CC. 1/12 2012 T NO.1

IN THE HIGH COURT OF SIERRA LEONE
(FAMILY AND PROBATE DIVISION)

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATES ACT CAP 45 OF THE LAWS OF SIERRA LEONE
AND
IN THE MATTER OF THE ESTATE OF JAMES JENKINS THOMAS (DECEASED)

BETWEEN:

SIDI MOHAMMED TALIB - PLAINTIFF
(By an Order of the Court dated 25th May 2015 replacing MOHAMED TALIB (As Beneficiary of the Estate of James Jenkins Thomas (Deceased) With SIDI MOHAMED TALIB as Attorney and Representative of Mohamed Talib)

AND

KENNETH AKINSOLA THOMAS
(ADMINISTRATOR OF THE ESTATE OF JAMES JENKINS THOMAS (DEACEASED)

AND

VERA DENISA BUCKLE
(ADMINISTRATRIX OF THE ESATES OF JAMES JENKINS THOMAS (DECEASED) - DEFENDANTS

BEFORE THE HONOURABLE MS. JUSTICE MIATTA MARIA SAMBA, J.
DATED THIS 7th DAY OF MARCH 2017

Counsel:
T.A Jabbi for the Plaintiff
E.E.C Shears-Moses Esq for the 1st Defendant
L. Jenkins-Johnston Esq for the 2nd Defendant

1. The matter before this Court was begun by Writ of Summons dated the 3rd day of February 2012 for the following reliefs:

a. The revocation and nullification of the illegally obtained grant of Letters of Administration issued on the 2nd day of August 2011 to the Defendants out of the Probate Registry of the High Court.
b. A declaration that the Defendants are not entitled to take out Letters of Administration because the deceased has Executors.
c. A declaration that the property known as No. 27 Wilkinson Road was devised to the Plaintiff Mohammed Talib by the deceased through a duly executed Will dated 9th day of December 2010.

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d. A perpetual injunction restraining the Defendants from interfering with the use and enjoyment of the said property at No. 27 Wilkinson Road.
e. A grant of Letters of Administration with Will annexed to the Plaintiff Mohamed Talib.
f. Any further and other reliefs that this honourable court deems fit.

1.1. Mohamed Talib died on the 11th day of May 2015 and by a Court Order dated the 25th day of May 2015, he was replaced by his eldest son, Sidi Mohamed Talib as Plaintiff in the matter herein.

1.2. The Plaintiff's case is that in a letter dated the 1st day of October 2008 as in Exhibit E, signed by the deceased, James Jenkins Thomas, the deceased, James Jenkins Thomas made clear that he did not want his brother Kenneth Akinsola Thomas and sister Vera Denisa Buckle, the Defendants herein, to interfere in his affairs; that he was a trusted friend, Attorney and confidant of the deceased, James Jenkins Thomas who before his demise, on the 27th day of May 2009 executed a Power of Attorney appointing him to oversee and care for his properties at No. 27 Wilkinson Road and the top floor of property at No. 9 Bathurst Street as referenced in Exhibit F.

1.3. The Plaintiff's complaint is that the deceased, James Jenkins Thomas, during his life informed him that he had made a specific devise to him in his last Will and Testament as in Exhibit J1-6. According to the Plaintiff, all efforts as in Exhibits L1-2 dated 21st day of June 2011 to contact the Executors, Mr. Lebbie and Mr. Lansana for them to collect the said Will from the office of the Administrator & Registrar-General and perform their respective roles as Administrators proved futile.

1.4. The Plaintiff is concerned that even though there exists a duly executed Will, to use his words in the Writ hereinbefore referred, the 1st and 2nd Defendants took out Letters of Administration of the Estate of James Jenkins Thomas on the 2nd day of August 2011 out of the Probate Registry of the High Court as in Exhibit K1-12. By Exhibit N23, the Plaintiff, had, through his then Solicitors, Serry-Kamal & Co and through a letter dated 24th day of June 2011 informed the 1st Defendant about the existence of a Will; it is noted that Exhibit N23 came in about two months before the grant of Letters of Administration.

2. By letter dated 17th day of August 2011 from the then Solicitors for the Plaintiff, Musa & Forna Solicitors as in Exhibit M, the 1st Defendant was urged to desist from his 'unlawful act' in respect of taking out Letters of Administration being that there was a Will in existence. A citation as in Exhibit N1-7 was caused to be issued to the 1st Defendant in which the Administrator and Registrar-General was copied, asking that he, the 1st Defendant returns the Letters of Administration issued to himself and the 2nd Defendant to the Probate Registry. All efforts to get the 1st Defendant to return the said Letters of Administration to the Probate Registry proved futile.

