



REPUBLIC OF KENYA



**In re Estate of Sdha Rajnikant Shah (Succession Cause 15 of 2017)
[2022] KEHC 13133 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 15 OF 2017**

JN KAMAU, J

SEPTEMBER 26, 2022

IN THE MATTER OF THE ESTATE OF SDHA RAJNIKANT SHAH

BETWEEN

**RONAL RAJ SHAH 1ST EXECUTOR
ASHOK KHETSHI SHAH 2ND EXECUTOR
EXECUTORS OF THE ESTATE OF SUDHA RAJNIKANRT SHAH (DECEASED)**

AND

**PRASHANT RAJNIKANT SHAH 1ST CAVEATOR
SOANL RAJNIKANT SHAH 2ND CAVEATOR**

RULING

Introduction

1. On January 18, 2021, this court directed that the caveators' notice of motion application dated July 15, 2021 would be heard before the 1st petitioner's notice of motion application dated December 10, 2020 and filed on December 11, 2020 and the 2nd petitioner's notice of motion application dated May 15, 2020.
2. On February 4, 2021, this court further directed that the respective parties' affidavits would be deemed to be their evidence during the hearing of the said caveators' notice of motion application. Upon the request of the parties, on September 20, 2021, this court directed that the said caveators' notice of motion application would proceed by way of viva voce evidence on November 15, 2021 and November 22, 2021 as had also been directed by Cherere J on October 22, 2020.
3. When the matter came up on November 15, 2021, all the parties indicated that they were ready to proceed with the hearing. However, before the hearing could commence, the respondent indicated that



he had filed a notice of preliminary objection on even date which ought to be heard before the hearing could proceed. To save time, the court directed that parties file witness statements and list and bundle of documents in place of the replying affidavits which the respondent had wanted certain averments expunged.

4. On December 1, 2021, the respondent filed another notice of preliminary objection of even date raising the same issues as the notice of preliminary objection that was dated November 14, 2020 and filed on November 15, 2021. He also filed another notice of preliminary objection dated and filed on December 1, 2021 in which he stated that the 1st caveator had introduced extraneous matters instead of converting verbatim the contents of his affidavit in support of the caveators' notice of motion application.
5. By December 6, 2021, all parties had filed their witness statements. However, the respondent informed the court that he still wished to proceed with his preliminary objection, a position that the other parties were not opposed to.
6. The court therefore directed the parties to file their respective written submissions in respect of the respondent's notice of preliminary objection that was dated and filed December 1, 2021 which was to the effect that paragraphs (6), (7) and (8) of the witness statement of Hiamanshu Ratilal Shah dated November 30, 2021 be struck out and deemed to be expunged from the court records for reasons that their contents offended the rules of evidence against hearsay and violated the principals of construction of wills and the respondent's notice of preliminary objection also dated and filed on December 1, 2021 which was to the effect that the 1st caveator's witness statement that was dated November 29, 2021 was filed in complete disregard of the court's directions of November 15, 2021 and that it purported to introduce at the hearing viva voce matters that were completely extraneous.
7. The respondent filed two (2) sets of written submissions dated January 10, 2022 and filed on January 20, 2022. one (1) set had the list and bundle of documents. His further written submissions were dated and filed on March 10, 2022. The caveators also filed two (2) sets of submissions. The first set of written submissions were dated January 25, 2022 and filed on January 26, 2022 while the second set of written submission were dated February 22, 2022 and filed on February 23, 2022. The 1st and 2nd petitioners did not file any written submissions.
8. This ruling is based on the caveators' and respondent's written submissions which they relied upon in their entirety.

