, on February 17, 2016, the Applicant filed a

Notice of Application and Affidavit in Support seeking an order to be allowed to apply for a Grant of Letters of Administration with the Will annexed. This application was set for hearing on January 10, 2018, and on that date, Damion Larman attended Court along with his Attorneys-at-Law, Scott, Bhoorasingh & Bonnick. The matter was adjourned to July 10, 2018.

[13] On July 10, 2018, the Respondent and her brother, Damion Larman, attended Court. After hearing the application, the Court ordered the Respondent to apply for and file all documents in relation to the application for a Grant of Probate on or before September 10, 2018, failing which the Applicant would be permitted to apply for Letters of Administration with the Will annexed.

[14] The Respondent thereafter filed an application for a Grant of Probate in the deceased's estate on September 4, 2018. The Respondent did not comply with a requisition dated September 24, 2018, issued by the Probate Registry of the Supreme Court. The Applicant states that, once again, due to the Respondent's failure to comply with the Orders of the Court, on April 1, 2019, she filed another application for a Grant of Administration with the Will annexed under Claim no. SU2019ES00587.

[15] The Applicant deponed that she only became aware of the filing of a corresponding application for Probate regarding the estate of her late husband when a requisition dated May 8, 2019, was issued to her by the Probate Registry. Consequently, on July 2, 2020, she filed a Notice of Application for Court Orders requesting that the application for Grant of Probate filed by the Respondent be struck out.

[16] This application was heard on November 6, 2020, and the Court struck out the application for the Grant of Probate filed by the Respondent. On September 13, 2021, the Applicant received a requisition from the Probate Registry relating to her application for a Grant of Letters of Administration with the Will annexed (which was filed on April 1, 2019). She states that although cognizant of the prior orders of this Honourable Court, the Probate Registry requires her to account for the

persons entitled in priority for the Grant of Letters of Administration with the Will annexed. Those persons entitled in priority are the Respondent and Damian Larman.

[17] She indicated that the previous Order of this Honourable Court giving her permission was insufficient to provide the statutory clearance required to process her application for Letters of Administration with the Will Annexed. Therefore, without a specific Order of this Honourable Court clearing off the executor and/or residuary legatees/devisees, the Respondent and Damion Larman remain entitled in priority according to Rule 68.11 of the Civil Procedure Rules, 2002.

[18] The Applicant emphasised that it has been eleven years since the death of the deceased, and his estate still languishes unsettled. This inordinate delay has prevented her from receiving her benefits under the Will of the deceased. She also indicates that she has expended significant financial resources with respect to continuous litigation in an effort to have the estate administered and her benefit under the will realised. She, therefore, desires to have the Respondent cleared off as the executrix and the said Respondent and her brother also cleared off as the residuary legatees/devisees entitled in priority to a Grant of Letters of Administration with the Will annexed.

Respondent's case

The Respondent's Evidence

[19] The Respondent states that shortly after her father's death and before the death of her co-executor, Wayne Larman, she became aware that the Applicant was in possession of the Last Will and Testament of the deceased. She said that she gave instructions to the firm of Messrs. Davis, Robb & Co, Attorneys-at-law, to complete the process of obtaining Probate in her father's estate. She denied that she did not take any steps to apply for or complete the application for a grant of probate. She expressed that as the sole executrix, she was always prepared to make the necessary application for the Will to be admitted to Probate.

[20] The Respondent stated that when she learned that the last Will was in the Applicant's possession, she made several unsuccessful attempts to obtain it. She said that she filed an Application for a Grant of Probate on September 4, 2018. However, due to the Applicant's unwillingness to turn over the last Will of the deceased, she was prevented from moving forward with the Application.

[21] She acknowledged that a requisition was issued by the Court, however, she was adamant that she could not comply with the requisition since the last Will was and still is in the Applicant's possession. She added that the stance of the Applicant appeared to have been an attempt to sabotage the desire to have the deceased's last Will admitted to Probate.

[22] The Respondent denies that she failed to comply with the Court Order made on July 10, 2018. She asserted that obtaining the last Will of the deceased from the Applicant was an exercise in futility. She said that the Application filed by the Applicant on July 2, 2020, was an attempt to circumvent the due process by taking control of the deceased's estate.

