Joni ak Mos & Ors v Beti ak Rujim
[2017] MLJU 1241

Malayan Law Journal Unreported

HIGH COURT (KUCHING)

STEPHEN CHUNG J

SUIT NO KCH-22NCVC-64/12 OF 2016

25 August 2017

Candida Entri (Candida Entri & Assoc) for the plaintiffs.
Francis Teron (Francis Teron Kadap & Co) for the defendant.

Stephen Chung J:

JUDGMENT

[1]Mos Anak Sengep (the deceased) married one Kho Huang Kheng on 21.9.1980. The five Plaintiffs are their children from this marriage. Mdm. Kho died on 10.6.2014.

[2]The Defendant befriended the deceased in 2011. On 14.5.2016 the deceased was admitted to the Sarawak General Hospital (SGH) for treatment of liver disease. He died on 29.5.2016 while warded in SGH.

[3]The deceased was the proprietor of a parcel of land described as Lot 821 Block 8 Sentah-Segu Land District which was later transferred to his eldest son. This parcel was not included in the deceased's will and not an issue for trial.

[4]The deceased owned two other parcels land, without any land title, situated at Kampung Betong, Kuching, Sarawak.

[5]The first parcel was described as No. 77, Kampong Betong, Jalan Landeh, with a dwelling house thereon where the deceased, his late wife and their children resided. The 1st Plaintiff now resides at Lot 821 whereas the 2nd Plaintiff continues to reside in this house. The 3rd Plaintiff is married and lives with her husband and their children at Kpg. Bangau, Penrissen. The 4th and 5th Plaintiffs were working in Johor and would stay in the house when they came back to Kuching. There is another small farm-house or shed used as a store on this parcel of land. The evidence showed that the Defendant had resided in this farm house. She said she had resided there for about four

years until the deceased passed away. The other parcel of land was described as the 'Tikuyung land'.

[6]After the deceased's death, the Plaintiffs applied to administer the estate of their late father but discovered that a will dated 20.5.2016 was executed by the deceased in favour of the Defendant. The Defendant had earlier applied for probate of this will, which is pending the determination of this suit.

[7]The Defendant is the sole executrix and beneficiary of the will. Under the will, the Defendant was bequeathed a house on one of two parcels of land, the monies in different bank accounts, ASB, EPF and insurance under the name of the deceased.

[8]The Plaintiffs also discovered that the Defendant had sold a Kobelco tractor belonging to the deceased for RM18,000.00 and kept this sum for her own use.

[9]The Plaintiffs contended that there were suspicious circumstances surrounding the making of the will and have lodged a police report against the Defendant.

[10]The Defendant claimed to be entitled to the estate under and by virtue of the will whereas the Plaintiffs have challenged the execution and validity of the will.

[11]The Plaintiffs contended that at the material times the deceased was not in good health or sound mind, memory and understanding. The Plaintiffs contended that, at the time of execution of the will, the deceased was hospitalised at SGH undergoing medical treatment for acute liver failure which he later succumbed to and that in such frail condition of mind as result of the medication he was treated with, that he was unable to understand the nature of the act and its effects and the extent of the property of which he was disposing. The Plaintiffs submitted that he did not comprehend and appreciate the provisions and effects of the will.

[12]Therefore the Plaintiffs applied for (i) a declaration that the deceased was survived by the Plaintiffs being his lawful heirs and beneficiaries who are duly entitled to his estate in equal shares; (ii) for a declaration that the last will and testament of the deceased dated 20.5.2016 was invalid, null and void and died intestate; (iii) for an order that the Defendant do take such necessary steps to restore the estate of the deceased, all assets, properties and effects belonging to the deceased and or the documents of title in relation thereto; (iv) for damages for inducing or procuring the purported last will and testament dated 20.5.2016; and or (v) for damages for fraud.

[13]In her Defence, the Defendant admitted that by the will dated 20.5.2016, the deceased had bequeathed the properties listed therein in her favour but denied that the Plaintiffs had suffered loss and damages and put the Plaintiffs to strict proof thereof. The Defendant submitted that the will was valid, both in form and its integrity.

