EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2022/0191

IN THE ESTATE OF ELIEZER BATISTA DA SILVA LATE OF RUA MINISTRO ARTUR RIBIERO 219, JARDIM BOTANICO, RIO DE JANEIRO, RJ, FEDERATIVE REPUBLIC OF BRAZIL, DECEASED

BETWEEN:

WERNER FUHRKEN BATISTA

Applicant

AND

DIETRICH FUHRKEN BATISTA

Respondent

Appearances: Mr. Christopher Pease, Mrs. Kimberly Crabbe-Adams & Mr. Gerrard Tin, Counsel for the Applicant
Mr. Jerry Samuel & Ms. Allana J. Joseph, Counsel for the Respondent

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2022: November 30th

DECISION

Introduction

[1] **FELIX-EVANS J (Ag.):** By amended application, originally filed on 24 June 2022, the Applicant, Werner Fuhrken Batista, applies to the High Court for a grant probate of the Last Will and Testament of his deceased father, Eliezer Batista da Silva.

[2] The application is made pursuant to r. 67(1) of the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017 (the **"Probate Rules"**). The

Respondent, Dietrich Fuhrken Batista, the sole named Executor of the Will, vigorously opposes the application.

[3] By the time this application came on for hearing on 10 November 2022 several affidavits of evidence, including affidavits from experts in Brazilian taxation, and several exhibits, comprising over 1000 pages had been filed on behalf of the parties. The allegations made by the Applicant against the Respondent in support of the application are not confined to failure to apply, or failure to apply with reasonable diligence, for probate of the Will. They extend to allegations of misconduct on the part of the Respondent, including that he (the Respondent) is acting in his own self-interest rather than in the best interest of the beneficiaries, has mismanaged the bank account of the BVI Estate, misappropriated the BVI Estate funds and attempted to extort monies from the beneficiaries under the Will. The Respondent counters with his own allegations against the Applicant which he says render the Applicant not suitable to act as executor. In reviewing the evidence and submissions it became easy to forget that this is an application under r.67(1) of the Probate Rules and not one to pass over or remove the Respondent for a grant of probate in favour of the Applicant.

Brief Summary of relevant facts

[4] The Applicant and Respondent are brothers, both being the sons of the Eliezer Batista da Silva (the **"deceased"**), who died in Brazil, his place of residence and domicile, on the 18 June 2018. By his Last Will and Testament executed on 14 June 2017 (the **"Will"**), the deceased left his worldwide estate to be divided equally among his 7 children, including the Applicant and the Respondent. The deceased's worldwide estate comprise assets located in Brazil (the **"Brazil Estate"**) and assets located in the BVI (the **"BVI Estate"**). The BVI Estate comprises shares in the BVI company, Kaku Management Corporation Limited (**"Kaku"**). Kaku's main asset is an investment bank account in a bank in Switzerland. The deceased appointed the Executor of the Will in the following terms: *"I appoint as my Executor and Administrator my son DIETRICH FUHRKEN BATISTA, in his absence, HELMUT FUHRKEN BATISTA, and in the absence thereof, WERNER FUHRKEN BATISTA... always giving preference to that who resides in the city of Rio de Janeiro..."*. The Applicant resides in Florida, USA and the Respondent resides in Rio de Janeiro, Brazil. It is not disputed by the

Applicant that the Respondent is entitled to be appointed executor unless the Respondent is absent or renounces probate or is declared by a court not to be entitled to the grant.

[5] Within a couple months of the deceased's death, the Respondent had applied for probate of the Will in Brazil. Shortly after filing his application for probate, the relevant authorities in Brazil informed the Respondent that for the purpose of probate in Brazil, the deceased's assets located outside of Brazil are excluded from the deceased's estate. With this information, by January 2019 the Respondent knew that he was required to apply for probate of the Will in the BVI in order to administer the BVI Estate.[1]

