

JUDGMENT Express

[2023] 6 MLRH

Sim Kooi Chuan & Ors
v. Nelson Sim Ping Hun

549

SIM KOOI CHUAN & ORS v. NELSON SIM PING HUN

High Court Malaya, Penang
Azizan Md Arshad JC
[Civil Suit No: PA-22NCVC-147-06-2019]
8 August 2023

Succession: *Probate — Challenge by plaintiffs as to validity of will and grant of probate to defendant — Application by defendant under O 14A of the Rules of Court (ROC 2012) for determination of questions of law — Whether issuance of citation under O 72 r 7 of the ROC 2012 a mandatory preliminary requisite before probate action under O 72 of the ROC 2012 may be commenced by citors — Whether court has jurisdiction to consider or decide on merits on objections raised by citee, as the proper forum for the issues to be articulated, ventilated and decided would be provided once a probate action under O 72 of the ROC 2012 was begun by writ — Whether non-compliance with the mandatory requirements of O 72 of the ROC 2012 a defect that could be cured or ratified*

The plaintiffs were the siblings of the defendant who was brought up by his paternal grandfather (deceased). Subsequent to the death of their father, the defendant discovered that he had been named in the deceased's will as the sole executor of the deceased's estate, almost the whole of which was bequeathed to him. The plaintiffs challenged the validity of the will and the probate that was granted in favour of the defendant on the ground that the will was executed under undue influence and/or that the deceased lacked the necessary testamentary capacity to execute the will. The plaintiffs accordingly commenced the instant action under O 72 r 2(3) of the Rules of Court 2012 (ROC 2012) and sought a declaration that the will be declared null and void and that the deceased had died intestate. The plaintiffs had also obtained an injunction to restrain the defendant from dealing in any manner whatsoever with the assets of the estate. The defendant objected to the proceedings and applied pursuant to O 14A of the ROC 2012 for the determination of two questions of law namely, whether the issuance of a citation under O 72 r 7 of the ROC 2012 was a mandatory preliminary requisite before the citors may commence a probate action under the same Order; and whether the court should not consider or decide on the merits on the objections raised by the citee, as the proper forum for the issues to be articulated, ventilated and decided would be provided once a probate action under O 72 ROC 2012 was begun by writ. The grounds advanced in support of the defendant's application *inter alia* were that prior to the commencement of the instant action, no citation under O 72 r 7 of the ROC 2012 was issued or requested by the plaintiffs; that the probate was not deposited in court as mandatorily required under O 72 r 2(3) of the ROC 2012; that the plaintiffs' non-compliance with the said Order was fatal;



and that the determination of the aforesaid questions would finally decide the whole cause or matter and would save time and expense of the court and the parties. The application was opposed by the plaintiffs on the grounds that the same was made four years after the commencement of the proceedings; that the defendant had taken multiple steps in the proceedings; and as no evidence was adduced of any prejudice suffered by the defendant. The plaintiffs in response argued that the defendant having filed all the documents and taken an active part in the proceedings, was estopped from raising the issue of the court's jurisdiction and that the non-compliance with the requirements of O 72 of the ROC 2012 was a defect that could be cured or ratified.

Held (allowing the defendant's application with costs):

(1) Following *M RM SP V Subrahmanyam Chettiar @ V Subramaniam M RM SP V Venkatachalam Chettiar & Anor v. Swaminathan Swetharanyam @ SM Swetharanyam Swaminathan Chettiar @ M RM SP SM Swetharanyam & Anor*, the mandatory procedures under O 72 of the ROC 2012 must be followed by the citor before the questions related to the instant case could be continued against the citee. (para 23)

(2) A probate action to revoke the grant of letters of administration (LA) could only be made after the grant of LA was extracted. Such action could not be initiated without the deposit of the grant of LA in the Registry pursuant to O 72 r 2(3) of the ROC 2012. (para 25)

(3) The plaintiffs' argument that the defendant having taken an active part in the proceedings was estopped from raising the issue of the court's jurisdiction, could not stand because the issue of jurisdiction could be raised at any time as it was a legal issue. As was stated in *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd*, the issue of estoppel was not applicable if it involved jurisdiction. (paras 32-33 & 36)

(4) Contrary to the plaintiffs' argument, the non-compliance with the mandatory requirements of O 72 r 2(3) of the ROC 2012 was not a defect that could be cured or ratified. (para 39)

Case(s) referred to:

Agilaisweri Munusamy & Ors v. Selva Pandaian Sigamani [2022] MLRHU 2323 (refd)

