Dah Dukuly Sherman, **Bindu Dukuly** and **Osman Dukuly** all of Monrovia, Liberia APPELLANTS VERSUS **Neh Dukuly Tolbert**, also of the City of Monrovia.

November 5, 2008 Decided :January 28, 2009

OBJECTION TO PROBATION OF THE WILL OF AMBOLAI M. DUKULY. JUDGMENT AFFIRMED

MRS. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT

During the 2008 March Term of this Court, a question of law arising from a motion to dismiss the appeal in this same case came before us for determination. The contention of the Movant at that time was that since the verdict was brought by the jury sitting in the Civil Law Court, any appeal from that verdict should be processed from that forum and not from the Probate Court. We ruled then, and confirm even now, that when an issue of fact is forwarded to the Civil Law Court from the Probate Court for disposition by jury in a contested Will case, the findings or verdict must be returned to the Probate Court for final decree or ruling. It is from that final ruling that an appeal may be taken to the Supreme Court; further, that in all estate matters, the Probate Court has original jurisdiction, appeal from which lies only before the Supreme Court. On the basis of that opinion the Probate Judge made a final ruling, in favor of the Petitioner, which ruling is now before us. On appeal processed from the Probate Court of Montserrado County.

Ambolai Dukuly died in the City of Monrovia on April 10, 1999 survived by three sisters: Neh Dukuly-Tolbert, Dah Dukuly-Sherman, and Bindu Dukuly; and a brother named Osman Dukuly. The deceased had no issues of his body. The siblings, unaware of the existence of a will, authorized their eldest sister, Neh Dukuly-Tolbert to apply for letters of administration to administer their deceased brother's estate. Having received the letters of administration, the administratrix subsequently returned to the United States. While she was abroad, one of the objectors herein, the only surviving brother, Osman Dukuly, finally summoned the courage to go through his late brother's papers having previously disposed of his other personal effects. While roaming through the papers, he came across a sealed envelop which he tore opened and discovered three copies of a document, allegedly, the Will of the deceased. Upon the return of the administratrix to Liberia in 2004, and after the estate had been administered for five (5) years as an intestate estate, the said Osman Dukuly delivered one of the copies of the alleged will to his sister, the administratrix.

The said administratrix offered the copy of the alleged will for probate in the Monthly and Probate Court of Montsterrado County by petition duly filed on August 23, 2004, praying for reading and publication of the will. The Probate Judge, pursuant to a provision of law, ordered the issuance of notice to be served on all interested persons that is, the other three siblings to attend upon the reading of their brother's purported will.

On September 13, 2004, the purported Will was read and published for the information of all interested persons or the general public thereby allowing would-be objectors to so proceed. The only objectors were the Appellants herein. We quote verbatim the grounds of their objection;

OBJECTION

1. That the instrument purporting to be the last Will and Testament of the late Ambolia Dukuly and is now being offered to be admitted into probate is a photocopy and should be therefore denied admission into probate. Objectors request Your Honour to take Judicial notice of the Court's file;

2. Also because the Objectors say that their brother Ambolia Dukuly died on April 10, 1999 and it has been five years since his death. Objectors submit that the Petition is statute bar because same was filed five years after the death of Testator;

3. Further the Objectors say that on May 10, 1999, the Petitioners obtained letters of Administration to administer the intestate Estate of the late Ambolia Dukuly and that said intestate estate has not been closed. Objectors request Your Honour to take judicial notice of records in the case file;

4. Further to count three(3) above. Objectors say that as recently as March, 2004 Objectors and Petitioner agreed that the proceed from the property be shared equally among the Objectors and Petitioner. This agreement was communicated to this Honourable Court by Counsels for the family as is clearly shown in a letter dated March 24, 2004 from the Dugbor Law Firm attached hereto as exhibit ob/1;

5. And also because the Objectors say the instrument purporting to be the last Will and Testament of the Ambolia Dukuly was materially altered with respect to the name of the Testator as can be fully seen on page one of the said instrument. That the type writing named "Ambolia Micheal Dukuly" was altered and named Ambolia was hand written to reas only "Ambolia Dukuly" Objectors submit assuming without admitting that said instrument is the Last Will and Testament of the late Ambolai

Dukuly, said material alteration constitute a revocation of said Will. Moreover, the deceased was known as always Ambolia Dukuly.