[6] By 24 March 2021, almost 3 years after the death of the deceased, the Respondent had not yet applied for probate of the Will in the BVI and as a result the Applicant caused a citation to be issued to him to accept or refuse the grant pursuant to r. 66(1) of the Probate Rules. Prior to the issue of the citation, Helmut, the first-named alternate Executor of the Will renounced his right to apply for probate and consented to the Applicant being appointed Executor in the absence of the Respondent. The citation to accept or refuse was served on the Respondent on 22 February 2022. On 21 March 2022 the Respondent filed an acknowledgment of service wherein he indicated his intention to apply for probate. On 26 May 2022 a probate search by the Applicant confirmed that the Respondent had not applied for probate of the Will. On 7 June 2022, the Respondent applied for probate of the Will; an affidavit explaining the delay, as required by r.8(1)(h) of the Probate Rules, was included in that application. On 24 June 2022, without seeking to confirm whether or not the Respondent had applied for a grant of probate since his last search on 26 May 2022, the Applicant, pursuant to r. 67(1) of the Probate Rules, filed an application to the High Court for an order to be granted permission to apply for a grant in the estate of the deceased (the "**permission application**").

[7] The Respondent received notice of the permission application on the same day of its filing and immediately informed the Applicant that he had already filed his application for probate. The Respondent requested the Applicant to discontinue and withdraw his application. The Applicant did not withdraw his application. By email of 13 July 2022, through his solicitors, the Applicant indicated

[1] By correspondence dated 16 January 2019, a law firm had submitted a proposal to him for work on grant of letters of administration in respect of the BVI Estate and distribution of shares among the beneficiaries.

his intention to continue with the application and on 22 July 2022 filed a caveat against the issue of a grant.

[8] Following directions given on 25 July 2022 for the hearing of the permission application, on 23 September 2022 the parties jointly proposed variations to the directions order of 25 July 2022 by which the Applicant was permitted to file an amended application for a grant of probate (the **grant application)** to replace the permission application, the parties were to file supplemental evidence and the hearing of the amended application (the grant application) was to take place on the original hearing date of 10 November 2022. A copy of the proposed grant application was attached to the Agreed Draft Amended Directions Order. The parties filed their respective supplemental evidence. As it turned out, the Agreed Draft Amended Directions Order had not received the court's approval by the hearing date. The parties' written and oral arguments were on the basis of the grant application (i.e., the amended application). The court approves the Agreed Draft Amended Directions Order and deems the grant application and all supplemental evidence filed subsequent to the Directions Order of 25 July 2022 properly filed. The Respondent's application for a grant of probate filed on 7 June 2022 remains pending before the Registrar. The Applicant's caveat remains in force.

The Applicant's arguments

[9] The Applicant rests exclusively on r. 67(1) of the Probate Rules as the authority for his application. In the permission application the Applicant asserted that the Respondent's failure and/or refusal to apply for the grant of probate almost 4 years after the deceased's death[2] entitled him to make this application. In the grant application, the Applicant contends that he is entitled to the grant of probate because the Respondent has failed to proceed with his application for probate with reasonable diligence[3]. The Applicant argues that in determining whether the Respondent failed to proceed with reasonable diligence, the court must assess time beginning from the date of the deceased's death. The Respondent did not proceed to apply for probate with reasonable diligence as his application was filed almost 4 years after the deceased's death. The delay is contrary to what the deceased intended in setting up Kaku to hold his assets, which was a quick distribution of the estate to the

[2] Rule 67 (1) (a)
[3] Rule 67 (1) (b)

beneficiaries. The Respondent's reasons for the delay do not stand up to scrutiny. The delay is inexcusable and unconscionable.

[10] The Applicant urges the Court to exercise its wide discretion and take into account considerations, other than delay, in making its determination under r. 67(1). The misconduct by the Respondent in dealing with the BVI Estate and the distrust and loss of confidence in the Respondent by all the other beneficiaries of the estate render the Respondent unsuitable to be granted probate of the Will. Further, because of the Respondent's failure to perform his duties as executor of the Brazil Estate and act in the best interest of the beneficiaries of that estate, the Applicant has initiated proceedings against him in Brazil to be removed as executor of the Brazil Estate. The possibility of an order from the Brazilian court removing the Respondent as executor of the Brazil Estate provides a further reason why a grant should not be made to him in respect of the BVI Estate. In the circumstances, Helmut having renounced probate, the grant should be made to the Applicant, the next person to be entitled to it under the Will, who has the support of all of the other beneficiaries.

