



**Rai & another v Khan t/a MA Khan Advocates; Habib Bank AG Zurich
& another (Interested Parties) (Civil Miscellaneous E777 of 2022)
[2023] KEHC 1302 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS E777 OF 2022

JK SERGON, J

FEBRUARY 23, 2023

BETWEEN

IQBAL SINGH RAI 1ST APPLICANT

DALIP SINGH BENAWARA 2ND APPLICANT

AND

MOHAMED AKRAM KHAN T/A MA KHAN ADVOCATES RESPONDENT

AND

HABIB BANK AG ZURICH INTERESTED PARTY

DIAMOND TRUST BANK KENYA LIMITED INTERESTED PARTY

RULING

1. The subject matter of this ruling is the motion dated November 16, 2022 taken out by Iqbal Singh Rai and Dalip Singh Benawara the 1st and 2nd applicants herein respectively. In the aforesaid motion, the applicants sought for the following orders:
 - i. That this application be and is hereby certified as urgent and the same be heard ex parte at first instance.
 - ii. That pending service and the hearing inter partes of the application, a freezing injunction be issued to restrain the respondent whether by themselves, their servants, and/or agents from removing from this jurisdiction, disposing of, assigning, diminishing, transferring, disposing, alienating, operating, pledging



and/or otherwise interfering, intermeddling and/or dealing in any manner howsoever with this funds held in the following bank accounts:

- a. Account number held with Habib bank AG Zurich -
xx-xxxxxxxx-xxx-xxxxx.
 - b. Account No 1938-55 with Diamond Trust Bank
(Formerly Habib Bank Limited).
- iii. That there be and is hereby issued an interlocutory injunction barring the respondent whether by themselves, their servants, and/or agents from removing from this jurisdiction, disposing of assigning, diminishing, transferring, disposing, alienating, operating, pledging and/or otherwise interfering, intermeddling and/or dealing in any manner howsoever with his movable assets and household goods including the following motor vehicles:
- a. KCJ 303H
 - b. KAJ 729H
- iv. That there be and is hereby issued an order adopting the Law Society of Kenya judgment in DTC 151 of 2019 and DTC 158 of 2019 (consolidated) delivered on September 20, 2015 as a judgment and decree of this court.
- v. That there be and is hereby issued an order for discovery of tracing of the funds that were received by the respondent on behalf of Mr. Sukhdev Mangat Singh (deceased) to his account at Habib Bank Limited (acquired by Diamond Trust Bank (K) Limited)
- vi. That there be and is hereby issued an order directing Habib Bank A. G. Zurich to account for and thereafter remit the balance from the sale/disposal of the property known as LR 5/103(IR.35572) to the estate of Sukhdev Singh Mangat (deceased)
- vii. That the costs of this application be provided for.

2. The applicants filed an affidavit and a further affidavit jointly swore in support of the application.
3. Mohamed Akram Khan T/A M. A. Khan Advocates the respondent herein filed a replying affidavit he swore to oppose the motion.
4. I have considered the grounds stated on the motion plus the facts deponed in the rival affidavits. I have also considered the rival oral submissions of learned counsels appearing in this matter. Dr Ekuru Aukot, Alvin Kosgei and Shella, learned counsels jointly appeared to argue the application on behalf of the applicants. It is the submission of the applicants that the respondent was engaged by the late Sukhdev Singh Mangat to offer legal services in the sale and purchase of the parcels of land registered as LR No 10419 (IR 33986/1) and LR No 5450 (IR 7363/1) and on account of both transactions, the respondents received money which he has not remitted to the rightful owners.
5. It is pointed out that an account of title No L.R 10419, the respondent received a sum of Kshs 63,000,000/= and on account of L.R 5450 the respondent is said to have received Kshs 19,000,000/= . It is stated that the respondent only remitted to Sukhdev Singh Mangat deceased, a sum of Kshs 10,000,000/= leaving unpaid on the later transaction a sum of Kshs 9,000,000/=.