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 1 MLRA 98 (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor And Another Appeal [2009] 1 MLRA 528 (refd)

Guindarajoo Vegadason v. Satgunasingam Balasingam [2014] MLRHU 507 (refd)

Harjinder Kaur Sham Singh & Anor v. Balvinder Singh Sham Singh & Ors And Another Appeal [2017] MLRHU 1407 (refd)

Kok Chee Yoong & Anor v. Wong Lee Yuen [2018] MLRAU 265 (refd)

Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 1 MLRA 490 (folld)



M RM SP V Subrahmanyam Chettiar @ V Subramaniam M RM SP V Venkatachalam Chettiar & Anor v. Swaminathan Swetharanyam @ SM Swetharanyam Swaminathan Chettiar @ M RM SP SM Swetharanyam & Anor [2021] MLRHU 2130 (folld)

Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah And Another Appeal [2023] 3 MLRA 1 (refd)

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 MLRA 10 (folld)

Ng Kong Ling & Anor v. Low Peck Lim & Ors [2017] 3 MLRA 419 (refd)

Ong Siang Pheng v. Millennium Mall Sdn Bhd & Ors [2021] MLRHU 732 (refd)

Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam [2006] 2 MLRA 178 (refd)

Re The Estate of Yap Hong Kai, Deceased (Yap Teck Ngian, Petitioner) v. Eric Claude Cooke [2001] 5 MLRH 197 (refd)

Sivanderan V Markandoo & Anor v. Dr Mahendran V Markandoo [1988] 1 MLRA 147 (refd)

Tan Choon Meng & Ors v. Khoo Boo Lai & Ors [2023] MLRHU 891 (refd)

The Estate of Loh Ah Moy @ Loh Siew Keng [2021] MLRHU 2207 (refd)

Thein Hong Teck & 4 Ors v. Mohd Afrizan And Another Appeal [2012] 4 MLRA 87 (refd)

Usahabina v. Anuar Yahya [1998] 1 MLRH 71 (refd)

Legislation referred to:

Rules of Court 2012, O 1A, O 2 r 3, O 14A, O 33, O 72 rr 2(3), 7

Counsel:

For the plaintiffs: Teh Han Ker (Khaw Yit How & Cheong Yew Sheng with him); M/s B C Teh & Yeoh

For the defendant: Wong Yee Chue (Lee Khe Wei with him); M/s Y C Wong

JUDGMENT

Azizan Md Arshad JC:

Introduction

[1] This is an application (encl 185) by the Respondent (Defendant) under O 14A of the Rules of Court 2012 ("ROC 2012") for the determination of the question of law and/or facts without having to go through a full trial. In this case, the Defendant has raised an issue related to the Jurisdiction of this Court to hear this case because it involves O 72 Rules of Court 2012 which is mandatory to be followed, to give jurisdiction to this Court.

[2] The Plaintiffs have raised the issue of estoppel as a reason for objecting to the Defendant's application. Since this issue is the main issue, other applications (Enclosures 92, 115 and 188) depend on this issue. The Defendant's application



has been allowed with a cost of RM5,000.00 subject to the allocator fee on 18 July 2023. The Plaintiff has appealed against this decision. The parties are referred to as they were in the High Court.

Application And Legal Questions

[3] The following questions have been referred to this Court to be decided or determined, ie:

- (1) bahawa persoalan undang-undang berikut diputuskan tanpa suatu bicara penuh tindakan ini:

“Adakah tindakan plaintiff-plaintif di sini (untuk pembatalan geran probet bagi wasiat seorang simati) dibawa ke hadapan Mahkamah dengan betul apabila plaintiff-plaintif gagal untuk mematuhi peruntukan mandatori Aturan 72, kaedah 2(3) Kaedah-kaedah Mahkamah 2012 (“Kaedah-kaedah tersebut”) kerana tiada sitasi dikeluarkan atau dipohon di bawah Aturan 72 kaedah 7 Kaedah-kaedah tersebut dan probet tidak diserahkan di Pejabat Pendaftaran sebelum pengeluaran writ di sini; dan adakah kegagalan plaintiff-plaintif untuk mematuhi peruntukan mandatori sedemikian “fatal” kepada tindakan mereka di sini?”

