THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(PROBATE)

CLAIM NO.: BVIHCV2008/0024

IN THE ESTATE OF KANTILAL KARSANSAS CHOHAN

Applicant

Before:
The Hon. Mr. Anthony Ross, QC

Appearances:
Monique Peters for the Applicant

……..
2008: March 14;
June 4.
……..

DECISION

[1] ROSS J. [AG]: This is a matter brought before the Court by way of "application to prove lost will".

[2] The order sought is "that the copy of the will dated December 1, 2001 be admitted to proof in the application for a grant of Probate, the grant to be limited until the original will or an authentic copy thereof be proved."

[3] This "application" is supported by the affidavits of Paresh Kantilal Chohan, solicitor, of Radlett Hertfordshire, United Kingdom and Prakash Patel, solicitor, of Pinner (presumably also of the United Kingdom).

[4] The affidavit of Paresh Chohan deposed to on November 11, 2003, states that he forwarded the original will by express mail to "a law firm in the British Virgin Islands retained to facilitate the probation of the said will."

[5] It further states that on or about December 21, 2005 (some twenty-five (25) months after the will had been sent to the BVI law firm), it was returned to him "via express mail for the purpose of marking." It continues that on January 25 2006, the will along with other documents were in his briefcase in his car, and sometime after, the car was broken into and the briefcase stolen. It goes on, that "Despite a thorough search of the neighboring *[sic]* areas and the enquires made by myself and the Police, we had no success in tracing the said will." It states further that the copy of the original will was made at the office of the BVI law firm when it was in their possession, and it is a photocopy of that document which is produced and marked Exhibit 'PCK 1' with the request that it "be admitted to proof in the application for a grant of Probate, the grant to be limited until the original will or an authentic copy thereof be proved."

[6] In his affidavit, Prakash Patel deposed that he was the attorney for the deceased testator and the individual who prepared the original will and suggested that the photocopy marked "PP1" to his affidavit "is a correct copy of [the will]."

[7] At the hearing of the application, the Court identified difficulties with the application and suggested that counsel for the applicant withdraw the application. This was

done, but apparently on second thought, counsel returned before me and asked that a decision be made on the application as presented, and counsel further requested that reasons be given.

[8] In reality, the court is being asked to certify the photocopy of the will and order that it be admitted in the application for a grant of Probate.

[9] Dealing first with the affidavits, I find that they do not meet the requirements of Parts 30(5)(5) and 30(5)(6) of CPR 2000, *to wit:*

> "(5) A person may make an affidavit outside the jurisdiction in accordance with-
>
> (a) the law of the place where the affidavit is made; or
>
> (b) this Part.
>
> (6) Any affidavit which purports to have been sworn or affirmed in accordance with the law and procedure of any place outside the jurisdiction is presumed to have been so sworn."

There is nothing before the court pursuant to which the court could properly presume that the affidavits, apparently sworn to before one Charles da Silva (of no stated capacity) on January 25, 2008, and according to a stamp, Harris da Silva on January 8, 2008 are consistent with the practice in the jurisdiction in which they are purportedly sworn. For these reasons, the application must fail. There was no proper affidavit evidence before the court.

[10] As to the form of application, reference is made to Part 8 of CPR 2000 governing the commencement of proceedings and Part 11 governing applications. The application document before the court neither complies with Part 8 nor 11 of CPR

2000. Counsel's attention is drawn to paragraphs 18 and 22 of the decision of Rawlins J., (as he then was) in Steele Douglas v. Pinneys Investment Company Limited[1] which states the following;

> [18] "At the conclusion of the hearing on the 11th day of December 2001, I indicated to all of the Parties that my first concern was with the method by which the Application was instituted. *The case was commenced by way of a Notice of Application in Form 6 under Part 11 of CPR 2000. However, Part 8 of the CPR 2000 provides two (2) methods for the commencement of civil cases, which fall under the ambit of these Rules. One is by way of Claim Form. The other is by way of Fixed Date Claim Form.* Part 8 provides only two (2) exceptions. Thus Part 8.1(6) of CPR 2000 provides for Form 6 to be the first process only where a remedy is sought prior to the commencement of proceedings or in respect of a matter in proceedings commenced in another jurisdiction."
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> ...
>
> [22] "At the conclusion of the hearing of the Application on the 11th day of December 2001, I had informed Mr. Butler of my intention to dismiss the Application for failure to conform with the requirements for the commencement of proceedings under Part 8 of CPR 2000. I have noted that Solicitors and Counsel for the Respondent Company were willing to waive this requirement. *It is my view, however, that this is a strict requirement. In their wisdom, the framers of CPR 2000 provided an originating procedure that is intended to facilitate a detailed pleading process and the subsequent ventilation of those matters subject to a proper evidential process including cross-examination.* This, in my view, is particularly helpful in caveat proceedings. Non-compliance with the originating process is fatal, particularly in cases such as this." [*My Emphasis*]

[11] As to the merits of bringing this type of application before the court, and specifically by way of directions as those may apply to similar applications in the future, it is my opinion that the courts of the BVI, and indeed any of the Courts within the jurisdiction of the Eastern Caribbean Supreme Court should not be seen

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as courts of convenience, particularly with respect to estate matters. The alleged testator in this matter was domiciled in Kenya. There is nothing to suggest that any of his property, "moveable and immoveable" was situated or had any real or substantial connection to the BVI.

[12] The original document was apparently prepared in the United Kingdom where the testator (now deceased), the witnesses and the beneficiaries apparently reside and in the case of the testator, resided.

[13] On this application, this Court will not be drawn into issues such as: jurisdiction to grant probate; what may be proved; proof of the will and the like. For all intents and purposes the court is only being asked to certify a document which, according to the affidavit of Paresh Chohan, was last seen by a lawyer practicing in this jurisdiction. It is my view that an affidavit from the local lawyer who, or under whose instructions the will was photocopied would have constituted better evidence than what is before this court. And so that there is no misunderstanding, curing the "affidavits deficiencies" would not mean that the application would succeed.

[14] I confirm the decision of the court that the application should be dismissed for the reasons given above.

E. Anthony Ross, QC
High Court Judge