6. That as to count two (2) of Petitioner's Petition that the deceased died. leaving three sibling I false and misleading because the deceased died leaving no issue as clearly evident by the letter dated March 24, 2004 from the family Counsel hereto attached as exhibit ob/1.

To these objections the Petitioner filed the following resistence:

RESISTENCE:

1. Because Respondent says that the Objection was filed and served contrary to the Statute in this jurisdiction, in that, "Objections must be served at least one day before the return day of process and filed on or before that day..." see Decedents Estate Law Section 113.11 page 107 and the Court is requested to take Judicial Notice of its records.

2. Because Respondent says there is no law extant which prohibits a copy of a document to be admitted into evidence; the law only requires that as a precondition for a copy of a document to be admitted into evidence, the whereabouts of the Originals must be accounted either lost or destroyed. In the instant case, the Originals of the last Will of the late Ambolia M. Dukuly, Sr. was never available to the Respondent, therefore, copy of the Will that was found was offered. Court one of the Objection should therefore be denied and overruled.

3. That as to Count 2 of the Objection to the affect that the Testator died Five years ago, and therefore the Will is statute barred. Respondents submit that it is a public historical fact the Testator died during the Civil War in Liberia and the Country was unstable and because of the continued political instability and insecurity of the Country during that period, it was impossible to search for the Original, up to the present and the Original Will has not been found up to the present.

4. As to Count Three of the Objection regarding the opening of the Estate as Intestate, same was done prior to the advised of Counsel that the document that was presented to the Court as the last Will and Testament of Ambolia M. Dukuly, Sr., the late, should be accepted as such and there is no law which prohibit offering the document now purporting to be the Last Will and Testament of the Testator, merely because the Estate has been opened and was being administered as Intestate Estate.

The test in such as case is whether the document that offered as the Last Will and Testament of the deceased is indeed the genuine signature of the Testator, and meets all the legal requirement which supercedes all the past acts of the parties who are interested and beneficiaries under the Will and there is no time limit provided by law to offer a Will.

5. As to Count Four of the Objection, Respondent reaffirm and confirm count three above and say that the fact that the Estate of the Testator, in the absence of a Will, was regarded by relative of the Testator as Intestate, does not defect the Last genuine Will of the Testator now being offered.

6. As to Count Five of the Objection same does not present any ground for objection to a Last Will and Testament. Moreover, the alleged alteration Complained of is immaterial.

7. That as to Count Six of the Objection to the effect that the deceased died without any issue of his body, Respondent says that this does not preclude a deceased from disposing of his property according to his wish as well as to dispose of same by Will according to his wish and desire, regardless of a blood relationship between the beneficiaries of his Will the Testator. Moreover, the reference made by the Testator to the beneficiaries as his Nephew and son were during his lifetime and he continue to recognize and regard them as in his will; same is not ground for objection to a Will according to law. Count is requested to observe that nowhere in the defective objection is it alleged that the signature appearing on the Will offered for probate is not the signature of the Testator;

8. The Respondents denies all and singular the allegations of both law and facts assumed not specifically traversed in this Resistance and pray that the entire Objections be overruled and dismissed.

After the parties had rested their pleadings, the Judge, upon motion by counsel for the petitioner forwarded the case to the Circuit Court to be tried by jury on the merits as required by law in contested will cases. The jury was to find whether or not fraud had been committed because as shown in the introductory portion of the will, the type written name Ambolai Michael was scratched and the handwritten name Ambolai was inscribed over the scratched out name. (see will). The objectors stated in Count 5 of their objection that the erasure constituted material alteration and that said material alteration constituted a revocation of the will.