- (2) bahawa sekiranya jawapan kepada persoalan undang-undang tersebut adalah bahawa tindakan ini tidak dibawa ke hadapan Mahkamah yang Mulia ini dengan betul dan bahawa kegagalan plaintiff-plaintif untuk mematuhi peruntukan mandatori tersebut adalah “fatal” kepada tindakan mereka di sini, penghakiman dimasukkan secara memihak kepada defendan di sini seperti berikut:
 - (i) tindakan ini ditolak in limine;
 - (ii) injunksi bertarikh 17 Mac 2022 (“injunksi tersebut”) dibubarkan;
 - (iii) plaintiff-plaintif diperintahkan untuk membayar secara bersesama dan berasingan kepada defendan ganti rugi yang akan ditaksirkan untuk kerugian dan kerosakan yang disebabkan oleh injunksi tersebut; dan
 - (iv) kos tindakan ini.
- (3) bahawa kos permohonan ini dibayar oleh plaintiff-plaintif kepada defendan; dan
- (4) relif-relif yang selanjutnya atau yang lain sebagaimana dianggap wajar dan berpatutan oleh Mahkamah yang Mulia ini



Issues

[4] The following issues are raised for determination by this Court, ie:

- (i) Whether the issuance of a citation under O 72 r 7 ROC 2012 is a mandatory preliminary requisite before the Citors may commence a probate action under the same Order; and
- (ii) The Court should not consider or decide on the merits on the objections raised by the Citees, as the proper forum for the issues to be articulated, ventilated and decided will be provided once a probate action under O 72 ROC 2012 is begun by writ.

The Law

[5] In this judgment, the relevant provisions which will be discussed are as follows;

- (i) Order 14A of the ROC 2012

“1. Determination of questions of law or construction (O 14A r 1)

- (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
 - (a) such question is suitable for determination without the full trial of the action; and
 - (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
- (2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
- (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
- (4) The jurisdiction of the Court under this Order may be exercised by a Registrar.
- (5) Nothing in this Order shall limit the powers of the Court under O 18, r 19 or any other provisions of these Rules.

- 2. Manner in which applications under r 1 may be made

An application under r 1 may be made by a notice of application or, notwithstanding O 32, r 1, may be made orally in the course of any interlocutory application to the Court.”



(ii) Order 72 of the Rules of Court 2012 (Contentious probate proceedings)

Order 72 r 2 which reads:

“2. Requirements in connection with issue of writ (O 72 r 2)

- (1) A probate action shall be begun by writ, and the writ shall be issued out of the Registry.
- (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 r 7 has been issued or the probate or letters of administration, as the case may be, has or have been lodged in the Registry.”

(iii) Order 72 r 7 of the Rules of Court (Citation to bring in grant)

Order 72 r 7 which reads:

“In an action for the revocation of the grant of probate of the will, or letters of administration of the estate of a deceased person, a citation against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, may be issued on the application of the plaintiff.”

Background Facts

[6] The summary of facts is based on the claims, defences, related affidavits, cause papers, submissions, previous rulings and judgments throughout this proceeding as submitted by both parties.

[7] The late Sim Ban Hong (“the deceased”) is the Defendant’s paternal grandfather. The Defendant’s father had passed away on 26 December 2018, leaving behind five siblings who are the Plaintiffs in this suit. The Defendant claims to have been brought up by the deceased at No 31, Peel Avenue, Georgetown, Penang.

[8] The Defendant claims that about two weeks after their father had passed away, he discovered that the deceased had left a will dated 27 June 2013 and named the Defendant as the sole executor of the deceased’s estate. According to the will, almost the whole of the estate was bequeathed to the Defendant.

[9] On 12 March 2019 probate was granted by the Penang High Court to the Defendant. The Plaintiffs filed this suit challenging the validity of the will and the grant of probate. It is alleged that the will was made under undue influence and/or that the deceased did not have the necessary testamentary capacity to



make the will. Therefore, the will should be declared null and void and the deceased died intestate.

[10] The Plaintiffs obtained an injunction, *inter alia*, to restrain the Defendant from selling, disposing, encumbering, damaging, parting with possession of and/or dealing with in any manner whatsoever all assets of the deceased's estate. The assets include several properties and shares held in twelve limited companies worth millions.

[11] On or about 31 March 2023 (after 4 long years of proceedings in court), the Defendant suddenly informed the Plaintiffs' solicitors that he objected to the proceedings herein under O 72 r 2(3) of the ROC 2012 and then proceeded to file encl 185 on 2 April 2023.

[12] The Plaintiffs' solicitors then replied by letter dated 6 April 2023 as to whether the Defendant is agreeable to deposit a copy of the grant of probate in court in order to regularize the alleged noncompliance to which the Defendant replied that he refused. In light of the refusal of the Defendant to regularize the proceedings, the Plaintiffs then filed (encl 188) an application for an extension of time to file a citation in order to comply with O 72 r 2(3) of the ROC.

