MALAYSIA
IN THE HIGH COURT OF MALAYA SITTING AT MUAR IN THE STATE OF JOHORE
[CIVIL SUIT NO: JB-32NCVC-190-08/2019]

In the matters of the Estate of the Deceased Tan Tau @ Tan Geok Hiang (NRIC: 270802-02-2010/0067535)

And

In the matters of Order 71 Rule 5 Rules of Courts 2012

And

In the matters of section 3 Probate and Administration Act 1959

LOK SWEE TIONG ... APPLICANT

AND

LOK SIEW CHOO
LOK CHENG HWA @ LOCK SIEW HWA
LOCK PEK YEM
LOK SIEW HOON ... CAVEATORS

CORAM:

AWG ARMADAJAYA BIN AWG MAHMUD

JUDICIAL COMMISSIONER

GROUNDS OF JUDGMENT (ENCLOSURE 44)

INTRODUCTION

[1] This is an application vide Enclosure 44 pursuant to Order 71 Rule 37 & 40 Rules of Court 2012 for an Order of the following:

i. The Caveats entered against the Estate of the Deceased Tan Tau @ Tan Geok Hiang (NRIC 270802-02-5010 / 0067535) by the Caveators (Lok Siew Choo (NRIC: 550416-01-5034) Lok Cheng Hwa @ Lock Siew Hwa (NRIC: 480926-01-5480) Lock Pek Yem (NRIC: 511231-01-5264) Lok Siew Hoon (NRIC: 561206-01-5540) Lok Swee Long (NRIC : 640502-01- 5815)(Lock Siew Lang @ Lock Swee Luan (Singapore Passport No. E6728655A) be removed

ii. Cost to be borne by the Caveators.

iii. Any other Orders that the Court deems fit and just.

[2] The basis of this application pursuant to Enclosure 44 was because the Caveators has informed that they do not intend to challenge the application for the Grant of Probate which is the subject-matter of the Originating Summons filed before this Court and that the Caveators were said not to have any basis or right to object to the application for the Grant of Probate by the Applicant.

[3] The Cause Papers are as follows:

i. The Notice of Application (Enclosure 44).

ii. The Affidavit-in-support (Enclosure 45).

iii. The Affidavit-in-opposition (Enclosure 46).

iv. The Affidavit-in-opposition (Enclosure 47).

v. The Affidavit-in-opposition (Enclosure 48).

vi. The Affidavit-in-opposition (Enclosure 49).

THE BACKGROUND FACTS

[4] Tan Tau @ Tan Geok Hiang (NRIC: 270802-01-5010 / 0067535) ("the Deceased") who used to stay at No.67-6 Jalan Hang Tuah, Taman Khalidi Baru, 84000 Muar, in the State of Johore, died at the age of 91, on 4 November 2018. The Deceased was purported to have left a Will and Last Testament in respect of her Estate ("the purported Will"). The purported Will was said to be executed in 2011. The purported Will was executed and said to be witnessed by 2 persons who are New Lok Hua and Siti Noor Afizie binti Saat.

[5] The applicant is a Malaysian citizen of full age and the son of the Deceased and whose address is No.37 Jalan Putra Indah 3, Taman Putra, Jalan Salleh, 84000 Muar, Johore. He is said to be one of the Executors of the purported Will. The other Executor of the purported Will was Lok Swee Meng (NRIC 530131-01-5033) who passed away on 26 September 2018. Following this turn of events, the Applicant filed an Originating Summons seeking for a Grant of Probate for the Estate of the Deceased.