2.1. The Plaintiff claims the Defendants have no claim to the property which by Will dated 9th day of December 2010 was devised to the Plaintiff herein who

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complain that by the actions of the Defendants, he has been deprived of the subject-matter herein for which he now seeks redress.

3. On file is a Memorandum and a Notice of Appearance, each dated the 9th day of February 2012, filed for and on behalf of the 1st Defendant and 2nd Defendant by Shears-Moses & Co and J.B Jenkins-Johnston & Co respectively.

3.1. In his Defence, the 1st Defendant said that the deceased James Jenkins Thomas was his brother and that he, that is the deceased, was not of a sound mind before his death; that the Plaintiff was known to be hovering around him for most of the time. He denied that the deceased executed a Will dated 9th day of December 2010 as in Exhibit J1-6 or at any other time. He claims, the Will on file is fake and that same does not have the genuine signature of the deceased.

3.2. The 1st Defendant argues that the deceased could not have informed the Plaintiff that he made any specific devise to him in a Will as according to him, that is the 1st Defendant, there was no Will executed by the deceased. He admits he was asked to return the Letters of Administration issued to him in respect of the Estate of the deceased to the Probate Registry, as in Exhibit N1-7. The 1st Defendant contends the Plaintiff is not a beneficiary to the Estate of the deceased James Jenkins Thomas.

4. By Notice dated the 21st day of May 2015, the Plaintiff, joined issue with the 1st Defendant in his Defence. The 2nd Defendant filed her Defence and Counter-Claim to the Plaintiff's claim on the 7th day of July 2015. She denied the deceased made any Will before his demise and that the Will dated the 9th day of December 2010 is a fraudulent and forged document.

4.1. Counsel for the 1st Defendant argues that the said Executors deliberately refused to associate themselves with the said fraudulent Will. I would have thought the fraud, if any, would be a reason for the said Executors to Honour the call for justice rather than refuse as Counsel puts it, to help the Court.

5. The 2nd Defendant contends through her Counsel that as the only living blood relatives of the deceased, they were perfectly entitled to take out Letters of Administration to their brother's Estate. I could not agree more to Counsel's assertion; the only difficulty here it seems, is the existence of a Will as alleged by the Plaintiff. And I would not think that it is suggested by the Defendants that because the Plaintiff was not a blood relation to the deceased, James Jenkins Thomas, he could not have devised his property to him.

6. In his Counter-Claim, the 2nd Defendant asks the Court to dismiss the Plaintiff's claim and declare that the Letters of Administration granted by the High Court to the Defendants herein on the 2nd day of August 2011 was granted lawfully and is valid; that the alleged Will of 9th December 2010 be revoked as being false and fraudulent.

7. An order of Summons for Direction dated the 13th day of July 2015 was issued by the Honourable Justice Alusine Sesay J.A. Counsel for the Plaintiff and the 1st

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Defendant complied with the Court order for Direction but Counsel for the 2nd Defendant never did despite several reminders by this Court. Counsel could not hold the Court back in light of the adage 'justice delayed is justice denied' and more so because of the determination and aim of the judiciary to deal with cases expeditiously.

7.1. By Notice of Entry for Trial dated the 29th day of February 2016 therefore, the action herein was entered for trial. The matter was first mentioned for trial to commence on the 18th day of April 2016

8. PW1, Augustine Kelly Musa Esq started his testimony on oath on the 19th day of May 2016. He told the Court he use to know Mohammed Talib, now deceased through his client, James Jenkins Thomas, also now deceased. He told the Court that he got to meet and know James Jenkins Thomas in 2008 when he retained his services for the first time. He said he was Solicitor for the said James Jenkins Thomas till his demise.

8.1. PW1 told the Court that he got to know about property situate at No. 27 Wilkinson Road through his client, James Jenkins Thomas (Decd) who claimed the said property to be his. I note that it is not in contention or rather there is no justification that the property on No. 27 Wilkinson Road, Freetown was not the *bona fide* property of the said James Jenkins Thomas. He said because the deceased James Jenkins Thomas was advanced in age, the relationship between them was one of father and son.

8.1. PW1 tendered Exhibit E hereinbefore referred, to the Court, a document signed by the deceased, James Jenkins Thomas appointing the said Mohamed Talib as his agent with powers to rent out and deal with his property with instructions that he, James Jenkins Thomas, did not want the Defendants, his brother and sister, to deal with his properties. He tendered Exhibit F, a Power of Attorney which he prepared on the instructions of the deceased James Jenkins Thomas appointing Mohammed Talib (Decd) as his Attorney to deal with his properties at No. 27 Wilkinson Road, Freetown and No. 9 Bathurst Street, Freetown.