[23] The Respondent asserted that the learned judge may have erred in arriving at her decision when she refused to take into consideration the fact that other beneficiaries ranked in priority to the Applicant. Further, an Order to clear off the executor and/or residuary legatees or devisees is not necessary since, in her capacity as the sole surviving executor, she has begun the process of applying for probate, and she was acting and is still willing to act for the benefit of the estate.

[24] She also pointed out that she was hindered in moving ahead because of the Order of this Honourable Court made on November 6, 2020. She declared that there is no need for this Court to consider this current Application since she is the sole surviving executrix in the deceased's estate, and according to Rule 68.11, she is the person entitled in priority to a Grant of Probate. She further adds that she is willing to complete her executorial duties in a manner that will enure to the benefit of the deceased's estate. She maintains that all the pertinent documents have

been filed, and the only outstanding document is the original last Will of the deceased which is in the Applicant's possession.

Damion Larman's Evidence

[25] In his evidence, Mr. Larman replicated a substantial portion of the Respondent's evidence. He gave evidence that the sole surviving executrix, the Respondent, took steps in filing all the necessary documents grounding an application for a Grant of Probate in the estate of the deceased and was prepared to administer the estate of the deceased. He was aware that a Requisition dated November 6, 2020, was issued to the Respondent for the original last Will to be filed.

[26] He also blames the inability of the Respondent to comply with the requisition on the unwillingness of the Applicant to give up possession of the last Will of the deceased. Mr. Larman shared similar sentiments as the Respondent that the Applicant's refusal to surrender the Will to the Respondent appeared to be an attempt to sabotage the Respondent's desire to have the deceased's last Will duly admitted. He also asserted that the Applicant's application for the Respondent's application to be struck out, was an attempt to stall the application made by the Respondent and to re-route the supervision of the deceased's estate to herself.

[27] He agrees with the Respondent that the learned Judge may have erred in arriving at her decision when she failed to give due consideration to the fact that, in his capacity as a residuary legatee/devisee, he was ranked in priority to the Applicant. He highlighted that had the Respondent been unwilling to perform her role as the surviving executrix, he would be willing to make the relevant application in her stead. He denied the relevance of an Order to clear off the executrix and/or residuary legatees and/or devisees since he and the sole surviving executrix are willing to act. He further pointed out that there is no need to consider the application to clear off the executrix as she is entitled in priority to the Applicant, has already started the process and is willing to complete the Application.

Applicant's Submission

[28] Ms. Marjorie Shaw, Attorney-at-law for the Applicant, made brief submissions. She argued that it was pertinent for the Court to appreciate that what was currently before the Court was not an application for the exercise of the Court's discretion in determining who may be appointed the Personal Representative of the deceased. She emphasised that the Court has already exercised that discretion by virtue of the conditional Orders made on July 10, 2016, and later, by the Orders made on November 6, 2022. Counsel indicated that what is now before the Court is the need for the clarification and perfection of the intention and purpose of the Orders made on November 6, 2020.

[29] Counsel recited the applicable law, which speaks to the order of priority for a grant where the deceased has left a Will. She relied on Rule 68.11 of the **Supreme Court of Jamaica Civil Procedure Rules 2002** (hereinafter referred to as the 'CPR'). Ms Shaw contends that the purpose of the Orders made on November 6, 2022, will be rendered impotent and inconsistent with the intention of the Court without the necessary clarification by making further orders. She relied on the Court of Appeal decision of ***Dalfel Weir v. Beverly Tree*** *[2016] JMCA App 6*, where Phillips JA opined at para. [68] "*that there is no need to refer in any detail to the other bases in respect of which the Court could exercise its jurisdiction to preserve the clarity and functioning of its Order, save to say that if a supplemental Order was needed for the 'working out' of the Order according to the implied liberty to apply jurisdiction…*" the Court could make the Order.

[30] Ms. Shaw also submitted that clearing off the executor and residual legatees is necessary to allow the Applicant, as ordered by the Court, the right to make the application for Letters of Application with the Will Annexed. Counsel argued that generally, in the absence of an appeal or the proper grounds for a variation, the Court has no jurisdiction to alter an order of the Court that has been entered or perfected.