[13] The objection to O 72 r 2(3) of the ROC 2012 was raised for the very first time on 31 March 2023. The question for the court to decide is whether the Defendant's objection is reasonable and fair when he raises this objection for the first time, after 4 years. If this question is answered in the negative, then it will be that this Court should allow the Plaintiff's application in encl 188 (for the alleged non-compliance to be regularised).

Defendant's Submissions

[14] The reasons for this application are as follows:

- (i) The Plaintiffs commenced this action for annulment grant of probate for the will of Mr Sim Ban Hong, simati, and the following reliefs ("consequential relief");
- (ii) It is an undisputed fact, which also can easily determine from the filing record court, that before the issuance of the writ here, no citation under O 72 r 7 of the ROC 2012 issued or requested by the Plaintiffs; and the probate is not deposited in the Registry Office as required under O 72 r 2(3) of the ROC 2012;
- (iii) Requirements in O 72 r 2(3) of the Rules that is mandatory;
- (iv) Due to the failure of the plaintiffs to comply mandatory provision in O 72 r 2(3) of the Rules, this action is not properly brought to before this Court;



- (v) Failure of the Plaintiffs to comply with the provision the mandatory is “fatal” to this action; and
- (vi) The decision of this legal question will finally decide the whole cause or matter here, and will save valuable time and expense of this Court and all parties.

Plaintiffs’ Submissions

[15] It is submitted that the Defendant has failed on all 3 counts of the conditions set out because:

- (a) The objection made now to nullify the proceedings, was made 4 years after proceedings have commenced where the Defendant had dragged the Plaintiffs through years of litigation. The Defendant had clearly slept on his rights;
- (b) By the same token above, he had already taken multiple steps in the proceedings before awakening from his slumber. The number of enclosures filed by the Defendant in this case is self-evident of this fact; and
- (c) There is absolutely no evidence of any prejudice suffered by the Defendant.

[16] It was after the Defendant had refused to regularise the irregularity that the Plaintiffs were compelled to file encl 188. The clearly inordinate delay by the Defendant in raising this objection must therefore be dismissed in favour of the overall justice or at the very least it ought to be mitigated by allowing encl 188.

[17] In *Guindarajoo Vegadason v. Satgunasingam Balasingam* [2014] MLRHU 507, the defendant therein raised the same objection after 10 years. The court without hesitancy dismissed the said objection and noted that he had slept on his rights. This exactly fits the facts of this case. The court held that:

“59. The authorities illustrate that the question I need to consider is whether the defendant has suffered any prejudice or damage by reason of the plaintiffs non-compliance with O 72 r 2(3) ROC. There is no evidence to show that the defendant has been prejudiced by the non-compliance, and I therefore reject the complaint made by the defendant. In any event, having raised no objection for the last 10 years the defendant has waived his right to raise this objection.”

[18] The court had in effect held that the Defendant had waived his right to the objection raised. The Learned Judge had correctly exercised her powers under O 1A and O 2 r 3 of the ROC to overrule the objection. In contrast, all cases cited by the Defendant can be distinguished by one important factor. In those cases, the opposing party had applied to strike out the writ and statement of



claim at the earliest instance. None had slept on their rights and/or misled the opposing party.

[19] This case is eminently suitable for the court to invoke its inherent powers under O 1A and/or O 2 of the ROC. Whereas, even if the objection is dismissed or is allowed to be rectified, the Defendant suffers no harm and would still have his day in court. The Defendant does not suffer any prejudice. If encl 188 is not allowed, the prejudice that befalls the Plaintiffs would be grave and irreversible. Thus, the Plaintiffs urges this Court to exercise its very wide discretion to, at the very least, allow encl 188 for the said non-compliance to be regularised.

[20] The Defendant has and will not suffer any prejudice and that the alleged non-compliance with O 72 r 2(3) of the ROC is a mere irregularity that can be cured. This was the reason the Plaintiffs' Solicitors had written to the Defendant's Solicitors for the Defendant to deposit the grant of probate in court which he refused.

[21] The doctrine of election also applies with equal force against the Defendant. By filing multiple applications against the Plaintiffs and contending this suit in a particular manner without objecting to its legitimacy (for allegedly not complying with O 72 r 2(3) of the ROC), the Defendant is taken to have made an election that he cannot now resile from. It is preposterous for the Defendant to raise such an objection about the validity of the proceedings after sleeping on his rights for 4 long years.

