**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN COMMON LAW**

**SUIT NO. C.L. P.436/96**

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| **BETWEEN** | **CARLTON BAUGH** | **PLAINTIFF** |
| **A N D** | **VENITTA MORRISON** | **1st DEFENDANT** |
| **A N D** | **BERYL TAYLOR** | **2nd DEFENDANT** |

In the estate of Allan Alexander Baugh late of 22 Johnson Terrace, Kingston 2, Plumber, deceased, testate.

Mr. Samuel Harrison, attorney-at-Law, for the plaintiff instructed by Dunn, Cox, Orrett and Ashenheim, for the plaintiff.

Mr. Patrick Brooks and Mrs. C. Busby-Earle, attorneys-at-law, for the defendants, instructed by Nunes, Scholefield, DeLeon and Company.

**HEARD: 29TH JUNE, 2000**
**2ND OCTOBER, 2000**
**4TH OCTOBER, 2000**
**21ST, FEBRUARY, 2001**

**RECKORD, J.**

The plaintiff field a Writ of Summons dated 14th August, 1998, endorsed with a statement of claim stating that:-

1. The plaintiff is the son of Allan Alexander Baugh, late of 22 Johnson Terrace, Rollington Town in the parish of Kingston, retired plumber,

deceased, who died a widower on or about the 11th day of January 1996 without any other issue or parents or any other person entitled in priority to share in his estate by virtue of any enactment.

2. The defendants have entered an appearance to the plaintiff's warning to the defendants' caveat wherein they claim an interest as beneficiaries under an alleged will of the deceased dated the 28th day of April, 1976.
3. The said alleged will was destroyed by the deceased prior to his death.
4. Prior to his death the deceased had destroyed and/or revoked all wills and testamentary instruments made by him and died intestate.

AND the plaintiff claims:-

1. that this Honourable Court shall pronounce against the validity of the said alleged will dated the 28th day of April, 1976;
2. a grant to the plaintiff of letters of administration of estate of the deceased;
3. costs.

Consequent upon an order made in this matter on the 1st of March,1999, by Courtenay Orr, J, the plaintiff supplied the following further and better particulars.

"UNDER PARAGRAPH 3"

The plaintiff was informed by his late father during 1992 that the latter had destroyed the will made on or about 28th April, 1976.

"UNDER PARAGRAPH 4"

The plaintiff says that he had seen his late father make another Will on or about December, 1993 which was witnessed by Norma Chin-See and Monica Smith. His late father subsequently informed him during 1995 that he had destroyed that 1993 will and had made another will during 1995 which the plaintiff was not shown. To the best of the plaintiff's knowledge information and belief any Will subsequently to the December 1993 Will must have been destroyed, as on the death of his late father he made a thorough search of his late father's possessions and premises at 22 Johnson Terrace, Rollington Town, Kingston and could find no Will or other testamentary instrument. Dated the 22nd day of March, 1999."

The defendants who are nieces of the testator herein, entered appearance to the plaintiff's writ of summons claiming an interest as beneficiaries of an alleged last will and testament of the deceased dated 28th April, 1976. However, neither has filed a defence.

Whereupon, the plaintiff filed a notice of motion dated 11th May, 2000 seeking an order that:-

"1. There being no defence filed and delivered in answer to the Statement of Claim filed herein, the filing of a Reply, issue of the Summons for Directions and discovery of documents be dispensed with and this action be and is hereby tried as a short cause;

2. This Honourable Court doth hereby pronounce against the validity of the alleged will of the above-named deceased dated on or about the 28th day of April, 1976;

3. Letters of Administration in the Estate of Allan Alexander Baugh, late of 22 Johnson Terrace, Rollington Town, in the Parish of Kingston, retired plumber, deceased, intestate, be hereby granted to his son, the Plaintiff; Carlton Baugh of 3705 Anna Drive, Opopka, Florida 32730, in the United States of America.

4. The costs of this Notice of Motion be the Plaintiff's."

Before me counsel for the plaintiff, Mr. Harrison, on the 29th of June, 2000 has moved the court for an order in terms of the notice of motion. He referred the court to the affidavits of Monica Smith and Norma Chin-See both sworn to on the 26th of May, 1999, both of whom deponed that the deceased duly executed a will dated the 25th day of December, 1993, in their

presence and that they subscribed their names as attesting witnesses to the said will in the presence of the deceased. They further averred that no other document purporting to be a will or codicil of the deceased has ever come to their knowledge.

On behalf of the defendants, Mr. Brooks submitted that there was no evidence of any revocation of the 1993 will. The plaintiff in his oath of administrator dated 10th of April, 1996, gives no indication of any will whatsoever. "Therefore the defendants were well written their rights being seized of their knowledge of the existence of a will a copy which was exhibited in the affidavit of Brenda Chrisholm, one of the attesting witnesses" The hearing was adjourned until the 2nd of October, 2000, when the plaintiff gave viva voce evidence.