[14]She contended that Mdm. Kho had separated from and left the deceased in 2009 and that she and the children had abandoned the deceased and refused to take care of him. She contended that she met the deceased in 2011 and that the deceased asked her to live with him and to take care of him. She said the deceased promised to give his properties to her for her services. She contended that she was not chasing after the properties and monies of the deceased but instead it was his children. It was submitted that therefore the Plaintiffs' claims were baseless, frivolous and vexatious.

[15]The Defendant submitted that the law is clear, in that, even if the testator was wrought with grief, anger or spite when executing a will, it does not take away his ability or capacity to execute it. It was submitted that everyone is left free to choose the person whom he will bestow his property after his death, entirely unfettered in the selection he may think proper to make and that he may disinherit his children and leave his property to strangers to gratify his spite. It was submitted that we must give effect to his will, however much we may condemn the course which he has pursued, citing the authorities in support of her contention: see *Boughton & Anor v Knight & Ors* [1861-78] All E.R. Rep. 40; *Tan Cheu Kee v Lim Siew Hwa* [2016] MLJU 1599; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868.

[16]The burden of proving testamentary capacity rests on the person alleging the validity of the will: *Udham Singh v Indar Kaur* [1971] 2 MLJ 263; Gan Yook Chin's case (supra). In our case, the Defendant contended that the will in her favour was valid. The burden of proving testamentary capacity of the deceased rested on her in this trial.

[17]If the propounder of a will wished to succeed in obtaining probate, he must, upon challenge being taken, establish testamentary capacity and dispel any suspicious circumstances surrounding the making of the will. Suspicious circumstances, in the context of wills, relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator: *Tho Yow Pew & Anor v Chua kooi Hean* [2002] 4 MLJ 97.

[18]Based on authorities cited, it is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties that no insane delusion shall influence his will in disposing of his property. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health that it is to attend to: *Banks v Goodfellow* (1980) LR 5 QB 549, cited with approval in Gan Yook Chin's case (supra), both in the Court of Appeal and in the Federal Court.

[19]Has the Defendant discharged the burden? I shall deal with the evidence. The Defendant testified that the deceased had separated from his wife in 2009 and who died in 2014. The Defendant testified that she had known the deceased since 2011. She said the deceased confided to her that his late wife and children abandoned him and did not want to live with him or to take care of him as well as his aged mother. This was hearsay evidence and without corroboration.

[20]She said the deceased was staying alone in the house at Kpg. Betong and his mother stayed at Kpg. Punau. She together with the deceased visited his mother at Kpg. Punau often and she addressed his mother as 'mother' or "sindok" in Bidayuh Biatah dialect. She said the deceased's children had refused to take care of him and left him to live alone.

[21]The Defendant said that in July 2014 the deceased's health deteriorated and requested her to stay with him, to keep him company and to care for him and his aged mother. However, she had also said she had resided there for 4 years until the deceased passed away in 2016. She did not clarify this discrepancy.

[22]She said they developed platonic relationship and she was still married but had separated from her husband. She said they planned to get married once her marriage was dissolved. She said she was never paid any salary for her services except being provided a place to stay and food bought by the deceased from his savings. She said the deceased promised to give her some of his properties upon his death as further token of her services.

[23]The Plaintiffs' witnesses have challenged her version of the story. The mother of the deceased (PW1) testified that the deceased did not separate from his wife and that they lived together with the children in the house until the wife died in 2014. She said after that, the Defendant moved to stay in the farm house and she had met the Defendant. PW1 said she did not live with the deceased and the Defendant at Kpg. Betong because she has her own house in Kpg. Punau. She said the Defendant never took care of her. PW1 was corroborated by the Plaintiffs.

[24]The 3rd Plaintiff testified that her parents never separated until her mother died on 10.6.2014. She said sometimes her mother stayed with her at Kpg. Bangau to help take care of her young children because she was working at Eastern Mall, Siburan. Sometimes her mother travelled back and forth between Kpg. Bangau and Kpg. Betong until her mother fell sick in May, 2014 and was admitted to SGH.

