



Jai & another (Suing as the Executors of the Estate of the late Bhanoo Shashikant Jai) v Waiyaki Way Shopping Centre Limited (Environment & Land Case E075 of 2021) [2023] KEELC 17573 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E075 OF 2021**

MD MWANGI, J

MAY 23, 2023

BETWEEN

PARESH SHASHIKANT JAI 1ST PLAINTIFF

TREKHAAL DESAI 2ND PLAINTIFF

SUING AS THE EXECUTORS OF THE ESTATE OF THE LATE BHANOO SHASHIKANT JAI

AND

WAIYAKI WAY SHOPPING CENTRE LIMITED DEFENDANT

RULING

(In respect of the defendant’s notice of motion dated February 2, 2023 seeking to strike out the amended plaint)

Background

1. This case was filed by one Bhanoo Shashikant Jai in February 2021. The said Plaintiff passed on, in the month of December 2021 and was subsequently substituted with Paresh Shashikant Jai and Trekhaal Shamir Desai, the Legal Representatives of his estate who were the executors of her will. The plaint was duly amended upon the substitution. The two Plaintiffs are now described as, “adults of sound mind duly appointed as the executors of the estate of the late Bhanoo Shashikant Jai through a will dated March 29, 2021.”
2. The defendant filed the application before court seeking to strike out the amended plaint on the basis that the executors lack the locus standi to amend and maintain the suit since they have not obtained a grant to qualify them as ‘the Legal representatives’ in the estate of Bhanoo Shashikant Jai.



3. In the supporting affidavit sworn by Stephen Mwanza Gachie, the defendant avers that the plaintiffs have not obtained a grant of probate in accordance with section 51 of the Law of Succession Act, and rule 7 of the Probate and Administration Rules before purporting to amend the plaint. He therefore asserts that they lack the locus standi to do so.
4. The reply by the Plaintiffs was by way of a replying affidavit sworn by Paresh Shashikant Jai who deposes that he is one of the executors of the estate of the deceased in accordance with the will executed on March 29, 2021. The executors filed an application for substitution which was allowed by the court way back on June 27, 2022. The Defendant did not appeal from the decision of the court allowing the substitution.
5. Relying on advice from his advocates, the deponent avers that the Defendant's application is based on a misapprehension of the law since it is settled law that the office of executor operates from the time the testator dies without the need for a grant of probate. The deponent prays that the application be dismissed with costs.

Court's directions

6. The court's directions were that the Defendant's application be canvassed by way of written submissions. Both parties complied and the court has had the opportunity to read through the submissions with the cited authorities by the parties to augment their respective positions.

Issues for Determination

7. Considering the Defendant's application and the response by the Plaintiffs as well as the submissions filed by the parties, the court is of the view that the only issue for determination is whether executors can file or take over a suit on behalf of the estate of a deceased person before grant of probate.

Analysis and determination.

8. In its submissions, the defendant insisted that the Plaintiffs have no locus standi to substitute and maintain the present suit on behalf of the estate of the deceased Plaintiff. The Defendant termed the plaintiffs as strangers to the suit as the so called will upon which they based their application for substitution has not been propounded.
9. Relying on the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* (Migori Civil Appeal No. 119/2015), the Defendant submitted that the issue of Locus is such a serious one especially when it involves the estate of a deceased person. It reiterated that doubts have been cast as to the validity of the purported will especially on the aspect of execution and attestation and this would dictate that it be propounded before any actions are undertaken over it. The Defendant opined that the purported will was invalid for the reason that it was purportedly executed by the deceased before the same advocate who drew it.
10. The Plaintiffs on their part asserted that the Defendant's application is based on a misapprehension of the law of succession in particular. The Plaintiffs cited several authorities to support their submissions.
11. In '*Tristan & Coote's Probate Practice*, 29th Edition', Chapter 4 regarding the 'executor's title' the authors state that;

“An executor derives his title and authority from the will of the testator and not from any grant of probate. The property of the deceased, including any right of action, vests in him on the testator's death, and he can institute an action, as executor, before he proves the will.”



12. The Plaintiffs additionally referred to various cases in support of their position; *Kothari v Qureshi & Another* [1967] E.A 564; *Ganje Glass Mart Ltd & 2 others v First American Bank Ltd* [2007] eKLR; *Stephen Musembi Nguu (deceased) & 2 others v David Mutiso Nthenge* [2016] eKLR, & *Nicholas William Bently-Buckle & Another (suing in their capacity as executors of the estate of Anthony William Bently-Buckle (deceased) v Custody Registrars Services Ltd* [2016] eKLR.
13. I have taken the liberty to look at the provisions of the law of Succession Act, Cap 160, Laws of Kenya. At section 82 thereof, the said Act provides that ‘personal representatives’ shall have the power to enforce by suit, or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death.
14. The Act at section 3 defines a ‘personal representative’ to mean, “the executor or administrator, as the case may be of a deceased person.”
15. Going by the provisions of the law of Succession Act cited above, and the authorities cited by the Plaintiffs, it is clear that an executor(s) has the legal capacity to institute a suit or take over a suit by a deceased person, as in this case.
16. I have also had occasion to look at the holdings in the case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Another* [1987] eKLR and *Rajesh Pravijan v Sailesh Pravijan Chundasama* [2014] eKLR, both of which support the position that an executor’s title springs from the will not from the grant of probate. Probate is merely for purposes of authentication of the will.
17. Going by the above findings, the court holds that the defendant’s application lacks merit and is hereby dismissed with costs to the plaintiffs.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ndung’u for the Plaintiffs

Mr. Omondi for the Defendant

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

