

**IN THE COURT OF APPEAL OF MALAYSIA**

**Coram:** Lim Yee Lan, JCA; Dr. Badariah Sahamid, JCA; Abdul Rahman Sebli, JCA

**Kok Chee Yoong and Another v Wong Lee Yuen**

**Citation:** [2018] MYCA 245 **Suit Number:** Rayuan Sivil No. W-02(IM)(NCVC)-984-05/2016

**Date of Judgment:** 16 March 2018

*Litigation & court procedure – Application to strike out an amended claim pursuant to Order 18 rule 19(1)(a)(b) or (d) of the Rules of Court 2012*

*Probate – Contentious probate action – Order 72 of the Rules of Court 2012 – Whether the failure to comply with the mandatory requirements of Order 72 of the Rules of Court 2012 fatal to the probate action – Whether the appellant had failed to comply with the mandatory requirements of Order 72 of the Rules of Court 2012*

**JUDGMENT****Introduction**

[1] This is an appeal against the decision of learned High Court Judge, delivered on 5.03.2016, which dismissed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' application via Enclosure 12 to strike out the Plaintiff's Amended Writ of Summons dated 18.09.2014 and the amended Statement of Claim dated 27.10.2014 pursuant to O. 18 r. 19(1)(a)(b) or (d) of the **Rules of Court 2012** (“**ROC 2012**”).

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court.

**Background Facts**

[3] A summary of the background facts derived from the grounds of judgment of the learned Judge with suitable modifications is stated below.

[4] The Plaintiff was married to the late Kok Chee Keong on 28.8.2001. There were no children from the marriage. Kok Chee Keong (the Deceased) died on 9.6.2007 without leaving a will.

[5] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the younger brothers of the Deceased.

[6] The Deceased's assets at the time of his death included the following:

**“8.1 Hartanah**

**8.1.1** ½ bahagian ke atas sebuah rumah semi-detached 2 tingkat yang dikenali sebagai Lot No. 67, Cheras Hartamas anggaran 307-meter persegi dipegang dibawah Hakmilik Induk PN 10439, No. Lot 43375, Mukim Ampang, Daerah Ulu Langat Selangor dan mempunyai alamat di No. 7, Jalan CH11, Taman Cheras Hartamas, 43200 Batu 9, Cheras, Selangor Darul Ehsan;

**8.1.2** Kesemua bahagian ke atas sebuah kedai 2 tingkat yang dipegang dibawah hakmilik No. HS (M) 2808 No. PT 12, Mukim Batu, Tempat Kampong Selayang Baru, Negeri Selangor dan beralamat di No. Lot 12, Jalan 11B Selayang Bharu 68100 Selangor Darul Ehsan;

**8.2 Motokar**

**8.2.1** Sebuah motokar Mercedes Benz E280 (A) dibuat pada tahun 2006 bernombor plat WPJ 9938;

**8.2.2** Sebuah motokar Pajero V34VNDRM dibuat pada tahun 2001 bernombor plat WJD 7982;

**8.2.3** Sebuah motokar Perodua Kancil EZ, 847 S.P. dibuat pada tahun 1999 bernombor plat WHC 7986;

**8.3 Akaun Bank**

**8.3.1** Kesemua wang berjumlah RM382,856.93 di dalam akaun simpanan Bank Standard Chartered, Jalan Ipoh, Kuala Lumpur, No. Akaun 873-1-5659574-3;

**8.3.2** Kesemua wang berjumlah RM131,036.98 di dalam akaun semasa Bank Hong Leong Bhd, Jalan Raja Laut, Kuala Lumpur, No. akaun 03900029889;

**8.3.3** Kesemua wang berjumlah RM1,894.87 di dalam akaun simpanan Bank RHB Bhd, Menara Tun Razak, Kuala Lumpur, No. akaun 1-14351-3004663-6;

**8.3.4** Kesemua wang berjumlah RM27,768.77 di dalam akaun simpanan EON Bank Bhd, Kuala Lumpur, No. akaun 0018-10-007382-6;

**8.4 Syer Syarikat**

**8.4.1** Syer dalam PW Jewellery Trading Sdn Bhd (No. Syarikat 702831-U) berjumlah 25,000 unit;

**8.4.2** Syer dalam Ho Ngiap Sdn Bhd (No. Syarikat 231475-D) berjumlah 171,000 unit;

**8.4.3** Syer dalam Kedai Emas Poh Wah Sdn Bhd (No. Syarikat 545255-D) berjumlah 99,000

unit;

**8.4.4** Syer dalam Kedai Emas Sri Indah Sdn Bhd (No. Syarikat 47841-A) berjumlah 176,000 unit;

## **8.5 Wang Kumpulan Wang Simpanan Pekerja (KWSP)**

**8.5.1** Wang berjumlah RM123,071.27 di dalam akaun KWSP di bawah ahli 10113011”.

[7] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were granted Letters of Administration dated 06.01.2011 over the estate of the Deceased.