6. The applicants further averred that the deceased instituted two disciplinary complaints with the Law Society of Kenya against the respondent being DTC No 151 of 2019 and DTC 158 of 2019. They further averred that the aforesaid complaints consolidated and judgment against the respondent was delivered on 20th September, 2021 whereof the respondent was found guilty of professional misconduct. The applicants aver that the deceased died before recovering his money from the respondent.
7. Two executors namely; Dilip M. Patel (now deceased) and Tripat Singh Mangat were appointed to follow with the recovery of the deceased's money from the respondent. It is said that Dilip M. Patel passed away prompting the remaining executor, Tripart Singh Mangat to appoint Iqbal Singh Rai and Dalip Singh Benawara as co-trustees.
8. The applicants aver that trio have been following up to recover the money with no success hence the filing of this instant application. The applicants have stated that they recently learnt that the only property owned by the respondent namely LR No 1/503 (IR 35572) is the subject of an impending sale by Keysian Auctioneers on account of an outstanding debt to Habib Bank A. G Zurich, the 1st Interested Party herein leaving the deceased's estate without any attachable assets.
9. The applicants urged this court to grant the orders to restrain the Interested Parties from selling the aforesaid property. They averred that as of now the outstanding amount due to the deceased's estate from the respondent now stands at 181,802,548/15.
10. Mr. Mwangi, learned advocate for the respondent, urged this court strike out or dismiss instant motion arguing that the same is incompetent, unfounded and without merit. The respondent's advocate raised the main grounds of objection against the applicants' motion. First, it is the submission of the respondent that the applicants' motion is not founded on any substantive suit hence the same is incompetent and cannot stand in law.
11. It is further pointed out that the matter before this court is a miscellaneous application which cannot lead to issuance of substantive orders.
12. The applicants further questioned the rationale of seeking for temporary orders yet the whole proceedings will terminate at the conclusion of the application which is inappropriate and not permitted in law. In response to this objection, the applicants argued that the objection is a technical issue which should not be entertained under Article 159 of the Constitution.
13. The applicants did not deny that the matter before this court is a miscellaneous application in which they seek for inter alia issuance of interlocutory order of injunction to restrain the respondent from removing, alienating, operating, pledging and or interfering, intermeddling of dealing in any manner with his movable assets and household goods which includes motor vehicles registration No KCJ 303H and KAJ 729H.
14. The question which lingers in the mind of the court is the purpose of the order. If the order is granted, it will be final in order, yet the order sought is temporary in nature. There is suit pending determination as a basis for issuance of a temporary order. In my view, the objection cannot be said to be technical. The same goes to the root of the application. The application seeks for a temporary order of injunction pending nothing. The proceeding shall terminate upon the determination of the instant interlocutory application without the need of undergoing a trial. This takes away the right of hearing which is a fundamental right in the administration of justice.
15. Section 19 of the Civil Procedure Act as read with Order 3 rule of the Civil Procedure Rules give guidance on the institution of suits while Order 51 of the Civil Procedure Rules gives the guidelines to be followed



in the filing of applications. It is clear in my mind that the law and procedure envisages that temporary applications such as the instant one to arise out of a substantive suit. In the end, I find merit in the applicants' first ground of objection.

