COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PROBATE DIVISION

2016/PRO/cpr/00036

In the Estate of **LESTER EUGENE ADDERLEY JR.** late of #455 Hawaii Avenue, the city of Freeport on the Island of Grand Bahama, one of the Islands of the Commonwealth of The Bahamas

BETWEEN

LYLE ETHRIN ADDERLEY AND LYRIC ETHAN ADDERLEY
(Minors)

AND

LAKISHA HIELD
(Mother and Next Friend)

Plaintiff

AND

(1)MICHAEL DURAN ADDERLEY
(Intended Executor of the Estate of Lester Eugene Adderley Jr.)

First Defendant

AND

(2) LESTER ADDERLEY SR.
(Intended Beneficiary of the Estate of Lester Eugene Adderley Jr.)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Robyn D. Lynes of KLA Chambers for the Plaintiff

Ms. Sophia Rolle-Kapousouzoglou along with Mr. Valdere J. Murphy of Lennox Paton for the First Defendant.

Hearing Dates: 7 April 2020, 8 May 2020

Costs – Court ordered reasonable costs to the Plaintiff to be paid by the Defendants – First Defendant applies for his costs and that of the Plaintiff to be borne out of the corpus of estate or Plaintiff's costs be paid out of the estate – Court declared will a forgery – First Defendant was executor of will – Court did not believe his evidence - Whether his costs and Plaintiff's costs should be borne out of the corpus of the estate

In the substantive action before me, I declared the purported will to be a forgery. The Defendants were ordered to pay costs to be taxed if not agreed. The First Defendant has now applied to an order that: (i) his costs should be paid out of the Estate of Lester Eugene Adderley Jr; ("the Deceased") and (ii) the costs incurred by the Plaintiff herein should be paid out of the Estate of the Deceased, or in the alternative, the Plaintiff should bear her own costs of the action.

HELD: The Defendants will pay the Plaintiff's costs of $40,000 which is reasonable.

1. In civil proceedings including administration of estates, the Court has a wide discretion in its award of costs and full power to determine by whom and to what extent the costs are to be paid: Section 30(1) Supreme Court Act; Order 59, Rule 2(2) of the RSC; Order 59 Rule 3(2) of the RSC; **Wilmott v Barber** (1881) 17 Ch. D. 772 considered.

2. As a general rule, an executor who is a party to proceedings whether as plaintiff or defendant is entitled to be paid out of the testator's estate the costs of those proceedings. However, an executor is not entitled to his costs if he has acted unreasonably or he has acted for his own benefit: Order 59, Rule 6(2) of the RSC; **Kramer and others v Delancy** [2009] 1 BHS J No. 23 applied.

3. In probate matters where an allegation of forgery has been proved, it would be tantamount to a windfall if the unsuccessful party is not condemned in costs. The Estate should not be punished and be made to pay the costs of the Defendants' fraudulent actions.

4. Upon a scrutiny of the Plaintiff's Bill of Costs and taking all of the relevant factors into consideration, the Court finds the sum of $63,000 to be excessive. A reasonable sum is $40,000: **William Downie v Blue Planet Limited** (SCCivApp & CAIS No. 188 of 2019)

RULING

Charles J:

Introduction

[1] On 24 March 2020, this Court delivered a Judgment in favour of Lakisha Hield ("the Plaintiff") and ordered, in paragraph 70, that she, being the successful party in these proceedings, is entitled to reasonable costs to be paid by the Defendants.

[1] Michael Duran Adderley ("the First Defendant") has now applied to the Court seeking an order that:

(i) the costs incurred by the First Defendant herein should be paid out of the Estate of Lester Eugene Adderley Jr. ("the Deceased"); and

(ii) the costs incurred by the Plaintiff herein should be paid out of the Estate of the Deceased, or in the alternative, the Plaintiff should bear her own costs of the Action.

[2] The application seeks to vary the Order for costs which I made. My reason for the award of reasonable costs to the Plaintiff is founded on the general principle that cost follows the event and, the Plaintiff, being the successful party, is entitled to her costs from the Defendants. The First Defendant implores me to reconsider this issue before the Final Order is perfected. The Court has the jurisdiction to do so.

