



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

FAMILY DIVISION
SUCCESSION CAUSE NO. 264 OF 1994

IN THE MATTER OF THE ESTATE OF CHANDRAKANT SHAMJIBHAI GHEEWALA (DECEASED)

MUKTA CHANDRAKANT GHEEWALA.....1ST APPLICANT

MAMTA CHANDRAKANT SHAMJIBHAI.....2ND APPLICANT

VERSUS

ELESHKUMAR CHANDRAKANT GHEEWALA.....RESPONDENT

EVANGELICAL MISSION TO AFRICA.....INTERESTED PARTY

RULING

1. The beneficiaries of the estate of the deceased Chandrakant Shamjibhai Gheewala who died testate on 26th February 1984 are the executrix (widow) Mukta Chandrakant Gheewala (1st applicant), Eleshkumar Chandrakant Gheewala (respondent), Shrikesh Chandrakant Gheewala and Mamta Chandrakant Gheewala (2nd applicant). The 1st applicant was on 13th November 2006 issued a grant of probate. Summons for the confirmation of the grant was filed on 25th March 2021. The grant has not been confirmed.

2. On 5th February 2019 the court referred the dispute to the Court Annexed Mediation. On 31st July 2019 the parties signed a Mediation Settlement Agreement which was filed in Court on 2nd August 2019. The terms of the Agreement were as follows:-

“MLM/MED/337/2019

Arising out of Case No. 284 of 1994

CASE TYPE: PROBATE & ADMINISTRATION

MEDIATION SETTLEMENT AGREEMENT

The parties having participated in mediation, agree that the estate assets are distributed as follows:-

Elesh Gheewala

(i) Centre Park Plaza Limited

(ii) Nyaku Limited House No. 49 and Plot 47

(iii) Insurance proceeds at Phoenix Insurance Ltd

(iv) 35% shareholding Cassava Plantation Ltd

(v) 26% shareholding in Rural Housing Estate Ltd

(vi) Within 12 months from 31st July 2019, Elesh will pay 200,000 USD to Mamta Gheewala and 200,000 USD to Shrikesh Gheewala

Shrikesh Gheewala

- i) Unique Holdings Ltd**
- ii) 37.75% Rural Housing Estate Ltd**
- iii) 33% of Cassava Plantation Ltd**
- iv) Nyaku Ltd Empress Office Suite**
- v) House No. 51 in Kyuna**

Mamta Gheewala

- (i) House No. 56 in Kyuna**
- (ii) Associated Securities Limited**
- (iii) 36.25% of Rural Housing Estates**
- (iv) 32% of Cassava Plantation Ltd**
- (v) Housing Schemes Ltd**

(vi) Within 12 months from 31st July 2019, Mamta will pay 100,000 USD to Shrikesh Mamta Gheewala has voluntarily surrendered her 25% share of the estate which shall now be distributed at the ratio of 10% to Elesh Gheewala, 8% to Shrikesh Gheewala and 7% to Mmata Gheewala.

The two sons, Elesh Gheewala and Shrikesh Gheewala will give to their mother a monthly stipend of 25,000 Kenya Shillings each. They also share all her other expenses, including but not limited to health, insurance and travel.

All pending court proceedings relating to this estate in Kenya and Uganda, between the parties and all related Companies are hereby withdrawn.

Whereto the parties hereto set forth their hand freely and willingly, this 31st day of July 2019.

Elesh Gheewala (Signed)

Shrikesh Gheewala (Signed)

Mamta Gheewala (Signed)

Mukta Gheewala (Signed)

In the presence of:-

Roseline Odede Advocate (Signed)

Kimano Kuria Advocate (Signed)

Steve Kimathi Advocate (Signed)

P.M. Kamaara Mediator - (Signed)”

3. In the notice of motion dated 19th November 2021 by the applicants claimed that the respondent had sold House No. LR No. 209/8349 to the interested party Evangelical Mission to Africa and the property had now been registered as LR No. 209/8349/6 (“MCGI”). They claimed that the property belonged to Nyaku Limited which was the estate property. They further stated that the sale before the confirmation of the grant was illegal and amounted to intermeddling, and that the respondent had not accounted for the proceeds of the sale.

4. Secondly, the respondent had instructed Akenga Kimutai & Associates Advocates to sell 28 sub plots of land registered in the name of Rural Housing Estates Ltd which was part of the assets of the deceased. The instructions were contained in the letter dated 24th August 2021 (“MCGI”). It was alleged that this amounted to intermeddling with the estate of the deceased.

5. The third complaint was that the respondent had refused to grant the applicants access to Empress Office Suites to facilitate the letting of the same to raise funds to pay the decretal sum of Kshs.2,157,438/= in **Nairobi HCCC No. 7552 of 2016** which debt was in respect of

unpaid service charge for the said offices.

