



**In re Estate of Chandrakant Shamjibhai Gheewala (Deceased) (Succession Cause 264 of 1994) [2023] KEHC 1558 (KLR) (Family) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 264 OF 1994  
MA ODERO, J  
FEBRUARY 24, 2023**

**BETWEEN**

**ELESHKUMAR CHANDRAKANT GHEEWALA ..... APPLICANT**

**AND**

**SHRIKESH CHANDRAKANT GHEEWALA ..... 1<sup>ST</sup> RESPONDENT**

**MUKTA CHANDRAKANT GHEEWALA ..... 2<sup>ND</sup> RESPONDENT**

**MAMTA CHANDRAKANT SHAMJIBHAI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court are two (2) applications for determination as follows:-
  - (i) Application dated 5<sup>th</sup> July 2021
  - (ii) Notice of Motion dated 10<sup>th</sup> May 2022
2. The court directed that the two (2) applications were to be heard and determined together. The parties were directed to file and exchange written submissions. The Applicant filed the written submissions dated 28<sup>th</sup> June 2022 whilst the 1<sup>st</sup> Respondent relied upon his written submissions dated 9<sup>th</sup> May 2022.

**Background**

3. This matter relates to the estate of the late Chandrakant Shamjibhai Gheewala who died testate on 26<sup>th</sup> February 1984. The Deceased was survived by the following persons:
  - (1) Mukta Chandrakant Gheewala - Widow
  - (2) Eleshkumar Chandrakant Gheewala – Son



- (3) Shrikesh Gheewala - Son
- (4) Mamta Chandrakant Shamjibahi - Daughter
4. As stated earlier the Deceased died testate having left a written Will dated 4<sup>th</sup> May 1976 in which the widow Mukta Chandrakant Gheewala was named as Executrix.
5. On 13<sup>th</sup> November 2006 a Grant of Probate was issued to the Executrix. Summons for confirmation of the Grant was then filed on 25<sup>th</sup> March 2021; however to date the Grant still remains unconfirmed.
6. This is a very old matter which has had a long convoluted history and numerous applications and counter applications have been filed by the parties herein. On 5<sup>th</sup> February 2019 the matter was referred to Court Annexed Mediation ('CAM'). This culminated in the Mediation settlement Agreement ('MSA') dated 31<sup>st</sup> July 2019. The 'MSA' was duly adopted by the court on 16<sup>th</sup> October 2019.
7. The 'MSA' provided (*inter alia*) that the Applicant Eleshkumar Chandrakant Gheewala was to within twelve (12) months pay USD 200,000 each to Shrikesh Chandrakant Gheewala (1<sup>st</sup> Respondent) and Mamta Chandrakant Shamjibahi (3<sup>rd</sup> Respondent). The Applicant failed to make the required payments and thus contempt of proceedings were instituted. *Vide* a Ruling delivered on 28<sup>th</sup> April 2022 the Applicant was found guilty of contempt and was fined Kshs.500,000/= or in default Six (6) months in jail. It is the Ruling that has given rise to the present applications. I will deal with each application individually.

**(i) Application dated 5<sup>th</sup> July 2021**

8. By this Application the Applicant Mamta Chandrakant Gheewala sought the following orders:-
  1. Spent
  2. On the basis of the facts set out herein and the evidence in the Supporting Affidavit filed herewith, this Honourable do make a finding that Eleshkumar Chandrakant Gheewala is in contempt of the Orders of this court made on 16<sup>th</sup> October 2019.
  3. This Honourable Court be pleased to issue such orders of sanction as it may deem fit and just under the applicable law, against the 1<sup>st</sup> Respondent Eleshkumar Chandrakant Gheewala (the Contemnor) for contempt of court by his continued disobedience of the of the Court Orders made on 16<sup>th</sup> October 2019 requiring him to inter alia, pay to the Applicant the sum of 200,000 USD within twelve (12) months from 31<sup>st</sup> July 2019 which date has come and passed with no payment having been made despite repeated requests and reminders.
  4. This Honourable Court be pleased to issue such Orders to the 1<sup>st</sup> Respondent Eleshkumar Chandrakant Gheewala (the Contemnor) requiring him to forthwith pay to the Applicant the said sum of 200,000 USD plus interest at court rates calculated from the due date of 1<sup>st</sup> August 2020 until payment in full.
  5. In the alternative to prayer 4 above, this Honourable Court be pleased to issue an Order of sequestration for the real and personal property of the said Eleshkumar Chandrakant Gheewala (Contemnor) to the full satisfaction of the said sum of 200,000 USD plus interest at Court rates calculated from the due date of 1<sup>st</sup> August 2020 until payment in full in consequence of the said Contemnor's continued contempt of Court in disobeying orders issued by this Honourable Court on 16<sup>th</sup> October, 2019 requiring him to inter alia, pay to the Applicant the said sum of 200,000 USD within twelve (12) months from 31<sup>st</sup> July 2019 which



date has come and passed with no payment having been made despite repeated requests and reminders.