[25]She said they knew the Defendant had moved in to stay in the farm-house because she was their father's friend. She said her father was in good health until he had fever in April, 2016 and became bedridden. She said she visited her father day and night. When her father was admitted to SGH, she and her siblings visited their father in SGH daily and her brothers, namely the 4th and 5th Plaintiffs, flew in from Johor to visit their father. The Plaintiffs' witnesses have testified that they never abandoned their father in particular the 2nd Plaintiff lived and continues to live in the house. These contradicted the testimony of the Defendant.

[26]The 3rd Plaintiff said the Defendant did not consult them and did not inform them of the will. She said at that time her father's condition was very weak and affected his ability to understand.

[27]It should be noted that the Defendant in her Defence pleaded that while the deceased was hospitalised, the deceased asked for her help to prepare a will and she consulted Wendy Jorai, an advocate, for advice and for preparation of the intended will. She said Wendy Jorai then prepared the will. This contrasted with what she had said in her witness statement that the deceased asked her to call Wendy Jorai to prepare a will. She did not explain

this discrepancy.

[28]She said she then called Wendy and explained the request made by the deceased. She said Wendy spoke directly with the deceased on the phone to find out what properties he wanted to bequeath and to whom.

[29]The Defendant said that on 20.5.2016 she together with Wendy Jorai and Norida Sipek, another advocate, had gone to see the deceased at SGH to explain the contents of the will. This contrasted with what Wendy had said that she and Norida went to see the deceased at SGH and that the Defendant was waiting for them in SGH. Again, the Defendant did not explain this discrepancy.

[30]The Defendant then said the conversations and explanations were in Bidayuh and the deceased understood the same, had affixed his signature on the will followed by the signature of Wendy Jorai and Norida Sipek as witnesses thereof. She said Wendy and Norida took turn to record the meeting in a video using a handphone. These video clips were shown in court, with a transcript of the conversations, including a translation in English, which were tendered as exhibit D6.

[31]She said the deceased appeared to be in pain but was able to comprehend and understood the conversations and able to respond appropriately to all the facts presented by Wendy. She said she heard Wendy asked and the deceased confirmed repeatedly the contents of the will.

[32]She said the deceased even said he was only able to give those properties as compensation for all those years of hardship suffered in taking care of him. It must be noted that this alleged conversation that 'he was only able to give those properties as compensation for all those years of hardship suffered in taking care of the deceased' was not heard in the video clips and not stated in the transcript. The transcript contradicted her allegation as such.

[33]Wendy Jorai (DW2) testified that she received a phone call from the Defendant who indicated that the deceased asked the Defendant to call her to prepare a will and she asked to talk personally with the deceased to find out what he actually wanted, the list of properties and to whom he wanted to bequeath. Several days later she completed the will.

[34]On 20.5.2016 she with Norida went to see the deceased at SGH. She said she asked him to confirm what he told her earlier over the phone about the content of the will. She said the deceased confirmed with her. DW2 also said the deceased even said the said properties were given away to the Defendant as compensation and gift for all the years of hardship the Defendant had endured in taking care of him. As stated above, this alleged conversation was not heard in the video clips and not stated in the transcript which raised doubts on her allegation as such: see *Choo Mooi Kooi @ Choo Soo Yin v Choo Choon Jin @ Jimmy Choo and other suits* [2012] 2 MLJ 691. Norida (DW3) testified that she was merely to witness the execution of the will.

[35]DW2 was cross-examined, that when she visited the deceased at SGH, whether she asked the deceased his condition at that time and she said she did not remember asking the deceased about his condition. She was questioned whether she asked the doctor in charge about the deceased's condition and she said she believed she did not have to ask consent first from the doctor before taking the deceased's signature.

[36]I remind myself that there is no law to require, and it is not mandatory, to call a doctor to testify on the testamentary capacity of a person who executed a will. Whether the person has the testamentary capacity depends on the facts and circumstances of each case. Where a person has been sick, and bedridden for a month, and admitted to hospital for acute liver failure, and died from his disease in hospital, within two weeks of his admission, the question is whether he has the testamentary capacity to execute his will while in hospital. It has been said that the best person to testify on his testamentary capacity would be the doctor who treated him: see *Re Simpson, the deceased; Schaniel v Simpson* [1977] 121 SJ 224.