The salient paragraphs of the Judgment

[3] Based on the nature of the First Defendant's application, it is prudent to reverberate the salient paragraphs of the Judgment dealing with the issue of costs:

> **"Costs**
>
> **[69] In accordance with case management directions, both parties were to submit their respective Bill of Costs to the Court. The Defendants did. The Plaintiff did not. Before I handed down the Judgment, I enquired of learned Counsel for the Plaintiff, Ms. Lynes, that, if her client were successful, what amount of costs would she be seeking. Learned Counsel suggested a figure of approximately $63,000.**
>
> **[70] The Plaintiff, being the successful party in these proceedings, is entitled to reasonable costs to the paid by the Defendants.**
>
> **[71] At first blush, I found the amount of $63,000 to be excessive. That said, I granted an extension of time to Friday, 27 March 2020 for Counsel to email her Bill of Costs to Counsel for the Defendant and the Court. With the assistance of Counsel for the First Defendant, Mr. Murphy, the Court will then properly consider the amount bearing in mind that, <u>in civil proceedings, costs are always discretionary: see O.59 rr. 2(2) and 3(2) of the RSC and section 30(1) of the Supreme Court Act.</u>**

[72] **<u>In addition, the discretionary power to award costs must always be exercised judicially. The Judge is required to exercise his/her discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else</u>: see Buckley L.J. in Scherer v Counting Instruments Ltd [1986] 2 All ER 529 at pages 536 -537.**

[72] **I reminded Counsel that the Court must take into account all the circumstances, including but not limited to:**

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

.

[74] **As it stands, the issue of costs remains outstanding and hopefully, can be agreed between the parties".** [Emphasis added]

Costs are discretionary

[4] In civil proceedings, costs are entirely discretionary and the court has a wide discretion in its award of costs. This settled principle is found in section 30(1) of the Supreme Court Act which provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, <u>including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid</u>.**" [Emphasis added]

[5] Similarly, Order 59, rule 2(2) of the Rules of The Supreme Court ("RSC") states:

> "**<u>The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid</u>, and such powers and**

discretion shall be exercised subject to and in accordance with this order." [Emphasis added]

[6] In addition, Order 59, rule 3(2) of the RSC provides:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[7] These provisions give the court a wide discretionary power as to whether the costs are payable by one party to the other, the amount of those costs and when they are to be paid. In **Wilmott v Barber** (1881) 17 Ch.D. 772, Jessell MR said:

> **"The judge has a large discretion as to costs. He may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in definite proportion, and therefore would dismiss the claim without costs. Or he might say that the plaintiff should have half the costs of the action, or some other aliquot part.**
>
> **Or he may follow the course which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum for one party to pay to the other, so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum that the party would have to pay if costs were taxed."**

Costs in the administration of estates

[8] As a general rule *an* executor who is a party to proceedings whether as plaintiff or defendant is entitled to be paid out of the testator's estate the costs of those proceedings.

[9] Order 59, Rule 6(2) of the RSC provides:

> **"Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund."** [Emphasis Added]

[10] In the Bahamian case of **Kramer and others v Delancy** [2009] 1 BHS J No. 23, Adderley J considered the effect and meaning to Order 59, Rule 6 (2). The brief facts are that the first plaintiff as executor and legatee propounded one of six wills executed by the deceased in 1992, 1994, 1996, 1997, 1998 and 2000. The defendant sought to prove that the first plaintiff's conduct as executor was such that the plaintiff had acted unreasonably and for his own benefit, more specifically, it was claimed, among other things, that the plaintiff commenced the proceedings knowing at the time of the existence and contents of a medical report, which the plaintiff did not disclose to the defendant or the Court, and opposed its production until ordered by the Court to do so. The defendant argued that the plaintiff's conduct was such that it came within the exception to Order 59, Rule 6(2) of the RSC, and that the plaintiff was not only disentitled from recovering his costs but he, together with the second and third plaintiffs should be ordered to pay the defendant's cost from their personal estate. Order 59 Rule 6(2) was properly interpreted to mean that as a general rule an executor who is a party to proceedings whether as plaintiff or defendant is entitled to be paid out of the testator's estate the costs of those proceedings. An executor is not entitled to his costs if he has acted unreasonably or he has acted for his own benefit. [supra]

Discussion, findings and conclusion

[11] Learned Counsel Mr. Murphy submitted, in the first instance, that the First Defendant is entitled to have his costs paid out of the Estate of the Deceased and based on the facts of the present case in conjunction with the principles as enunciated in the authorities as set out below, the Plaintiff's costs should also be paid out of the Estate of the Deceased, or alternatively, the Plaintiff should bear her own costs.

[12] Learned Counsel Mr. Murphy argued that the First Defendant did not act unreasonably, nor did he act for his own benefit. According to him, an examination of the Last Will and Testament of the Deceased, which was the subject-matter of the present action, shows that the First Defendant was not a beneficiary of the Estate of the Deceased. Simply put, the First Defendant had no interest in the estate.

[13] Counsel submitted that the First Defendant's involvement in the case arose by virtue of

the fact that he was named as the executor in the said Will. In that capacity, he is entitled to be paid his costs in defending these proceedings out of the Estate of the Deceased in accordance with Order 59, Rule 6 (2) of the RSC.