Analysis And Findings

[22] In *Re The Estate of Yap Hong Kai, Deceased (Yap Teck Ngian, Petitioner) v. Eric Claude Cooke* [2001] 5 MLRH 197, it was held that:

“Order 72 r 18 of the Rules of Court is only applicable to all applications after probate actions have been filed and initiated:

“... I am also in agreement with the citors' counsel that r 18 is only applicable to all applications after probate actions have been filed and initiated. Rule 18 refers to any application to the court in a 'probate cause or matters,' 'Probate cause' refers to 'probate action' as defined under O 72 r 1(2) which means an action for the grant of probate or letters of administration; or for revocation of such grant or for a decree pronouncing for or against the validity of an alleged will. That being the case, it does not include a simple application for the issue of a citation under r 7 of the same Order, which arises at the stage before a writ is filed.”

(See *Tan Choon Meng & Ors v. Khoo Boo Lai & Ors* [2023] MLRHU 891)

[23] Order 72 r 2(3) of the Rules of Court 2012 must be complied with. In the case of *M RM SP V Subrahmanyam Chettiar @ V Subramaniam M RM SP V Venkatachalam Chettiar & Anor v. Swaminathan Swetharanyam @ SM*



Swetharanyam Swaminathan Chettiar @ M RM SP SM Swetharanyam & Anor [2021] MLRHU 2130, where the learned Judicial Commissioner Amarjeet Singh (as His Lordship then was) held that it is mandatory in a probate action to comply with the prerequisites set out in O 72 r 2 ROC 2012:

“[20] The application to remove the defendants is in essence an application to revoke the grant of probate and therefore falling within the meaning of a “probate action” under O 72 r 1(2). A “probate action” is required to comply with the following mandatory prerequisites set out in imperative terms that constitutes O 72 rule 2...”

(See *Sivanderan V Markandoo & Anor v. Dr Mahendran V Markandoo* [1988] 1 MLRA 147)

[24] This court agrees with the above and decides that it is a mandatory procedure that must be followed by the Citors before the question related to this case can be continued against the 1st Citee. In *Harjinder Kaur Sham Singh & Anor v. Balvinder Singh Sham Singh & Ors And Another Appeal* [2017] MLRHU 1407, it was held:

“[96] Mr Beh contended that by reason of the breach by the Plaintiffs, this Suit is consequently a nullity following the case of *Tan Ah Chai v. Loke Jee Yah* [1998] 2 MLRH 507 in relation to reference to small claims tribunal under O 54 of the Subordinates Court Rules 1980 wherein Augustine Paul J (later FCJ) held as follows:

“It will be observed that the rule is couched in mandatory terms by the use of the word “shall”. The use of the word “shall” is *prima facie* to be construed as giving a mandatory effect... As the breach goes to the root of procedure prescribed it is fundamental in the nature and its therefore not curable. Where a breach is fundamentally defective it can be classified as a nullity.”

[Emphasis Added]

[25] These citation proceedings are provided for under O 72 of the ROC 2012 for a revocation of the Grant of LA. There was no delay, as present citation proceedings before this Court can only be initiated after the Grant of LA was issued on 19 May 2022, which is approximately 5 years after Order dated 11 April 2017. Therefore, a probate action to revoke the Grant of LA can only be done after the Grant of LA is extracted. Such action cannot be initiated without the deposit of the Grant of LA in the Registry pursuant to O 72 r 2(3) ROC 2012.

[26] In *The Estate of Loh Ah Moy @ Loh Siew Keng* [2021] MLRHU 2207, where the High Court held:

“[24] This Court when hearing the application to issue the citation is not entitled to hear and determine the merits of the claim. It is only a procedural requirement.



[25] The merits of the claim and any issue that the Citors or even Citee wishes to raise should be dealt with in the Writ Action between parties. It is not the function of this Court to make any determination whether the Citors has any valid claim against the Citee.

[26] I refer to the decision of the Court of Appeal in *Yap Teck Ngian v. Yap Hong Lang* [2006] 2 MLRA 198 and the High Court in *Re Estate of Yap Hong Kai* [2001] 5 MLRH 197.

[27] In both cases the Courts have clearly stated that the merits of the claim should not be disposed of in an application for citation under O 72 r 7 of the Rules of Court 2012. The Citors and Citee will have ample opportunity to raise all issues before the appropriate forum once the Writ is filed and heard.

[28] I also refer to O 1A of the Rules of Court 2012. This Court is required to consider the overall justice of the case and not merely any technical non-compliance of the rules.

[29] Therefore, I do not find any material prejudice that is suffered by the Citee. As I have said earlier, he is entitled to raise all issues that he may have against the Citors in the appropriate forum.”