8.3. He tendered Exhibit J1-6 the last Will and Testament of the late James Jenkins Thomas which he said he prepared in his office and which the said James Jenkins Thomas executed in the presence of two witnesses at his residence. According to PW1, as per the instructions of the late James Jenkins Thomas, the property at No. 27 Wilkinson Road was devised to the late Mohammed Talib. PW1 told the Court that he lodged Exhibit J1-6, the said Last Will and Testament, at the office of the Administrator and Registrar-General at Roxy building as required by law.

8.4. PW1 told the Court that when he learnt that James Jenkins Thomas passed away, pursuant to the instructions in Exhibit J1-6, that 40 days after his death, the Executors of the said Will must read out same to all occupants of 27 Wilkinson Road, he wrote a letter to the said Executors and informed them about their duties as Executors. He tendered Exhibit L1 & 2 hereinbefore referred,

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which are the said letters to the Executors same dated 21st June 2011. PW1 said the Executors failed to honour their duties under the Will.

8.5. He told the Court that he had cause to send Exhibit M which he tendered to the Court to the 1st Defendant whom he learnt was intermeddling with the property at 27 Wilkinson Road. He tendered Exhibit V1 & 2 as his statement to Solicitors for the Plaintiff, which upon application pursuant to Order 30 Rule 1 (9) (a) of the High Court Rules, 2007 made by Counsel for the Plaintiff, now forms part of PW1's evidence in chief.

8.6. In answer to questions put in cross examination by Counsel for the 1st Defendant, PW1 reiterated that it was in his office that the late James Jenkins Thomas gave him instructions to prepare his last Will and Testament and that he prepared the Will in his office and that the deceased signed the Will he prepared at his, i.e the deceased's residence in the presence of two witnesses.

8.7. He said the 1st Defendant lives as a close neighbor to the property at 27 Wilkinson Road and that the letter he sent to the 1st Defendant, as hereinbefore referred in respect of his intermeddling with the deceased's property was sent to his 27A Wilkinson Road address. He said the deceased James Jenkins Thomas never told him how he got the property. How the deceased James Jenkins Thomas got the property on 27 Wilkinson Road, Freetown is not an issue before this Court for as said, it is not contended that the late James Jenkins Thomas was the owner of the property, the subject-matter herein.

8.8. He told the Court that the 1st Defendant was the brother of the late James Jenkins Thomas but that they had a sour relationship. He reiterated that Mohamed Talib was a beneficiary to whom the property at 27 Wilkinson Road, Freetown was devised. He said the late James Jenkins Thomas use to visit him at his house and that he did give him information about the sour relationship between himself and his brother and sister, the Defendants herein. He said he had no cause to reconcile the sister and brothers because the deceased James Jenkins Thomas felt strongly about the bad relationship between himself and his siblings. The matter before this Court is to do with property and the Solicitor's role in preparation and execution of a Will; it has nothing to do with what the Solicitor could have done to reconcile the late James Jenkins Thomas and his brother and sister.

8.9. PW1 said Exhibit E was dated 2008 when the deceased showed him in his office in the latter part of 2008 and told him that he himself, i.e the deceased James Jenkins Thomas, prepared it. He said he never tried to find out how James Jenkins Thomas got the property on 27 Wilkinson Road nor did he try to find out whether the said property was part of the deceased person's late father's property. The assertion by way of cross examination seem to shift the Defence from the Will herein being forged to one of the deceased not having a right to dispose of property which he himself does not have. As said, there is nothing in evidence to suggest that the subject-matter herein was not the property of the deceased, James Jenkins Thomas. PW1's answers in chief remained unshaken in cross-examination.

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10. The matter was adjourned on the 19th day of May 2016 to allow Counsel for the 2nd Defendant to cross-examine PW1 on his client's behalf. On the 30th day of June 2016, J.B Jenkins-Johnston Esq of blessed memory on behalf of the 2nd Defendant adopted the cross examination done by his learned colleague, Counsel for the 1st Defendant as, according to him, the interest of the 1st and 2nd Defendants are the same.

10.1. Counsel for the Plaintiff closed the case for the Plaintiff on the 30th day of June 2016. The Defence opened its case on the 12th day of July 2016 with the 1st Defendant making his testimony on oath before the Court.

11. DW1 identified James Jenkins Thomas as his elder brother. He told the Court that his brother, the said James Jenkins Thomas was not survived by any child or wife. He said upon his brother's death, himself and the 2nd Defendant took out Letters of Administration as in Exhibit K1-12 for his estate.

