



Taib v Nanji (Sued as the legal representative of the Estate of Shamsudin Gulamhusein Nanji (Deceased) & another (Commercial Case E006 of 2023) [2023] KEHC 26122 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E006 OF 2023
RE ABURILI, J
NOVEMBER 28, 2023**

BETWEEN

TAIB ALI TAIB PLAINTIFF

AND

FARRAH NANJI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHAMSUDIN GULAMHUSEIN NANJI (DECEASED) 1ST DEFENDANT

SHABIN NANJI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHAMSUDIN GULAMHUSEIN NANJI (DECEASED) 2ND DEFENDANT

RULING

1. The plaintiff moved this court vide an application dated 26th April 2023 and filed on the 3rd of May 2023 in which he sought the following orders:
 - i. That in view of the urgency of the matter and the fact that the object of granting the injunction will be defeated by any delay, this Honourable Court do, in the first instance, dispense with the service of this application on the Respondents and hear the matter ex-parte and make interim orders in terms of the prayers below in conformity with the provisions of Order 40 Rule 4(1) of the *Civil Procedure Rules*, 2010.
 - ii. Pending the hearing and determination of this Application and this suit, this Honorable Court be pleased to declare Taib Ali Taib Advocates, on record for the Plaintiff herein, as entitled to a charge or lien over the Late Shamsudin Gulamhusein's share of all that property known as Title No. Kisumu/Kogony/2642 -Kisumu Beach Resort Hotel to cover the entire fees due to them in the sum of Kshs. 55,839,294.66 plus all disbursements, taxes, costs and interest thereon and any other decretal amounts and or sums found due to the Plaintiff from the Defendants.



- iii. In the alternative and completely without prejudice to the above, Pending the hearing and determination of this Application and this suit, the Honorable Court be pleased to order and declare that Taib Ali Taib Advocates, on record for the Defendant, in Kisumu HCC No 261 of 2013 *Nizar Hasham Virani v Shamsudin Gulamhusein Nanji* is entitled to a charge or lien over the Late Shamsudin Gulamhusein's share of all that property known as Title No. Kisumu/Kogony/2642 -Kisumu Beach Resort Hotel to cover the entire fees due to the and at the very least to cover the Minimum Agreed Fees due to them in the sum of Kshs. 22,500,000 (Twenty-Two Million Five Hundred Thousand) plus VAT thereon in the sum of Kshs 3,600,000.00 making a total of Kshs. 26,100,000.00 on and over any Decretal Amounts and or sums found due to the Defendant as outstanding legal fees and disbursement pending filing, hearing and determination of the Plaintiff's Advocate Client itemized Bill of Costs for taxation by the Court on a priority basis.
 - iv. That the Chief Registrar and or the Registrar responsible do ensure the registration of these orders in the Registry and as against the Title to Kisumu/Kogony/2642 and to ensure that the same is not disposed of until after the interests of the Plaintiff and the Orders of this Court have been satisfied.
 - v. That the costs of this application be provided for.
2. The application was expressed to be brought under sections 3A, 63(c) and (e) of the *Civil Procedure Act*, Section 52 of the *Advocates Act*, Rules 4 and 5 of the *Advocates Remuneration Order* and was anchored on the grounds therein as well as the supporting affidavit of Taib Ali Taib Bajaber.
 3. The plaintiff's case is that he met the Deceased, accompanied by one Iqbal Kanji, on the 6th June 2014 which meeting culminated in an agreement on the terms of engagement which terms were reduced into a Retainer Agreement dated 6th June 2014 wherein the plaintiff was to represent the deceased in Kisumu HCC No. 261 of 2013 *Nizar Hashamvirani v Shamsudin Gulambusein Nanji*, a case wherein the deceased was staking claim over the suit property, Kisumu/Kogony/2642-Kisumu Beach Resort Hotel.
 4. The plaintiff contended that even if no Retainer Agreement had been entered into between the parties, the Deceased would still have been under an obligation to pay the Plaintiff based on the Advocates Remuneration Order as the Retainer Agreement only set out the alternative agreement of the parties on the actual fees payable and the terms and conditions thereof and as such, that the deceased and/or his estate owed the plaintiff payment for his fees.
 5. The plaintiff contended that he had a cordial Advocate-Client relationship with the deceased and managed to secure the deceased's interest vide a judgement of the court delivered by Justice S.M. Kibunja on 24th October 2017 but that the nature of the judgment required the parties to undertake post-Judgment negotiations to agree on the preferred portions and valuation of the Suit Property.
 6. The plaintiff averred that on the verge of recording a Consent, the deceased passed away on 16th June, 2019 in Canada and subsequently the 1st Defendant informed him that they were the legal representatives of the Estate of the Deceased by virtue of a Written Will of the Deceased made on 7th February 2015 and so the plaintiff filed the requisite applications to substitute the Defendants in the Subject suit to secure their interests and eventually, a Consent dated 5th March 2021, that would finally settle the Subject Suit was entered into between the Defendants and the Plaintiff in the Subject Suit.
 7. It was the plaintiff's case that he continued representing the defendants and took all the necessary steps towards the completion of the sub-division of the Suit Property and further that subsequently, the



defendants asked him to prepare a draft Fee Note for discussion and/or settlement pursuant to terms of the Retainer Agreement.

