



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 258 OF 2018

IN THE MATTER OF THE ESTATE OF AMRITLAL VIRA SHAH

(ALSO KNOWN AS AMRITLAL VIRA NATHOO SHAH (DECEASED))

NIRMALABEN MANGALBHAI PATEL.....APPLICANT

VERSUS

MAYUKUMAR AMRITLAL SHAH.....1ST RESPONDENT/EXECUTOR

BHARATKUMAR AMRITLAL VIRA SHAH.....2ND RESPONDENT

RULING

1. On 31st October, 2019, the 1st Respondent filed a Notice of Preliminary Objection dated 30th October, 2018 citing two grounds:

a. That the Applicant is not properly before the court as no leave/order has been obtained prior to her inclusion as a party.

b. The Applicant's Advocates having been party to the drawing up of the will and the adviser to the deceased cannot in the circumstances properly appear to act for or against either party to the cause and should disqualify themselves from so acting or step aside in the interests of fair play and overall appearance of impartial justice.

2. The Applicant had filed a Notice of Motion application dated 16th October, 2019 seeking a stay of execution of the orders issued by this court on 17th September, 2019 and any subsequent orders thereof pending the hearing and final determination of these proceedings. Further that the orders be discharged and set aside and the Applicant granted leave to defend the Notice of Motion application dated 8th April, 2019.

3. The application is premised on the ground that the Applicant was never served with any proceedings relating to this matter and only came to know of the proceedings hereof and the ruling dated 17th September, 2019 upon being called by the bank. That this resulted in severe prejudice to the rights of the Applicant and occasioned a miscarriage of justice. Further that the 1st Respondent had deliberately and purposely withheld material information namely that the property the subject of the application had been sold and the deceased distributed his share of the sale proceeds *inter vivos* thereby defeating the will. That

as such, the Applicant cannot be ordered to refund money that was utilized by the deceased during his lifetime. Therefore, that unless the orders of 17th September, 2019 are stayed, the Applicant stands to be condemned unheard as she was not given a chance to respond to the application dated 8th April, 2019.

4. On 26th November, 2019 the 2nd Respondent filed a replying affidavit sworn by himself on 25th November, 2019 in response to the Notice of motion application. He averred that since the Applicant was not a party to the probate proceedings, service of the application dated 8th April, 2019 to her was not necessary. That the Applicant herein is not an Executor of the deceased's last will and cannot therefore allege to have been left out in the administration of the estate. He however stated that since the Applicant had a close relationship with the deceased, she was in a position to disclose the whereabouts of other properties left by the deceased. He urged that it is only fair that full disclosure of the deceased's properties be made to the joint executors for complete administration of the Estate as per the will. Soon thereafter, the 1st Respondent raised the Preliminary Objection which is for determination. The Preliminary Objection, though filed on 31st October, 2019, is erroneously dated 30th October, 2018.

5. On 24th January, 2020, the Applicant filed a supplementary affidavit sworn by herself on 3rd January, 2020. In it she deposes that she is the deceased's widow, having cohabited with him as husband and wife for a period of over 27 years prior to his death. She maintained that the deceased lived for a period of more than 3 years after the sale of the subject property known as subdivision number 643 (Original No. 483/1) Section V main land North which was owned by his family company known as Acme Textiles Limited. She explained that the proceeds were initially transmitted to the joint account held by the deceased and the Petitioner before the share of the deceased was transferred into his account. She urged that from the time of the sale of the said property till the time of the deceased's death on 18th October, 2017, a period of over 3 years, the deceased reapplied the proceeds in his account in accordance with his wishes.

6. The Applicant asserted that as a beneficiary to the deceased's will, she was entitled to have been given notice of the opening of the will and the filing of these proceedings. Further that since the orders in the ruling of 17th September, 2019 were directed at her, she ought to have been given an opportunity to defend herself in that application. This, she stated, was especially so since the orders sought were drafted in a way that affected her bequest flowing from the will.

7. She urged that to her knowledge, from the deceased's portion of Kshs. 52,447,370/=, a sum of Kshs. 20,000,000/= was transferred to the Petitioners' account by way of loan granted to the Petitioner who had not refunded it back by the time of the deceased's death. That the Petitioner also received money from the 48 per centum proceeds of the sale of Acme Textiles Limited and cannot fault the deceased for spending his 52 per centum share. She asserted that by the time of his death, the joint accounts held by herself and the deceased had little funds left for her personal use which according to Clause 5 of the Will was bequeathed to her. Therefore, that by issuing the orders of 17th September, 2019, the court blocked her access to her personal accounts which have nothing to do with the estate.