[6] The Estate of the Deceased comprised of the following:

Immovable Property

No.	Description of Property	Estimated Value
1.	2/5 share of the property that is held under the Title GM 22751, Lot 4096, Bandar Maharani, Muar District, State of Johore	RM240,000-00

2.	the property that is held under the Title CT6877 Lot 1109 Bukit Kepong Sub District, District of Muar, State of Johore	RM630,000-00
3.	the property that is held under the Title CT6878 Lot 1110 Bukit Kepong Sub District, District of Muar, State of Johore	RM630,000-00
4.	the property that is held under the Title CT6879 Lot 1111 Bukit Kepong Sub District, District of Muar, State of Johore	RM630,000-00
5.	the property that is held under the Title CT6880 Lot 1112 Bukit Kepong Sub District, District of Muar, State of Johore	RM630,000-00
6.	the property that is held under the Title CT 5351 Lot 559 Jalan Bakri Sub District, District of Muar, State of Johore	RM1,040,000-00
7.	the property that is held under the Title CT 5352 Lot 560 Jalan Bakri Sub District, District of Muar, State of Johore	RM1,170,000-00
8.	½ share of the property that is held under the Title 96274 lot 558, Jalan Bakri Sub District, District of Muar, State of Johore	RM585,000-00
9.	the property that is held under the Title GM231 Lot 2212 Ayer Panas Sub District, District of Jasin, State of Melaka	RM2,100,000-00
10.	the property that is held under the Title GM238 Lot 2222, Ayer Panas Sub District, District of Jasin, State of Melaka	RM2,100,000-00

11.	½ share of the property that is held under the Title GM232 Lot 2216, Ayer Panas Sub District, District of Jasin, State of Melaka	RM1,050,000-00
12.	½ share of the property that is held under the Title GM233 Lot 2217, Ayer Panas Sub District, District of Jasin, State of Melaka	RM1,050,000-00
13.	½ share of the property that is held under the Title GM234 Lot 2218, Ayer Panas Sub District, District of Jasin, State of Melaka	RM1,050,000-00
14.	½ share of the property that is held under the Title GM235 Lot 2219, Ayer Panas Sub District, District of Jasin, State of Melaka	RM1,050,000-00
15.	4/6 share of the property that is held under the Title QT1192 Lot 1004 Bandar Maharani District of Muar, State of Johore	RM900,000-00
16.	the property that is held under the Title GM 52485 Lot 2385 Bandar Maharani District of Muar, State of Johore	RM2,990,000-00

Movable Property

No.	Description	Value

1.	Shares at the Bursa Malaysia Depository Sdn Bhd, under the CDS Account No. 052-004-011278181	
2.	Dana Johor account No. 003450	20,000 shares as at 19 September 2010
3.	Cash Money as at 4 November 2018	RM954,642-98
4.	Money in Savings Account at HSBC Bank Malaysia Berhad, account No. MYHBMS012-106969-025	
5.	Money in Account at Public Bank Berhad, account number 1170493632	
6.	Money in Account at Affin Bank Berhad, account number: 20-622-000046-4	
7.	Money in Account at Bank Simpanan Nasional account number 01156-41-00014332-1	
8.	Money in account at Malayan Bank Berhad, account number 101048902104	
9.	Money in account at Malayan Bank Berhad, account number 101049005568	
10.	Money in account at Malayan Bank Berhad, account number 001048218106	
11.	Money in account at Hong Leong Bank Berhad, account number 066-50-21385-6	

[7] The Interveners applied to intervene and were allowed by the Court and they also act as Caveators because they filed caveats

against the properties of the Estate because they brought a challenge against the purported Will of the Deceased. Notwithstanding the fact that the Interveners were named in the purported Will, there are other names in the purported Will and hence the Caveators filed an Appearance vide Form 166 and gave the Appearance to a Warning to the Applicant.

