

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 1 OF 2023

BETWEEN:

ROSALBA FRANCISCA GUZMAN

Claimant/Respondent

and

AMIR CONTRERAS

Defendant/Applicant

Appearances:

Mr. Arthur Saldivar for the Claimant/Respondent

Ms. Velda Flowers for the Defendant/Applicant

2024: October 2;
November 4.

APPLICATION TO DISMISS

ORAL RULING

[1] **Nabie, J.:** The claimant in this matter challenges the grant of probate of Alberto Contreras (the deceased) on the basis that the will which was probated dated 8th September 2009 by the defendant was not the last will and testament of the deceased. The defendant has filed an application to dismiss the claim as the purported last will dated 6th April 2019 (the 2019 will) was not disclosed and produced by the claimant. The claimant has not followed the relevant Civil

Proceedings Rules (CPR) and provided pertinent evidence in support of her claim. I therefore dismiss the claim.

Background

- [2] By Fixed Date Claim, the claimant seeks inter alia the following reliefs against the defendant:
- (i) Order that Grant of Probate No. 55 of 2020 dated 6th March 2020 be revoked as the claimant is in the possession of the last will and testament of Alberto Contreras.
 - (ii) An injunction to restrain the defendant from acting upon the Grant of Probate as aforesaid.
 - (iii) Damages
- [3] Alberto Contreras (the deceased) died on 31st August 2019. The defendant, the deceased's son, probated the will of the deceased Alberto Contreras which was dated 8th September 2009.
- [4] The claimant, the deceased's daughter asserts that the deceased had a subsequent will dated 6th April 2019, ("the 2019 will").
- [5] The defendant filed an affidavit in opposition to the claim and exhibited the probated will dated 8th September 2009. The defendant deposed in particular to the claim that the 2019 will was not properly executed and could not revoke the probated will. No further details were supplied in the affidavit.
- [6] By statement of claim filed on 18th October 2023, the claimant essentially pleaded the same facts set out in the affidavit of the claimant. The defence was filed on 2nd November 2023 containing much of the same information as the affidavit filed in defence.
- [7] The claimant filed the witness statements of Luis Oliva Sr., Consuelo Tzib and Felton Williams. These witness spoke of the execution of the 2019 will.

[8] The defendant filed two witness statements, that of the defendant and one from Laura Mota. For the two years preceding his demise on 31st August 2019, the deceased would stay occasionally with his daughter Gladys Contreras in Cayo and Laura Mota would be his caregiver during those visits. Ms. Mota recalled that on 6th April 2019, the claimant came to visit. Ms. Mota recalled that the claimant brought a document for the deceased and she overheard the claimant say that the document was a will. Ms. Mota observed that the claimant did not read the will to Alberto and that the claimant put the deceased's thumb print on the will/document. The claimant was accompanied by her daughter Laura that said day. According to the defendant, the deceased's will was prepared by the Law Offices of Fern Orlando Fernandez. The deceased gave the defendant a copy of will dated 8th September 2009. This will was ultimately probated resulting in Grant of Probate 55 of 2020.

[9] The defendant has filed a Notice of Application to dismiss the claim pursuant to **Rule 67.9(2) (b)** of Part 67 of the CPR on the following grounds:

- (i) The claimant provides no evidence to support her claim.
- (ii) The witness statements of the claimant, Luis Oliva Sr., Consuelo Tzib and Felton Williams provide no evidence to support the claim.
- (iii) The claim has no real prospect of succeeding.

Law and Discussion

[10] The claimant has not produced in disclosure a copy of the 2019 will. It is not annexed to the statement of claim or any of the claimant's witness statements.

[11] **CPR 67.9(2)** provides:

“(2) At any stage of the proceedings the court may, on the application of the claimant or of any party to the proceedings who has entered an acknowledgement of service –

(a) order the proceedings to be discontinued;

(b) order the proceedings to be dismissed on such terms as to costs or otherwise as it thinks just,

and may further order that a grant of probate of the will, or letters of administration of the estate of the dead person, as the case may be, be made to the person entitled.”