8. On 31st October, 2019 the court directed that the 1st Respondent's Preliminary Objection be heard first and further that it be disposed of by way of written submissions. Learned Counsel Mr. Masese filed written submissions dated 24th February, 2020 on behalf of the 1st Respondent while learned Counsel Ms. Kinyua filed written submissions dated 9th August, 2021 on behalf of the Applicant. Learned Counsel Mr. Mogeni did not file any written submissions on behalf of the 2nd Respondent but completely associated himself with the position taken by the 1st Respondent.

9. In advancing arguments for the Preliminary Objection, Mr. Masese asserted that the 1st Respondent obtained a Grant of Probate with Written Will annexed on 9th November, 2018 and that there was no objection to the issuance of the Grant within the requisite 30 days in spite of a duly published Notice inviting any such objections. That in any event, the Applicant had not sought leave to be made a party to the proceedings in this cause, contrary to the provisions of **rules 60 and 61** of the **Probate and**

Administration Rules and Order 1, rule 10 and Order 8, rule 3 of the Civil Procedure Rules, 2010.

10. It was Mr. Masese's view that the Court had in granting the orders merely given an interpretation to a Clause in the Will. That as such, the proper procedure would be to seek an appeal or review of the interpretation so given. Counsel urged that the Executor's application for an interpretation of a Clause in the Will was purely impersonal and non-partisan in nature and did not intend to dispossess any Beneficiary. Therefore, that the inclusion of the Applicant or any other parties was inappropriate, premature and uncalled for at that stage.

11. In opposing the Preliminary Objection, Ms. Kinyua proposed two issues for determination: whether the Preliminary Objection herein qualifies as a proper preliminary objection and whether the grounds of the objections are merited.

12. According to Ms. Kinyua, the issues raised by the 1st Respondent do not satisfy the settled requirements of a preliminary objection in law as adopted in the decisions in **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR** and **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR**. Counsel asserted that what emerges from these cases is that no independent evidence is required to investigate the issues raised in an objection. That the facts of a dispute must generally be straightforward and unequivocal. Counsel urged that in the instant case, the facts are in dispute and the court will therefore need to call for external evidence and hear the parties in order to establish the truth.

13. Ms. Kinyua cited the decision in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3** and submitted that it is trite that parties are bound by their pleadings. Therefore, that in making its determination, the court should strictly stick to the word of the Preliminary Objection given the binding nature of pleadings. To this end, Counsel urged the court to consider the fact that the 1st Respondent has abandoned the first ground of the Preliminary Objection and further that the 1st Respondent had in his written submissions cited **Order 1, rule 10** and **Order 8, rule 3** of the **Civil Procedure Rules**, which provisions are misplaced and inapplicable to these proceedings. I observe that what was withdrawn was the second limb of the Preliminary Objection and not the first as alluded to by Counsel.

14. Ms. Kinyua asserted that since this matter revolves around the administration of the estate of the deceased, the court ought to be guided by the **Law of Succession Act** together with the **Probate and Administration Rules**. Counsel urged that under **Rule 60** and **63** of the **Probate and Administration Rules** which is applicable herein, there is no requirement that an applicant seek leave in order to be made a party to succession proceedings.

15. On the issue of the representation of the Applicant, Ms. Kinyua submitted that the objection was overtaken by events since a Notice of Change of Advocates dated 19th February, 2020 was filed on 28th February, 2020 by the firm of Isolina Kinyua & Co. Advocates. That the firm of Kivuva Omuga & Co. Advocates no longer represent any party in this matter and the conflict of interest was therefore no longer existent. Indeed, at the hearing of 28th July, 2021 learned Counsel Mr. Kiluva while holding brief for Mr. Kinyua also conceded this, stating that the 1st Respondent was intent on abandoning the second limb of the Preliminary Objection upon change of Advocate by the Applicant.