[8] On 14.12.2012, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed an Originating Summons to seek permission for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to transfer a 2-storey shop lot belonging to the estate of the Deceased.

[9] On 29.08.2013, the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, via Originating Summons 24 NCVC-3195-12/2012, entered into a Consent Judgment in respect of the division of the assets of the Deceased.

[10] Subsequently, about a year after the Consent Judgment was entered into, the Plaintiff initiated a suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as administrators of the Deceased’s estate in Civil Suit No. 22 NCVC-395-08/2014 (“the 2014 suit”).

### **The Plaintiff’s Claim**

[11] In the 2014 suit, amongst the reliefs sought by the Plaintiff were the following:

- (i) a declaration that the Consent Judgment dated 29.08.2013 is invalid;
- (ii) a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had breached their fiduciary duties as administrators of the Deceased’s estate;
- (iii) an order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be revoked from being administrators of the Deceased’s estate and that new administrators be appointed to administer the Deceased’s estate.
- (iv) an order that the Plaintiff be named as administrator and/or one of the administrators of the Deceased’s estate.

[12] The Plaintiff pleads in her amended Statement of Claim, that as the widow of the Deceased she is entitled to a half share of all the Deceased’s estate. She calculates the total worth of the Deceased’s estate to be RM2,211,628.50.

[13] It is the Plaintiff’s contention that she was the subject of fraudulent misrepresentation and duress by the 3<sup>rd</sup> Defendant and did not have full knowledge of the terms, conditions and effect of the Consent Judgment when she executed the draft copy of the Consent Judgment.

### **Issue before the High Court**

[14] The learned Judge had determined that the issue before him was whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can show that the Plaintiff's claim-

- (a) fulfils no reasonable cause of action;
- (b) is frivolous vexatious or scandalous; and
- (c) is an abuse of process;

and thus is liable to be struck out pursuant to O. 18 r. 19(1)(a)(b) and/or (d) of the **Rules of Court 2012**, ("**ROC 2012**").

### **Findings and Decision of the High Court**

[15] The learned Judge decided that there are issues that are best determined at trial, in particular:

- (a) the issue of fraudulent misrepresentation on the Plaintiff in respect of the Consent Judgment;
- (b) the issue of the fraudulent deprivation of the Plaintiff's ½ share of the Deceased's estate.

[16] Thus, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to prove that the Plaintiff's claim is either hopeless or unsustainable, or vexatious, frivolous or an abuse of the process of the court to warrant the Court to exercise its powers under Or. 18 r. 19 (1)(a)(b) and (d) to be struck out. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's application in Enclosure 12 was dismissed with costs.

### **Grounds of Appeal**

[17] For the purposes of this appeal the pivotal issue raised before us is whether the learned Judge had erred in law and fact in his failure to take into consideration that the Plaintiff/ Appellant had failed to comply with the mandatory requirements of Or. 72 **ROC 2012** in respect of a contentious probate action.

### **Preliminary Objection**

[18] The Plaintiff/ Respondent had raised a preliminary objection before us that the substantive appeal of the Defendants/ Appellants be suspended until the Defendants had purged their contempt.

[19] On 20.04.2015, the Plaintiff had initiated an application for leave to make an application for an order of committal against the Defendants. On 07.05.2015 the High Court granted the Plaintiff leave to make an application for an order of committal against the Defendants. On the same day the Plaintiff made an application (*inter partes*) in the High Court for an order of committal against the Defendants.

[20] Subsequently, both the Plaintiff and the Defendants filed their respective Affidavits in respect of

the Plaintiff's application (*inter partes*) for an order of committal against the Defendants.

[21] On 29.05.2015, the Defendants filed an application in the High Court to set aside the High Court order dated 07.05.2015 which granted leave to the Plaintiff to make an application for an order for committal against the Defendants.

[22] Notwithstanding the ex-parte leave, the learned Judge exercised his judicial discretion and proceeded to hear and determine the striking out application which is the subject of this appeal before us. The learned Judge further granted a stay of all proceedings in the High Court pending the disposal of this appeal.