16. The second ground of objection put forward by the respondent is that the instant application is res-subjudice. The respondent pointed out that Tripat Singh Mangat in her capacity as the executor of the last will and testament of Sukhdev Singh Mangat, deceased sought for similar reliefs as those obtaining in the instant matter vide Kisumu HC Misc Civil Cause No 57 of 2022 Tripat Singh Mangat v Akram Mohamed Khan.
17. It is said the Kisumu matter is still pending determination at the time of hearing the instant application. This court was urged to find the applicants' motion to be an abuse of the court process. In response to the second ground of objection, the applicants stated that there is no similar suit to the instant proceedings hence there is nothing that is res-subjudice.
18. I have carefully considered the material placed before this court. It is in dispute that Kisumu HC Miscellaneous Civil Cause No 57 of 2022 Tripat Singh Mangat (Suing as the executor of the last will and testament of Sukhdev Singh Mangat (deceased) v Akram Mohamed Khan is pending for determination. The assertion by the applicants that no suit is pending cannot stand.
19. The applicant in the above cause i.e. Tripat Singh Mangat filed a motion dated February 17, 2022 where he sought for the following orders *inter alia*:
 - i. The judgment of the Disciplinary Tribunal of the Law Society of Kenya dated and delivered on September 20, 2021 in Cause Nos 151 of 2019 and 158 of 2019 (consolidated) be adopted as the judgment and decree of this court and upon such adoption, judgment be accordingly entered for the applicant against the respondent in the sum of Kshs 72,700,000/= (Kenya shillings seventy two million, seven hundred thousand only) together with interest at 12% per annum from 1st December, 2014 till payment in full.
 - ii. That the costs of this application be borne by the respondent.
20. The aforesaid prayer is similar the order sought in prayer (iv) of the instant motion which reads as follows:

That there be and is hereby issued an order adopting the Law Society of Kenya judgment in DTC 151 of 2019 and DTC 158 of 2019 (consolidated) delivered on September 20, 2015 as a judgment and decree of this court.
21. It is clear that the aforesaid prayers are the substantive two matters. I am therefore persuaded by the submissions of the respondent that the instant motion is res-subjudice. The provisions of section 6 of the [Civil Procedure Act](#) directs the court to stay further proceeding of the instant matter which in any case was filed much later than the Kisumu cause.
22. The third ground raised is to the effect that the applicants have no authority to take out the instant proceedings. The respondent pointed out that the applicants have failed to produce the deed of appointment. The respondent also stated that there are only two executors namely; Dilip M. Patel and Tripat Singh Mangat. In response to this objection, the applicants argued that they were appointed on August 10, 2021 by Tripart Mangat to take care of the estate and prevent it from intermeddling and attrition.



23. I have perused the document titled “Indemnity” dated August 10, 2021 and it is apparent that Iqbal Singh Rai and Dalip Singh Benawara were appointed power delegated to them in accordance with a special irrevocable power of attorney made on July 13, 2021. The question as to whether or not the executor of the deceased estate had power to delegate his power is an issue which cannot be determined vide these proceedings but can be done through other proceedings. I therefore decline the invitation to make any finding on the validity of the appointment of the applicants to exercise delegated powers of the executor of the deceased’s estate.
24. The final ground the respondent has put forward is to the effect that the L.S.K. disciplinary proceedings are still pending determination therefore the order seeking for adoption is premature. The respondent argued that the Disciplinary Tribunal of the Law Society of Kenya cause No 151 of 2019 and cause No 158 of 2019 are yet to be concluded and are pending for sentencing and mitigation.
25. The applicants did not respond to this application. In other words, the applicants did not provide this court with evidence showing that mitigation and sentencing had been done on May 9, 2021.
26. However, the truth is that the LSK Disciplinary Tribunal delivered its judgment on September 20, 2021 whereof the respondent was found guilty and convicted for professional misconduct for converting his client’s funds into his personal use and therefore failing to account and pay the client. The Tribunal further directed the respondent to release to the client a sum of Kshs 72,700,000/= within 90 days plus interest at the rate of 12% per annum with effect from 1st December, 2014 until full payment.
27. I find the objection that the prayer seeking for the adoption of the L.S.K Tribunal’s judgment is premature holds no water and without merit. The applicants were entitled to make the application.
28. In the end,
 - i. The applicants’ motion dated November 16, 2022 is found to be incompetent for want of a substantive suit or action hence it is hereby ordered struck out. Had the aforesaid motion been competently before this court, I would still have issued an order staying further proceeding of the same under Section 6 of the *Civil Procedure Act* since the same is resub-judice Kisumu HC Misc. Civil Cause No 57 of 2022 Ripat Singh Mangat v Akram Mohamed Khan.
 - ii. In the circumstances of this matter, a fair order on costs is to order which I hereby do, that each party meet their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
23RD DAY OF FEBRUARY, 2023.**

.....

J. K. SERGON

JUDGE