[27] In both cases, *Yap Hong Kai and Harjinder Kaur (supra)* the Courts have clearly stated that the merits of the claim should not be disposed of in an application for citation under O 72 r 7 of the Rules of Court 2012 and parties will have an opportunity to raise all issues once the Writ is heard as stated in *Yap Teck Ngian v. Yap Hong Lang (supra)*.

[28] In *Agilaisweri Munusamy & Ors v. Selva Pandaian Sigamani* [2022] MLRHU 2323, held:

“The failure to comply with the mandatory requirements of O 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* [2014] MLRHU 273, the plaintiff had instituted a probate action without following the procedure mandated by O 72 r 2 ROC 2012, in particular, there was no prior endorsement of the writ in compliance with the abovementioned Order, as well as O 72 r 9 of ROC 2012 in respect of Affidavits of testamentary scripts. **Accordingly, the plaintiffs action was dismissed ‘in limine’ for the failure to comply with the mandatory procedure under O 72 ROC 2012.**”

[Emphasis Added]

[29] In the case of *Kok Chee Yoong & Anor v. Wong Lee Yuen* [2018] MLRAU 265, the Court of Appeal held that;

“[32] Authorities have laid down that compliance with O 72 ROC 2012 is mandatory. In the case of *Sivanendran s/o Markandoo & Anor v. Mahendran Markandoo* [1988] 1 MLRA 147, 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 SCJ who delivered the judgment of the Supreme Court emphasised the mandatory



nature of O 72 of the Rules of the High Court 1980 (in *pari materia* with O 72 ROC 2012) in the following words:

“For the purpose of this appeal, we would regard the writ taken out by the plaintiff, Mahendran Markandoo (the respondent herein), as probate action *albeit* the procedure laid down in O 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 O 71 and Order 72 of the Rules of the High Court 1980.

.....

[36] Thus due to the failure of the Plaintiff to comply with the mandatory requirements of O 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.”

[Emphasis Added]

[30] In *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 2 MLRA 178, Court of Appeal held:

“The relevant rules relating to probate proceedings are found in the RHC, particularly O 71 and O 72. Order 71 of the RHC provides for procedures relating to non-contentious probate proceeding, while O 72 of the RHC provides for procedures relating to contentious probate proceeding...

Both O 71 and O 72 of the RHC provide for the mode of issuance of citations, which is a preliminary step to be taken by the parties concerned in the probate proceedings.”

[Emphasis Added]

[31] The Plaintiffs argument depended on the case of *Usahabina v. Anuar Yahya* [1998] 1 MLRH 71, where the court held that:

“What required consideration was whether the entry of unconditional appearance by the defendant amounted to the taking of a step in the proceedings. Where the appearance is conditional it does not amount to a submission to the jurisdiction of the court. The effect of an unconditional appearance is the waiver of any irregularity there may be and a submission to the jurisdiction of the court. It must be observed that when a writ is served on a person in respect of a contract with an arbitration clause, he has to elect whether he will allow the action to go on or avail himself of the arbitration clause. The filing of an unconditional appearance means that he has elected to allow the action to go on and has accordingly submitted to the jurisdiction of the court. This amounts to a step in the proceedings. It could not be argued that the entry of unconditional appearance by the defendant was done for the purpose of merely preventing any order being made against him. In any event, the proper course for the defendant would have been to enter conditional appearance.”



[32] The Plaintiff argued that since the Defendant had filed all the documents and also took an active part in this proceeding, the Defendant was estopped from raising the issue of the Court's jurisdiction and this action was too late.

[33] The court did not agree with this argument because the issue of jurisdiction, can be raised at any time as it is a legal issue. In *Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah And Another Appeal* [2023] 3 MLRA 1, it was held:

“[43] Therefore, it should not matter that the respondent, for lack any legal avenue, approached the Syariah Court first. Jurisdiction cannot be vested in the Syariah Court if the court has no jurisdiction in the subject matter to start with, especially in a matter that involves a fundamental liberty under the Federal Constitution. The learned High Court Judge found that the respondent was not a person professing the religion of Islam and that her conversion was unlawful. **Therefore, the subject matter plainly falls within the jurisdiction of the civil court as it is an *Ab initio* case. It follows that the decision of the Syariah Court is not binding on her. To reiterate, it is trite law that neither consent nor estoppel nor waiver can confer jurisdiction upon a court that lacks jurisdiction and thus the doctrine of *res judicata* cannot apply to any decision made by such a court (see *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 1 MLRA 98).**”

[Emphasis Added]

[34] In *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 1 MLRA 98 where Gopal Sri Ram JCA (as he then was) held:

“Being a land office title, the application for foreclosure should have been made to the land administrator. Section 260(2) of the Code requires that to be done in mandatory terms. **The section is jurisdictional. In other words, the High Court had no jurisdiction over the matter.**

First, that although the High Court has unlimited jurisdiction, it nevertheless has no jurisdiction to make an order in breach of the express provisions of a statute (in that case, the Malay Reservation Enactment) or of the Federal Constitution.

