ABDUL HAKIM v AMINA BI (HPP12J of 2003S)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

31 August 2007

Succession — wills and codicils — whether will was made in contemplation of marriage — whether will was invalid by reason of subsequent marriage — whether will was intended to survive and operate after the marriage — High Court Rules O 76 r 4 — Will Act 1972 (Cap 59) s 13.

This was an action for probate arising out of a will which left everything to the Defendant. The Plaintiff was one of the testator's (the deceased's) five children. The Defendant and deceased began living together as husband and wife sometime after the deceased and the Plaintiff's mother obtained a divorce.

The deceased subsequently married the Defendant in a civil ceremony. The deceased died on 20 November 2002. The Defendant then obtained a grant of probate (No 40954) on 18 February 2003. On 31 March 2003, the Plaintiff successfully applied and obtained a letter of administration over the deceased's estate. Both the probate and the letters of administration were lodged into court pursuant to O 76 r 4 of the High Court Rules. The Plaintiff alleged that marriage was not in the contemplation of the deceased at the time of the making of the will in favour of the Defendant and was therefore invalid under s 13 of the Will Act 1972 (Cap 59).

Held — (1) The court was satisfied from the evidence that there was no merit in the Plaintiff's allegation of fraud. There was no evidence of the Defendant knowingly trying to mislead or suppress any information from the court.

(2) The court was satisfied that the deceased made his will in contemplation of his marriage to the Defendant. It was in the manner and the tenor of the language of the will itself (the testamentary expression) that, in the view of the court, conveyed the inevitable conclusion that the deceased had not only expressly made the will in contemplation of the marriage, but equally importantly, it was also his intention that the will survive and operate after his marriage to the Defendant.

(3) The court was firmly of the view that the terms of the will amounted to an unequivocal declaration by the testator of his intention that the will should survive the marriage. It was clear that the will in this case had a denunciation clause that specifically excluded his wife and their children, including the Plaintiff, as beneficiaries to his estate. The testator appointed his common law wife to be the executrix of his will and disposed of his whole estate to his common law wife.

(4) The court found that in making the will, the testator had not only contemplated his marriage to the Defendant, but had expressly excluded under it, any other beneficiaries to his estate.

Application dismissed.

Cases referred to

Re Coleman [1975] 1 All ER 675; *Re Langston* [1953] P 100; [1953] 1 All ER 928; *Pilot v Gainfort* [1931] P 103; *Re Taylor* [1949] VLR 201; [1949] ALR 863, cited.

Burton v McGregor [1953] NZLR 487; *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60; *Public Trustee v Crawley and Ors* [1973] 1 NZLR 695, considered.

S. Khan for the Plaintiff

R. Prakash and *M. Muir* for the Defendant

Jitoko J. This is an action for probate arising out of a will made on 25 March, 1993, which left everything to the Defendant. The testator "the deceased" one named Mohammed was legally married to one Kamrul Nisha. They had five

children, of which the Plaintiff is one. Mr Mohammed and Kamrul Nisha separated in 1972 and subsequently divorced on 15 June 1994. It is not disputed that the Defendant began living together with the deceased, as husband and wife, sometime after the deceased and Kamrul Nisha separated. It is also not disputed that the deceased made his will of 25 March 1993 under which the Defendant was appointed the executrix and sole beneficiary to the estate. The will provides as follows:

> *THIS IS THE LAST WILL AND TESTAMENT* of me *MOHAMMED* son of Abdul Rahiman of Yalandi Street, Waiyavi, Stage 11, Lautoka, Driver.
>
> 1. *I REVOKE* all former Wills and Testamentary dispositions hereof are made by me and declare this to be my last Will and Testament.
> 2. *I APPOINT* my common law wife *AMINA BI* daughter of Rama of Yalandi Street, Waiyavi Stage II, Lautoka, Domestic Duties to be the sole Executrix and Trustee of this my Will.
> 3. *I GIVE DEVISE AND BEQUEATH* all my real and personal property of whatsoever nature or kind and wheresoever situate which I shall have power to dispose at my death unto my said wife *AMINA BI* absolutely.
> 4. *I EXPRESSLY DO NOT* make any provision for my married wife *KAMRUL NISHA* (presently living in adultery) for the last 20 years and/or since the year 1972 and any of my children of the said married wife because none of them have contributed to my welfare and in particular my son *ABDUL HAKIM* and his wife who stay with me but still do not care about me.

The deceased subsequently married the Defendant in a civil ceremony at the Lautoka Registry on 18 September, 1997. The deceased died on 20 November 2002. The Defendant then obtained a grant of probate (No 40954) on 18 February, 2003.