The special jury listened to the evidence and the arguments pro and con and returned a verdict of not liable, meaning that there was no proof of fraud. To this verdict the objectors noted their exception. The Circuit Court then pursuant to Supreme Law, forwarded the findings back to the Probate Court for final decree or ruling. The Probate Court entered a final ruling confirming the verdict of the special jury. It is from this ruling the objectors appealed and have fled to this court on the following Bill of Exceptions:

BILL OF EXCEPTIONS:

1. "Your Honour the presiding of the Sixth Judicial Circuit Court committed reversible error when Your Honour in passing on the verdict of the in empanelled jury ruled that the document presented by Neh Dukuly-Tolbert to be the Last Will and Testament of the late Ambolai Dukuly be admitted into probate and ordered registered according to law. And revoking the Letters of Administration issued to Mrs. Neh Dukuly-Tolbert

(a) The Honour presiding Judge of the Six Judicial Circuit Court committed a reversible error when he passed the minutes based on the verdict of the jurors who verdict was contrary and manifestly against the weight of the evidence produced at the trial.

(b) That on sheet 7, Monday, April 2, 2007, last paragraph, last sentence in which the presiding Judge charged the jury as following: "the law says, anyone who has perfect knowledge of matters at issue is the best evidence as such in the mind of this court Osman Dukuly who was in possession of the Will after the death of the deceased, he said, he open the Will and read it, he is the best evidence along with other documents." Appellant says that the presiding Judge charged aforesaid is inconsistent with the law on the best evidence rule. Objectors submits that the best evidence is the Will itself and not the testimony of Osman Dukuly who testified that he could not recall all of details contain in the Will that he read.

(c) That on sheet 8 and 9 beginning with last sentence on page 8 the Presiding Judge charged the jury as follows: "but the testimony before you say that the Respondent did not get to know about the Will when the left for the United States of America, she returned to Liberia in 2004 during which time the Will was presented to her, and take said Will for probation and registration in keeping with law...." Objectors say that said charge is contrary to the evidence adduced during the trial and that records of said case is void of any evidence as to the date and year when the said copy of the

purported Will was presented to the Respondent.

(d) That the Presiding Judge charged to the jury required a directed verdict and that in so doing Presiding Judge evaded the province of the jury who are the sole trial and judge of the facts in the case thereby prejudicing the interest and rights of the Objectors.

2. That Your Honour in your final judgment committed reversible error when Your Honour confirmed the unanimous verdict of the empanelled jury which is contrary to the weight and evidence produced during the trial. That Your Honour committed reversible error, when Your Honour ruled that the testament did not intend to create a joint tendency but rather a tendency in common which was not a controversial issue in these proceedings. That Your Honour proceeded to interpret a clause 13 of the last will and testament of Momoly Dukuly which was not controversial in these proceedings and ordered the Law Will and Testament of Ambolai Dukuly to be admitted into probate and ordered registered according to law contrary to objection filed by the objectors.

WHEREFORE AND IN VIEW OF THE FOREGOING, Objector/Appellant prays this Honourable Court to approve this Bill of Exception so as these adverse, erroneous and prejudicial ruling made contrary laws and facts governing in this case, including your illegal final judgment b reversed by the Honourable Supreme Court which exercise appellate jurisdiction over such case; and this Objector so pray Your Honour.