6. The fourth complaint was that the respondent had instructed Tysons Limited to advertise for sale House No. 57 in Paradise Valley registered in the name of Nyaku Limited for Kshs.100 million. Copies of the advert and title deed were annexed. The applicants feared that the sale could be effected if the respondent was not stopped by an injunction pending confirmation.

7. The seventh complaint was that the respondent was in possession of the original title documents in respect of 59 properties in the name of Rural Housing Estates Limited which was estate property, two named plots in the name of Associated Securities Limited which was estate property, three named properties which were in the name of Nyaku Limited which was estate property, a named property in the name of Housing Scheme Limited which was estate property, a named property in the name of Centre Park Plaza Limited which was estate property and a named property in the name of Cassava Plantations Limited which was estate property. The applicants sought that pending the hearing and determination of the application for confirmation the respondent be restrained from selling.

8. The applicants other issue was that the estate and the companies above had named debts, which were particularised, and so they sought authority of the court to sell 30 sub-plots and 18 commercial plots, all of which were named, to raise a total of Kshs.32,400,000/= to pay the debts, otherwise the estate would suffer loss, damage and wastage arising out of unnecessary litigation.

9. The application was supported by the 2nd applicant and by Shrikesh Chandrakant.

10. The respondent filed a replying affidavit and notice of preliminary objection dated 3rd December 2021 whose grounds were as follows:-

“1. The honourable court, being a probate court, has no jurisdiction to entertain the application dated 19th November 2021 in its entirety as all the properties mentioned in the said application are owned by limited liability companies to wit, Nyaku Limited, Rural Housing Estates Ltd, Associated Securities Ltd, Centre Park Plaza Limited, Cassava Plantations Limited and not the estate of the deceased.

2. The jurisdiction of the probate court can only be invoked in the distribution of shares of a deceased person in a limited liability company and not in the distribution/disposal of assets owned by a limited liability company.

3. The probate court has no jurisdiction to intervene in issues related to the management of limited liability companies whatsoever.

4. A limited liability company is separate and distinct from the person of the deceased person and the company is free to transact whether or not there is a deceased shareholder.

5. The application dated 19th November 2021 is an abuse of the process of this Honourable Court.

6. The application dated 19th November 2021 is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even *suo motu*.”

11. In the replying affidavit, the respondent reiterated what was contained in the grounds of objection but also stated that the 2nd applicant and Shrikesh Chandrakant Gheewala had transferred USD 550,000 and USD 250,000 from the account of Associated Securities Limited to the account of the 2nd applicant, and that Shrikesh Chandrakant Gheewala had instructed Centenary Bank to transfer USD 200,000 funds of Associated Securities Limited to Granton Consulting Limited and that these had been done despite his protests. His case was that the application had not been brought by people with clean hands.

12. The applicants opposed the preliminary objection through their joint affidavit dated 11th February 2022. They stated that despite the properties being held in the names of the companies they were still part of the estate of the deceased. Further, that all the parties had when signing the Mediation Settlement Agreement agreed that the companies formed part of the estate of the deceased.

13. Shrikesh Chandrakant Gheewala swore that the deceased was the majority shareholder in the companies subject of the Mediation Settlement Agreement, but that upon his death the respondent had illegally allocated shares in the companies to companies associated with himself and in so doing intermeddled with the estate of the deceased. Regarding the allegation that the applicants had transacted in the funds of the estate, he stated that the transactions had been sanctioned by the High Court of Uganda in **Comm. Misc. Appl. No. 362 of 2020**.

14. On their part, the interested party's director responded that they were duly registered as the proprietor of LR No. 209/8349 being bonafide purchaser of the property whose ownership could not be challenged.

15. Written submissions were filed by the respondent's counsel on the application and the objection. I have considered them.

16. My considered view is that, now that the application for the confirmation of the grant has been filed by the 1st applicant, the enduring, and most appropriate action should be to prioritise, hear and determine the application so that the estate of the deceased is finally distributed. It is during the hearing of the application that the court will comprehensively determine the questions being raised in the preliminary objection against the Mediation Settlement Agreement terms, and deal with the question whether the respondent, in raising the objection, is seeking, without an appropriate application, to resile from the Agreement.

17. For now, and given the foregoing facts, the applicants will not be allowed to sell any of the indicated plots, and an order is issued

preserving the properties in prayer 7(1), (b), (c), (d), (e) and (f), and the property sold to the interested party, until the application for the confirmation of the grant has been heard and determined.

18. In particular, the property sold to, and now registered in the name of, the interested party is being preserved because it is during the application for the confirmation of the grant the court will deal with, and determine the question, whether the respondent had authority to sell the same in view of the Mediation Settlement Agreement.

19. I ask the parties to take a hearing date of the application today. Hearing shall be by oral evidence.

20. Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2022.

A.O. MUCHELULE

JUDGE