

**IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
[ORIGINATING SUMMONS NO: WA-24NCvC-710-12/2022]**

BETWEEN

LIM POH CHUAN

[NRIC No: 730628-07-5257]

... PLAINTIFF

AND

LIM POH LEONG

[NRIC No: 570720-07-5727]

... DEFENDANT

DECISION

Application to order for DNA testing

- [1] The Plaintiff filed this application [Enc 28] seeking for this Court to order the parties to undergo a DNA test to determine whether they are siblings from the same father. The basis cited for the Plaintiff's application was because the Defendant did not admit and acknowledge that the Plaintiff is an issue of Lim Kean Chie (the deceased) who is the Defendant's father. The Defendant challenged the data on the birth certificate of the Plaintiff that stated the father as the deceased. The issue for trial is whether the Plaintiff is entitled to a distributive share of the deceased's estate.
- [2] The Plaintiff relied on the inherent powers of this Court for such orders. The Defendant vehemently objected to this application. It was argued that there are no provisions of law that allow for such orders sought by the Plaintiff. This Court heard submissions that s.24(d) Courts of Judicature Act 1965 (CJA) only allows the court to order DNA testing for a child where here neither the Plaintiff nor the Defendant is a child.

The facts pleaded

- [3] The Defendant, the only child of the deceased and Toh Guat Huah was named as the deceased lawful heir, as Toh was. Back on 10.7.1990 the Defendant was appointed as the Administrator of the deceased's estate.
- [4] The Plaintiff claimed he was a child of the deceased and filed this suit thirty-two (32) years after the Letter of Administration had been issued. He produced a photocopy of his birth certificate that stated the deceased's name in the 'Father' section.
- [5] The Plaintiff's suit is to revoke the Letter of Administration and claim for his entitlement to the deceased's estate. Enc 28 was filed to counter the Defendant's challenge that the Plaintiff was the issue of the deceased.

The Defendant's objection

- [6] The Defendant who professed to have no knowledge of the existence of the Plaintiff for the past sixty-five years of his life objected to Enc 28. Arguing that there was no legal basis for such an application, the Defendant referred to the Deoxyribonucleic Acid (DNA) Identification Act 2009 (DNA Act). As the provisions of the DNA Act only apply to criminal proceedings, the Defendant submitted that he could not be compelled to take the DNA test in civil proceedings like these. Furthermore, it was not for the purpose of resolving paternity disputes.

This Court's consideration

- [7] This Court was invited to consider the decision in *Peter James Binstead v. Juvencia Autor Patrosa* [2000] 2 MLJ 569 where it was held that there was no general power for the High Court to compel a person to undergo a DNA test to ascertain paternity. Any person like the Defendant was entitled to refuse to submit to such DNA test and

the courts cannot compel him in the absence of any legal provisions.

[8] A case this Court considered deeply is *Lee Lai Cheng (suing as the next friend of Lim Chee Zheng and herself) v. Lim Hooi Teik* [2017] 10 MLJ 331 where the court decided not to invoke its inherent jurisdiction and powers as it viewed that was limited to prevent injustice or abuse of the court process. Reliant upon Order 92 Rule 4 Rules of Court 2012 (RoC) and IH Jacob’s article ‘The Inherent Jurisdiction of the Court’ *Current Legal Problems* (1970) 23(1): A23-52, it upheld that the provision is only defensive in nature to abate procedural injustice. To borrow the exact words in the decision – “*In other words, the inherent power cannot be utilized to invoke or facilitate a substantive right, albeit unjustly denied.*”

[9] As to s.24(d) relied on by the Defendant, the civil jurisdiction of this Court includes “*jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants.*” In England, the courts had long recognize this in common law as it derived from the right and duty of the Crown as *parens patriae* to take care of children in their kingdom who were not able to take care of themselves. Closer to home, the Court of Appeal in *MPPL & Anor v. CAS* [2023] 4 MLJ 51 considered this legal point. The learned Bench considered not just the history and legal position in England but also that of India. It was held at p63:

“Thus, we concur with the findings and ruling of the learned High Court judge on the application of the common law principle that as parens patriae the High Court had general inherent powers over a child to make any order that would be in the best interest of the child, and this this would include the power to order that a child undertake a DNA test for the purposes of determining his or her paternity.”

[10] The Plaintiff most definitely does not fall in this category. The Plaintiff is fifty years of age as opposed to the definition of a child

which s.2 of Child Act 2001 defined it as ‘*a person under the age of eighteen years old.*’ He had also failed to demonstrate and satisfy this Court by way of analogy or otherwise that such legal doctrine also applies to him. It is insufficient to simply request this Court to exercise its inherent jurisdiction and power to order the Defendant under protest, to submit to DNA test. The purpose of which, to fulfill his mission to demand for a stake in the deceased’s estate. On this matter, the deceased’s estate had long been administered, but that is for adjudication at the hearing proper. There were no other objectives to the relief sought – it was not to strengthen familial ties or contribute to the building of blood relationships.