Dated at Monrovia, this 19th day of October A. D. 2007, respectfully submitted by the herein named above Objectors/Appellants by and thru their legal counsel:
Legal Services, Inc.
3rd Floor, First Merchant Bank Bldg.
Monrovia.
Counsel-At-Law

Approved:
J. Vinton Holder
PRESIDING JUDGE"

In this Bill of Exceptions we shall restrict our comments to only two points: (1) The Appellant says that the verdict was contrary to the weight of the evidence produced at the trial. The verdict was that no fraud was committed. Is the Appellant saying that

fraud was proven and yet the jury brought a unanimous verdict of not liable? What proof was produced at the trial? We took recourse particularly to the records of the testimony of Osman Dukuly. He said that the erasure or clossing out of the words Ambolai Micheal and replacing same with the name Ambolai only, and in handwriting, was on the copies when he opened the envelop and gave one copy to the administratrix upon her return to Liberia from the United States. He admitted that it was he, Osman Dukuly who discovered the envelop. So now on the question of fraud, who was the perpetrator suspect or was it Neh Dukuly-Tolbert who offered the document for probation or Osman Dukuly, their fellow objector, who discovered it? There was no showing, only a wild insinuation that fraud was committed. The other question is, were the objectors, while suspecting the commission of fraud also contending that the erasure was a material alteration tantamount to a revocation of the will? To so argue or reason is not only confusing but contradictory. The question is who was doing the revocation of the will? If the proponents of this theory say the Petitioner, Neh Dukluly-Tolbert erased the names and wrote Ambolai with intent to revoke the will, we wonder why would she then offer said instrument for probation? On the other hand, if the alleged testator erased his two names and inserted only one and that by so doing he intended to revoke his will, then why argue the issue of fraud? Or was he perpetrating fraud on himself? We dare not say. It has been said again and again in numerous opinions of this court that fraud must not only be alleged. It must be proved by some direct positive evidence or circumstantial evidence well established. Weeks v. Weeks et al, 29LLR 332 (1981). Ware v. Ware, 10LLR 158 (1949). We discovered no record or proof of fraud in this case. We only heard inferences of fraud been committed but by whom and how, there was no showing. In Al-Boley ans Sluwar v. The Proposed Unity Party 33LLR 309 text at pane 316 (1985), the Supreme Court held as in it held in many other cases that fraud is never presumed, even in third party whose conduct only comes into question collaterally. Fraud must be particularly pleaded.

One of the hallmarks of a good lawyer is the ability to reason logically so as to convince or persuade the court to rule in his or her favor. The total lack of logic and reasonableness in Counsel's contention in the above discourse left us unconvinced that fraud was intended and perpetrated in this case, or that the will was revoked, or was intended to be revoked by the erasure of the name Ambolai and handwriting Ambolai instead.

The act of revoking a will is controlled by statute in this jurisdiction. The Decedent Estates Law as found in 1LCL Rev. Section 2.14 procedure for revocation and alteration of wills states what actions constitute revocation of a Will and they are (a)

Revocation by will or by writing executed with same formalities (b) Revocation by destruction (c) Revocation or alteration by nuncupative declaration. The alleged testator did not employ any of these modes, nor did anyone else to suggest his intention to revoke the will. We do not therefore see how in this jurisdiction the mere erasure of the two names and the replacement of one of those names with a correction in spelling can rise up to the standard set for revocation of a Will as enumerated by the statute. In the opinion of this Court, the erasure of two names and the replacement of one with a correction in the spelling is not a material alteration that could render the will invalid. To constitute a material alteration the change or alteration must adversely affect the intention of the testator to dispose of his earthly possessions, partially or wholly. There was no evidence produced at the trial to the contrary that Ambolai Michael Dukuly was the same person known as Ambolai Dukuly, whose signature on the alleged will was neither challenged in the objection nor during the trial in the Court below or in the argument before us. We hold therefore, that the verdict was not contrary to the evidence and that said count in the Bill of Exceptions is dismissed for lack of both legal and factual support for the contention.