If reinforcement is required to support the proposition that neither consent nor estoppel nor waiver can confer jurisdiction upon a court that lacks jurisdiction,....”

[Emphasis Added]

[35] In *Ng Kong Ling & Anor v. Low Peck Lim & Ors* [2017] 3 MLRA 419, it was held:

“Adopting the approach that commends itself to me, I find that the justice of the present instance demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from reagitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings.



If the High Court lacked jurisdiction at the time it made the order for sale, it continued to lack the jurisdiction despite the views expressed by Peh Swee Chin SCJ. As such, it would be an affront to justice to permit the respondent to successfully plead *res judicata* in the second suit as that would tantamount to applying the editorial blue pencil across the mandatory provisions of s 260(2) of the Code.”

[36] As for the issue of estoppel, it is clearly not applicable if it involves jurisdiction. This is clearly stated in the case of *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 1 MLRA 490:

“Estoppel

For the respondent, it was further argued that the applicant, having orally applied for leave to appeal in the course of the hearing before the Court of Appeal, was estopped from contending that leave to appeal was not necessary. I am unable to accept this argument. The point in issue relates to the jurisdiction of the Court of Appeal ie, whether the Court of Appeal had jurisdiction to strike out the notice of appeal when the disputes seriously in contest were whether s 68(1)(a) of the Courts of Judicature Act 1964 was applicable so that leave of the Court of Appeal was necessary for the appeal, and whether the principle laid down in *Auto Dunia*, supra, applied. In law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from subsequently raising the objection. *Farquharson v. Morgan* [1894] QB 552 CA. This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel.”

[37] Plaintiffs further argued, this failure is a defect that can be cured or ratified, as decided in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor And Another Appeal* [2009] 1 MLRA 528, where the Federal Court held:

“[46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus, in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons.”

[38] The Court also took guidance from the judgment of the Federal Court regarding the considerations that need to be made in considering non-compliance with the Rules of Court as stated in the case of *Megat Najmuddin Dato’ Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 MLRA 10 as follows:

“However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law.”



[39] The court could not agree with the Learned Plaintiffs Counsel's argument that it is a defect that can be cured or ratified. Order 72 r 2(3) of the ROC 2012 is mandatory to be complied with; failure to do so, cannot be cured or ratified under O 1A of the ROC 2012.

[40] The issue of jurisdiction will dispose of this entire action. This will save time and cost for the parties and should be accordingly disposed of under O 14A of the ROC 2012. There is no need to call witnesses for a full trial.

[41] A guide to the application of O 14A of the ROC 2012 can be quoted from the case of *Ong Siang Pheng v. Millennium Mall Sdn Bhd & Ors* [2021] MLRHU 732 that lists as follows:

- “(1) Order 14A is only applicable to determination of questions of law: O 14A r 1;
- (2) The question of law must be suitable for determination without the full trial of the action: O 14A r 1(a);
- (3) Such determination of question of law will finally determine the entire cause or matter or any claim or issue therein: O 14A r 1(b);
- (4) The prerequisites in items (1) to (3) above are cumulative prior conditions to be fulfilled before this O 14A procedure can be invoked: *Dato' Sivanathan Shanmugam* case (Court of Appeal) (*supra*);
- (5) The word “may” at the beginning of O 14A r 1 gives the Court the discretion whether or not to invoke the O 14A procedure even if the three prerequisites are fulfilled;
- (6) Where there is a dispute by the parties as to the relevant facts, O 14A is not applicable: *Thein Hong Teck* case (Federal Court) (*supra*), *Director of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* (Federal Court) (*supra*);
- (7) O 14A should not be used to determine questions which are based on hypothetical, ambiguous or fictitious facts: *Thein Hong Teck* case (Federal Court) (*supra*), *Director of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* (Federal Court) (*supra*);
- (8) The question of law or construction to be determined by the court under O 14A should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity: *Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals* (Federal Court) (*supra*); and
- (9) Where the issues of disputed fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination: *Thein Hong Teck* case (Federal Court), *Director of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* (Federal Court).