Mr. Baugh lived in Florida, U.S.A. and was the only child of the deceased who died on the 11th of January, 1996. Before his father died be was aware of one will that his father made dated 1993, his father gave him a copy. His father told him what his assets were and had opened a joint account in their names. His father took back the copy will on another occasion telling him he was going to make another will. He had that copy for about six months and had read it. He recalled that it read that he was of sound mind and body, that it superceded and made absolete any other will.

The house at 22 Johnson Terrace should be sold upon his death and the proceeds devided as follows:-

**Carlton Baugh (plaintiff) to get 50% of the proceeds;**

**Eileen, his niece, 20% of the proceeds,**

**Beryl Taylor, his niece, 10% of the proceeds,**

**Arthur, his brother, should get 10% of the proceeds**

**Audrey, his niece, should get 10% of the proceeds.**

The plaintiff said that his father's wife, the plaintiff's mother, had died in 1991. Up to when his father died he never saw any other will although his father told him he had made another will. When he heard that his father was dying he came home in December, 1995. His father was a patient in St. Joseph's Hospital. He searched his father's dresser drawer at his home and found the joint account bank book. He withdrew funds from the account to pay outstanding bills for his father. At his father's request he attempted to get an attorney-at-law to make a will for his father but the attorney never turned up.

The plaintiff said he returned to the home one night and found his father's brother, Arthur, there in heated conversation with his father. He and a neighbour separated them, trying to make peace. The next morning he got a call and went to the home and found his father in bed. The bed and pillows were in blood and his father had a gash an his forehead. He was

admitted to Kingston Public Hospital that day in an unconscious condition. Up to when he died he never regained consciousness. After his father's death he returned to his house and searched all 3 bed rooms there. He broke in dresser drawers and found no will.

SUBMISSIONS

Mr. Harrison, for the plaintiff submitted that the 1976 will having been revoked by that of 1993, even if the 1993 will was subsequently destroyed, the 1976 will stands revoked. There is no evidence of any will surviving the deceased despite a thorough search by the plaintiff. Counsel submitted that since no will was found, then the deceased died intestate and his son would be his sole heir and administrator of his estate. He therefore asked for an order in terms of the notice of motion.

Mr. Brooks, for the defendants in response said that they were not objecting to the motion but there was need for some evidence for court to feel satisfied. There was evidence that the 1976 will was revoked by the execution of the 1993 will; there was evidence of its contents. The question for the court's consideration is whether there was evidence of a revocation of the 1993 will. Counsel further submitted that the request by the testator for the return of the copy was not an act of revocation. The absence of a will being found, though in certain circumstances, can raise a presumption of

revocation the evidence heard does not take it within that category. He submitted that the contents of the 1993 will given by two affidavits and one viva voce evidence should be admitted to probate by virtue of proper methods. **See Triston and Coote on probate practise. Case of Addison's Estate (1964) Volume 108 Solicitor's Journal page 504.** Presumed will last in possession of testator-inference he destroyed will to make new one.

In reply, Mr. Harrison, submitted that the authority quoted by Mr. Brooks did not support his case. On the question of presumption of destruction of a will, he referred to **volume 12 English Report, page 828, and (1836) Volume, Moores Report page 300, Anna Maria Welch and Lucy Allen Welch vs. Nathaniel Phillips.**

> "The rule of law is that if a Will is traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the Will."

**See also Sykes and Drake vs Sykes and other. Volume 23, Times Law Report page 747.**

"If a will duly executed was in testator's possession when last seen, and is not forthcoming after his death, there is a presumption of law that he destroyed it animus revocandi, but that presumption may be rebutted by evidence of facts."

Re Broome, King and Ewens vs. Broome, Volume 29, D.L.R. page 631.

> "Where a will is duly executed by a competent testator who later becomes insane and the will cannot be found at his death, the burden of proving that it was destroyed amino revocandi while the testator was sane lies on the party asserting revocation."

Counsel submitted that the plaintiff having raised the presumption, nothing has been placed before the court by the respondent to rebut the presumption. The will is a very personal document. If a diligent search is made, and there was no evidence that a will has been found, then the presumption of revocation must prevail.

CONCLUSION

The defendants have not entered a defence to this action. Their attorneys are not objecting to the motion, but say there was need for evidence of revocation of the 1993 will, failing which this will, ought to be admitted to probate. However, the decision of the Privy Council in the case

of Welch vs. Welch (Supra) was that if the will was last in possession of the deceased and not forthcoming at his death, it is presumed to have been destroyed by himself. There has been no evidence before this court to repel this, and the presumption must therefore prevail.

Accordingly, the 1976 will having been revoked and the 1993 will presumed destroyed by the testator, there shall be an order in terms of paragraphs 2 and 3 of the notice of motion dated 11th of May, 2000.

Costs of both plaintiff and defendants to be bourne out of the estate.

Leave granted to the plaintiff to appeal on the issue of costs.