[14] Mr. Murphy further submitted that the Plaintiff should also bear her own costs. In that regard, he again referred to **Kramer v Delancy**. At paragraphs 13-14, Adderley J, stated:

> **"[13] In Re Plant, Wild v Plant [1926] P.139 C.A. where the general principles and authorities were considered [i.e. issue of costs in probate proceedings], Scrutton LJ at 151 summarized the general principle in this way:**
>
> > **"...Now, an executor in an administration action in the Chancery Division would get his costs as between solicitor and client of any action necessary to prove the will of which he is executor.**
> >
> > **...But the Court may protect the estate by ordering the unsuccessful party in the first instance to pay such costs taxed as between party and party, in which case if the executor cannot recover them from the defendant, he should get them from the estate, and anyhow get the excess of solicitor and client over party and party costs from the estate."**
>
> **[14] Subject to the Court's overriding discretion, two general principles have emerged from the Probate Courts [cf. Spiers v English [1907] P.122] for awarding costs in the case of unsuccessful parties, namely:**
>
> > **(1)Where the cause of litigation originated in the fault of the testator (e.g. when the testator left his testamentary papers in a confused or disorderly state) the costs of both sides are allowed out of the estate.**
> >
> > **(2)If based on his knowledge and means of knowledge, there were reasonable grounds to question the validity of the will whether as to the testator's capacity, question of due execution, charges or undue influence or fraud he will not be ordered to pay costs.**
> >
> > **According to Lord Gorell in Spiers v English at 123 "the costs may be left to be borne by those who have incurred them" which I adopt as a fair approach."** [Emphasis added]

[15] In **Spiers v English** [1907] P.122, Lord Gorell stated at page 123:

> **"In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation."**[Emphasis added]

[16] Mr. Murphy argued that the facts of the present case warrant applying the second principle namely that the First Defendant was reasonable in defending these proceedings, more specifically, the allegation of the Plaintiff that the Last Will and Testament of the Deceased was a forgery. According to him, an officer of the Court, to wit, Attorney Rawle Maynard ("Attorney Maynard") presented the Second Defendant with the Last Will and Testament of the Deceased. Further, Attorney Maynard stated in correspondence dated 17 May 2017 which was addressed to Counsel for the First and Second Defendants at the time that:

> "**On instructions from Mr. Lester Adderley Jr., I prepared a Will for him, I gave the document to him unexecuted and he was instructed that it be signed by him in the presence of two witnesses and the witnesses also sign as such. I have no doubt that he followed my instructions. For the purpose of a Probate application, the witnesses came before me and each one swore an Affidavit that they were present when Lester Adderley Jr. signed the Will and that they saw him sign it."**

[17] Mr. Murphy submitted that based on the foregoing, the First Defendant had reasonable grounds to believe that the Deceased executed the will and, as a result, he was justified in defending the action on that basis. According to him, it was not unreasonable for the First Defendant to defend the proceedings given the unequivocal and pellucidly clear statement of Attorney Maynard, who was, at the time, an experienced attorney and who the First Defendant was entitled to believe was acting competently and truthfully. There was also no justifiable reason for the First Defendant, a layman, not to accept the account of the attesting witnesses.

[18] Mr. Murphy further stated that, with the utmost respect to Counsel for the Plaintiff at the time, the Statement of Claim was poorly drafted and, to some extent, raised matters which were scandalous, frivolous and vexatious and was otherwise an abuse of the process of the Court: see paragraphs 52 and 53 of the First Defendant's Closing Submissions and Plaintiff's Statement of Issues filed herein on 30 January 2018. The First Defendant was therefore fully justified in defending the action.

[19] Furthermore, says Mr. Murphy, the nature of the dispositions made in the Last Will and Testament of the Deceased were not unusual in light of the relationship between the deceased and the Second Defendant, his father (now deceased) to alert and/or give concern to the First Defendant that the Will was a forgery, see paragraphs [24]-[29] of the First Defendant's Closing Submissions.

[20] Mr. Murphy also argued that the First Defendant did not act unreasonably in challenging the evidence of the expert witness. More specifically, the comparison documents which were provided to Ms. Hoeltzel by the Plaintiff for her analysis were not authenticated at trial and it was justifiable, in the circumstances, for the First Defendant to challenge same at trial: see paragraphs 54-66 of the First Defendant's Closing Submissions.

[21] Mr. Murphy further argued that that the costs incurred by the First Defendant should be paid out of the Estate of the Deceased and the burden rests on the Plaintiff to prove that the Court should make a different order. In addition, the costs incurred by the Plaintiff should also be paid out of the Estate of the Deceased or, in the alternative, the Plaintiff should bear her own costs of the Action.

[22] Conclusively, Mr. Murphy argued that in the event that the Court finds that the cost of the Plaintiff should not be borne out of the Estate of the Deceased but by the First Defendant, the Plaintiff's Bill of Costs is excessive and the lack of particularity therein gives rise to grave concern.