11.1. He told the Court that the late James Jenkins Thomas did not execute a Will before his death; that before they applied for the said Letters of Administration, he caused the Registrar-General's office to be searched for any possible Will of his late brother but that none was found. There is nothing on file to show that there was any search of the Court records; there is no receipt for search fee and being that this is a Court of law, such evidence or reason for lack thereof is crucial.

11.2. DW1 told the Court that he was challenged by Mohamed Talib for interfering with his property. This piece of evidence ties with the testimony of PW1 when he said letters, as in Exhibit M and N1-7 were sent to the 1st Defendant in respect of his intermeddling with the property of Mohammed Talib, the supposed beneficiary of the Estate at 27 Wilkinson Road. It also supports the evidence on file as in Exhibit N23 written by erstwhile Solicitors for the deceased Plaintiff, Serry-Kamal & Co.

11.3. DW1 told the Court that Mohammed Talib was his late brother, James Jenkins Thomas' agent who use to collect rent on his late brother's behalf. This piece of evidence ties very well and confirms Clause 1 of the Particulars of Claim in the Writ of Summons which commenced this action and shows that the said Mohamed Talib acted as an agent as required of him by Exhibits E and F. There must have existed quite a high level of trust in a 'stranger' to use the words used in the Defence of Counsel for the 2nd Defendant, to collect rents and deal with properties on behalf of the deceased, James Jenkins Thomas.

11.4. He said he got to know about the Will for the first time in Court which I hold could not be true because he had, in his Defence filed on his behalf, averred that the Will of 9th December 2010 is false; he could not have made that averment without knowing a Will exists. Also, DW1 admitted in chief to have been approached by Mohamed Talib for intermeddling with his property devised to him in a Will even before he took out Letters of Administration as in Exhibit K1-12. He, DW1, had also received Exhibit N23 dated 24th day of June 2011 from the

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said Mohamed Talib's then Solicitors, Serry Kamal & Co informing him about the existence of a Will in respect of the Estate of James Jenkins Thomas even before himself and the 2nd Defendant took out the said Letters of Administration. DW1 tendered his statement as Exhibit B which he made to his Solicitor dated 15th March 2012 as part of his evidence in chief pursuant to Order 30 R1 (9) (a) of the High Court Rules, 2007.

11.5. In cross-examination by Counsel for the Plaintiff, DW1 was shown his Defence as in Exhibit B where he denied that Mohamed Talib was ever an agent to his late brother; completely contrary to what he said in chief to the Court. He was also shown Exhibit C1-3 where he, DW1 said that the late Mohamed Talib was an agent to the late James Jenkins Thomas, that which he had denied in his statement to his Solicitors which is now before the Court as Exhibit B.

11.6. In his cross examination though, he said that he knew Mohamed Talib produced a Will but he never saw the said Will and that the first time he ever saw the Will was in Court on the 12th day of July 2016. DW1 was referred to Exhibit NT4, (i.e Exhibit N23 hereinbefore referred) letter dated 24th day of June 2011 but still refused he had any notice of their being a Will before taking out Letters of Administration as in Exhibit K1-12. The letter dated 24th June 2011 addressed to the 1st Defendant informed the 1st Defendant, DW1 herein about the existence of a Will. I must note that the 1st Defendant did not deny receiving Exhibit NT4. In essence, he must have known there was a Will.

11.7. DW1 was referred to his statement, Exhibit B, paragraph 3 thereof and he stated that even though he has no evidence of the mental status of the late James Jenkins Thomas before his death and that he himself is not a medical doctor, his brother, James Jenkins Thomas was not of sound mind and that he was helped by Mohamed Talib most of the time. Again, the fact that the deceased was helped by Mohamed Talib during his life time ties with the 1st Clause of the Particulars of claim and the testimony of PW1.

11.8. DW1 confirmed the property on 27 Wilkinson Road was the property of his late brother. I have ruled that ownership of the property on 27 Wilkinson Road Freetown is not in contention. He referred to Exhibit J1-6 and told the Court that the signature on Exhibit J1-6 look like his brother's (James Jenkins Thomas') signature but being that he is not a handwriting expert, he cannot say whether or not the signature on the Will referred to herein is that of his late brother. He was not certain the signature on the Will was his brother's; he left a possibility that it could be his brother's signature.

11.9. In re-examination, DW1 told the Court that his Solicitor forwarded a copy of the Will herein to a signature expert together with receipts for analysis of the signature on the Will.

12. DW2 Ekundayo Festus Vincent testified on oath on the 8th day of November 2016. He identified himself as a handwriting and document examination expert. He said he examined some documents pertaining to the deceased James Jenkins Thomas after which he did a Report. He tendered the Report as Exhibit BB1-9.