Respondent's Submission

[31] Mr. Ian Davis, Attorney-at-law for the Respondent, argued that the two central issues which arose in the case were:

i. whether the Court ought to exercise its discretion to remove the Respondent as a surviving executor and residuary legatee in the deceased's estate; and

ii. whether this application is permissible where there is a residuary legatee which ranks in priority to the Applicant to make an application for Letters of Administration with the Will annexed?

[32] Counsel relied on Rule 68.31 of the CPR, which grants the Court the authority to substitute and remove a personal representative. He expressed that the CPR was silent as to the principles which the Court ought to consider in making such an application. Counsel referred to cases from the United Kingdom as a useful starting point for the exercise of this power where the Courts have interpreted section 50 of **The Administration Act 1985,** which is a parallel statutory provision. He relied on ***Harris and others v Earwicker and others*** *[2015] EWHC 1915 (Ch)*. Counsel also emphasised that the Court opined that the exercise of this power was discretionary, and the overall consideration was the welfare of the beneficiaries. He said that the case provided a guideline for the circumstances the Court could consider in granting such an application, but he noted that the list was not exhaustive.

[33] Counsel also relied on ***Kershaw v Micklethwaite & others*** *[2010] EWHC 506 (Ch)* for support that an application of this nature must not be frivolous or vexatious and must be supported by strong evidence. He contended that the Court would not lightly interfere with the Will of a testator to freely choose his executors.

[34] He argued that removing the personal representative or, in this case, the Respondent would be to the detriment of the Applicant and the other residuary

beneficiary. Mr. Davis added that the fact that the deceased chose the Respondent as his executor militated against her removal. He said any perceived friction or hostility on the Applicant's part is not determinative of the application to remove the Respondent. As such, in making its determination, the Court must weigh the factors against and in favour of the application. In support of this argument, he also placed reliance *on* ***Long (as administrator of the estate of Rodman deceased) v Rodman and others*** *[2019] EWHC 753 (Ch)*.

[35] Counsel contended that the Applicant had not provided this Court with sufficient evidence to ground a claim for the removal of the Respondent. The delay complained of by the Applicant has been occasioned due to her intentional acts of withholding the original last Will. The Applicant is aware of the requisition from the Probate Registry to provide this document and, to her detriment, continues to seize the document.

[36] He expressed that the Respondent has always remained willing and available to obtain the grant of probate and to administer the estate faithfully and dutifully in her role as the surviving executrix. Mr. Davis further pointed out that it is the Respondent's position that she was not aware of any need to obtain any grant in her father's estate hence the initial delay on her part. However, since retaining the services of an attorney-at-law, the Respondent has made every effort, to the extent possible, to comply with every order from the Court. Counsel also denied that the Respondent was seeking to frustrate the administration of the estate and to prevent the Applicant from obtaining her gifts according to the Will of the deceased. Counsel said that any such action would negatively impact the interests of the Respondent, who stands to benefit from the administration of the estate.

[37] Learned counsel also relied on ***Wilbert Christopher v Patrick Fletcher*** *[2012] JMCA Civ 54*, at para. [13], in pointing out that while it was unnecessary to find any wrongdoing on the part of the respondent, it was a relevant consideration as to whether "*the respondent had intermeddled in the estate of the deceased or committed any acts of mismanagement to justify [her] removal*". He urged the

Court to give serious consideration to this issue. He argued that the Applicant had provided no such evidence to require this Court to interfere with the deceased's wishes to appoint the Respondent as one of the executors.

[38] Counsel said that the Applicant's only real complaint was one of delay, which was occasioned by her mischief. The Respondent has no difficulty with the Applicant, and this will not impair her ability to administer the estate. Counsel further argued that it would be more prejudicial to the estate to allow the grant of the application to remove the Respondent. Counsel also argued that the Applicant was not someone the Respondent and Damian Larman could reasonably trust to administer the estate.