[8] There are 6 caveats entered on the properties of the Estate of the Deceased which are as follows:

No.	**Caveator**	**Date of entry of Caveat**
i.	Lok Siew Choo	5 July 2019
ii.	Lok Cheng Hwa @ Lok Siew Hwa	26 July 2019
iii.	Lock Pek Yen	5 August 2019
iv.	Lok Siew Hoon	5 August 2019
v.	Lok Siew Long	18 December 2018
vi.	Lock Siew Lang @ Lock Swee Luan	25 November 2020

[9] The 6 Caveators then entered their appearance against the Warnings as follows:

No.	**Caveator**	**Date of Entry of Appearance**
i.	Lok Siew Choo ("1st Caveator")	26 December 2019
ii.	Lock Cheng Hwa @ Lok Siew Hwa ("2nd Caveator")	26 December 2019
iii.	Lock Pek Yen ("3rd Caveator")	26 December 2019
iv.	Lok Siew Hoon ("4th Caveator")	26 December 2019
v.	Lok Siew Long ("5th Caveator")	7 November 2020
vi.	Lock Siew Lang @ Lock Swee Luan ("6th Caveator")	24 December 2020

[10] The applicant averred that there was this withdrawal of the interest to pursue the matter which may be enumerated as follows:

a. The 5th Caveator through his solicitors Messrs Tay Kuan Teck & Son wrote to the Applicant's solicitors that he shall not enter any appearance against the Warning (Enclosure 45 para 5 and Exhibit "LST-1").

b. The 1st, 2nd, 3rd, 4th Caveators wrote to this Court, that they do not wish to pursue the matter in this Court (Enclosure 45 para 7 and Exhibit "LST-2").

c. The 1st, 2nd, 3rd, 4th Caveators through their solicitors Messrs Bhag Sulaiman & Co. wrote to this Court, that they do not wish to pursue the matter in this Court (Enclosure 45 para 8 and Exhibit "LST-3").

d. After the application to remove the caveats, the 1st, 2nd, 3rd, 4th and 5th Caveators through the solicitors Messrs Bhag Sulaiman & Co. reversed their earlier decision as evident from Enclosures 46, 47, 48, 49.

e. The 6th Caveator through the solicitors Messrs Bhag Sulaiman & Co. informed the Court that he shall proceed with the challenge to the application for the Grant of Probate by filing the 6th Caveat.

THE ISSUES IN THE APPLICATION

i. Whether the Court can dismiss the Challenge by the Caveators / Interveners without giving the opportunity to be heard.

ii. Whether this Originating Summons may be dealt with summarily.

iii. Whether this Originating Summons may be converted to a Writ action.

I shall deal with the issues accordingly.

i. Whether the Court can dismiss the Challenge by the Caveators / Interveners without giving the opportunity to be heard.

[11] The Application is initially made pursuant to Order 71 Rules of Court 2012 because it was for a Grant of Probate by the purported Executor who is the applicant. There was another purported Executor Lok Swee Meng (NRIC : 530131-01-5033) who passed away on 26 September 2018. Hence, the Applicant becomes the sole executor.

[12] However, when the Caveators made an application to intervene, they are now contesting the purported Will.

THE LAW IN RESPECT OF CONTESTED WILL.

[13] To begin with Order 71 Rules of Courts 2012 is for Non-Contentious Probate Proceedings. However when the Probate Proceedings becomes contested then Rule 38 sets in and it stipulates:

[38] *Contested matters (O. 71 r. 38)*

(1) ***Every contested matter shall be referred to a Judge who may dispose of the matter in dispute in a summary manner or direct that the provisions of Order 72 shall apply.***

(2) ***Where a matter is directed to be disposed of summarily the originating summons, if any, shall ordinarily be***

adjourned into open Court for hearing and the Court may on such adjourned hearing either grant or refuse the prayer in the originating summons or make such other order as may be just.

[14] The principles were illustrated again by the Court of Appeal in *LEE ING CHIN & ORS v. GAN YOOK CHIN & ANOR* [2003] 2 CLJ 19. At page 63, his Lordship Justice Gopal Sri Ram (as he then was) said –

> ***"We begin with the proposition that there are three and only three ways in which a gift inter vivos may be made. First, by an outright transfer of the property to the intended done. Second, by a transfer of the property absolutely to trustees to hold on trust for the donee. Third, by the owner declaring himself as trustee for the donee. An ineffective outright gift will not be saved by the court by construing it as a declaration of trust because "there is no equity in this court to perfect an imperfect gift"***

(Per Lord Justice Turner in *MILROY v. LORD* [1862] 45 ER 1185)

[15] The case of *JONES v. LOCK* [1865] 1 Ch. App 25 is an illustration of the principle I have just stated.