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12.1. In carrying out his assignment, DW2 told the Court that he used the following documents:

a. Three receipts as in exhibits AA1-3, signed by one Mr. Thomas.
b. Indenture between Mr. Kenneth Alphonse Thomas, Mr. James Jenkins Thomas, the deceased herein and Mr. Sydney Spencer Thomas dated 21st December 1961.
c. The Last Will and Testament of Mr. James Jenkins Thomas.

12.2. DW2 told the Court that his findings after examination of all the documents presented him is that Exhibits 1, 2, 3 and 4 are similar in features and so it is highly probable that the signatures thereon were done by the same author. He said the documents in exhibit JJT5 said to be written by James Jenkins Thomas when compared with documents A, B, C and D, Exhibit JJT 1, 2, 3, and 4 show significant signs of dissimilarities in features which make it highly probable that the signature of Exhibit E and Exhibit JJ5 were executed by another author.

12.3. DW2 was cross-examined by Counsel for the Plaintiff. He confirmed he examined 5 documents before writing his Report. He agreed a person's signature may change in some circumstances as for eg, if the person was sick when executing the signature or if he is under duress; he said the signature could also change due to old age.

12.4. Counsel for the 2nd Defendant told the Court on the 7th day of February 2017 that since the interest of the 2nd Defendant is the same as that of the 1st Defendant, he will rely on the final address filed by Counsel for the 1st Defendant.

13. In one breath, Counsel for the 1st Defendant suggests by way of questioning that the property is not owned by the deceased, yet he puts in no evidence to support his suggestion. In quite an other breath the Defendant suggests during his testimony that the deceased was of unsound mind and therefore could not have signed the Will yet Counsel for the 1st Defendant puts in no evidence to support the medical condition suggested by the 1st Defendant and did not put that suggestion to PW1. The last suggestion is that the signature on the said Will was forged but even this was not put to PW1 who prepared the Will and who was the only witness for the Plaintiff.

13.1. Counsel for the 1st Defendant rightly stated in his final address that every Will must be witnessed by two persons who must sign in the presence of each other and the testator. He however raises a concern that in the instant case, these witnesses were not called by the Plaintiff's Solicitors to testify in the matter herein. I refer to Exhibit JJ1-6 in the Plaintiff's Court bundle and note that the Executors of the Will herein, Alfred Lebbie and Francis Lansana are the same persons who witnessed the Will, Exhibit JJ1-6. I know of nothing in law, which says that an Executor cannot be a witness to a Will.

13.2. I refer to Exhibit L1-2 dated 21st day of June 2011 from Solicitors for the Plaintiff to the said Alfred Lebbie and Francis Lansana in respect of performing

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their respective roles as Executors of the Will herein. The evidence before this Court is that all efforts to get the said Executors to perform their respective role proved futile. I refer to Exhibit J 2 attached to the Plaintiff's Court bundle in which the deponent, Tuma Adama Jabbi Fitha deposed in paragraph 4 on the 8th day of May 2015 that she was informed that the said Executors who as said were witnesses to the Will herein, died of the Ebola epidemic in Sierra Leone. No evidence was led to contradict that point. The above two points to wit: the Executors not responding to Exhibit L1-2 hereinbefore referred and the affidavit of Tuma Adama Jabbi Fitha show why the said Executors who as said were witnesses could not have testified during trial. They were simply no where to be found whether or not they were alive.

13.3. Counsel for the 1st Defendant, in his final address at page 2, the last paragraph thereof shows concern that Exhibits J1 and J2 are unsigned but that Exhibit J3 is signed. I must add also that the back of Exhibit J4 is also signed by the supposed testator; J4 is signed by the supposed witnesses. My analysis and understanding of Exhibit J1-6 in respect of the concern raised by Counsel for the 1st Defendant is that Exhibit J1, front and back is a typed not a copied version of the Will, that is the typed version of the original Exhibit J1 to which is attached registry stamps. In the absence of the Executors herein, the Solicitor for the Plaintiff swore to an affidavit as in Exhibit J2 to enable the Administrator and Registrar-General to read the Will herein and therefore Exhibit J1 (front and back) was typed out and made after the testator's death so he could not have signed off on it.

13.4. Re the dates 9th December 2010 and 8th May 2015 and registration number 11/2015 referred to by Counsel, my understanding of Wills is that they must be executed in the testator's lifetime. The Will herein was executed by the testator on the 9th day of December 2010. It is after the execution of the Will that it is deposited at the Registry. The evidence before this Court is that the testator died on the 23rd day of May 2011 and that all efforts to get the Executors to prove the Will was futile. The date of registration which obviously must happen after the death of the testator was 8th day of May 2015. The evidence before this Court is that all efforts to get the Executors to prove the Will proved futile to wit: Exhibit M, L1-2 and the Citation from the law offices of Musa & Forna and Serry-Kamal & Co respectively. The Will was therefore only registered on 8th day of May 2015.