The Plaintiff on 31 March 2003 had successfully applied and obtained letter of administration over the deceased estate. Both the probate and the letters of administration are now lodged into court pursuant to O 76 r 4 of the High Court Rules.

The issue

In his statement of claim the Plaintiff alleges fraud on the Defendant. Further the will, he claims, is invalid by reason of the deceased subsequent marriage to the Defendant. The marriage was not in the contemplation of the deceased at the time of the making of the will and was therefore invalid under s 13 of the will Act (Cap 59).

The Defendant denies fraud and argues that the will was made in contemplation of marriage.

The law

The relevant law is s 13 of the Wills Act (the Act). The court notes that the section was amended by the 2004 Wills Amendment Act (No 10 of 2004). The amendment however does not apply to this case as the will and probate predates the 2004 amendment. The old 1972 s 13 therefore still applies.

Section 13 of the Act states as follows:

> *Subsequent marriage*
>
> 13. A will is revoked by subsequent marriage of the testator except a will made in exercise of a power of appointment when the property hereby appointed would not in default of such appointment, pass to his executor, administrator or the person entitled in case of intestacy:

> *Provided that a will expressed to be made in contemplation of a marriage is not revoked by the solemnization of the marriage contemplated.* (emphasis added)

The requirements of s 13 are clear enough. Generally, a will is revoked by the subsequent marriage of the testator except a will made in exercise of a power of appointment. The second exception to this general rule is that contained in the proviso namely, a will made in contemplation of a marriage. What exactly is the interpretation to be accorded to the proviso, has been the subject of many court's decisions in other jurisdictions. There does not appear to have been a case decided on it here. It is nevertheless clear from the reading of the proviso, reinforced from decided cases that the will is made by the testator in contemplation of a marriage, and that particular marriage took place. Halsbury's Laws of England, 4th ed, vol 50, says, at para 279, of the similar provision of the English Wills Act 1837, that:

> To gain the benefit of this provision the whole Will must have been made in contemplation of a particular marriage which was subsequently solemnized; a general statement that it was made in contemplation of marriage is not sufficient. It is enough if on the terms of the Will and in the circumstances the Will "practically expressed" that it made in contemplation of the particular marriage.

Plaintiff's arguments

In his submissions the Plaintiff argued that the will was not made in contemplation of marriage to the Defendant. From the evidence, the will was made a year before the divorce was granted, and although the deceased made the will in 1993, he did not tell the Defendant, and that the Defendant did not know that he had made a will. Neither was the Defendant aware of the content of the brown envelope that given to her by the deceased (the will), except that he said "when I won't be here, this will be useful to you". At no time, according to the Plaintiff, did the deceased ever mention anything to the Defendant about them getting married.

Further, the Plaintiff pointed to the Defendant's evidence that they, the deceased and the Defendant were content living together without getting married legally at the time of the making of the will. The Defendant was quite satisfied with going through the religious ceremony of marriage in 1993. Finally, the Plaintiff argued that it was significant that while the deceased's divorce was granted in June 1994, the marriage to the Defendant did not take place until September 1997, more than 3 years after the divorce and four-and-a-half years after the making of the will. Counsel then referred to decisions of the courts in other jurisdictions to support the contention that there has to be an express reference in the will to the marriage apart from contemplation of marriage. I will deal with them later.

The Defendant's arguments

In summary, the Defendant, in her evidence said that she had lived with the deceased as wife and husband for over 30 years. They had undergone a Muslim religious marriage ceremony called "Nikha" about 3 months after they started living together; she had converted to Islam; changed the names of her three children from her earlier marriage to Muslim names; and attended religious instructions and Muslim religious functions. While she was happy as they were, the Defendant testified that the deceased assured her that they would be legally married at a late date, and when it happened, it was after he proposed to her. Also,

they could only have a religious marriage at the time they started living together, because the deceased was still legally married to Kamrul Nisha. The deceased was however determined, according to the Defendant, for them to get married legally eventually.

The Defendant also referred to other court's decisions in the submission, which I will revert to later.

Court's consideration

I will first deal with the Plaintiff's allegation of fraud. The Plaintiff, in his statement of claim had alleged fraud against the Defendant. The details of the allegation are set out at para 8 therein. In particular, the Plaintiff submitted that the Defendant obtained the grant of probate without divulging to the court of her subsequent marriage to the deceased and which would revoke the will under which she was acting.

This allegation of fraud was not argued by counsel both in the hearing and at the submissions. In any case, even if the contention was taken up in the Plaintiff's arguments, the court would have dismissed it. The court is satisfied from the evidence before it that there is no merit in the argument. The Defendant was illiterate and relied on her daughter and another both without legal qualifications, for help in her application for the grant of probate. There is no evidence of the Defendant knowingly trying to mislead or suppress any information from the court.