[39] It was his further submission that the Applicant has yet to show any good reason why the other residuary legatee, Damian Larman, ought also to be removed, especially in light of Rule 68.11. Relying again on ***Wilbert Christopher v Patrick Fletcher*** *(supra), at* para. [14], Counsel argued that the Court should not grant the application to remove Damion Larman. Counsel acknowledged that the Applicant is entitled to make an application, however, she does not rank above Damian Larman, who is ready and willing to seek a grant in the estate.

[40] Mr. Davis further submitted that the Court, in considering any alternatives, ought to make an Order for the Applicant to deliver to the Court the original last Will, putting the Respondent in a position to obtain the Grant of Probate. Reliance was placed on ***Long (as administrator of the estate of Rodman deceased) v Rodman and others*** *(supra).*

The issues

[41] On the assessment of the pleadings, it is my view that the main issue for determination is whether the Court should grant the application of clearing off persons in priority, that is, the surviving executor and residuary legatees in the deceased’s estate.

[42] However, before coming to a decision, the Court will have to deal with the following sub-issues:

i. Does the Court have the power to clarify, vary or alter a previous Court Order of a Judge of concurrent jurisdiction that has been entered or perfected, and, if so, in what circumstances?

ii. What was the Court's intention in the original Order that the Court made on November 6, 2020, and what is the interpretation or clarification of the words "permitted to proceed"?

iii. Has the Order defeated the purpose and/or objective of the Order made, and is clearing off necessary for the perfection of the Orders previously made on November 6, 2020?

Issue i: Does the Court have the power to clarify, vary or alter a previous Court Order of a Judge of concurrent jurisdiction that has been entered or perfected, and, if so, in what circumstances?

[43] Section 6(1) of the **Judicature (Supreme Court) Act** has prescribed that "Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction."

[44] The issue of whether a Judge can vary a final Order made by a Judge of concurrent jurisdiction was addressed in the Court of Appeal decision of ***Bardi Limited and McDonald Millingen*** *[2018] JMCA Civ 33*, where Phillips JA opined at para. [32]:

> *" …..that the authorities establish that 'the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud' (emphasis added). It was clear that his use of the word 'include' in this context, meant that this was not an exhaustive list, and was not a pre-requirement for the exercise of the discretion of the judge in the making or reviewing of provisional or final charging orders. It was not, in any event, a statement made exclusively in relation to an ex parte jurisdiction. At any rate, the rules provide, as indicated, that any order made by the court can be varied or revoked by the court."*

[45] In that decision, F Williams JA concurred with that finding by Phillips JA where he opined at para. [47] that:

> *"I too take the view that on a proper reading of the dictum of Dingemans J in* ***Richard Parr v Tiuta International Limited*** *[2016] EWHC 2 (QB), the categories of circumstances in which a judge may review an order of another judge of co-ordinate jurisdiction, are not closed."*

[46] I appreciate that the power to set aside orders is limited to particular circumstances. However, I am mindful that there is no exhaustive list; it depends on the circumstances of each case. In the Court of Appeal case of ***Weir v Tree***, Morrison P (Ag), as he then was, cited with approval, ***American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited*** *[2014] JMCA App 16*; ***Sans Souci Limited v VRL Services Limited*** *[2012] UKPC 6 and* ***Hatton v Harris*** *[1892] AC 547.* His Lordship distilled at para. [17] that:

> *"**This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions**, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order. In order to determine what was the intention of the court which made the original order**, the court must have regard to the language of the order, taken in its context and against the background of all the relevant circumstances, including (but not limited to) (i) the issues which the court which made the original order was called upon to resolve; and (ii) the court's reasons for making the original order.**" (Emphasis added)*

[47] Rule 42.10(1) of the CPR provides that "the court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission".

[48] This Court is empowered to clarify, vary or alter a previous Court Order of a Judge of concurrent jurisdiction in particular circumstances, including but not limited to the abovementioned circumstances. A judge can also exercise discretion to vary an order if the presiding judge fails to comply with existing practice and procedure.

[49] I find that the circumstances highlighted in the case of ***Weir v Tree*** (supra) are most appropriate to the case at bar and will be discussed further in issue (ii) below.

Issue ii: What was the Court's intention in the original order that was made on November 6, 2020, and what is the interpretation of the words "permitted to proceed"?

