

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)
[GUAMAN NO.: WA-23NCvC-114-12/2021]**

ANTARA

**TAN SRI DATO' KAM WOON WAH
(No. K/P: 291129-10-5173)**

... PLAINTIF

DAN

**1. HANNAH KAM ZHEN YI
(No. K/P: 911130-14-5118)**

**2. MESSRS THOMAS PHILIP,
ADVOCATES AND SOLICITORS
(*suedas a firm*)**

... DEFENDAN-DEFENDAN

GROUND OF DECISION

[Encl. 29: To Reject 1st Defendant's Affidavit in Support (Encl. 24)]

Background

[1] This is the Plaintiff's Notice of Application filed pursuant to Order 42 rule 1 (4) to read together with Order 92 rule 4 Rules of Court 2012 for the following orders or reliefs:

- a) that the 1st Defendant's **Affidavit in Support** (to strike out the Plaintiff's claim against the 1st Defendant) affirmed by Hannah Kam Zhen Yi on 24.3.2022 in Encl. 24 be rejected and/or not admitted;
- b) to that effect, that the 1st Defendant's Affidavit in Support be removed from the file of this proceeding/cause list;

- c) following the above prayers, that the Notice of Application (striking out of the Plaintiff's claim against the 1st Defendant) dated 24.3.2022 (Encl. 25) be dismissed with costs;
 - d) costs of this application to be paid by the 1st Defendant to the Plaintiff; and
 - e) any other orders or reliefs that the Court deems fit and appropriate.
- [2]** The grounds in support of the Plaintiff's application are as stated in the 1st Defendant's Affidavit in support affirmed by Tan Sri Dato' Kam Woon Wah on 24.3.2022 (Encl. 24) that amongst others, the 1st Defendant's Affidavit in Support does not comply with the mandatory requirements set out under Order 41 rule 1(4) ROC 2012.
- [3]** The **cause papers** filed in relation to Encl. 29 are as follows:
- a) Plaintiff's Affidavit in Support (Encl. 30) and Reply Affidavit (Encl. 58 and 65);
 - b) 1st Defendant's Affidavit s in Reply (Encl. 45 and 64);
 - c) *Notis Niat Menggunakan Afidavit* (Encl. 48);
 - d) Plaintiff's Written Submissions and Bundle of Authorities (Encl. 68 and 69); and
 - e) 1st Defendant's Written Submissions and Bundle of Authorities (Encl. 72 and 73).
- [4]** The **relevant facts** not in dispute are as follows:
- a) The Plaintiff is the 1st grandfather and is 96 years old. The Plaintiff is a lawyer by profession but not in active practice.

- b) The 1st Defendant is a lawyer and also the Plaintiff's granddaughter.
- c) On 5.4.2022, the Plaintiff filed Encl. 29.

Plaintiff's submissions

- [5] The Plaintiff submits that the Affidavit in Support of the 1st Defendant filed in Encl. 2 and it ought to be expunged on the ground that the said Affidavit is defective as the address stated in it is not her residential address at *No. 45, Langgak Tunku, Bukit Tunku, 50480 Kuala Lumpur, Malaysia*.
- [6] The 1st Defendant was not residing at the said address for the following reasons:
 - a) The ownership of the said Address was transferred by 1st Defendant's father, Andrew Kam to Lee Siew Chow on 11.6.2020;
 - b) The said Address was found to be in an abandoned and dilapidated condition. The sole occupant of the said Address is a Bangladeshi security guard; and
 - c) The Tenaga Nasional Berhad's bills for the said address shows that the electricity usage decreased drastically when 1st Defendant and her family ceased occupying at the said address, after 1st Defendant father sold and transferred the property to its present owner.
- [7] By providing a false address, this is in violation of **Order 41 rule 1 (4) ROC 2012** which states as follows:

"O. 41 r. 1 ROC 2012

(4) Every affidavit shall be expressed in the first person and shall state the place of residence of the deponent and his

occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit shall state that fact:

Provided that in the case of a deponent who is giving evidence in a professional, business or other occupational capacity, the affidavit may, instead of stating the deponent's place of residence, state the address of which he works, the position he holds and the name of his firm or employer, if any."

- [8] The Courts have taken a consistent view that such requirements are mandatory. In *Zamrud Properties Sdn Bhd v. Pang Moor Gaid & Anor* [1999] 5 MLJ 180 at p. 190 - 191 it was held that:

"(8) That the affidavit did not comply with O.41 r1 (4) of the RHC:

The affidavit in support, ie encl. 2 did not comply with O41 r1 (4) of the RHC, as the deponent has not stated his residential address as required.

....