6. The costs of this Application be borne by the said Contemnor, Eleshkumar Chandrakant Gheewala who is in contempt of Court.
9. The Application was supported by the Affidavit of even date sworn by the said Applicant.
10. I having perused the record in this matter I find that the Application dated 5<sup>th</sup> July 2021 is Res Judicata as the issues raised therein were already dealt with by my predecessor Hon. Justice Muchelule (as he then was) in his ruling delivered on 21<sup>st</sup> June 2021.
11. In that Ruling the Honourable Judge found as follows:-

“ The result is that I allow the application by finding that the respondent was in contempt of the court order dated 16<sup>th</sup> October 2019 that asked him to pay 200,000 USD within twelve (12) months to the Applicant. I direct him to personally appear in court on 22<sup>nd</sup> September 2021 to show cause why he should not be punished in accordance with the Law”
12. The Ruling effectively dealt with prayer (2) and (3) of the Application dated 5<sup>th</sup> July 2021.
13. Following that ruling of 21<sup>st</sup> June 2021 the same judge proceeded on 28<sup>th</sup> April 2022 to sentence the contemnor by imposing a fine of Kshs.500,000 in default to serve Six (6) months imprisonment. The court went on to direct that the Respondents were at liberty to commence execution proceedings for the recovery of the USD 200,000 plus interest at court rates. This effectively dealt with prayers (4) and (5) of the application.
14. Indeed the orders made by the court on 28<sup>th</sup> April 2022 form the genesis of the application dated 10<sup>th</sup> May 2022 filed by the Applicant/Contemnor which application sought a stay of the two rulings of 21<sup>st</sup> June 2021 and 28<sup>th</sup> April 2022.
15. As stated earlier this application is *Res Judicata* and therefore this court will make no orders on the same.

**(ii) Notice of Motion dated 10<sup>th</sup> May 2022**

16. In the Notice of Motion dated 10<sup>th</sup> May 2022 the Applicant sought the following orders:-
  1. Spent
  2. That Honourable Justice A.O. Muchelule be pleased to recuse himself from further hearing and/or determining this matter.
  3. That pending the hearing and determination of the intended appeal affecting the Ruling dated 21<sup>st</sup> June, 2021 and the sentence dated 28<sup>th</sup> April 2022, execution against the Applicant to recover 200,000 USD by the Respondent be stayed/suspended.
  4. That the Court to grant any further orders or directions as may seem expedient in the circumstances of the application.
  5. That the costs of this Application be provided for.
17. The above application was premised upon article 150 and 159 of the Constitution of Kenya, Regulation 21 Part II of the Judicial Service Code of Conduct & Ethics, Regulations 2020, Regulation 9 of the Judiciary Code of Conduct, Bangalore Principles of Judicial Conduct, Section 47 of the Law of Succession



Act and all other enabling provisions of Law and was supported by the Affidavit of even date sworn by the Applicant Eleshkumar Chandrakant Gheewala.

18. The 1<sup>st</sup> Respondent Shrikesh Chandrakant Gheewala opposed the application through the Replying Affidavit dated 20<sup>th</sup> May 2022 whilst the 3<sup>rd</sup> Applicant Mamta Chandrakant Shamjibahi also opposed the Application through her Replying affidavit dated 9<sup>th</sup> May 2022.
19. The Applicant sought the recusal of Hon. Justice Muchelule (as he then was) from hearing the application on grounds that the Honourable Judge was obviously biased against the Applicant in the manner in which he was handling the applications filed by the Applicant. It was alleged that the court dealt with and expeditiously determined the applications filed by the Respondents while the applications which had been filed earlier by the Applicant were yet to be heard.
20. The 1<sup>st</sup> Respondent in opposing the application alleged that the Applicant had been indolent in prosecuting his applications. The 3<sup>rd</sup> respondent whilst concurring with the 1<sup>st</sup> Respondent denied the claim that the court was biased against the Applicant. That the current application was merely a delaying tactic.
21. The Respondents both contend that the current application is frivolous and vexatious and is a mere abuse of court process aimed at derailing the 3<sup>rd</sup> Respondent application dated 5<sup>th</sup> July 2021.