[23] Ms. Lynes who appeared for the Plaintiff submitted the general rule that an executor who is a party to proceedings whether as plaintiff or defendant is entitled to be paid out of the testator's estate the costs of those proceedings does not apply to or envisions an

'executor' who was not a bona-fide executor of the estate and never appointed as one by the Deceased. According to her, the Court has found the Will to be a forgery and therefore, it follows that the First Defendant was not defending this matter in any true legal capacity.

[24] She next submitted that the general principle was formulated to protect a duly appointed executor who, in fulfilling his role assigned by a testator who had been made party to proceedings or had to initiate them but it does not include the protection against cost of an individual chosen to be named as executor on a fraudulent will produced to disinherit lawful beneficiaries. Such an individual should not be offered any protection against cost flowing from the matter as the action was in fact the result of the fraud. These submissions make good sense.

[25] Ms. Lynes contended that the Plaintiff, acting on behalf of the interests of the Deceased's minor dependent children, filed an application to be granted Letters of Administration in the Estate of the Deceased as the mother and next friend of the minor children. That application was made sometime in 2015.

[26] Subsequent to the said application, the Second Defendant, now deceased (who was the father of the Deceased) lodged a Caveat on 8 December 2015 against the Estate. A further Caveat was lodged by the Second Defendant on 2 June 2016. The First Defendant also made an application for a grant of Probate in the Estate of the Deceased and produced a Last Will and Testament dated 11 April 2014. The Probate Registry advised that it could not process either application until such time as a determination was made. The Plaintiff therefore had to initiate these proceedings.

[27] She argued that if the Will had not been created and produced to deceive the Probate Registry and disinherit the minor children (who were only 6 years old at the time), this case would never have ensued. Counsel then rhetorically inquired: how can it follow that the Estate of the Deceased be made to pay the cost of the Defendants' fraudulent actions in producing the forged Will when the Court's findings inferred that the parties including the First Defendant had knowledge that the Will was forged?

[28] According to Ms. Lynes, the Defendants and their witnesses knowingly and willfully colluded and conspired to defraud minor children of their inheritance. She submitted that the only reason the First Defendant was named as Executor of the forged Will is because the Second Defendant could not be named as the Executor as well as the Beneficiary.

[29] Ms. Lynes further submitted that at paragraph [42] of the Judgment, the Court acknowledged that the First Defendant's evidence surrounding the Will was mostly hearsay and rejected it. She also submitted that the First Defendant did not appear for cross-examination on the date assigned for continuation of the trial because he did not wish to be subjected to cross-examination. It is a fact that the First Defendant did not appear but Counsel did not object to the admissibility of his evidence. That said, even without cross-examination, I did find the First Defendant's evidence surrounding the Will to be based on hearsay evidence. I also stated that "*it is bizarre that he was also present when they met with Attorney Johnson to execute "mutual" wills and he was unaware that it was never done. This is questionable because if you sign a will, you should be able to speak positively about that. With respect to the inconsistency of the Deceased' signature, he did not provide any documentary evidence to demonstrate that inconsistency. I therefore reject his evidence"*.

[30] Like Counsel for the Plaintiff, I also observed that none of the cases relied upon by the First Defendant includes facts where the will was found to be forged and the makers of the forged will escaped paying the costs of the proceedings.

[31] It seems logical to me that in probate matters where an allegation of forgery has been proved, it would be tantamount to a windfall if the unsuccessful party is not condemned in costs. It would be a travesty for the Plaintiff and one of the fraudulent parties, namely the First Defendant to be paid from the corpus of the Estate. In essence, and in the words of Counsel "*the Estate should not be punished and be made to pay the costs of the Defendants' fraudulent actions*". I agree.

Reasonable costs

[32] Having come to that conclusion, I commented, at paragraph 71 of the Judgment, that the amount of $63,000 appears exorbitant. Costs must be reasonable. Having already set out the factors that the Court takes into consideration in determining what is fair and reasonable [paragraph [73]], the sum of $40,000 is more than reasonable. The Defendants will pay to the Plaintiff, costs in the amount of $40,000.

[33] I also take some comfort in making this Order after considering the Court of Appeal decision in **William Downie v Blue Planet Limited** (SCCivApp & CAIS No. 188 of 2019 delivered on 5 March 2020. In that case, the intended appellant filed his Bill of Costs for a total amount of $335,406.48. Winder J. scaled it down to $40,750. Although it was not a taxation of a trial, the appellant had asked the Judge to conduct a mini taxation.

[34] This Court had ample opportunity to scrutinize the Plaintiff's Bill of Costs and taking all of the relevant factors into consideration, I came to the conclusion that the sum of $63,000 is excessive and a fair and reasonable sum is $40,000.

[35] The Plaintiff will also have her costs of this hearing in the sum of $2,500. All costs are to be paid on or before 31 October 2020.

Dated this 25th day of September, A.D. 2020

Indra H. Charles
Justice