8. The plaintiff averred that by an email dated 7th June 2021, the Plaintiff issued a Fee Note Assessment of even date detailing the legal fees due inclusive of VAT and disbursements which indicated the total fees due being Kshs. 55,839,294.66 but that despite writing several emails thereafter, he never heard from the Defendants again.
9. It is the plaintiff's case that he is entitled to a lien over the property Kisumu/Kogony/2642-Kisumu Beach Resort Hotel for recovery of his fees and that unless this Honourable Court intervenes and issues the Orders sought, then he stands to suffer irreparably.
10. The plaintiff's case was further supported by one Iqbal Nanji who swore an affidavit in which he deposed that he was present when the plaintiff entered into the retainer agreement dated 6th June 2014 with the deceased.
11. In response, the 1st defendant swore a replying affidavit dated 12th June 2023 in which she deposed that they were the deceased's daughters and that despite being aware of the deceased's court case in Kisumu, they were not aware that the deceased had entered into the retainer agreement with the plaintiff herein, which agreement they termed as strange, onerous and patently exploitative.
12. The 1st defendant further denied informing the plaintiff that they were the representatives of the deceased's estate and went on to state on oath that following the deceased's passing, they informed the plaintiff so that they could take the steps needed to safeguard the deceased's interest in the pending court case.
13. It was deposed that on advice from the Plaintiff, they had petitioned the Supreme Court of British Columbia Canada for grant of probate over the deceased's estate but as it was taking long, the plaintiff advised them to obtain limited grant for purposes of taking up the deceased's position in the case at Kisumu so that they could implement the judgement of the court and that they successfully obtained Limited Grant of Letter Ad Litem dated 14th August 2020.
14. The 1st defendant deposed that as holders of a grant ad litem, the said grant was only limited for purposes of defending the suit and not for any other purposes and as such, did not place the defendants in a position to be sued on behalf of the deceased's estate thus the instant application and suit was wholly misconceived.
15. The plaintiff subsequently filed a supplementary affidavit sworn on 17th September 2023 in a rejoinder to the replying affidavit deposed by the 1st defendant. The plaintiff denied the allegations of any form of fraud, forgery, misconduct, blackmail, intimidation or any other underhanded or unlawful action as relates to his engagement in entering into the Retainer Agreement dated 6th June 2014 with the deceased.
16. The plaintiff further deposed that it was self-evident that the 1st respondent was not possessed of any first-hand information nor any personal knowledge of the facts to be in any position to aver and or produce any facts of evidence capable of meeting the standards laid down by the law.
17. It was the plaintiff's deposition that there was no legal requirement that an adult of sound mind would need to consult or inform anyone either before or after entering into an agreement which he entered into of his own volition to recover his property.
18. The plaintiff further deposed that the provisions of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya are that the representatives of an Estate of a Deceased are the Executors of the Estate and



that an Executor's appointment becomes effective upon the death of the maker of the will pursuant to Section 80(1) of the *Law of Succession Act*.

19. The plaintiff deposed that that at no instance did the Respondents send any query on any debts or liabilities or any such schedule outstanding as against the Deceased either from his firm and/or from any other party nor did they ask for any assessment of any possible liability that may arise out of the proceedings in court in the event the same was decided by the court against the Deceased.
20. The parties filed submissions to canvass the application.

The Plaintiff's Submissions

21. It was submitted that under Section 45 (2) of the *Advocates Act*, a challenge as regards a retainer agreement being unconscionable or exorbitant needed to have been made in the form prescribed therein within one year of the making of the agreement or within three months after demand for payment under the agreement by rendering a fee note and thus the Retainer Agreement having been made on 6th June 2014 and the fee note rendered by the Applicant on 7th June 2022, the challenge on the aforementioned retainer agreement was time barred and incompetent for want of form pursuant to the provisions of the *Advocates Act*.
22. The plaintiff submitted that having demonstrated that the engagement of the Plaintiff firm by the Deceased was unopposed and the fact that fees were owed was unopposed, there was precedent for grant of the Orders sought by the Plaintiff for preservation of the Plaintiff's claim even if the validity of the Retainer Agreement was in question.
23. It was submitted that that there will be no prejudice suffered by the Defendants since they are under the misapprehension that they cannot deal with the Suit Property in any manner whatsoever regardless of the provisions of Section 80(1) of the *Law of Succession Act* as read with Section 79 which vests the Suit Property in the Defendants as the personal representatives of the Deceased within the meaning of Section 2 of the *Law of Succession Act*.
24. The plaintiff submitted that the balance of convenience and the interests of justice tilt in favour of the Court exercising its discretion to preserve the suit Property as against any interference from any party pending the determination of this suit which orders would benefit all parties against claims or interference with the Suit Property.