[11] The Applicant contends that this application is properly made to a judge of the High Court as r. 67(1) states that *"the citor may apply to the court on notice to the citee for a grant to himself or herself"*. "Court" in r. 2 of the Probate Rules means the Eastern Caribbean Supreme Court, so the word "court" in r.67(1) means the high court. Notice of application (Form P2) is the proper procedure to commence this application. Further, if the notice of application is not the proper manner to commence these proceedings, the court should exercise its power under CPR to put matters right.

The Respondent's arguments

[12] The Respondent opposes the application on several grounds:

i. it demonstrates an abuse of and misunderstanding of the citation procedure under r.67(1) which is to activate a dormant executor. The scope of r.67(1) is limited to failure to apply for grant or failure to proceed with reasonable diligence. Other factors are not relevant under this provision. The application seeks to impugn the conduct and usurp the authority of the Respondent who has intermeddled in the BVI Estate. As executor, the Respondent gets his authority from the Will, not from the grant. It is therefore within his power to intermeddle even before a grant is issued to him. The Respondent's

evidence of the things he has done demonstrates that he has intermeddled in the estate. Further, some of the complaints by the Applicant about the Respondent's conduct are in effect an acknowledgment that the Respondent has intermeddled in the estate. R. 67(1) does not provide a mechanism for removing an executor who has intermeddled. The provision under which an application should be made for an executor who has intermeddled is r. 67(3), which the Applicant has failed to come under;

ii. it is procedurally flawed. It should have been made to the Registrar in compliance with r. 5 of the Probate Rules and in Form P1. Under the Probate Rules an application for a grant of probate in the first instance can only be made in accordance with r. 8 which specifies that Form P1 should be used;

iii. it is unnecessary. By the time of its filing (24/6/22), the Respondent had already filed his application for the grant of probate (7/6/22). Further, by bringing this application, the Applicant has caused two parallel proceedings regarding the same matter to be engaged at the same time before two different judicial officers: the Registrar and the High Court Judge. This creates an untenable tension between the probate application and the application before this court;

iv. the Probate Rules are not the framework for disputing the allegations of wrongdoing raised in this application;

v. in any event, the Respondent did not fail to proceed with his application for probate with reasonable diligence as only 3 months had elapsed from the date of service of the citation to the date the Respondent filed his application for probate. The relevant period for considering whether or not there was failure to proceed with reasonable diligence under r. 67(1) is the period post-citation, that is, the period commencing from the date of service of the citation, not the period commencing from the date of the deceased's death as the Applicant contends. Considering that the Respondent resides in Brazil and much of the documentation had to be translated from Portuguese to English, 3 months between the date of service of the citation and the date of filing the application for probate, is not an unreasonable delay. Further, within the context of when things should

get done under the Probate Rules, 3 months is not an unreasonable delay. Even taking the relevant period as commencing from the date of death, while he concedes that in retrospect he sees that he should have applied for probate earlier, there were good reasons for the delay which included the complexity of the Brazilian tax law and his various attempts to reach agreement with the beneficiaries on how best to distribute their share of the BVI Estate. This was necessary so as to protect the Respondent from being held personally liable by the tax authorities in Brazil for the potential tax liabilities of those beneficiaries who resided out of Brazil and who would have failed to pay the requisite tax on their inheritance. He "acted reasonably and diligently in his administration of the BVI Estate"; and

vi. the Applicant is not suitable to act as executor: he is in serious financial difficulties and may be seeking to evade creditors; creditors who have judgment debts against him in Florida and Brazil are pursuing him; in 2017 other creditors had mistakenly seized assets of the deceased (now part of the Brazil Estate) to satisfy some of his debts; he has a propensity for dishonesty and the Respondent has a real concern that he would not administer the BVI Estate honestly and in accordance with the law; his administration of the BVI Estate alongside the Respondent's administration of the Brazil Estate would create great tension; his administration of the BVI Estate would expose the Respondent, who continues to live in Brazil, to great personal risk of liability in Brazil for estate taxes or debts to creditors by the beneficiaries residing outside of Brazil.