[37]Although DW2 testified that the deceased knew and understood the contents and nature of his will, based on her testimony and questions put to her, she did not ask and did not find out the physical and mental conditions of the deceased when she asked him to sign the will. She did not bother to find out from the doctor who treated the deceased about his health, his mental condition, his testamentary capacity, memory and understanding. Although DW2 was in SGH, she did not consult any doctor or nurse, nearby or available, at that time, about the testamentary capacity of the deceased when she asked him to sign the will bearing in mind that the deceased was very sick at that time. She should be cautious and should ask the doctor. Instead she said she did not have to ask consent first. That showed her attitude.

[38]The Defendant chose not call any doctor to establish the testamentary capacity of the deceased and whether the deceased had the testamentary capacity to grant and execute the will although the burden was on her. The Defendant had ample time and opportunity to consult and ask the doctor and for the doctor to testify on the testamentary capacity of the deceased and whether the deceased had the testamentary capacity to execute his will but did not do so.

[39]Further, the evidence showed that there are two houses on the land described as No. 77, Kpg. Betong, Jalan Landeh, Kuching. One of the houses is the house where the deceased and his family resided and the other is the farmhouse. The Defendant confirmed that, after the deceased's wife died in 2014, the Defendant moved in to stay in the farmhouse to be near to the deceased.

[40]DW2 confirmed that she was not aware and did not know of this farmhouse where the Defendant had stayed. The deceased did not tell DW2 that there were two houses on the land described as Lot 77, Kpg. Betong, Jalan Landeh, Kuching. The Defendant did not tell DW2 that there were two houses on this parcel of land. During her phone conversation with the deceased, who was in hospital, DW2 did not find out from the deceased how many houses on the land or whether there was a farmhouse as well on the land where the Defendant had stayed. DW2 did not find out to ascertain whether the deceased bequeathed the house or the farmhouse to the Defendant. The deceased did not instruct DW2 that he wanted to bequeath the farmhouse instead of the house. These raised doubts on his memory, understanding and intention which house he wished to bequeath to the Defendant. DW2 did not clarify these doubts. It is essential that the deceased should know and approved the contents of the will: see *Hastilow v Stobie* [1865] LR 1 P&D 64; *Guardhouse v Blackburn* [1866] LR 1 P&D 109.

[41]The deceased in not telling DW2 that there were two houses on that parcel of land or that the Defendant had stayed in the farmhouse and not in the house where he and his children had stayed or that his sons still stayed in this house showed that the deceased had forgotten and was oblivious to these facts and which house he wished bequeath. These illustrated his frail memory and whether he had the testamentary capacity to make the will. These raised doubts whether the deceased understood which house he wished to bequeath to the Defendant. These raised doubts on his testamentary capacity at that material time. As stated above, I have reservations and doubts on the testimony of the Defendant and that of DW2.

[42]On evidence adduced, and on a balance of probabilities, the Defendant has failed to establish that the deceased had the testamentary capacity to execute the will. The Defendant also failed to dispel the suspicious circumstances surrounding the making of the will: see *Krishnavani A/P Muniandy v Sethambal D/O Doraiappah & Anor* [1998] 7 MLJ 366. The Defendant has failed to prove that the will was valid.

[43]For the reasons given, I allow the Plaintiffs' claims against the Defendant in terms of paragraphs 12.1, 12.2, 12.3 and 12.4 of the Statement of Claim.

[44]Counsel for the Plaintiffs informed the court that they would not be asking from the Defendant for the return of the sum of RM18,000.00 from the sale of the tractor.

[45]Based on the above orders made, the Plaintiffs have not incurred any loss and have not established that they were entitled to damages against the Defendant for procuring the will. There is no necessity for the declaration sought in paragraph 12.6. The trial took less than two days. The Defendant is to pay costs of RM10,000.00 to the Plaintiff and to pay the allocatur.

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