Legal analysis

9. The respondent argued that in paragraphs (6), (7) and (8) of the witness statement of Himanshu Ratilal Shah dated November 29, 2021, the caveators had purported to introduce intrinsic evidence in the form of recollections of an alleged private conversation he had with the testator (sic) to interpret the contents of her will in circumstances in which no party questioned the validity of the will or the capacity of the testator to make the same and hence, the court was duty bound to protect the presumption of due execution which could only be rebutted upon sufficient evidence being presented by the caveators.
10. He argued that Himanshu Ratilal Shah had purported to provide clarification of what the testator's intentions were by stating that 'saving account' meant or included fixed deposit accounts yet there was no inconsistency in the testator's use of the two (2) terms appearing in clause (4) of the will.
11. He submitted that there was nothing that was stated by the caveators that the testator had made the will on the wrong application of the law or lacked capacity to make the will. In this regard, he placed



reliance on the case of *Perrin vs Morgan [1943] AC 399* as was applied by Nyakundi J in the case of [*Re Estate of Lusila Wairu Waweru \[2020\] eKLR*](#).

12. He added that although there was a modern intentional and purposive approach to construction of wills that permitted the admissibility of extrinsic evidence to give meaningless provision as was held by Musyoka J In the matter of the [*Estate of Salome Mukami Kariuki \[2013\] eKLR*](#), there was nothing meaningless in the respective terms 'savings account' and 'fixed deposit' which words must depend on the immediate context and general scheme of the will and not on the caveator's conjectural hypothesis and testator's intention.
13. He was emphatic that the technical sense of the terms 'savings account' and 'fixed deposit' must be presumed to mean exactly that as there was no contrary meaning derived from the context and they must be assigned their ordinary and grammatical sense.
14. He further submitted that in their witness statements, the 1st caveator and Himanshu Ratilal Shah altered the contents of their respective replying affidavits. It was his submission that allowing the caveators to proceed with the said witness statements and replying affidavits would be greatly prejudicial to him. He averred that the proceedings would be tainted with illegality, completely eroding his constitutional right to fair hearing.
15. It was his contention that the caveators would be permitted to escape the inevitable failure of their application that was predicated on falsehoods and material non-disclosure in the original material that was presented to court that they now sought to escape from.
16. He thus urged this court to strike out and expunge paragraphs (6), (7) and (8) of the affidavit and witness statement of Himanshu Ratilal Shah together with the witness statement of the 1st caveator due to the material change in their witness statements.
17. On their part, the caveators submitted that the respondent had abandoned his preliminary objection which was that the witness statement of Himanshu Ratilal Shah offended the rules of evidence against hearsay and violated the principles of construction of wills as he had submitted that there was material change to his witness statement.
18. They added that the respondent had initially asked the court to expunge paragraphs (6), (7) and (8) but that in his submissions, he had now referred to paragraphs (5), (7) and (8). They were categorical that a party ought not to be allowed to change his case at the submissions stage. In this regard, they placed reliance on the case of [*Agnes Nduume Kioko vs Alexander Njue \[2019\] eKLR*](#) where Odunga J stated that submissions were not evidence on which a cases was decided.
19. They averred that the respondent appeared to have taken a position that the witness statements were supposed to be like the affidavits word for word. They relied on article 159 of the [*Constitution*](#) of Kenya and rule 73 of the [*Probate and Administration Rules*](#) which donate power to the court to doing justice. They contended that locking out their evidence was to do injustice to them.
20. They further submitted that the respondent was not at the meeting when Himanshu Ratilal Shah was with the deceased and he understood the contents of the will and the reasoning behind it. They averred that the respondent was capitalising on what looked like an ambiguity to disinherit those the deceased had bequeathed her property.
21. They pointed out that the issue of whether the 'savings account' which the deceased referred to in clause 4 of her will were held at Prime Bank Limited Kisumu Branch were the fixed deposit accounts that were held at the bank at the time of her demise were in the ruling of October 22, 2020 said to have been very contentious issues which could only be tested by way of oral testimony.