Appellant argued that the Trial Judge erred when he ruled that "the testament did not intend to create a joint tenancy, but rather a tenancy in common," the Appellant argued that said averment was not a 'controversial issue in these proceedings. "And that the Judge proceeded to interpret clause 13 of the last will and testament of Momolu Dukuly which was not controversial in these proceedings and ordered the last will and testament of Ambolai Dukuly to be admitted into *probate and* ordered registered according to law contrary to objection filed by the objectors." The will of Momolu Dukuly was made profert of and testified to by one of Counsel's own clients Bindu Dukuly, who said in her testimony, among other things, "...Your Honor, members of the trial jury, counselors, I beg to let you know that I stand representing our late father Momolu Dukuly and our late mother, Lagleh Seba. All documents pertaining to this case will be found in the court. I also have in my possession our late father's will where CEMENCO took 2.5 acres that was willed to us by our late father Momolu Dukuly, to Dah Dukuly Sherman, Bindu Dukuly and Ambolai Dukuly. It has been based on the CEMENCO land also inclusive in the will (Ambolai's) that was made out by Sister and whoever that Ambolai Dukuly's share goes to Momolu Tolbert is where the contention came from." She testified further and said that they went to CEMENCO to renegotiate a lease agreement but that her sister, Neh Dukuly Tolbert, refused to sign unless her son's name was included in the lease. So they (objectors) consulted a lawyer. "According to the law of survivorship, she said, Ambolai did not have children and none he left behind or any will. Therefore, our

lawyer Counsellor Frederick Cheru filed a petition with the court for equal distribution of all properties that were leased by our father. The law of survivorship granted the 2.5 acres to me and my sister Dah Dukuly Sherman according to law..."

In view of the above testimony of Appellant's own witness, how could counsel for Objectors/Appellants state in the Bill of Exceptions that the Trial Judge erred when he ruled on the issue of joint tenancy and tenancy in common and that the Momolu Dukuly estate matter was extraneous to the proceeding at bar? In order to determine whether the objectors' late father created a joint tenancy as was claimed by the witness or tenancy in common in the relevant devise, the Judge had to refer to the clause in Momolu Dukuly's will which will formed part of the objectors' case. Note that clause 13 which counsel for Appellants referred to is not part of the transcribed records. We however, found Clause Seventeen to be germane to the point under discussion. Clause Seventeen of Momolu Dukuly's will reads as follows:

"Clause Seventeen: I give, bequeath and device all of my interests in that parcel of land situated in Billima, Bushrod Island, Monrovia, Liberia , commonly referred to as the Dukuly-Sirleaf Estate (hereinafter called "the Trust Estate") IN THRUST, to be Telbort, Osman Dukuly, and Dah Dukuly IN TRUST, to be controlled and managed by them as Trustees for the good purposed and benefit of all of my children, including the two whom I have named herein as Trustees and my loving wife, Victoria B. Dukuly for life. My said Trustees shall have full power and authority to invent, reinvent, and keep invented the Trust Estate and increments thereof as they shall deem best; and from time to time to lease or otherwise improve or develop any of the said Trust Estate; to collect and receive the income, rents, and profits thereof; and the net income to be derived therefrom to be distributed as follows:

(a) Two Hundred Fifty (250,00) Dollars to my foster daughter, Famatta Freeman Carter, annually for five (5) consecutive years;

(b) Two Hundred Fifty (250,00) Dollars to Musa Sirlead, annually for five (5) consecutive years;

(c) Subject to compliance with the provisions contained in sub-paragraphs (a) and (b) above, the not profits derived from the said Trust Estate to be distributed equally among my wife, Victoria E. Dukuly, for her life; and my children Famatta, Neh, Dah, Bindu, Osman and Ambolai;

(d) The Trust herein granted shall be terminated upon the death of my wife, Victoria

E. Dukuly and my Trustee Stephen A. Tolbert, and any income accrued or held undistributed as will as the properties comprising the said Trust Estate, shall then be divided equally among all of my children named herein, trace and discharged of any trust, for them and their heirs forever."