[50] Before I address what was intended by the Court in the original order, I will set out the order of November 6, 2020, and assess the evidence of the parties regarding the relevant circumstances that led to the making of that order. The Order reads:

> *"1. The Defendant's Application for the Grant of Probate of the Estate of Orville Anthony Larman in Suit No. P 01642/2018 is struck out.*
>
> *2. The Application for the Grant of Probate of the Estate of Orville Anthony Larman in Suit No.SU2019ES00587 is permitted to proceed.*
>
> *3. Costs to the Claimant to be taxed if not agreed."*

[51] The Court, in that order, struck out the sole executrix's application for a grant of Probate in the deceased estate. This was approximately 10 years after the death of the testator. During this time, nothing had been accomplished by the executrix in respect of the administration of the deceased's estate.

[52] Simmons J in ***Howard Jacas (Executor, estate of Sylbert Jacas, deceased) v Bryan Jacas and Bryan Jacas (attorney of Thelma Jacas)*** *[2014] JMSC Civ 190*, sets out the duty of an executor at paras [23] and [24]:

> *"[23] The duty of an executor is to administer the testator's property and to carry into effect the terms of the will. In* ***Re Stewart; Smith and another v Price and others*** *5 ITELR 622 at 630, Laurenson J in his examination of the role of an executor stated: -*
>
>> *'An executor is the person appointed by a testator or testatrix to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers, namely to:*

> - *Bury the deceased;*
> - *Make an inventory of assets;*
> - *Pay all duties, testamentary expenses and debts;*
> - *Pay legacies; • Distribute the residue to the persons entitled; and*
> - *Keep accounts.*
>
> *…*
>
> *[24] An executor's title is derived from the will and he may pay or release debts as well as get in and receive the testator's estate even before probate is granted. He holds the assets of the estate for the sole purpose of carrying out his duties and functions and is therefore in a fiduciary position in relation to those assets and may be held liable if he is negligent or reckless in his management of the estate. It is for this reason that he is bound by his oath to "faithfully collect, get in and administer according to law all the real and personal estate of the deceased" and to 'render a just and true account of" his "executorship whenever required by law so to do' [Civil Procedure Rules 2002, Form P.1]".*

[53] In the case at bar, the deceased died on July 4, 2010, leaving his Will, which had specifically named the Respondent as one of the executors. The evidence led by the Applicant highlighted a timeline depicting an attempt to fuel the commencement of the process of administering the estate of the deceased by the Applicant on August 18, 2014, when she filed a citation to accept or refuse probate four years after the death of the deceased. I note that the Citation was served on Damian Larman via an order granting substituted service.

[54] On February 17, 2016, more than five years after the passing of the deceased, the Applicant filed her first Notice of Application, a supporting Affidavit with a copy of the deceased's last Will exhibited, whereby she sought an order to be permitted to apply for a Grant of Letters of Administration with the Will annexed. On hearing the application on July 10, 2018, the learned judge ordered that the Respondent should file all documents required for a grant of Probate on or before September

10, 2018. The learned judge further ordered that if the Respondent failed to do so, the Applicant would be permitted to file an Application for Letters of Administration. On September 4, 2018, eight years after the deceased's death, the Respondent applied for a Grant of Probate in the deceased's estate. A requisition was issued by the Probate Registry dated September 24, 2018, which read:

> *"1. Please file the original will and the Death Certificate so that the file can be properly vetted.*
>
> *2. Re: Oath of Executor-*
>
> *a. please furnish details of the Deed of Renunciation by stating the date of registration and the Liber New Series Number*
>
> *b. the net real estate cannot exceed the gross real estate.*
>
> *c. the footnote should be included on the document."*

[55] On April 1, 2019, the Applicant filed an application for a Grant of Administration because, up to that date, the Respondent had not complied with the requisition. On July 2, 2020, the Applicant filed her second Notice of Application for Court Orders and sought to have the application for grant of Probate filed by the Respondent struck out and for permission for her (the Applicant) to proceed with the Application for the Grant of Letters of Administration with the Will Annexed.