> ***It follows that an inter vivos gift that is not effected in one of the three ways aforesaid can only take effect either as testamentary gift under a will of a testator or pass under an intestacy. And if the donor intends to make a testamentary gift he must observe the requirements of the Wills Act.***

[16] Scott's leading work "**The Law of Trusts**", 4th edition at p.94, correctly sets out the law:

> ***The owner of property may intend to create a trust of the property, either by transferring it to another person as trustee or by declaring himself trustee of it. In either event, if the beneficiaries do not acquire any interest in the property prior to his death, the transaction is clearly testamentary and invalid unless there is a compliance with the requirements of the Statute of Wills.***

[17] Lord Slynn in *FULTON v. ANDREWS* [1875] LR 7 HL 448:

> ***"These authorities, and many others to which it is not necessary to make reference since they are on similar lines, make it clear that where a person is in a fiduciary relationship with another who is intending to make a will, that person if he prepares or is closely involved in the preparation of the will or informing the testator's intentions must if the will is challenged satisfy the court that the testator knew and understood what he was doing and that the will has given effect to his intentions. The possibility of undue influence leading to the provision of such a benefit for the person, whether a solicitor or not, but particularly a solicitor, must be ruled out. The simplest way of avoiding the conclusion that there has been such influence is to ensure that an independent legal adviser is consulted by the testator or at any rate to give a clear and recorded opinion that such advice be obtained. But the statement in RHODES v. BATE [1886] 1 Ch App 252, 257 upon which Permanand JA relies that the persons by whom the benefits have been conferred must be shown to have 'had competent and independent advice in conferring them' goes too far. It is simple and conclusive but other methods showing that the will contains the intention of the testator and that he knew and understood what he was doing may be sufficient to***

remove the suspicions which have arisen."

[18] In the Court of Appeal case of *EU BOON YEAP & ORS v. EWE KEAN HOE* [2007] 6 CLJ 791; [2008] 2 MLJ 868, his Lordship Justice Low Hop Bing held as follows:

> ***"[92] As alluded to above, the plaintiff as propounder of the will bears the burden of dispelling any suspicious circumstance that may surround the making of the will.***
>
> ***[93] This burden may be discharged by showing that the deceased being of competent mind, had his will read over to him*** *(FULTON v. ANDREW ([1874]-75) LR 7 HL 448)* ***or that the deceased knew and approved of the contents of the will*** *(TYRRELL v. PAINTON [1894] P 151) (see LEE ING CHIN where at p 116B).*
>
> *[94] Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will has been read over to the deceased and the deceased understood the dispositions of the will, after which he had executed the will as his will, there is an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will (see LEE ING CHIN, (CA), at p 138G-H)."*

[19] In the words of Viscount Sumner in *BLACKWELL v. BLACKWELL* [1929] AC 318, at page 339, this is to "**enable the** testator to 'give the go-bye' to the requirements of the Wills Act, because he did not choose to comply with them".

[20] Learned author of **Sarkar on Evidence**, 14th edition Vol 2 at page 1396 has this to say:

> ***"Wills.-The law has been thus stated in two well-known***

cases: "These rules are two; first, that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased" *[BARRY v. BUTLIN, [1938], 2 Moo PC 480, 482: 46 RR 123 (relied on and explained in HARMES v. HINKSON, A [1946] PC 156: 50CWN 895) and TYRREL v. PAINTON, [1894] PD 151: 10LT453. See SURYANARAYANA v. SURAMMA, A [1947] PC169; BAI GANGABAI v. BHAGWAN, 29 B 530 PC: 9 CWN 769: GOMTIBAI v. KANCHHEDILAL, A [1949] PC 272).* ***"Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago****. These propositions will be found to be settled by BARRY v. BUTLIN (ANTE); CROSS v. CROSS, 10 LT 70: 33 LJP 49*

and TYRRALL v. PAINTON," (ante)-per LORD DUNEDIN, in ROBINS v. NATIONAL TRUST CO LTD, 101 IC 903 PC: [1927] AC 515; see JATINDRA v. RAJ LAKSHMI, 57 CLJ 8; KAMESWARA v. SURYAPRAKASA, A [1962] AP 178]. ***A propounder of the will has to prove its due and valid execution and if there are any suspicious circumstances he must remove them from the mind of the court- Facts to be considered on the question of due execution of will*** *[VENKATACHALA v. THIMMAJAMMA, A [1959] SC 443)."*

[21] **The Digest, Annotated British, Commonwealth and European case, Volume 50, Wills (Part 1-12(16)) (1983 Re-issue)** (**"Digest"**) has this as follows:

> ***"1519 General Rule -Witnessing beneficiary unable to take (I) By a will made since Will Act 1837 certain land and houses, after the death of testator's niece A and her husband J, to whom life interest had been given, were directed "to be equally divided among the children" of A and J. The will purported to be attested by three witnesses, two of them were Thomas and Sarah, children of A and J: held the devise to the children, although it was a devise to them as tenants in common, was a devise to a class, so that the whole was to be taken by those who after testator's death came within the limit of such class and were capable of taking, and therefore the share of Sarah and Thomas, who was attesting witnesses were themselves incapable of taking, went to the other members of the class, and not the heir-at-law of the testator."***

[22] Order 72 of Rules of Court 2012 (RC 2012) relates to contentious probate proceedings and is relevant to this suit. It is a strict requirement that there must be endorsement of the

parties' interest. The appellant complains that this requirement was not satisfied. We perused the relevant cause papers and we agree with the appellant that the strict requirement relating to the endorsement was not complied with. Order 72 Rule 2(2) says:

> ***"(2) Before a writ beginning a probate action is issued, it must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the Estate of the deceased to which the action relates."***

[23] This endorsement becomes relevant when there is an allegation that the provision of Order 72 rule 13 requirements are not satisfied for the plaintiff to succeed. If the mandatory particulars stated therein are not pleaded, the court cannot make a finding on unpleaded issues. Order 72 rule 13 reads as follows:

> *"Contents of pleadings (O. 72, r. 13)*
>
> *13. (1) Where the plaintiff in a probate action disputes the interest of a defendant he must allege in his statement of claim that he denies the interest of that defendant.*
>
> *(2) In a probate action in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his pleading that if the allegations made therein are proved he would be entitled to an interest in the Estate.*
>
> *(3) Without prejudice to Order 18, rule 7,* ***any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant***

in support of any of the following other pleas:

[1] that the will was not duly executed;

[2] that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and

[3] that the execution of the will was obtained by undue influence or fraud, shall be made by that party unless that other plea is also pleaded."

[24] The O. 72 r. 1(2) of Rules of Court 2012 states as follows:-

In these rules, 'probate action' means an action 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 an action which is non-contentions.

[25] The case of *NEOH AH YAN v. ONG LENG CHOO & ANOR* [2007] 10 CLJ 410 held that the provisions of O.72 are mandatory.

[22] The word "must" denotes that it is mandatory for the action to be begun by way of a writ action. In the Malaysian High Court Practice, at p. 2472, at para. 72.1.4, it is stated: [72.1.4] Actions for the revocation of grant. An application to revoke grant of probate is by probate action as defined in the Probate and Administration Act 1959 (Act 97)s. 2 and RHC O. 72 r. 1(2), and is to be begun by writ: *JIRGARLAL KANTILAL DOSHI & ANOR v. DAMAYANTI KANTILAL DOSHI (Executrix) & Anor [1998] 1 SLR 211, HC (a probate*

action begun by originating motion may be struck out on application by the defendants).