In the above clause (d) the testator created a trust to be terminated upon the death of two of the trustees viz: the widow, Mrs. Victoria Dukuly, and Mr. Stephen Tolbert and that the trust estate should then be divided equally among all his children named in the will, for them and their heirs forever. (Emphasis ours). That is the language of a fee simple estate, a tenancy in common. There can be no survivorship intent carved from these words employed by the testator. He directed that upon the demise of the widow and his son-in-law, Stephen Tolbert, the trust should be terminated and the relevant estate and proceeds be divided equally and distributed among his children, each child so named taking his or her equal share to use as he or she wishes. Ambolai Dukuly decided that his portion, his equal share in CEMENCO, should go to his nephew. In the opinion of this Court, Ambolai Dukuly violated no law by so doing. We are of the opinion also that the Trial Judge committed'no reversible error by ruling that the testament did not create a joint tenancy but a tenancy in common. The testamentary expressions, "to share and share alike," "to divide equally among or between" and "to then and their heirs forever" are words of fee simple conveyance or holding. So the phrase, "to be divided among" as was used in clause seventeen of the will of Momolu Dukuly were proof of his intention that his children should hold the devised estate in common, survivorship was never intended.

One of the primary responsibilities of a lawyer is to counsel or advise his/her client. No lawyer should succumb to his client's desire to proceed to Court. The lawyer who ought to know his trade must decide whether after listening to his client's information there is a provision of law to support the cause of action before instituting an action. In the case at bar, the objection to admit the will to probate listed as grounds (1) The fact that letters of administration had already been granted five years earlier. That is not a reason to defeat this or any will especially so, since at the time the letters of administration was granted the will had not been discovered. The discovery and probation of a valid will after years of intestate administration revokes previously issued letters of administration 1LCL Rev. vol.II Section 113.13. Counsel for Objectors/Appellants should have taken cognizance of that provision of law and refrained from relying on same as ground ‘to defeat the admission of the will to probate. (2) That the will proffered was a copy. The law with respect to admission of copies of documents is that the profferer of the copy must account for the original: that the whereabout of the original is unknown, or that it is lost, or it is destroyed. So

the fact that the document presented was a copy is no ground to deny its admission so long it meets the requirements of a valid will. (3) That the siblings had just agreed, and had informed the Probate Court; to divide Ambolai Dukuly's' estate equally among themselves. That also is not sufficient to void a valid Will. Whatever agreement or division of the estate of the deceased was made before his Will was discovered becomes null and void when the Will is probated. Counsel for Objectors having failed or neglected to properly advise his client against objecting to the Will for lack of evidence to support a claim of fraud and the other unmeritorious grounds for the objection did everyone involved a disservice including this Court which must take off time to correct errors which counsel ought to have known that it relied on would operate against a judgment in his client's favor. When the facts and the law in .a civil action seem unfavorable or adverse to the client's cause it is unprofessional for a lawyer to proceed to Court anyway just because he or she has been or has hopes of been retained.

In view of all the foregoing it is our holding that the Appellants/Objectors failed to state any sustainable ground for their objection to the admission of the will to probate. For example, there was no challenge in the objection to the validity of the alleged testator's signature, or a claim that the testator was unduly influence by the beneficiary to execute there 'was no evidence that the testator revoked the Will. The objectors in no manner or form stated that the Will was not executed pursuant to the statute controlling the execution of wills in this jurisdiction. The objectors also failed to prove fraud directly or circumstantially or to even raise the issue of fraud squarely. We hold therefore, that the objection was therefore properly dismissed by the court below. And we confirm that judgment.

The clerk of this court is therefore ordered to instruct the Judge below to resume jurisdiction in this matter and proceed to have the will proved and if so proven, to admit same to probate. Costs against the Appellants. AND IT IS HEREBY SO ORDERED.
JUDGMENT AFFIRMED.

Counsellor Snonsio E. Nigba, appeared for the Appellants. Counsellor Benjamin M. Togbah appeared for the Appellee