[56] On November 6, 2020, the application was heard, and Carr J (Ag) (as she then was) ordered that:

> *"1. The Defendant's Application for the Grant of Probate of the Estate of Orville Anthony Larman in Suit No. P 01642/2018 is struck out.*
>
> *1. The Application for the Grant of Probate of the Estate of Orville Anthony Larman in Suit No. SU 2019ES 00587 is permitted to proceed.*
>
> *2. Costs to the Claimant to be taxed if not agreed."*

[57] Pursuant to that order, the Applicant continued her application for the grant of letters of Administration with the Will annexed. However, a requisition was issued by Probate Registry on September 13, 2021, asking that the persons entitled in priority be cleared off.

[58] In response, both the Respondent and Damion Larman have complained that the delay resulted from the Applicant's refusal to provide the Respondent with the Will. They both agree that the Applicant impeded the Respondent's ability to comply with the Court order of July 10, 2018. Thereafter, the Respondent was further hindered by the order of Carr J (Ag) dated November 6, 2020.

[59] They claimed that the position of the Applicant appeared to have been an attempt to sabotage the desire to have the Deceased's last Will admitted to Probate. The alleged unwillingness to turn over the Will was the only argument put forward by both the Respondent and her brother as to why she did not act upon her duties as an executor. I find this to be insufficient ground for the inactivity or neglect on the part of the Respondent in taking active steps to administer the deceased's estate.

[60] As counsel for the Applicant pointed out in her submission, both the Respondent and Damion Larman were aware that the last Will of the deceased was in the Applicant's possession when both of the named Executors spoke with their father's Attorneys-at-Law, Messrs. Lightbourne and Hamilton. Ms. Shaw argued that if the Applicant was as reluctant in handing over the Will as the Respondent would like the Court to believe, there were avenues available to rectify such an issue. Counsel pointed out that the Respondent could have sought the assistance and direction of the Court as to the best recourse to take in these circumstances. She highlighted Rule 68.45(2) and (3), which provided that the Respondent could have made an application for an order for summons for the Respondent to bring in the Will. Damion Larman also had the opportunity as a residual legatee to apply for a grant of administration (see Rule 68.11 of the CPR) after the sole surviving executor's application was struck out.

[61] Neither the Respondent nor Damion Larman did anything to avail themselves of the resolutions available to them in administering the estate of the deceased. I also noted that the Respondent was represented at all material times in the previous applications. Although Damion Larman was not a party to the proceedings, he was always present in Court and ought to have made enquiries of the Respondent and, at minimum, informed himself as to what was taking place with his father's estate.

[62] In any event, Damion Larman would have at least been aware that nothing was being done to administer the estate and distribute the assets in the last 10 years.

Substantial Delay

[63] It is noteworthy that it is now more than 10 years after the passing of the deceased, and the deceased's estate is yet to be administered. The Court frowns on the delays being exhibited in this case. The Court notes that there has been no appeal from the decision of Carr J (Ag) despite the contention that it was erroneously made.

[64] I find that as a sole surviving executrix and one of the residuary legatees, the Respondent has shown herself to be incapable or unwilling to administer the estate. I find that there was excessive delay in winding up the estate of the deceased. The Respondent has not given any good reason for such inactivity, in fact, she seems to have slept on her duties for a great length of time and has failed to take proper action with reasonable diligence to obtain probate. As a result, she has prejudiced the estate of the deceased.

The Court's intention in the original Order

[65] Probate proceedings relate to seeking permission, whether by a grant of probate or letters of administration, to administer the estate of a deceased person. The purpose of the proceedings is to protect the assets by preventing any undue delay or misconduct and to ensure that the estate is administered as per the testator's wishes.

[66] I find that it was the Court's intention in the original Order dated November 6, 2020, in paragraph 1, to grant the Applicant's application to strike out the Respondent's application for the Grant of Probate filed on September 4, 2018.

Error

[67] Since the Court's intention is as I have stated at para. [66], the following questions arose:

1. What did para. 2 of the order made by Carr J (Ag) mean?
2. Was it the intention of the Court that the Applicant was to continue with her application filed on April 1, 2019, for the grant of Letters of Administration with the Will Annexed, or was it the Court's intention for the Respondent to achieve "another bite at the cherry", in seeking the assistance of the Court to probate her father's Will as a residual legatee or for her brother to make an application for a grant in the same estate?