13.5. The point has been made that the Executors were never reached. Their not challenging the 1st Defendant does not mean there was no Will. It is also not correct that the 1st Defendant was not challenged on the testator's property. I have referred to Exhibits M, L1-2 and the citation from Serry-Kamal & Co all of which happened before the Ebola epidemic and the testimony of DW1 himself on oath in that respect.

13.6. In respect of the deceased not being of sound mind at the time the Will was executed, it is presumed that the testator was sane at the time when he made his Will but if the question of his sanity is contested as in the instant case, the onus is on the person propounding the Will, that is the Plaintiff in this case, to prove that

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the testator was of sound and disposing mind at the time he made his Will. See *Flynn, Flynn Vs, Flynn* (1982) 1 AER 890.

13.9. In *Sutton Vs. Sadler* (1857) 3 CBNS 87, the fundamental proposition was stated that a party propounding a Will is bound to show that the testator was of sound disposing mind, but it is agreed that if there is no evidence of incompetence, the Will must be found for. The proposition that in the absence of evidence, the Will must be found for was upheld in the case of *Turner Vs. Penny* (1843) 1 LTOS 412 where there was a plea of insanity but because there was no evidence, the Will was found for. In sum if the Court feels there is no doubt substantial enough to defeat a grant of probate, the grant must be made. Complete proof of capacity is not essential. See *Worth Vs. Clasohm* (1952) 86 CLR 439.

13.10. Although capacity is initially presumed, a party challenging the Will need merely raise an issue about capacity for the burden to shift to the proponent who may then kick it back to the challenger by showing that the Will is valid and rational on its face. I again refer to Exhibits E and F by which the Plaintiff argues that the testator knew and understood exactly what he was doing. It was for the challenger, in this case, the Defendants, to reverse the burden a third time by producing evidence that raises real doubts about the testator's capacity which the proponent, that is the Plaintiff, will have to dispel in order to prove the Will. See *Key Vs. Key* (2010) EWHC 408 (Ch); (2010) 1 WLR 2010.

13.11. One would expect that the assertion of mental incapacity would have been supported by documentary evidence or getting a medical doctor who could testify that the deceased was of unsound mind at the time of execution of Exhibit J1-6 but none of that was done. For it is the case of the Plaintiff through PW1 that the deceased it was who signed the Will herein and that he was of sound disposing mind when he signed same thereby dispensing of the legal burden of proof. The evidential burden that the deceased was of unsound mind remained that of the Defendants. See Theobald on Wills, 17th Edition by J.G Ross, Martyn C Ford, A. Learmonth and M. Oldham, page 43 under the rubric 'Burden of proof'.

14. A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain. It does not matter whether the impairment is permanent or temporary. It must be shown that the testator was of sound disposing mind at the time when the Will was made. See *Arthur Vs. Bokenham* (1708) 11 Mod Rep 148. There should be sound disposing mind at the time when the instructions are given and when the Will is executed but if the Will is shown to have been drawn in accordance with instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute as his Will a document drawn in pursuance of those instructions though he is unable to follow all its provisions. See *Perera Vs. Perera* (1901) AC 354. This is so even where the testator is unable to remember the instructions given and his signature was affixed by another person on his behalf.

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14.1. In *Clancy Vs. Clancy* (2003) EWHC 1885 (Ch), a testatrix had a testamentary capacity when she gave instructions for her Will to be drafted and the Will was properly drafted in accordance with those instructions and executed by the testatrix, the Will was held to be valid if the testatrix understood that she was signing a Will which she believes gave effect to her earlier instructions, even if there was some doubt as to her capacity at the time. See also Re *Perrins, Perrins Vs. Holland* (2011) Ch 270; (2011) AER 174 where a Will was upheld where the testator was found to have testamentary capacity when he gave instructions for it in April 2000, although not when he executed it in September 2001.

14.2. I have stated that the evidence of PW1 before this Court is that the deceased who visited his office and home was of sound and disposing mind when he dealt with him including when he visited his office and gave him Exhibit E, when he instructed him to prepare a Power of Attorney which he signed as in Exhibit F and of sound and disposing mind when he gave instructions to prepare Exhibit J1-6. According to the Hon. Justice Ag Macauley in the case of *Beckley & Beckley Vs Aubee & Faulkner* Supreme Court 1969 (Civil case No. 212/64) The African Law Report page 199, "... but if the Will is shown to have been drawn in accordance with instructions given while the testator was of sound disposing mind, it is sufficient that when he executes it, he appreciates that he is being asked to execute as his will a document drawn in pursuance of those instructions though he is unable to follow all its provisions'.