[23] We have considered the circumstances of this case in respect of whether the alleged contemnor should be heard before he has purged his contempt. The Federal Court had emphasised that whether an alleged contemnor should be heard is a matter for judicial discretion. In the case of **Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah & Anor.** [2011] 2 MLJ 281, the Federal Court held that although as a general rule the party who is found to be in contempt of court should not be heard until he has purged his contempt, the court had a discretion that must be exercised judicially as to whether or not a litigant ought to be heard notwithstanding his contempt.

[24] After consideration of the circumstances, we dismissed the preliminary objection and proceeded to hear the substantive appeal before us.

## **OUR DECISION**

[25] After careful consideration of learned counsels' oral and written submissions and a perusal of the appeal records, we were of the unanimous view that there were merits in this appeal. We therefore allowed this appeal with costs and set aside the decision of the learned Judge. In consequence thereof, we allow the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's application to strike out the Plaintiff's Amended Writ of Summons dated 18.09.2014 and the amended Statement of Claim dated 27.10.2014 pursuant to O. 18 r. 19(1)(c) of the **Rules of Court 2012**. The reasons for our decision are set out below.

[26] We note that the Affidavit in Support by Dato' Kok Chee Ken (the 2<sup>nd</sup> Defendant) dated 26.02.2016 (at p. 14-24) had specifically raised the legal issue of the effect of non-compliance with Or. 72 **ROC 2012** on the Plaintiff's striking out action.

[27] However, on perusal of the learned Judge's Grounds of Judgment we note that nowhere did the learned Judge refer to Or. 72 **ROC 2012** which provides for requirements in respect of a contentious probate proceedings as in the matter before him. The learned Judge had dealt with the matter entirely on the basis of whether there were triable issues that merit a trial. There was therefore a misdirection that warrants appellate intervention.

[28] The suit initiated by the Plaintiff which seeks to revoke a grant of Letters of Administration obtained by the Defendants over the estate of the Deceased is clearly in the category of "contentious probate proceedings" that is governed by the **Probate and Administration Act 1959** and Or. 72

## **Rules of Court 2012.**

[29] Section 2 of the **Probate and Administration Act 1959** defines a probate action as follows:

*“Probate action “means a cause or matter in which a petition for probate or administration is contested by any person, and includes an application to alter or revoke any grant or representation”.”*

[30] Further, Or. 72 r. 1 **ROC 2012** defines a contentious probate proceeding as follows:

### **1. Application and Interpretation (O 72 r 1)**

*(1) This Order applies to probate causes and matters and the other provisions of these Rules apply to those causes and matters subject to the provisions of this Order.*

*(2) 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-contentious.*

[31] Order 72 r. 2 provides that all probate actions shall be begun by writ with certain requirements in connection of the writ as provided below:

*(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.*

*(3) A writ beginning an action for the revocation of the grant of probate of the will, or letters of administration of the estate, of a deceased person shall not be issued unless a citation under rule 7 has been issued or the probate or letters of administration, as the case may be, has or have been lodged in the Registry.*

[32] Authorities have laid down that compliance with Or. 72 **ROC 2012** is mandatory. In the case of **Sivanendran s/o Markandoo & Anor v Dr. Mahendran a/l Markandoo** [1988] 2 M.L.J. 169, the respondent/ plaintiff had brought an action against the administrator and administratrix of his deceased father’s estate for the appointment of a receiver and other ancillary relief. Seah S.C.J. who delivered the judgment of the Supreme Court emphasised the mandatory nature of Or. 72 of the **Rules of the High Court 1980** (*in pari materia* with Or. 72 **ROC 2012**) in the following words:

*“For the purpose of this appeal, we would regard the writ taken out by the plaintiff, Dr. Mahendran a/l Markandoo (the respondent herein), as probate action albeit the procedure laid down in Order 72 of the Rules of the High Court 1980 has not been complied with. We would like to emphasise that probate actions, whether contentious or non-contentious should comply with Order 71 and Order 72 of the Rules of the High Court 1980”.*

[33] Similarly, the same position was taken by the Federal Court in the case of **Yap Teck Ngian v Yap Hong Lang & Ors** [2007] 5 CLJ 290. The respondents had sought to file a writ to revoke the grant of a letter of administration of the estate of the deceased to the appellant. To meet the condition precedent for the writ, the respondents applied for a citation under Or. 72 r. 18 **RHC** and not vide Or. 72 r. 8(2). Both the High Court and the Court of Appeal affirmed the respondents' manner of applying for citation as correct. On appeal, the Federal Court held as follows (at p. 295-296):

*“... It must be noted that the instant case is a contentious probate action for the revocation of the letter of administration granted to the appellant under O. 72 r. 1(2) of the RHC. A probate action must be commenced by writ (O.72 r. 2(1))*