The issues for determination

[13] The following issues arise for determination on this application:

i. Who is the proper judicial officer to whom an application under r. 67(1) of the Probate Rules ought to be made;

ii. What is the nature of these proceedings and are the Probate Rules appropriate for these proceedings;

iii. What considerations should a court take into account in determining an application under r. 67(1) of the Probate Rules; and

iv. Whether the Applicant is entitled to the order that he seeks in his grant application.

The rules governing applications for grant of probate and letters of administration

[14] The procedure for applying for probate and letters of administration in the Territory of the Virgin Islands in non-contentious or common form probate business is set out in the Probate Rules. For the purpose of this application, the relevant rules are:

> *3. Subject to the provisions of these Rules and to any enactment, the CPR 2000 shall apply to non-contentions probate matters, except that nothing in Part 3 of the CPR 2000 shall prevent time from running in the Long Vacation.*
>
> *5. An application for a grant of probate or letters of administration shall be made to the registrar of the court and shall be filed at the registry where all caveats, warnings, citations, acknowledgments of service and notices of application under these Rules shall be filed.*
>
> *7. (1) An application under these Rules shall be made in the first instance to the court in Form P1 or Form P2, as the case may be.*
>
> *(2) Except where any enactment, rule or practice direction provides otherwise, the functions of the court may be exercised in accordance with these Rules and any direction made by*
>
> *(a) the Chief Justice;*
> *(b) a single judge;*
> *(c) a master; or*
> *(d) the registrar.*
>
> *8. (1) Except in the case of a notarial will in Saint Lucia which is subject to rule 11, an executor who applies for a grant of probate shall file at the registry*
>
> *(a) an application for a grant of probate in Form P1;*
>
> *(b) a certificate of search confirming that*
>
> *(i) no other grant of probate has been issued;*
>
> *(ii) no other application for a grant of probate has been made; and*
>
> *(iii) no caveats have been filed;*
>
> *(c) an oath in Form P3;*
> *(d) ...*
> *(e) ...*
> *(f) ...*

(g) ...
(h) *the appropriate affidavit under rule 22, if required; and*
(i) ...

10. *The person or persons entitled to apply for a grant, where a deceased left a will, is to be determined in accordance with the following order of priority*

(a) *the executor;*
(c) *any other residuary devisee or legatee;*
(e) *any devisee or legatee;*
(f) *any person entitled to share in the undisposed residuary estate; and*
(g) *such other person as the court may direct.*

22. *The following affidavits shall be filed with an application for a grant of probate or letters of administration, as appropriate;*

...
(6) *Affidavit of delay*

Where an application for a grant is made for the first time more than 3 years after the death of the deceased, the applicant shall file an affidavit explaining the delay.

61. (1) *A person who wishes to show cause against the sealing of a grant may enter a caveat in Form P20 at the registry, giving an address for service and the court shall not allow any grant to be sealed (other than an emergency grant) if it has knowledge of an effective caveat provided that*

(a) *no caveat shall prevent the sealing of a grant on the day on which the caveat is entered; and*

(b) *the sealing of the grant was first in time.*

[The rest of rr. 61, 62 and 63 set out the procedure to followed after the entry of a caveat.]

66. (1) *A person who would be entitled to a grant in the event of the citee renouncing his or her rights to a grant may issue a citation to accept or refuse a grant in Form P23 or Form P24, as the case may be.*

(5) *A person served with a citation shall file an acknowledgment of service in Form P22 and shall serve a copy of such acknowledgment on the citor.*

(6) *The time for filing and serving an acknowledgment of service is 28 days after service of the citation.*

(7) *After filing an acknowledgment of service, a citee may apply to the court for an order for a grant to himself or herself.*

(8) *An application under paragraph (7) may be made without notice, but must be supported by affidavit evidence.*

67. (1) *Where a person makes a citation under rule 66(1) and the citee has filed an acknowledgment of service but*

(a) *has not applied for a grant under rule 66(7); or*

(b) *has failed to proceed with his or her application with reasonable diligence;*

the citor may apply to the court on notice to the citee for a grant to himself or herself.