[68] I find that it was the Court's intention that the Applicant was to continue with her application filed on April 1, 2019, for the grant of Letters of Administration with the Will Annexed. I find that an error was made on the basis that the Applicant made an application for a grant of Letters of Administration with Will Annexed where the executrix had failed to execute her duties. Para. 2, in its present state, reads:

> *"The Application for the Grant of Probate of the Estate of Orville Anthony Larman in Suit No.SU2019ES00587 is permitted to proceed."*

Based on the nature of the application, the order should read:

> *"The Application for the Grant of Letters of Administration with the Will annexed in the estate of Orville Anthony Larman in Suit No. SU2019ES 00587 is permitted to proceed."*

I, therefore, find that there was an error which ought properly to be corrected under the "Slip Rule".

<u>The Language and interpretation of "permitted to proceed"</u>

[69] To ascertain the intention of the Court, I must now consider the language used and what was meant by the words "***permitted to proceed***" in para. 2 of the order. The Court should interpret its orders like any other legal instrument. The legal rule of interpretation most appropriate in the circumstances of this case is a purposive approach. In interpreting the order, it is imperative to give primacy to the purpose of the order in the interest of giving effect to the intention of the said order. The purposive rule envisages that where words are clear, the Court is to give effect to the natural, ordinary meaning of the word or phrase once consistent with the perceived purpose of the Order.

[70] In its natural and ordinary meaning and given the context of the order, I find that the word 'permit' means to give permission. 'Proceed' in its natural and ordinary sense and in the context of the order is taken to mean to go on, especially after stopping, to undertake and carry on some action and to take legal action.

[71] In examining the words in their natural, ordinary meaning, I find that the words to give permission, to go on and carry on some action and to take legal action are consistent with the perceived purpose of the Order. The purpose of the Order was to grant the Applicant permission to carry on or continue with her application for the Grant of Letters of Administration with the Will annexed.

<u>Omission</u>

[72] I also find that the Court intended to grant the Applicant permission to continue her application for the Grant of Letters of Administration with the Will annexed. Therefore, in my view, there was an omission in the Order. Rule 68.11 of the CPR governs the entitlement of an Order of priority for a grant where the deceased left a Will. The person or persons entitled to a grant, in the instant case, is to be determined under the following order of priority:

a. the executor;

b. any residuary legatee or devisee holding in trust for any other person;

c. any other residuary legatee or devisee.

[73] In preparation for the oath, an Applicant must set out in full detail how persons with prior rights are cleared off to ground his or her entitlement to a grant.

[74] A person with prior entitlement to a grant can be cleared off by: (1) death; (2) consent; (3) renunciation; or (4) citation or court order. Where the Court makes an order in the terms of para. 2, as Carr J (Ag) did, then I do believe that it ought to have included an order that persons with prior rights are cleared off. In this case, those persons would be the Respondent and Damion Larman. The order had omitted any reference to the standings of the executor and Damion Larman, who are both entitled to a grant of Letters of Administration with the Will Annexed in their capacity as the residuary legatees/devisees named in the Will. Therefore, further Orders should have been made, clearing off those persons in priority.

[75] I also note that no appeal was filed by the Respondent against the judgment that the Court handed down on November 6, 2020. This ought to have been pursued if the Respondent believed that the learned judge may have erred in arriving at her decision when she refused to take into consideration the fact that other beneficiaries ranked in priority to the Applicant.

[76] I am also in agreement with counsel Ms. Shaw that what is currently before the Court is not an application for the exercise of the Court's discretion in determining who may be appointed the Personal Representative of the deceased. The Court has already exercised that discretion by the orders made unequivocally on November 6, 2022. Counsel emphasised that what is before the Court is the clarification and perfection of the intention and purpose of the Orders made on November 6, 2020. As such, I disagree with the issues raised by counsel Mr. Davis that the Court, in considering any alternative Orders, ought to make an Order for the Applicant to deliver to the Court the original last Will, putting the Respondent

in a position to obtain the Grant of Probate. I believe that the time for such an order has long passed. Further, the cases relied on by Mr. Davis are distinguishable from the case at bar. The instant case is not one for removing or substituting a personal representative/executor or where the executors or beneficiaries have intermeddled with the deceased's estate.