*This is a mandatory requirement because of the word 'must', as stated in the Court of Appeal case of *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 MLJ 85 at p 93:*

"... the word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such discretion."

[9] The Plaintiff submits that the said affidavit violates the mandatory requirement of the Rules of Court 2012. The Plaintiff further submits that the 1st Defendant affidavit ought not be accepted by this Court and must be expunged from the records. The Plaintiff urged the Court to strike out Enclosure 25 being not supported by any affidavit evidence.

The 1st Defendant submissions

[10] The 1st Defendant submits that Encl. 29 is a frivolous application filed on the premise of a mere preliminary objection and a red herring merely to prevent this Court from delving into the merits of the 1st Defendant's striking out application in Encl. 25.

[11] The brief submissions by the Plaintiff are outlined as follows:

- (a) the 1st Defendant has in fact deposed and proven that she had resided at the said residential address;
- (b) the Plaintiff has not been misled by any purported noncompliance and there is no substantial miscarriage of justice or prejudice that has occasioned;
- (c) there was never any issue of service of documents upon the 1st Defendant in any other court proceedings;
- (d) the Plaintiff is not able to produce any concrete evidence to substantiate his allegation that the 1st Defendant did nor reside at the said address at the material time; and
- (e) the 1st Defendant has deposed that she had in fact resided at the address at the material time.

[12] According to the 1st Defendant's Affidavit in Reply (Encl. 64) that she 1st Defendant has moved to another address in late May

2023 at No. 19-1, Jalan Gemilang, off Jalan Duta, Taman Duta, 50480 Kuala Lumpur.

Analysis and Decision

[13] The question for the Court's consideration is whether the affidavit of the 1st Defendant **Affidavit in Support** (to strike out the Plaintiff's claim against the 1st Defendant) affirmed by Hannah Kam Zhen Yi filed on 24.3.2022 in Encl. 24 complies with the mandatory requirements set out under Order 41 rule 1(4) ROC 2012 whereby every affidavit shall be expressed in the first person and shall state the place of residence of the deponent.

There is no substantial miscarriage of justice or prejudice occasioned.

[14] In the event should there be any non-compliance, the Court should not allow this application if such non-compliance does not occasion any prejudice or any substantial miscarriage of justice.

[15] In the circumstances of this application, the Court is of the considered view that there is no substantial miscarriage of justice or prejudice that has occasioned against the Plaintiff.

[16] In furtherance to this, the Court shall have regard to the overriding interest of justice and not only to the technical non-compliance with the Rules of Court where regard shall be to justice. **(O. 1A ROC 2012)**.

[17] The High Court in the case of *Wong Kie Yik (suing as administrator of the estate of Wong Tuong Kwang) v. Kathryn Ma Wai Fong (as executrix of the estate of Wong Kie Nai)* [2016] MLJU 1848 decided as follows:

*"(9) With all due respect, this point taken by the plaintiff although adroitly couched to conceal its essence, is in reality a preliminary objection for non-compliance of rules. Under O 2 r 3 RC 2012, the court is prohibited from allowing any preliminary objection by any party only on the ground of non-compliance of any provisions of the Rules unless the non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both. To my mind, there is no question of any substantial miscarriage of justice or prejudice occasioned by the defendant's **failure to state the residential address in the Affidavit in Support** as it is obvious for all to see that the plaintiff knows the residential address of the defendant."*

[18] Needless to say, the Plaintiff's application to reject the 1st Defendant's Affidavit was clearly filed for a collateral purpose although adroitly couched to conceal its essence is in reality a preliminary objection for non-compliance of the rules.

[19] I have read and perused the Affidavits in Support, Affidavits in Reply, Written Submissions and the Authorities filed by both parties. I have also considered the submissions and arguments put forward by both parties and the numerous authorities cited and referred to for the Court's deliberation.

Conclusion

[20] Based on the aforesaid reasons, **Encl. 29 in respect of prayers (a), (b), (c) and (d) are hereby dismissed with costs of RM5,000.00** to be paid forthwith by the Plaintiff to the 1st Defendant.

[21] Consequently, the Court shall now deal with the 1st Defendant's application filed in Encl. 25 to strike out the Plaintiff's claim against the 1st Defendant.

Dated: 8 MAY 2025

(EDDIE YEO SOON CHYE)

Judicial Commissioner

High Court of Malaya

Kuala Lumpur

COUNSEL:

For the plaintiff - Michael Chow, Derek Chong, Koh Chuan Zhan & Neoh Kai Sheng; M/s Derek Chong, Kuala Lumpur

For the 1st Defendant - Lim Wei Jiet; M/s Lim Wei Jiet, Kuala Lumpur