22. They further asserted that Himanshu Ratilal Shah was only coming to adduce evidence on his role that led to the writing of the will whose validity and capacity of the deceased to write were not contested. In this respect, they placed reliance on the case of *In the matter of the Estate of Salome Mukami Kariuki (Supra)* as clause 4 was a meaningless provision.
23. They emphasised that the reason the court ordered a trial was because the meanings of the words in the will were ambiguous. It was their further submission that in the event the respondent suffered any prejudice, the same could be cured during cross-examination. They urged this court to dismiss the preliminary objection as the respondent wanted to win on technicalities by throwing out evidence.
24. In his Further written submissions, the respondent argued that the executors had purported to focus only on Prime Bank Limited Kisumu without pursuing enquiries if there were other banks because clause 4.1 had referred to savings account at Prime Bank Limited Kisumu and any other bank and hence the clause was not ambiguous.
25. He clarified that the preliminary objections were raised against the statements of the 1st caveator and Himanshu Ratilal Shah which were repeated in the sworn affidavits.
26. This court carefully analysed the respective parties' written submissions and noted that the same delved into matters which would ordinarily be best heard and determined during trial. In that regard, this court did not deem it necessary to reproduce the submissions regarding the construction of wills as the same were not relevant at this stage.
27. Indeed, the concern of this ruling was whether or not this court ought to strike out paragraphs (6), (7) and (8) of the witness statement of Himanshu Ratilal Shah and the witness statement of the 1st caveator which purported to introduce extraneous matters to the caveators' notice of motion application.
28. In his witness statement, Himanshu Ratilal Shah stated as follows:-
 7. The deceased also shared her concerns about her grandson Krish Jitendra Wadia and wanted to make provision from her property for his education.
 8. The deceased also informed me that she had substantial amount of money in several fixed deposits accounts in Prime Bank Kisumu Branch and it was her intention to have her two sons Prashant Shah, Shakunt Shah and her daughter Sonal Shah all share out the funds in her account.
 9. The deceased also informed me that she wanted to get my approval to be appointed to play a role in the disposal of her home in Kisumu, being Land Reference No Kisumu Municipality/ Block 12/75 in the event of her demise. She also wanted the future educational needs of her grandson named in Paragraph 6 foregoing to be provided out of the money she had in the fixed deposits in the bank.
29. It was evident that the assertions of Himanshu Ratilal Shah were a conversation he had with the deceased. In deciding the question of whether or not the said assertions offended the rules of evidence, the intentions and purpose of his assertions was immaterial.
30. Section 62 of the *Evidence Act* Cap 80 (Laws of Kenya) stipulates as follows:-

' All facts, except the contents of documents, may be proved by oral evidence.'
31. Further, section 63 of the *Evidence Act* provides that:-
 1. Oral evidence must in all cases be direct evidence.



2. For the purposes of subsection (1) of this section, 'direct evidence' means—
 - a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;
 - b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;
 - c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
 - d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:
32. Notably, hearsay evidence is when a witness purports to adduce direct evidence of another witness. It was apparent to this court that the averments of Himanshu Ratilal Shah were direct evidence as stipulated in section 63(1) of the [Evidence Act](#) and fell within the ambit of section 63(2)(b) of the [Evidence Act](#).
33. He purportedly heard the deceased tell her the words he set out in paragraphs (6), (7) and (8) of his witness statement. This court therefore found that the aforesaid paragraphs did not offend the rules of evidence against hearsay.
34. On the question of whether the said averments violated the principles of construction of wills, this court found and held that this was a matter of evidence to be determined during trial. The question of whether or not the assertions of Himanshu Ratilal Shah were accurate, truthful, verifiable and/or credible could only be ascertained during his cross-examination in line with section 154 of the [Evidence Act](#) that states that:-

' When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his accuracy, veracity or credibility'
35. This court also noted that the supplementary affidavit of Himanshu Ratilal Shah that was sworn on August 20, 2020 and filed on August 24, 2020 was generally similar to his witness statement that was dated November 29, 2021 and filed on November 30, 2021. The only material differences were in paragraph (7) and (8) of the witness statement which were initially merged in paragraph (7) of the said supplementary affidavit.
36. In addition, paragraph (7) of the witness statement introduced the words 'several fixed deposit accounts' and deleted the words 'in her bank account.'
37. Further, in his paragraph 10 of his witness statement, he stated that 'I left Kisumu for Nairobi on June 13, 2016' while in Paragraph (9) of his supplementary affidavit, the words were that 'I left Kisumu for Nairobi on June 14, 2016.'
38. Notably, a witness statement that has been filed remains a mere assertion. It only becomes sworn evidence after a witness takes oath and states that he or she wishes to rely the same as his or her evidence-in-chief. The averments in a witness statement that has not been admitted in court therefore ought not to be expunged.