I now turn to the important question of the validity or otherwise of the will. The issue of whether the will was made in contemplation of marriage can only be arrived at after a proper interpretation or construction of the will itself. Both the Plaintiff and the Defendant adduced evidence in attempts to show that marriage was not or was contemplated by the deceased when he made the will in March 1993. The most important consideration is the intention of the testator at the time of the making of the will, and while extrinsic evidence may assist the court in pointing to the testator's intention, they are generally inadmissible. In this case the testator appointed the Defendant Amina Bibi, to be the executrix and referred to her as "my common law wife". He then bequeathed his estate to "my said wife *AMINA BIBI* absolutely". Counsel for the Plaintiff argued that the phrase "my said wife *AMINA BIBI* …" can only mean Amina Bibi as his common law wife. There was no intention of marriage in the future, and in any case, if there was marriage contemplated it should have happened long before 1997, given the testator's acknowledgment in the will that his legal wife had been living in adultery for over 20 years. While the court appreciates that there may be some merit in the argument, the fact remains that at the time of the making of the will in March 1993, the testator was still to divorce his wife and therefore the Defendant could not be any more than a common law wife in March 1993. It is also true that the testator, if he had wanted to marry the Defendant, could have done so earlier. The court nevertheless can only consider the state of mind and intention of the deceased when he made the will.

Counsel for the Plaintiff referred to the New Zealand case of *Public Trustee v Crawley and Ors* [1973] 1 NZLR 695 (*Public Trustee*), where a similar New Zealand provision (s 13(1) of Wills Amendment Act 1955) to our s 13 of the Wills Act was examined. The facts of the case are briefly set out at lines 48–54 as follows:

> The testator in his Will made on 20 November 1959, devised and bequeathed all his property "to my fiancée Bunny Rameka of Opua aforesaid". The testator married

Ms Bunny Rameka on 19 May 1960, and they had three children (the defendants). On 27 April 1970 the marriage of the testator was dissolved by decree absolute, and on 21 June 1970 the testatr died. He had never made another Will, and thus the Will of 20 November 1959 was his last Will and testament.

The question for the court to decide was whether by virtue of s 13(1) of the Wills Amendment Act 1955 the will was "expressed to be made in contemplation of a marriage" and was therefore not revoked by subsequent marriage with the person contemplated. In his judgment Mahon J referred to two earlier conflicting decisions of the English Court in *Re Langston* [1953] P 100; [1953] 1 All ER 928 (*Langston*), where the court held that a will leaving everything "unto my fiancée Maida Edith Beck" was a will "expressed to be made in contemplation of a marriage" and therefore survived, and the New Zealand case of *Burton v McGregor* [1953] NZLR 487 (*Burton*) where F B Adams J arrived at a contrary conclusion, holding that a will leaving everything "unto my fiancée Valerie Richards" was not expressed to be made in contemplation of marriage and was therefore revoked by the subsequent marriage. Mahon J preferred the decision in *Burton* emphasising:

> In my opinion F B Adams J correctly identified the controlling requirement of the section which is not that a Will be made in contemplation of marriage but that it be expressed to be made in contemplation of marriage. I also respectfully agree with F B Adams J that the testamentary expression must convey the intention or contemplation of the testator that his Will shall operate after marriage. This may be done using the phraseology of the section itself of by using other words which unmistakably convey the same intention.

Applying *Burton* to the case, Mahon J concluded that:

> … a disposition in favour of "my fiancée" only establishes that a marriage is contemplated. It does not necessarily represent that the Will is being made in contemplation of that marriage, with the concurrent intention that the Will is to survive the marriage.

At the very most in the view of Mahon J, a disposition in favour of "my fiancée" is not an express statement in terms of s 13 but "an inferential statement" but added:

> the inference that the Will is made in contemplation of marriage will be stronger or weaker depending on the absence of / presence of dispositions in favour of other beneficiaries.

On the other hand the English court decision in *Langston* (above) appeared to have followed the earlier English decision in *Pilot v Gainfort* [1931] P 103 (*Pilot*) where the gift by the testator to X "my wife" was held to satisfy their equivalent of our s 13. In that case the testator's wife had disappeared 3 years before he began to live with X, 6 years before he made his will, and 7 years before he married X. The court held that the testator had made his will, at 104, "At a time when this marriage was obviously in contemplation of the testator, if he could validly contract it, he wrote out this holograph document, the material part of which is a bequest to the Plaintiff whom he described as his wife, of all that he had".

In a later English decision, *Re Coleman* [1975] 1 All ER 675, Megarry J noted that the court in *Pilot* appeared to have given little emphasis to the statutory requirement that the will should be "expressed to be made" in contemplation of the marriage, as distinct from there being a mere factual contemplation of it. This approach was applied by the court in Victoria in *Re Taylor* [1949] VLR 201;

[1949] ALR 863 (*Taylor*) where O'Bryon J refused to follow *Pilot* by holding that when the testator married X whom he previously described in his will as "my wife" X, that marriage was not "a marriage in contemplation of which" the "Will had been expressed to be made".