- [11] In the challenge of the truth of the Plaintiff’s birth certificate that stated the name of the deceased as his father, this Court agrees with the Defendant in that there was no other proof or fact pleaded to support such contention. No marriage certificate was adduced to show registration or solemnization of marriage. No indication of co-habitation or even access to sexual relations between the Plaintiff’s mother and the deceased. To now, thirty-two years later come out of the woodworks and claim that he was the deceased’s issue and a DNA test is required from the legal and only issue of the deceased is an assault not only to the privacy of the Defendant but his rights.
- [12] The deceased and the Defendant’s mother were legally married on 20.3.1957 and remained married until the deceased’s demise on 23.8.1989. All these are considered by this Court in its assessment of whether to allow Enc 28.
- [13] Even in the case of determining the paternity of a minor for its maintenance, the Court of Appeal in *Lim Hooi Teik v. Lee Lai Cheng (sebagai sahabat wakil Lee Chee Zheng dan untuk dirinya)* [2015] MLJU 2200 required evidence that proved intimate relationship between the mother and the alleged biological father needed to be adduced.

- [14] The counsel for the Plaintiff kept on stating that fairness warranted an order for the DNA test just because he was born on the wrong side of the bed. To this Court's considered view, it is a misconceived premise. No matter which side of the bed (even not a matrimonial one) a person wakes up at, if he wants to prove a fact in the court of law, the burden is on him. When the Plaintiff has to prove that his birth certificate is authentic and carries the truth of the statement that he is an issue of the deceased, s101 Evidence Act 1950 requires him to prove the existence of that fact, The Federal Court affirmed this position in *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] and it is binding on this Court and on this case.
- [15] This Court does not concede that to discharge his burden of proof, an order invading the Defendant's privacy and rights be ordered. The legal position in India requires that the applicant must first establish a strong prima facie case where the court must carefully examine what the consequences of ordering the blood test would be. It is not an order as a matter of course or to have a roving inquiry – see *Bhabani Prasad Jena v. Covenor Secretary, Orissa State Commission for Women and Another* [2010] 8 SCC 633, *Selvi Vijayalakshmi v. A Sankaran and Another* [2017] 4 MLJ (Madras Law Journal) 463.
- [16] This Court regarded the judgment in *BSM Lwn BAA & Satu Lagi* [2023] 1 CLJ 581, specifically the application of the inherent jurisdiction of the court at p608:

“Perhaps the true nature of the inherent jurisdiction of the court is not a simple one but it is to be found in a complex of a number of features, some of which may be summarized as follows:

- (1) *The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.*

- (2) *The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, ie. Without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for the outcome of any pending or other proceeding.*
- (3) *Because it is a part of the machinery of justice, the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to any one, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.*
- (4) *The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.*
- (5) *The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such cases. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.”*

[17] The Plaintiff has failed to convince this Court whether the inherent jurisdiction of this Court to make the order for DNA test that may be in the best interest of a child can be extended to the best interest of

adults and specifically to the parties of this case.

[18] As articulated above, there is nothing that warrants this Court to exercise its powers, discretionary or otherwise, to grant the order for the DNA test and all the other subsequent reliefs applied for in Enc 28. The Plaintiff's application Enc 28 is dismissed with costs. The sum of RM10,000 which this Court deems reasonable as costs is granted to the Defendant.

DATED: 3 JANUARY 2024

(ROZ MAWAR ROZAIN)

Judicial Commissioner

High Court In Malaya

Kuala Lumpur

Counsel:

For the plaintiff - Tan Beng Hong & Wan Sau Shon; M/s Tan Beng Hong & Co

For the defendant - Kevin Wu & Mohd Hussaini Rozi; M/s Kevin Wu & Associates

Cases referred to:

Bhabani Prasad Jena v. Covenor Secretary, Orissa State Commission for Women and Another [2010] 8 SCC 633

BSM Lwn BAA & Satu Lagi [2023] 1 CLJ 581

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017]

Lim Chee Zheng and herself v. Lim Hooi Teik [2017] 10 MLJ 331

Lim Hooi Teik v. Lee Lai Cheng (sebagai sahabat wakil Lee Chee Zheng dan untuk dirinya) [2015] MLJU 2200

MPPL & Anor v. CAS [2023] 4 MLJ 51

Peter James Binstead v. Juvencia Autor Patrosa [2000] 2 MLJ 569

Selvi Vijayalakshmi v. A Sankaran and Another [2017] 4 MLJ (Madras Law Journal) 463