[15] An application for a grant of probate or letters of administration which is contentious is provided for under Part 68 of the CPR. Part 68 is headed **"Contentious Probate Proceedings"**. R. 68.1(2) of the CPR defines "**probate claim**" as *"a claim for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious or common form probate business"*. R. 68.2 provides that a probate claim must be begun by fixed date claim form accompanied with a statement of claim.

Discussion

[16] The Court has considered the grant application, the affidavits in support and in opposition, with the accompanying exhibits, and the parties' oral and filed arguments and supplemental arguments with authorities. Failure by the Court to make mention of any fact, point or argument in no way means that the court has not considered it.

[17] The Court is of the considered view that an application under r. 67(1) of the Probate Rules is required to be made to the Registrar. Such an application is an application for a grant of probate or letters of administration albeit it is made where the prescribed circumstances in the rule exist and/or are alleged to exist. R. 5 of the Probate Rules clearly states that an application for a grant of probate or

letters of administration shall be made to the registrar of the court. The court notes that this provision is not made subject to any other provision in the Probate Rules. R. 8 of the Probate Rules provides for how an application for grant of probate shall be made. It specifies the form to be used, i.e., Form P1. Nothing in r. 67(1) suggests that a citor who makes an application for probate should not do so in conformity with rr. 5 and 8. The circumstances set out in r.67(1) give a person the right to apply for a grant. Other than stating that notice of the application must be given to the citee, r.67(1) does not provide for how the application must be made. To whom and how that application is made are set out in rr. 5 and 8, respectively.

[18] The Applicant contends that the word "court" in r. 67(1) means a single judge because "court" is defined in r. 2 of the Probate Rules as the Eastern Caribbean Supreme Court.[4] This interpretation is not supported by the Probate Rules. Under r. 7(2) of the Probate Rules the functions of the court may be exercised in accordance with the Rules and any direction given by the Chief Justice, a single judge, a master or the registrar. The effect of r. 7(2) is that an application for probate made to the Registrar as specified in r. 5 is an application made to the court. In light of the clear and unambiguous language of r. 5, in the absence of express language in r. 67(1) directing the citor to apply to a single judge, the application must be made to the court through the Registrar in compliance with r. 5. Further, it must be made in the manner set out in r. 8, which is the only rule dealing with how an application for probate is to be made.

[19] In **Donovan v Donovan BVIHCV2009/0058**, a case decided under the now repealed Supreme Court (Non-Contentious) Probate Rules, 1985 (the old Probate Rules) Hariprashad-Charles J concluded that the Registrar is the proper judicial officer to admit a will to probate or to grant letters of administration[5]. The judge came to that conclusion having considered the language in rr. 3(1) and 10(1) of the old Probate Rules[6] which can be considered to r. 5 of the Probate Rules. On that basis,

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[4] This interpretation by the Applicant does not jive with his earlier position. Initially, the Applicant accepted that the Respondent's application for a grant of probate on 7 June 2022 made to the Registrar was an application for probate in accordance with r. 66(7) of the Probate Rules. The Applicant's amendment of his application appears to be premised on that acceptance. R. 66(7) states: "After filing an acknowledgment of service, a citee may apply to the court for an order for a grant to himself or herself." The Applicant therefore accepted that the word "court" in r. 66(7) meant the Registrar.

[5] Para 25. The Judge recognized in the following paragraph that the Registrar's decisions in probate proceedings are subject to appeals to the High Court.

[6] R. 3(1) of the old Probate Rules stated, "An Application for a grant of a probate or letters of administration shall be made at the Registry." R. 10(1) stated "The Registrar shall not allow probate or letters of administration to issue until all the enquiries that he sees fit to institute have been answered to his satisfaction."

Hariprashad-Charles J set aside an order of the High Court Judge granting probate to the deceased's brother.

[20] On the basis of the Court's conclusion that an application for probate under r. 67(1) of the Probate Rules is required to be made to the Registrar, this application is dismissed on the ground that a high court judge does not have the jurisdiction to grant probate under the Probate Rules at the initial stage. The judge may be called upon to make a determination on the question of who is entitled to a grant of probate, but not in the manner pursued by the Applicant.