14.3. In the above case, the Learned Judge, Justice Macauley referred also to the case of *Parker Vs. Felgate* (1)(8P.D at 173; 52 L.J.P. at page 96 where Hannen P said, 'if a person has given instructions to a Solicitor to make a Will and the Solicitor prepares it in accordance with those instructions, all that is necessary to make it a good Will, if executed by the testator, is that he should be able to think thus far 'I gave my Solicitor instructions to prepare a Will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out'. .... To put it in a nutshell it is not sufficient that the testator be of sound enough memory when he makes his Will to answer familiar and usual questions; he ought to have a disposing memory so that he is able to make a disposition of his property with understanding and reason".

14.4. To my mind, based on evidence before this Court as referred above inclusive of Exhibits E and F and in the absence of any evidence to the contrary, the deceased James Jenkins Thomas was of sound mind and disposing memory when he gave instructions to PW1 to prepare his Last Will and Testament as in Exhibit J1-6, in which he disposed of his property at 27 Wilkinson Road, Freetown to Mohamed Talib.

14.5. At common law, sound testamentary capacity means that four things must exist at one and the same time:

a. The testator must understand that he is giving his property to one or more objects of his regard-it has been said that the testator gave specific instructions disposing of his property at No. 27 Wilkinson Road to Mohamed Talib for his love and affection for him; the testimony of DW1

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before this Court is that the deceased was very close with Mohamed Talib who use to assist him and to my mind, he understood that he was giving his property to Mohamed Talib as per paragraph 5 in Exhibit J1-6; he expressed clearly as in Exhibit E that he did not want the Defendants to deal with his properties and his relationship with the Plaintiff showed nothing but trust and love.

b. He must understand and recollect the extent of his property-The evidence before this Court is that the deceased testator owns real property at No. 27 Wilkinson Road; it is also in evidence that the 1st Defendant lives at No. 27A Wilkinson Road which the testator did not include in his Will. He specifically refers to No. 27 Wilkinson Road in paragraph 5 of his Will. I hold that he understood the extent of his property.
c. He must also understand the nature and extent of the claims upon him both of those whom he is including in his Will and those whom he is excluding from his Will-I have referred to Exhibit E above where he made clear that he does not want the 1st and 2nd Defendants herein to interfere in his properties; by Exhibit F, he gave powers to Mohamed Talib to deal with his properties. I have no doubt that the testator understood the nature and extent of his claim and the reasons why he devised his property to Mohamed Talib and not the Defendants herein.
d. No insane delusion shall influence his Will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made-there is no evidence of insane delusion; all evidence before the Court shows that the deceased knew exactly what he was doing.

14.6. In any event, in the case of *Banks Vs. Goodfellow* (1870) LR 5 QB 549, it was held that the fact that the testator was eccentric or was subject to one or more delusions is not of itself sufficient to invalidate a Will.

14.7. According to Williams on Wills, Volume 1, 10th Edition, at Chapter 10 para 10.1, "a Will may be in any form provided it is in writing, it is executed in accordance with the statutory provisions and it is clear that the deceased intended that the document should operate after his death." This provision is in line with Section 9 of the Wills Act of 1837 which provides that the Will must be signed by the testator in the presence of two or more witnesses. PW1's testimony that he prepared the Will which was signed by the testator in the presence of two witnesses has not been controverted.

14.8. In the case of *Re Musgrove's Estate, Davis Vs. Mayhew* (1927) P 264, CA, it was held that if a Will, on the face of it, appears to be duly executed, the presumption is in favour of due execution, applying the principle of *Omnia praesumuntur rite esse acta.*

14.9. As pointed out hereinbefore, PW1 was the Solicitor who prepared the Will herein. Where any doubt is cast as to the authenticity of the Will in respect of it being forged, one would expect that Counsel for the Defendants will point that out to him in cross-examination so as to give the witness an opportunity to confirm or deny it. In civil litigations, he who asserts must prove on a balance of

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probability and in such a case as the instant case, the Defendants have the evidentiary burden of raising the issue whilst the legal burden rests on the Plaintiff herein to disprove it. As said, this was not done in the instant case.

15. The Will which was given to the handwriting expert for his analysis and which is the questioned document was a photocopy and not the original. DW2 told the Court that he was given a copy of the said Will for his analysis and so to my mind, he could not have given a conclusive expert report. It is no wonder his findings were based on probabilities. Reproduction of a document, whether by dot-matrix printers or ink-jet printers or by laser printers has its own limitations as against the original of such document.