[26] In the book entitled **The Law and Wills Probate Administration and Succession in Malaysia and Singapore** by Mahinder Singh Sidhu, the learned author had observed the following:

> ***The duties of the executor are to carry out the funeral rites of the deceased in accordance with the terms of the Will; to prove the Will; to collect the Estate and as necessary to convert it into money; to pay the testator's debts in the proper order; to pay the legacies and to distribute the residue among the persons entitled.***

[27] Now that this application is a subset of the Originating Summons which seeks for the following prayers:

i. A Grant of Probate for the Estate if the Deceased Tan Tau @ Tan Geok Hiang (NRIC : 270802-01-5010 / 0067535) based on the purported Will and Last Testament.

ii. Other reliefs that the Court deems fit and just.

[28] Hence determination of the status of the caveats cannot be done without making an Order in respect of the Grant of Probate that the applicant is now seeking. They are different branches of the same tree and cannot be severed from each other because the purpose of removing the caveats is to allow for the granting of the Grant of Probate and appointment of Executor to carry terms of the purported Will.

[29] I shall deal with the issue of the alleged concession by the Caveators / Intervener a little later.

iii. Whether this Originating Summons may be dealt with summarily.

[30] It is being averred that based on letters sent by some of the interveners that they don't wish to pursue the matter and the matter should therefore end there. It did not escape my attention the following positions of the Caveators and their subsequent changes as follows:

a. The 5th Caveator through his solicitors Messrs Tay Kuan Teck & Son wrote to the Applicant's solicitors that he shall not enter any appearance against the Warning (Enclosure 45 para 5 and Exhibit "LST-1").

b. The 1st, 2nd, 3rd, 4th Caveators wrote to this Court, that they do not wish to pursue the matter in this Court (Enclosure 45 para 7 and Exhibit "LST-2").

c. The 1st, 2nd, 3rd, 4th Caveators through their solicitors Messrs Bhag Sulaiman & Co. wrote to this Court, that they do not wish to pursue the matter in this Court (Enclosure 45 para 8 and Exhibit "LST-3").

d. After the application to remove the caveats, the 1st, 2nd, 3rd, 4th and 5th Caveators through the solicitors Messrs Bhag Sulaiman & Co. reversed their earlier decision as evident from Enclosures 46, 47, 48, 49.

e. The 6th Caveator through the solicitors Messrs Bhag Sulaiman & Co. informed the Court that he shall proceed with the challenge to the application for the Grant of Probate by filing the 6th Caveat.

[31] I am of the view that this Court has not adjudged on the matters here, whether the issue of Grant of Probate or Removal of Caveats. I wish to put it on record that this Court looks upon

changing positions which is akin to changing horses mid-stream, with disdain because for a matter that is serious enough to be brought to the Court should not be treated lightly.

[32] But this Court is bound by its oath of office, to uphold justice and to decide matters on the merits of it (or lack thereof) and in the words of Order 1A that **"Regard shall be to justice (O. 1A). In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.",** I decided to look into the explanation of parties for the changes goal posts.

[33] Lok Siew Choo (1st Caveator) vide Enclosure 46 explained that she wish to challenge the purported Will and Last Testament because she was left in the dark of the purported will and that the allegations against her and other siblings are not true and she wishes to challenge them in court.

[34] Lok Siew Hoon (4th Caveator) vide Enclosure 47 explained that she found she was also kept in the dark of the purported Will and last Testament and the allegations against her by the applicant are false and wrong and wish to challenge the purported Will and Last Testament.

[35] Lok Swee Long (the 5th Caveator) vide Enclosure 48 explained that he found he was also kept in the dark of the purported Will and last Testament and the allegations against him by the applicant are false and wrong and wish to challenge the Will and Last Testament.