[21] In the event the Court is in error on this jurisdictional point, there is another reason why this application should be and is dismissed. Of the two applications for the grant of probate, the Respondent's application to the Registrar is first in time and is pending review by the Registrar. Subsequent to the Respondent's application, the Applicant filed a caveat against the grant of probate. The Applicant has provided no good reason, if any, why the proceedings before the Registrar should not be allowed to take their normal course as provided for by the Probate Rules. There has been no application or order to stay the proceedings before the Registrar. The Probate Rules[7] provide for how a matter ought to proceed when a caveat is filed. In the caveat proceedings pending before the Registrar, the Applicant will get the opportunity to put forward his reason(s) under r.67(1) or otherwise why a grant should not be made to the Respondent. Depending on the outcome of the caveat proceedings before the Registrar, this matter may or may not end up before the High Court Judge. The Court sees no prejudice to the Applicant if the caveat proceedings are allowed to take their course under the Probate Rules. In these circumstances, it seems highly improper and/or an abuse of the court's process and resources to continue with this application while proceedings before the Registrar are pending.

[22] Based on how this application has evolved, a question which arises for the court is, what is the nature of these proceedings? The fact that these proceedings came into being pursuant to r.67(1) of the Probate Rules does not by itself determine the nature of the proceedings which have unfolded. The Applicant begins his Skeleton Argument filed on 3 November 2022 with this clear statement, *"[t]his matter essentially concerns contentious probate proceedings where the Applicant and the*

[7] See Rules 61 to 64 of the Probate Rules

Respondent are each asking the court to appoint them as the BVI personal representative over the BVI estate...". The court is unable to disagree with the Applicant's description of these proceedings.

[23] Danckwerts L.J. in the case of **In re Jolley, dec'd, Jolley v Jarvis and Another**[8] stated that *"the non-contentious rules can only apply to non-contentious business".* In that case the Court of Appeal upheld the dismissal of a motion under r.47 of the Non-Contentious Probate Rules, 1954 in circumstances where the proceedings had become contentious. The Court of Appeal agreed that since the matter had become contentious, the Non-Contentious Probate Rules were no longer appropriate for the situation and that the registrar had made a "perfectly proper order when he required the appellant to issue a writ"[9]. The court drew attention to the definition of "non-contentious probate business" contained in Section 175 of the Supreme Court of Judicature (Consolidation) Act, 1925 as replicated from the section 2 of the Court of Probate Act, 1857: *"'Non-contentious or common form probate business' means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration."*[10]

[24] Undoubtedly, there is contention between the parties as to the right of each other to obtain probate. In this circumstance, the Court finds that it is inappropriate for the Applicant to have proceeded with this application after it became contentious.[11] Adopting the words of Danckwerts LJ in **Re Jolley**, *"this case is a case of contentious business, and the non-contentious rules can have no application"*[12]. Rule 68 of the CPR makes provision for how contentious probate matters are to be initiated.

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[8] [1964] 2 W.L.R. 556, 564
[9] Per Wilmer LJ at p. 562
[10] P. 563
[11] It became contentious at least by 13 July 2022 when the Applicant determined that he was not going to allow the Respondent's application for probate to proceed unchallenged
[12] P. 564

[25] The failure of the Applicant to commence this admittedly contentious matter properly is by no means a mere procedural irregularity that can be dealt with under rr.26.1(2)(w) or 26.9 of the CPR. The Applicant has filed these proceedings under the Probate Rules, not under CPR. For these reasons, the authorities the Applicant relies on to ask the Court to put matters right do not assist. The Court therefore dismisses this application on this additional ground.

[26] Having regard to the determinations above, it is not necessary to determine the other two issues, both of which go to the merits of the application.

[27] The Applicant shall pay the Respondent's costs of this application to be assessed, if not agreed.

[28] **It is therefore ordered as follows:**

1. The Application is dismissed.

2. The Applicant shall pay the Respondent's cost of the application, to be assessed if not agreed.

Heather F. Felix-Evans
High Court Judge (Ag.)

By the Court

Registrar