### **Analysis And Determination**

22. I have carefully considered the application before this court. The replies filed thereto as well as the written submission filed by both parties.
23. Prayer (2) of the Notice of Motion dated 10<sup>th</sup> May 2022 sought the recusal of Hon. Justice Muchelule (as he then was). In my view this prayer has been overtaken by events. The Honourable Judge has now been elevated to the Court of Appeal. Therefore he will no longer handle this matter as a trial judge. One can say that the universe has conspired to grant the Applicant the orders he sought.
24. In *Stephen Kimani Karuu t/a Kiriiyu Mechants Auctioneers & another v Construction & Constructing limited & another* [2019] eKLR, Okwany J. stated that:

“Starting with the application dated 28<sup>th</sup> March 2019, one can say that the said application has been overtaken by events as it mainly sought orders for the recusal of lady Justice Nzioka from this case. It is clear that the matter is no longer before Justice Nzioka and I will now turn and consider the prayers sought in the earlier application dated 15<sup>th</sup> March 2019.”
25. I will therefore not delve into the claims that the learned Judge was biased as he is no longer a High Court Judge and will not preside over this matter. Prayer (2) of the Application is spent.
26. The Applicant has prayed that the sentence pronounced against him on 28<sup>th</sup> April 2022 on an application by the 1<sup>st</sup> respondent to recover the USD 200,000 be stayed pending the hearing and determination of his intended appeal against that decision.
27. In ruling delivered on 28<sup>th</sup> April 2023, the court found the applicant guilty of contempt and sentenced him to a fine of Kshs.500,000/= in default to serve Six (6) months imprisonment.
28. Being aggrieved by that decision the Applicant intends to appeal against the same. The Applicant is also aggrieved by the order that the USD 200,000 plus interest at court rates from the time the money became due shall be recovered through execution. The Applicant contends that no prayer for execution was made by the Respondents and that the ‘MSA’ did not provide for interest.



29. The Applicant prays that the orders of the court be stayed pending his intended Appeal.
30. Order 42 rule 6 (2) of the *Civil Procedure Rules* provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-
- “No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
31. It is appreciated that stay of execution is a discretionary power, however the court in setting out the guidelines for granting a stay, stated in the case of *Butt v Restriction Tribunal* [1979] eKLR as follows:-
1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.” (own emphasis
32. In the case of *Loice Khachendi Onyango v Alex Inyangi & another* [2017] eKLR it was stated:-
- “The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 rule 6 of the *Civil Procedure Rules*. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.....”
33. The first question is whether this application for stay was filed without undue delay. The ruling in which the Applicant was found guilty of contempt for failing to pay the respondents USD 200,000 as agreed under the ‘MSA’ was delivered on 21<sup>st</sup> June 2021. The Notice of Appeal was filed on 28<sup>th</sup> June 2021 and leave was granted on 9<sup>th</sup> July 2021.
34. Thereafter sentence was delivered on 28<sup>th</sup> April 2022 and the present application was filed on 10<sup>th</sup> May 2022 barely two (2) weeks later. I am satisfied that the application was filed timeously.
35. It is not for this court to delve into the merits or otherwise of the intended appeal. That is a matter which lies within the exclusive mandate of the court of Appeal. Needless to say before the court can grant a stay it must be persuaded firstly that unless the stay is granted the Applicant’s appeal may be



rendered nugatory and secondly that the applicant is likely to suffer substantial loss unless the stay sought is granted.

35. I am not persuaded that the appeal will be rendered nugatory if no stay is granted. In the event the Court of Appeal agrees with the Applicant then the court can order that amounts which he has paid out be refunded to him.

36. In *Clement Wakari Njoroge v Daniel Mwangi Wahome (suing as the legal representative of the estate of Julia Wamaitha Mwangi)* [2022] eKLR the court stated as follows:-

“The applicant says in his application that he stands to suffer substantial loss if the application is not allowed as the respondent will proceed with the process of execution. In the case of *Kinyunjuri Muguta v Wotoku Muguta* (2018) eKLR it was held that it was not enough to merely state that loss will be suffered but that the applicant must show the substantial loss that it will suffer in the event that the orders sought are not given. In my view, the fact that the respondent will proceed with execution if the prayers sought are not granted does not amount to substantial loss on the part of the applicant as execution is a legal process.” [own emphasis]

37. The orders which were made by the trial judge are pegged on the ‘MSA’ which was agreed upon by all the parties. The Respondents are merely seeking to enforce this ‘MSA’.

38. I fail to see how the Applicant will suffer substantial loss by honouring payments which he had himself agreed to make.

39. The Applicant has offered as security his shares in Cassava Plantation Limited. This security was offered in lieu of the USD 200,000 and was expressly rejected by the Respondents.

40. All in all I find no merit in this application for stay. The notice of motion dated 10<sup>th</sup> May 2022 is dismissed in its entirety. This being a family matter each side will bear its own costs.

**DATED IN NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**MAUREEN A. ODERO**

**JUDGE**