[77] A judge's role is to dispense justice. I find that it would be unjust and prejudicial to the estate of the deceased and also an abuse of the Court's powers if the Respondent, at this time, was allowed to bring an application for a grant of Letters of Administration with the Will annexed, and for the Court to direct the Applicant to hand over the Will. I also find that the Respondent has not provided the Court with sufficient evidence to show that if the application was granted for clearing off those in priority to the Applicant, there would be a great injustice to the deceased's estate.

[78] The Respondent has sat upon her rights as the executrix of her father's estate. I would borrow the words of Brown J in ***Basil Louis Hugh Lambie et al v Marva Lambie et al*** *[2014] JMSC Civ 44*, at para. [72] that her duties were "*to discharge three functions in relation to the deceased's estate. First, the personal representative is to pay the just debts and testamentary expenses of the deceased. Secondly, the personal representative is to collect and realise the assets of the deceased. Thirdly, an executor or administrator is to distribute the assets of the estate."* To my mind, the Respondent has failed miserably in all three areas, and there has been substantial delay that could and should have been rectified.

[79] Based on the above discussion, I find that there was an error and an omission in the Order granted on November 6, 2020, and this Court has the power to correct this.

Issue iii: Has the Order defeated the purpose and/or objective of the Order made and is clearing off necessary for the perfection of the Orders previously made on November 6, 2020.?

[80] From the above discourse, issue (iii) can be answered in the affirmative that the original Order has defeated the purpose and/or objective of the Order made, and clearing off is necessary for the effectiveness and perfection of the Order previously made on November 6, 2020. Pursuant to rule 68.11 of the CPR, the persons in priority must be cleared off.

[81] The evidence is very clear that the Respondent and Damion Larman were woefully remiss in taking all the necessary steps to wind up the estate of their deceased father. Both were aware that the Applicant possessed their father's will and could have availed themselves of the necessary options to secure the document but failed to do so. At every step of the game, they only reacted to her applications. They never once took the initiative to proceed on their own to administer the estate.

[82] I also note that the chain of priority was broken from the Order made on November 6, 2020. Therefore, to make the order effective and being guided by ***Weir v Tree*** (supra), I must make further orders to give life to the purpose of the Court's initial order.

Conclusion

[83] In conclusion, I reiterate that there was an error and omission in the Order granted on November 6, 2020. The Court has the power to correct errors in an Order previously made by it arising from accidental slips or omissions so as to bring the Order as drawn into conformity with that which the Court meant to pronounce. The original Order has defeated the purpose and/or objective of the Order made and clearing off is necessary for the effectiveness and perfection of the Order previously made on November 6, 2020. Therefore, to make the order more effective, further Orders must be made to give life to the initial Order of the Court. Thus, for the above reasons, the Court will grant the application of clearing off of the persons in priority, that is, the surviving executor and residuary legatees in the Estate of Orville Larman.

Orders:

1. The order #2 made by the Honourable Mrs. Justice T. Carr (Ag) on November 6, 2020, is varied pursuant to Civil Procedure Rule 42.10(1) to read: "**The application for the Grant of Administration with the Will annexed in the Estate of Orville Anthony Larman in Suit No. SU 2019ES 00587 is permitted to proceed**."
2. Antoinette Larman is cleared off in her capacity as:
   (a) One of the executors, named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 entitled in priority to a Grant of Probate.
   (b) One of the residuary legatee and devisee, named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 entitled in priority to a Grant of Letters of Administration with Will annexed.
3. Damian Larman is cleared off as a residuary legatee and devisee named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 entitled in priority to a Grant of Letters of Administration with Will annexed.
4. Judith Opal Larman, the devisee named in the Last Will and Testament of Orville Anthony Larman, dated the 11th day of May, 2006 is appointed the person in priority to apply for and proceed with the Grant of Letters of Administration with the Will annexed in Suit No. SU 2019ES 00587, which was allowed to stand.
5. Costs to be costs in the estate.
6. The Applicant's Attorneys-at-Law are to prepare, file and serve the order.