*... Thus, it is clear from the above provisions that before any person can file a writ for revocation of the grant of a letter of administration, a citation against the person to whom the letter was granted must be issued to him requiring him to bring into and leave at the Court Registry the letter of administration (O. 72 r. 7) The citation must be settled by the court before it is issued (O.72 r 8(1)). Before a citation is issued pursuant to O. 72 r. 7 an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for the citation to be issued (O.72 r 8(2)) and that the citation must be served personally on the citee which the citors did in the present case. In the Administration of Estates Handbook, Kanesh Sundrum states at p. 187 para 192:*

*Every probate action must be begun by writ issued out of the Registry of the High Court. The writ 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. A writ beginning an action for the revocation of probate or administration can only be issued **after** a citation to bring in grant has been issued or the probate or letters of administration has been lodged in the said registry. (emphasis added)”.*

[34] There are numerous mandatory requirements under Or. 72 **ROC 2012** that the Plaintiff has not complied with, but suffice to refer to the three primary requirements below:

- a. The Plaintiff has not endorsed the Amended Writ of Summons with a statement of the nature of the interest of the Plaintiff and the Defendant in the estate of the Deceased to which the action relates. (Or. 72 r. 2(2) **ROC 2012**);
- b. The Plaintiff has not issued a citation against the Defendants to bring in the Grant of Probate. (Or. 72 r. 7 **ROC 2012**);
- c. The Plaintiff did not prepare an affidavit verifying the statement of facts before the issuance of a citation to bring in the Grant of Probate. (Or. 72 r. 8(2) **ROC 2012**).
- d. The Plaintiff has failed to file an affidavit of testamentary scripts. (Or. 72 r. 9 **ROC 2012**).

[35] The failure to comply with the mandatory requirements of Or. 72 of **ROC 2012** has been held to

be fatal to the probate action. In the case of **Debaroti Das Gupta v Deb Brata Das Gupta** [2015] 7 MLJ 605, the plaintiff had instituted a probate action without following the procedure mandated by Or. 72 r. 2 **ROC 2012**, in particular, there was no prior endorsement of the writ in compliance with the abovementioned Order, as well as Or. 72 r. 9 of **ROC 2012** in respect of Affidavits of testamentary scripts. Accordingly, the plaintiff's action was dismissed '*in limine*' for the failure to comply with the mandatory procedure under Or. 72 **ROC 2012**. (See also the case of **Saadon bin Abdullah v Jamilah bt. Omar** [2011] MLJU 652).

[36] Thus due to the failure of the Plaintiff to comply with the mandatory requirements of Or. 72 of **ROC 2012** in this probate action, we are constrained to make a finding that the Plaintiff has not properly brought the matter before this court. Accordingly, we are of the view that the Plaintiff's action should be dismissed.

[37] We are of the considered view that the failure to comply with the mandatory requirements of O 72 **ROC** may "*prejudice, embarrass or delay the fair trial of the action*" and accordingly, we allow the appeal of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to strike out the Plaintiff's Amended Writ of Summons dated 18.09.2014 and the amended Statement of Claim dated 27.10.2014 pursuant to O. 18 r. 19(1)(c) of the **Rules of Court 2012**, ("**ROC 2012**"). We also set aside the order of the High Court with costs.

Deposit to be refunded to the Appellants.

Signed

**DATUK DR. BADARIAH SAHAMID**

Judge,

Court of Appeal, Putrajaya

16 March 2018

#### **COUNSEL**

For the Appellant: Tetuan Thomas Phillip, 5-1, Jalan 22A/70A, Wisma CKL, Desa Sri Hartamas, 50480 Kuala Lumpur

For the Respondent: Tetuan Douglas Chai Chambers, Suite 658, Level 6, Blok A2, Leisure Commerce Square, Jalan PJS 8/9, 461480 Petaling Jaya, Selangor

#### **LEGISLATION REFERRED TO:**

*Probate and Administration Act 1959, Section 2*

*Rules of Court 2012, Order 18 Rules 19(1) (a), (b), (c) and (d), Order 72 Rules 1, 2, 7, 8 and 9*

**JUDGMENTS REFERRED TO:**

*Debaroti Das Gupta v Deb Brata Das Gupta* [2015] 7 MLJ 605

*Saadon bin Abdullah v Jamilah bt. Omar* [2011] MLJU 652

*Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah & Anor* [2011] 2 MLJ 281

*Sivanendran s/o Markandoo & Anor v Dr. Mahendran a/l Markandoo* [1988] 2 MLJ 169

*Yap Teck Ngian v Yap Hong Lang & Ors* [2007] 5 CLJ 290

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