15.1. At page 232, paragraph 8.1.1 of Forensic Science, 2nd Edition by Andrew Jackson and Julie M. Jackson the authors describe how the distinguishing features of an individual's handwriting develops from childhood through adolescence into adulthood. The authors describe the tracing method and freehold method of signature forgery in paragraph 8.2 at page 236 thus:

15.2. "In forging another's signature, the forger attempts to both copy the genuine signature accurately and to maintain the fluency of the writing. In practice however, these two aims tend to work in opposition to each other. If the writing is speeded up in order to improve its fluency, then accuracy will suffer as a result. Conversely, if the writing is slowed down in order to obtain greater accuracy, then some of the fluency will be lost .... The comparison of signatures has much in common with the comparison of handwriting. In order to assess the range of natural variation, it is necessary for the document examiner to have access to sufficient specimen signatures to allow him to assess their natural variation. Often this is in the region of 6-12 signatures. Ideally these should be non-request specimens, that are, as far as possible contemporaneous with the questioned signature ...." In the instant case, a limited number of four (4) samples were given the expert for his comparison with the Will as in Exhibit J, which to my mind was not sufficient.

15.3. After comparison, the examiner should be able to state definitely that a signature was forged, or, may only be able to give a qualified conclusion. In the instant case, DW2, the handwriting expert herein failed to state definitively that the signature of James Jenkins Thomas (Decd) was forged in the Will herein. He did not consider or comment on the other signatures on Exhibit J1-6 which it is alleged is that of the deceased. It left me wondering which of the alleged signatures of the deceased in Exhibit J3 and back of Exhibit J4 was analysed.

15.4. The provisions of the Will have not been contested. As far as the argument about the Testator's signature on the Will goes, my view is that DW2's Report is inconclusive on that point and so is his oral testimony. He did not definitely say that the signature was forged. Only a photocopy of the Will was given to him for his analysis so it is understandable that he could only come up with an opinion in terms of a probability that the deceased' signature had been forged and left open the possibility that the deceased could very well have signed the Will.

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15.5. To my mind therefore, the thorny issue being the authenticity or otherwise of the signature on the Will, it is my view that the Defendants failed to prove their case on forgery and that the testator hadn't the capacity to execute the Will. I hold that the Plaintiff has proved his case on a balance of probability and that the testimonial and documentary evidence of the Plaintiff remained unshaken by the Defendants. I hold that the last Will and Testament of James Jenkins Thomas (Decd) was duly executed by the said deceased James Jenkins Thomas and that same is valid.

16. Counsel for the 1st Defendant in his final address informed the Court that the 1st Defendant passed away at the close of the evidence and rightly stated that the said final address is based on the evidence before the Court. Aside the information in Counsel's final address as to the death of the 1st Defendant, there is nothing on file that supports the said information. Not that it would have made much of a difference if any at all but one would expect a death certificate to complete the records on file. I refer to Order 35 Rule 9 of the Annual Practice, 1999 Edition and state that where a party to any action dies after the ... finding of the issues of fact and before judgment is given, judgment may be given not withstanding the death. The Court has powers also under Order 15 Rule 7(2) to order that another person be substituted to the cause or matter where a party to an action dies before judgment is given.

Upon an application made by Counsel for the Plaintiff supported by documentary evidence, the current Plaintiff Sidi Mohamed Talib who stood in a representative capacity for the deceased Plaintiff Mohamed Talib was replaced by Mrs. Mariama Talib, the widow of the said deceased Mohamed Talib.

IN CONSEQUENCE WHEREOF, IT IS ORDERED AS FOLLOWS:

a. That Letters of Administration issued on the 2nd day of August 2011 to the Defendants out of the Probate Registry of the High Court is hereby revoked and nullified accordingly.
b. That Letters of Administration issued on the 2nd day of August 2011 to the Defendants out of the Probate Registry of the High Court shall be expunged from the Books of Letters of Administration kept at the office of the Administrator and Registrar-General.
c. That the Defendants are not entitled to take out Letters of Administration because there is a valid Will in respect of the Estate of the deceased herein.
d. That the property known as No. 27 Wilkinson Road was devised to the Plaintiff Mohammed Talib (Decd) by James Jenkins Thomas (Decd) through a duly executed Will dated 9th day of December 2010.
e. A perpetual injunction restraining the Defendants from interfering with the use and enjoyment of the said property at No. 27 Wilkinson Road is granted accordingly.
f. Letters of Administration with Will annexed to Mrs Mariama Talib, the lawful widow of Mohamed Talib is granted accordingly.
g. Costs of this action to be borne by the Defendants at Le. 50,000,000 (Fifty Million Leones) each, respectively.

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Hamid, J.

Delivered on: 7th March 2017

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