16. Ms. Kinyua contended that the Preliminary Objection was a delaying tactic aimed at delaying and frustrating the Applicant from accessing justice. In Counsel's view, the Preliminary Objection offends **Articles 48** and **159(2)(d)** of the **Constitution**, **sections 1A** and **3A** of the **Civil Procedure Rules, 2010**, **section 11** of the **Fair Administrative Actions Act, 2015** and the Applicant's legitimate expectation for a full hearing on merit. Counsel urged that it was important that the substance of this matter be heard on merit rather than waste important judicial time on sideshows. Further that this court is empowered under **section 47** of the **Law of Succession Act** to entertain any application and determine any dispute under the Act and to pronounce any such decrees and make such orders therein as may be expedient.

17. I have carefully considered the pleadings on record and the rival submissions filed by the Advocates

on record for the respective parties. The issue that comes to the fore for determination is whether the Applicant herein is properly before this court. I will not belabor the second ground of the Objection since both parties are in agreement that it has been overtaken by events.

18. The Preliminary Objection and the Notice of Motion application against which it was raised emanate from the ruling delivered by this court in this matter on 17th September, 2019. I deem it appropriate to state that the ruling dealt with the issue of construction of the deceased's last written will. In arriving at its decision, this court took cognizance of the pertinent law on construction of wills being **section 22** of the **Law of Succession Act** and the **First Schedule** to the **Act** and the evidence tendered before it in order to realize the deceased's wishes as expressed under the will.

19. In advancing arguments for the Preliminary Objection, the 1st Respondent sought to rely on the provisions of **Order 1, rule 10** and **Order 8, rule 3** of the **Civil Procedure Rules**. Notably, these provisions are not amongst the provisions of the Civil Procedure Rules which are applicable to probate and administration matters by dint of **Rule 63** of the **Probate and Administration Rules**. The other argument propounded was that the Applicant failed to comply with the provisions of **rule 60** of the **Probate and Administration Rules**. In my view, the rule speaks to affidavits filed in respect of pending applications which have been filed by an applicant other than the Interested Party. Additionally, the leave required under the rule is not sought by an interested party but rather by an applicant in order to respond to an affidavit filed by the interested party in response to the Applicant's application. As such, the 1st Respondent's argument in this respect fails.

20. Needless to say, despite the fact that the Applicant has previously not appeared in these proceedings, it is undisputed that the Applicant is one of the beneficiaries listed under the deceased's will and is therefore affected by the orders of 17th September, 2019. To my mind therefore, the Applicant can have audience before this court upon moving the court appropriately. In any event, this court is enjoined by the provisions of **section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules** to make such orders as necessary for the ends of justice to be met.

21. At a cursory glance, it appears that the Notice of Motion application which the 1st Respondent is opposed to, in effect seeks not only to have the court vacate its orders of 17th September, 2019 but also disputes the deceased's written will and the bequests under it. The orders of 17th September, 2019 sought to echo the deceased's wishes as stated under the will, without more. To dispute the orders is therefore in effect disputing the will.

22. It is imperative to state that before the Grant of Probate with Written Will annexed was issued to the Executor, all formalities including that of gazettelement had been complied with and at the date of 6th November, 2011 no objection had been lodged against the application. Consequently, a Grant of Probate with Written Will annexed was issued to Mayurkumar Amritlal Shah on 9th November, 2018. Probate is defined under **section 3** of the **Law of Succession Act** to mean "the certificate of a court of competent jurisdiction, that a will, of which a certified copy is attached in the case of a written will, has been proved to be a valid will, with a grant of representation to the executor in respect of the estate."

23. The orders of 17th September, 2019 which the Applicant seeks this court to set aside are therefore consequential to the Grant of Probate with written will annexed issued to the 1st Respondent as a named Executor. It is trite that the office of an Executor establishes upon the death of a Testator and derives from the will. The Grant of Probate is only evidence of an Executor's appointment and seeks to validate any acts performed by the Executor prior to the issuance of the grant. Needless to say, a Grant of Representation, whether or not confirmed, may at any time be revoked or annulled if the court so decides, either on application by any interested party or of its own motion as provided under **section 76** of the **Law of Succession Act**.

24. The upshot of the foregoing is that the arguments advanced by the 1st Respondent in support of the Preliminary Objection are unfounded. Therefore, the Preliminary Objection dated 30th October, 2018 and

filed on 31st October, 2019 cannot stand and is hereby struck out. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF OCTOBER, 2021.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant.

In the presence of.....Advocate for the 1st Respondent.

In the presence of.....Advocate for the 2nd Respondent.