[36] Lock Siew Lang @ Lock Siew Lang (6th Caveator) vide Enclosure 49 explained that she found she was also kept in the dark of the purported Will and last Testament and the allegations against her by the applicant are false and wrong and wish to challenge the purported Will and Last Testament.

[37] As I have said earlier, while the complaints that there was information that the Caveators (1st to the 5th) that they had, at one point in time, indicated they do not wish to pursue the challenge against the application of Grant of Probate, is not lost from me, I also take into account that in the averments of the affidavits of why they decided to change their mind in respect of the caveats when there was an application to remove the caveats and pursue the challenge.

[38] It must be appreciated that the Caveats entered on properties of the Estate of the Deceased (which may also stem from the Challenge against the application of Grant of Probate) is distinct from the very Challenge itself.

[39] One can challenge the purported Will and Last Testament by filing an opposition against the application for Grant of Probate but yet do not file caveat against the properties of the Estate (which may result in transaction of the properties to proceed) thereby rendering the challenge to a certain extent, otiose. This happens if the properties are sold to bona fide third parties for value and the proceeds of sale of the properties dissipated and becomes untraceable, making the challenge (if successful) a paper judgment. Of course there are other recourse(s) which I have no desire of discussing here.

[40] Hence instead of Order 71 which is for uncontested probate proceedings, Order 72 particularly Rule 38.

> *38. Contested matters (O. 71 r. 38)*
>
> ***(1) Every contested matter shall be referred to a Judge who may dispose of the matter in dispute in a summary manner or direct that the provisions of Order 72 shall apply.***

(2) Where a matter is directed to be disposed of summarily the originating summons, if any, shall ordinarily be adjourned into open Court for hearing and the Court may on such adjourned hearing either grant or refuse the prayer in the originating summons or make such other order as may be just.

[41] These rules are two;

The first, that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

[42] When there is a contest then the Rules applicable would be Order 72 Rule 38 Rules of Court.

[43] The options open to the Court are:

(1) be referred to a Judge who may dispose of the matter in dispute in one of these ways:

i. a summary manner or

ii. direct that the provisions of Order 72 shall apply.

(2) Where the Court directed that the matter be disposed of summarily then the originating summons, if any, shall ordinarily be adjourned into open Court for hearing.

(3) The Court may then, adjourned to a hearing and may either grant or refuse the prayer in the originating summons or make such other order as may be just.

[44] The Court cannot decide on Order 71 when it becomes contested. I am of the view that, it is unwise to decide on the matter summarily because cutting the branches will not kill the tree. Other branches may sprout and grow in their place. A proper resolution will be a holistic decision on all matters whether fundamental or incidentals or consequential to the matter at hand i.e. whether the purported Will and Last Testament was properly executed in accordance with law.

iii. Whether this Originating Summons may be converted to a Writ action.

[45] When a Court is unable to find sufficient evidence to decide one matter or to conclusive based on the material before it, then the Court may want to convert the Originating Summons to a Writ Action, if justice so demands.

[46] The yardstick is what would the demand of justice of the case be, in view of the facts and circumstances of the case. This power is pursuant to Order 28 Rule 8 which stipulates as follows:

Continuation of proceedings as if cause or matter begun by writ (O. 28 r. 8)

(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter

> ***had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.***
>
> *(2)* ***Where the Court decides to make such an order referred to in rule (1), Order 34 shall apply with the necessary modifications.***
>
> *(3)* ***This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.***
>
> *(4)* ***Any reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.***

[47] The Court could have on its own motion, order that the claim raised in the Originating Summons to be converted to a Writ action pursuant to Order 28 R. 8 (1) Rules of Court 2012 with the affidavits filed, to stand as pleadings.