39. Going further, once the evidence had been admitted in court, a court ought not to be expunge a witness' evidence unless the same had been adduced outside the rules of evidence such as when it was hearsay evidence. This court was therefore not persuaded that it should strike out the witness statement of Himanshu Ratilal Shah as he had intended to adduce direct oral evidence during trial which could be subjected to cross-examination with a view to the same being tested for consistency, ambiguity or contradictions.
40. Turning to the 1st caveator's witness statement that was dated November 29, 2021, it was clear that the formatting of affidavits and witness statements need not have been exact as the styles for setting out the averments in the two (2) documents and annexing documents thereto was materially different.
41. When the court directed parties to file witness statements, its intention was that the parties were to repeat the contents of their affidavits that had been filed for and against the caveators' notice of motion application in their witness statements verbatim, a position that was correctly pointed out by the respondent.
42. Having said so, it was evident that paragraphs (17)-(24) of the 1st respondent's witness statement were additions to the averments in his affidavit that he swore on July 15, 2022 in support of the said notice of motion application. Under normal circumstances, the respondent was expected to have responded to all averments in his supporting affidavit. Proceeding with the hearing on November 15, 2021 on the basis of the additional evidence by the 1st caveator would have been greatly prejudicial to the respondent as it would have amounted to an ambush.
43. This would have violated the respondent's right to fair hearing as enshrined in article 50(1) of the Constitution of Kenya, 2010 that provides that:-
- ' Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body'.
44. For the reason that the respondent would not have had an opportunity to fully respond to the caveators' case before the hearing, it was therefore necessary that the preliminary objections be heard and determined.
45. The above notwithstanding, this court also recognised that the sword cut both ways. The caveators also had the right to have their case heard. The fact that they stretched the evidence that they were to adduce during trial was not reason to strike out the averments in the 1st caveator's witness statement.
46. Notably, this court did not direct the parties to repeat the averments of their affidavits in the witness statements they were filing verbatim although that would have been most preferable and ideal as it would have not occasioned an adjournment on November 15, 2021 but instead would have expedited the hearing of this contentious matter.
47. This court was cognisant of the provisions of article 159(2)(d) of the Constitution of Kenya that mandates courts to administer justice without undue regard to procedural technicalities. Further, it was aware that rule 73 of the Probate and Administration Rules provides as follows:-
- ' Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'



48. Purely for purposes of meeting the ends of justice, this court took the view that it would be most prudent to give the respondent an opportunity to file a further witness statement in respect of paragraphs (17) – (24) of the 1st caveator’s witness statement.

Disposition

49. For the foregoing reasons, the upshot of this court’s decision was that the respondent’s preliminary objection that was dated and filed on December 1, 2021 in respect of the affidavit and written statement of Himanshu Ratilal Shah although was not merited and the same be and is hereby dismissed.

50. The respondent’s preliminary objection that was also dated and filed on December 1, 2021 in respect of the 1st caveator that was dated November 29, 2021 and filed on November 30, 2021 was merited and the same be and is hereby allowed with a rider that the respondent be and is hereby granted leave to file a supplementary witness statement in response to paragraphs (17)-(24) of the 1st caveator’s witness statement that was dated November 29, 2021 and filed on November 30, 2021 within thirty (30) days from the date of this ruling.

51. As the respondent only succeeded in the preliminary objection in respect of Himanshu Ratilal Shah, each party will bear its own costs of the two (2) respondent’s preliminary objections both dated and filed on December 1, 2021.

52. Matter to be mentioned on November 14, 2022 with a view to confirming compliance and/or for further orders and/or directions.

53. It is so ordered.

DATE AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER 2022

J KAMAU

JUDGE