[12] The basis of the defendant’s application is that where a party has failed to file disclosure in relation to any document(s) he or she wishes to use at trial, that party is precluded for using such document(s) at the trial.

[13] **Rule 28.13(1)** of the CPR provides:

“(1) A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.”

[14] The entire claim rests on the 2019 will. The defendant’s application being made at this point in the proceedings saves time in the resolution of the claim as opposed to waiting to take issue at the trial. According to the defendant there is no case/prima facie case at this time.

[15] It was argued on behalf of the claimant that this matter is not a free standing claim and that is related to an earlier filed claim that was before another judge. This was Claim No. 557 of 2021 in which the parties are the same as in these proceedings. The claimant states that in the related proceedings the 2019 will was disclosed. The claimant contends that it is unfair that the defendant says that the 2019 will is not in his possession.

[16] The claimant relies on **Rules 26.9** which allows the court the power to rectify matters where there has been a procedural error. I fail to see how the failure to provide standard disclosure and to provide the 2019 will of the deceased is a procedural error and can be put right.

“CPR 26.9

(1) This Rule applies only where the consequence of the failure to comply with a Rule, practice direction or court order has not been specified by any Rule, practice direction or court order.

(2) An error of procedure of failure to comply with a Rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a Rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without any application by a party.”

[17] The claimant argues that because the 2019 will was disclosed in the related proceedings, it was thus disingenuous for the defendant to make this objection. The 2019 will was filed on its own and not as a part of any pleading or affidavit. The claimant posited that the rules relied on are discretionary and the court should consider the overriding objective of CPR in order to do justice to parties. It was indicated to this court that the related matter was adjourned sine die until the conclusion of this matter.

[18] The claimant argues that this is the only omission by the claimant and that the court should exercise its discretion. The court was urged to exercise its discretion and to consider the evidence in the other matter, which was not disclosed to this court. The omission of a document which forms the basis of the claim does not amount to a procedural error.

Conclusion:

[19] This matter has been filed since January 2023. The crux of this matter is the will probated by the defendant dated 8th September 2009 was not the last will and testament of Alberto Contreras but a later will dated 6th April 2019.

[20] The claimant brings this claim and the onus is on the claimant to prove her case. However, the very document which this court is asked to validate has not been provided by disclosure as required under the rules. The claimant therefore cannot rely on it.

[21] The argument of the claimant that the defendant has a copy through related proceedings at best does not suffice. Further, that matter is not before this Court and even if it were it would not change the situation that the 2019 will has not been

disclosed in these proceedings. The 2019 will goes to the root of the claim. The evidence in Claim no. 557 of 2021 is not evidence in this matter. In these proceedings the disclosure of the 2019 will is material to the claim. A court cannot exercise a discretion to allow a claimant to proceed when such material disclosure has not been made or with evidence from another matter.

[22] According to **CPR 15.3(f)** a court must exclude probate proceedings from summary judgment. However, **Rule 67.9(1)** provides an avenue to dispose of matters brought pursuant to Part 67 without going to trial upon an application made pursuant thereto.

[23] There has been no filed response to application by claimant, however, Counsel for the claimant did make oral submissions at the hearing of the application.

[24] The claimant argues that the application was not properly served. However, counsel for the claimant was aware of the application on the last date before the hearing and participated in same in any event.

[25] Having reviewed the witness statements and pleadings, the matter is inevitably bound to fail. It has occupied enough time on the court's calendar. This matter was called before me several times and there has been ample opportunity for the claimant to rectify this fundamental discrepancy.

Disposition:

[26] I hereby make the following orders:

1. The application is allowed.
2. The claim is dismissed.
3. The claimant is to pay cost of the defendant in the amount of \$5,000.00.

Nadine Nabie
High Court Judge