[48] In *NATIONAL LAND FINANCE CO-OPERATIVE SOCIETY LTD v. SHARIDAL SDN BHD* [1983] CLJ Rep 282; [1983] 2 MLJ 211, the Federal Court held, *inter alia*,

> ***Counsel for the appellants objected to the respondents taking the proceedings by an Originating Summons instead of a writ. He argued that there are matters of credibility of witnesses and issues of facts which can only be decided by oral evidence instead of sworn affidavits. With respect, we disagree with the submission. The issue***

involved in this case is purely a matter of construction of the sale and purchase agreement between the parties. No other evidence is needed to determine the issue than the massive correspondence that passed between them and their solicitors. We think that the learned judge was right in holding that the issue can be decided on the basis of the documents exhibited in court together with the undisputed facts disclosed and that there are no issues relevant to the case which require evidence to be called at a trial.

[49] In *TING LING KIEW & ANOR V. TANG ENG IRON WORKS CO LTD* [1992] 1 CLJ Rep 331; [1992] 2 MLJ 217, the Supreme Court held,

Apart from the various inconsistencies in the affidavits of the appellants and the respondents in the court below, we also observe other matters which have not been satisfactorily explained in the affidavits and could be resolved if the proceedings have been begun by writ. ***Apart from the various inconsistencies in the affidavits of the appellants and the respondents in the court below, we also observe other matters which have not been satisfactorily explained in the affidavits and could be resolved if the proceedings have been begun by writ.***

[50] This power is unbridled if the Court finds that it is just to all parties.

CONCLUSION

[51] Having read the cause papers, perused over the written submissions and heard parties, I ruled that this is a fit and

proper case to be converted into a Writ and I order it accordingly.

[52] The decision that I am making is for this Originating Summons and all interlocutory matters therein and does not, in any way influence me in deciding the Writ Action (if parties would continue with it) nor the evidence to be adduced or other matters arising from or incidental to the Writ Action.

Dated: 24 AUGUST 2021

(AWG ARMADAJAYA AWG MAHMUD)
Judicial Commissioner
High Court of Malaya
Muar
Johor Darul Ta'zim
Curia Advisari Vult

Hearing Date: 25 MARCH 2021, 1 JUNE 2021, 7 JULY 2021

Decision Date: 24 AUGUST 2021

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Case(s) referred to:

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19

Milroy v. Lord [1862] 45 ER 1185

Jones v. Lock [1865] 1 Ch. App 25

Fulton v. Andrews [1875] LR 7 HL 448

Rhodes v. Bate [1886] 1 Ch App 252

Eu Boon Yeap & Ors v. Ewe Kean Hoe [2007] 6 CLJ 791; [2008] 2 MLJ 868

Tyrrell v. Painton [1894] P 151

Blackwell v. Blackwell [1929] AC 318

Barry v. Butlin, [1938], 2 Moo PC 480, 482: 46 RR 123

Harmes v. Hinkson, A [1946] PC 156: 50CWN 895

Tyrrel v. Painton, [1894] PD 151: 10LT453.

Suryanarayana v. Suramma, A [1947] PC169;

Bai Gangabai v. Bhagwan, 29 B 530 PC: 9 CWN 769:

Gomtibai v. Kanchhedilal, A [1949] PC 272

Neoh Ah Yan v. Ong Leng Choo & Anor [2007] 10 CLJ 410

National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] Clj Rep 282; [1983] 2 MLJ 211

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 1 CLJ Rep 331; [1992] 2 MLJ 217

Legislation referred to:

Probate and Administration Act 1959, s. 3

Rules of Court 2012, O. 1A, O. 28 r. 8(1), O. 71 rr. 5, 37, 38, 40 , O. 72 rr. 1(2), 2(2), 13

Others referred to:

Scott's "The Law of Trusts", 4th edition at p.94

Sarkar on Evidence, 14th edition Vol 2 at page 1396 at page 1396

The Digest, Annotated British, Commonwealth and European case, Volume 50, Wills (Part 1-12(16)) (1983 Re-issue)

The Law and Wills Probate Administration and Succession in Malaysia and Singapore by Mahinder Singh Sidhu