Turning to the facts of this case, the question the court has to address is whether the will made by the testator on 25 March 1993, was expressed to be made in contemplation of the testator's marriage to the Defendant in September 1997. As in *Pilot* and *Taylor* the testor bequeathed to one described as a wife who he had lived with for years. The gift in this case was to "my said wife AMINA BIBI" whom he later married. With respect to submission by the Plaintiff's counsel the term "a Will expressed to be made in contemplation of a marriage" does not mean that there must be a specific reference to that effect, such as "my common law wife Amina Bibi who I intend to marry after my divorce from Kamrul Nisha". It is enough that the testator had marriage to the Defendant in mind when he made the will. This is a question that is dependent on the construction of the language used in the will. As the New South Wales Court of Appeal stated in *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60 at 67:

> … "expressed" does not require that the Will state in terms that the deceased had the relevant contemplating. The provision requires only that … *the deceased have the marriage in mind at the time when the Will was made and that this appears from the terms of the Will* (emphasis added)

This is also clear from Mahon J's judgment in *Public Trustee* (above), that not only must the will be expressed to be made in contemplation of marriage, but that "the testamentary expression" conveys the same.

In this case, the court is satisfied that the deceased made his will in contemplation of his marriage to the Defendant. While it's true that the will does not contain any specific reference to the testator's intention of his future marriage to the Defendant, it is the manner and the tenor of the language of the will itself (the testamentary expression), that, in the view if the court conveys the inevitable conclusion that the deceased had not only expressly made the will in contemplation of the marriage, but equally important, it was also his intention that the will survive and operate after his marriage to the Defendant.

There are important facts in this case that support the finding that the will is not revoked by the subsequent marriage. First, the testator distinguished very clearly "my married wife Kamrul Nisha" who he was making no provision for, from "my common law wife Amina Bibi" who he was appointing as the executrix and trustee, and finally "my said wife Amina Bibi", to whom he was bequeathing everything. It seems logical in the sequence of these events that the testator at the time of the making of the will, refer to the reality of the then existing situation of a "common law wife" versus a "married wife" and later after his death the bequest to "my said wife Amina Bibi". It certainly suggests, in the view of the court, of a change of the Defendant's status and this in turn strongly infers the existence in the making of the will of contemplation of marriage.

The second fact is that there are no other beneficiaries under the will, except the Defendant. It is generally accepted that the inference of intention or contemplation of marriage is stronger where there is only a single beneficiary. Mahon J in *Public Trustee* (above) offered the view that at 700:

> a disposition in favour of "my fiancée" is in my opinion not an express statement in terms of the section but an inferential statement, *and the infewrence that the will is made*

in contemplation of marriage will be stronger on whether depending on the absence or presence of dispositions in favour of other beneficiaries (emphasis added)

So while it may be argued that the testator's bequest to "my said wife Amina Bibi", is no more than an inference, the fact that the Defendant Amina Bibi, is the sole beneficiary of the estate, makes the inference what the will was made in contemplation of marriage, much stronger.

Third, the court is firmly of the view that the terms of the will amounts to an unequivocal declaration by the testator of his intention that the will should survive the marriage. Unlike all the English, New Zealand and Australian cases cited by both parties the will in this case has a denunciation clause that specifically excludes his wife and their children including the Plaintiff, as beneficiaries to his estate. It is clear from the words of the will itself the reason for their exclusion. One does not need to rely on extrinsic evidence, even if it were allowed, to speculate on the intention of the testator. The testator had disinherited his wife and children, appointed his "common law wife" Amina Bibi to be the executrix of his will and dispose his whole estate to "my said wife Amina Bibi". The inference can only be that the will was expressly made in contemplation of the marriage and in the process disinheriting other beneficiaries and that will and its disposition was intended to operate notwithstanding the marriage.

Finally, it is important to bear in mind that in making the will, the testator had not only contemplated his marriage to the Defendant, but had expressly excluded under it, any other beneficiaries to his estate. It is not for the court to impede or in any way frustrate the express wish of the testator if it is so clearly stated in the will.

For the reasons I have given, I hold that the will before it is not revoked by the testator's marriage to the Defendant, and it falls within the proviso of s 13 of the Act.

The Plaintiff's claim is dismissed.

Order is made for the letters of administration previously granted to the Plaintiff be and hereby revoked.

The grant of probate (No 40954) to the Defendant is to be released.

I award costs summarily fixed to the Defendant.

Application dismissed.