[42] In *Thein Hong Teck & 4 Ors v. Mohd Afrizan And Another Appeal* [2012] 4 MLRA 87, the Federal Court held,

“[47] It is trite law that O 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 2 MLRA 495). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in *vacuo* or on a hypothetical ruling which the court will not do (see *State of Bank of India v. Mariani Marketing* 1 March 1991, CA Transcript No 91/0304).”

[Emphasis Added]

[43] Since the issue of failure to comply with O 72 r 2(3) of the ROC 2012 is mandatory and irreparable, this court did not decide the Plaintiffs application in encls 92 (to examine or copy the bank records) and 188 (to regularise the non-compliance), and also Defendant's application in encl 115 (Order 33 of the ROC 2012) because they have become irrelevant due to the decision of the encl 185. All the applications were struck out with no order as to costs.

Conclusion

[44] The Defendant's application [Enclosure 185] is allowed with costs of RM5,000.00 to be paid by the Plaintiffs subject to payment of the allocator fees.





The Legal Review

The Definitive Alternative

The Legal Review Sdn. Bhd. (961275-P)

B-5-8 Plaza Mont' Kiara,

No. 2 Jalan Mont' Kiara, Mont' Kiara,

50480 Kuala Lumpur, Malaysia

Phone: **+603 2775 7700** Fax: **+603 4108 3337**

www.malaysianlawreview.com

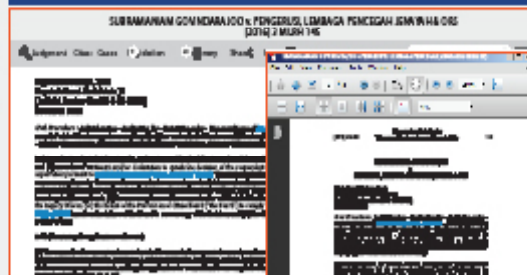
Our Features

Search Engine



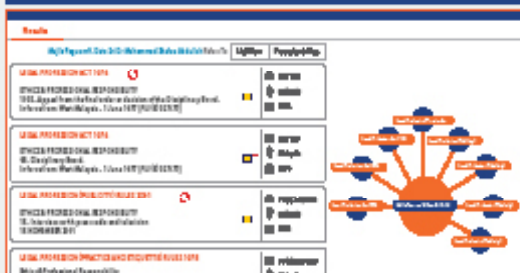
- ✓ Easier
- ✓ Smarter
- ✓ Faster Results.

Judgments Library



eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases



The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator



You can extract judgments based on the citations of the various local legal journals.*

Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator



eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my

• *Malaysia*

• *Singapore*

• *United Kingdom*



The Legal Review
The Definitive Alternative

Malaysia						Singapore						United Kingdom					
Volume	Issue	Year	Volume	Issue	Year	Volume	Issue	Year	Volume	Issue	Year	Volume	Issue	Year	Volume	Issue	Year
2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28	2018 MLR 28
1	2	3	4	5	6	1	2	3	4	5	6	1	2	3	1	2	1

Uncompromised Quality At Unrivalled Prices



MLR

The Malaysian Law Review (Appellate Courts) – a comprehensive collection of cases from the Court of Appeal and the Federal Court.

– 48 issues, 6 volumes annually



MLR

The Malaysian Law Review (High Court) – a comprehensive collection of cases from the High Court.

– 48 issues, 6 volumes annually



MELR

The Malaysian Employment Law Review – the latest Employment Law cases from the Industrial Court, High Court, Court of Appeal and Federal Court.

– 24 issues, 3 volumes annually

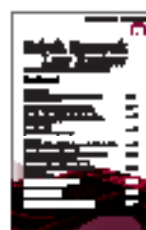


CLR

The Commonwealth Law Review – selected decisions from the apex courts of the Commonwealth including Australia, India, Singapore, United Kingdom and the Privy Council.

– 6 issues, 1 volume annually

Published by The Legal Review Publishing Pte Ltd, Singapore



SLR

Sabah Sarawak Law Review – selected decisions from the courts of Sabah and Sarawak.

– 12 issues, 2 volumes annually



> 80,000 Cases

Search Overruled Cases

Federal & State Legislation

Syarikat Cases, Municipal Laws

eLawmy is Malaysia's largest database of court judgments and legislation, that can be cross searched and mined by a feature-rich and user-friendly search engine – clearly the most efficient search tool for busy legal professionals like you.

Call 65 2775 7700, email marketing@malaysianlawreview.com
or subscribe online at www.malaysianlawreview.com