The Defendants' Submissions

25. It was submitted that the defendants do not dispute that the plaintiff acted for the deceased or that he was entitled to fees for service rendered to the deceased.
26. It was submitted that the instant application was a non-starter as the defendants had been sued in their capacities as legal representatives of the deceased's estate whereas the grant of letters of administration ad litem issued to them was only for the purposes of taking up the deceased's place in Kisumu ELC Case No. 261 of 2013 and did not place the defendants in a place where they can be sued on behalf of the estate of the deceased.
27. The defendants further submitted that under Section 77 of the *Law of Succession Act*, a foreign grant would only take effect and become usable locally if re-sealed upon an application to the High Court which the plaintiff failed to pursue.



28. On the Retainer Agreement, it was submitted that the one presented by the plaintiff did not qualify as an agreement on professional fees as between an advocate and his client as the same was incomplete as it did not fix a fee that could then be sued for in case of breach.
29. It was submitted that the instant application should have been made in Kisumu ELC Case No. 261 of 2013 in line with the provisions of Section 52 of the *Advocates Act* which the application was expressed to have been brought under.
30. The defendants submitted that the property in respect of which the plaintiff sought orders was registered in the names of the deceased and one Nizar Virani who was the plaintiff in Kisumu ELC Case No. 261 of 2013 and who ought to have been enjoined in the instant suit due to his interest over the suit property.
31. The defendants submitted that there was no ground for asking the court to make orders directed at the property as there was no suggestion that the defendants were unable to pay or are unwilling to pay the plaintiff's fees.

Analysis & Determination

32. I have considered the pleadings herein by both parties. In my view, a preliminary issue has been raised by the defendants albeit in the submissions and it is my view that the court has to handle this first as the same has the ability to determine the instant application and the suit.
33. It is the defendants' contention that they have been sued in their capacities as legal representatives of the deceased's estate whereas the grant of letters of administration ad litem issued to them was only for the purposes of taking up the deceased's place in Kisumu ELC Case No. 261 of 2013.
34. In a rejoinder to this, the plaintiff argued that Section 80(1) of the *Law of Succession Act* as read with Section 79 vests the Suit Property in the Defendants as the personal representatives of the Deceased within the meaning of Section 2 of the *Law of Succession Act* and as such, the defendants were well enjoined in the present suit.
35. It is trite law that that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate. In the case of *Kothari vs Qureshi & Another* [1967] EA 564, this distinction was made thus:

“It is elementary law that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate. An executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely authentication of the will in such cases...The position of an administrator is different; his rights date from the grant of letters of administration and any prior acts of administration of the estate can only be validated by the doctrine of relation back from the grant...”
36. In the instant case, the defendants were named by the deceased as the executors of his will in a will made on the 7th February 2015. The aforementioned will was made in Canada. Accordingly, then right to act as representative of the deceased's estate dated from the death of the deceased which was on the 16th June 2019.
37. The defendants further went on to petition the Supreme Court of British Columbia in Canada for grant of probate over the deceased's estate but it was not clear from the record whether the same had already been issued by the Court.



38. It is also worth noting the defendants obtained grant of letters of administration ad litem on the 14th August 2021, issued to them, limited for the purposes of taking up the deceased's place in Kisumu ELC Case No. 261 of 2013.
39. It would follow then that for the defendants to be deemed to be legal representatives of the deceased's estate, one of two things had to happen to wit; the defendants would have to petition for letters of administration over the deceased's estate here in Kenya since the will was made in Canada, or in the alternative wait for the Court in Canada to issue grant of probate over the deceased's estate then have the same resealed in Kenya as provided under Section 77 of the *Law of Succession Act*.
40. The law on sealing of foreign grants is provided for under section 77 of the *Law of Succession Act* which states inter alia that a grant of probate, or letters of administration issued by a court in any commonwealth country, "may" upon being produced to, and a copy thereof deposited with the High Court be sealed with the seal of that court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.
41. Accordingly, the defendants cannot be deemed to be representatives of the deceased's estate. They have no locus standi to be sued on behalf of the deceased's estate as they lack the capacity to sue and be sued in any other proceedings save for Kisumu ELC Case No. 261 of 2013 where they had obtained limited grant ad litem.
42. This court further observes that the plaintiff is claiming for his legal fees in respect of ELC 261 of 2013. The question is, why did he not file this suit before the Environment and Land Court and instead filed it in the High Court? What that means is that this court will be called upon to call for the ELC casefile No.261 of 2013 for perusal to determine if indeed the plaintiff represented the deceased in the matter therein since the retainer agreement or even in its absence, the client advocate client relationship was created in the ELC matter. This court's jurisdiction is ousted in that regard by Article 162(b) as read with Article 165(5)(b) of the *Constitution*.
43. The plaintiff is however not without any relief as there is a clear path set by the *Advocates Act* on how to recover fees from a client by initiating taxation proceedings against the offending client but the same must be done within the same court wherein the legal representation was given.
44. Even the retainer agreement under section 45 of the *Advocates Act* can be enforced before the same court wherein the advocate represented the client in the suit. The court in this case is the Environment and Land Court and not before this Court.
45. The upshot of the above is that the instant application and the whole suit are incompetently filed and therefore the suit and application are hereby struck out with no orders as to costs.
46. I so order and close this file.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

