



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 205 OF 2015
IN THE MATTER OF THE ESTATE OF TARLOCHAN SINGH RAI (DECEASED)
SARJIT KAUR RAI.....1ST APPLICANT/OBJECTOR
JASBIR SINGH RAI.....2ND APPLICANT/OBJECTOR
IQBAL SINGH RAI.....3RD APPLICANT/OBJECTOR
AND
JASWANT SINGH RAI.....EXECUTOR

RULING

1. The background of this cause is that the deceased Tarlochan Singh Rai died on 28th December 2010 at Mumbai in India. Before his death he was domiciled in Kenya and his last place of residence was Nairobi. His family comprised the following:-

- a. Sarjij Kaur Rai (widow)/1st objector;
- b. Hertej Ashwin Oza (daughter);
- c. Jasbir Singh Rai (son)/2nd objector;
- d. Jaswant Singh Rai (son)/Executor;
- e. Daljit Kaur Hans (daughter);
- f. Iqbal Singh Rai (son)/3rd objector;
- g. Tejpal Singh Rai (son) – predeceased the deceased; and
- h. Sarbjit Singh Rai (son).

2. The deceased died testate. This fact is acknowledged by either side. The written Will left by the deceased was dated 17th December 1999. The named executor and trustee was Jaswant Singh Rai. It is not in contention that the executor was moved by the objectors to petition for the grant of probate with written Will. The petition was filed on 14th March 2017. The objectors filed objection to the grant and filed petition by way of cross-application for grant. The objectors were opposed to the executor being granted probate to administer the estate of the deceased as per the Will because of several reasons. One, the deceased had not provided for the 2nd and 3rd objectors and Daljit Kaur Hans. Two, that the Will stated that they had been provided for during the deceased's lifetime which was not true. Three, that the 1st objector and Hertej Ashwin Oza had not been sufficiently provided for by the Will. Four, that the 1st objector's contribution to the deceased's accumulation of wealth during his lifetime had not been reflected in what he had provided for her. Five, that the Will was vague,

inconsistent, void and uncertain for various named reasons, including the fact that at the time of the making of the Will the deceased did not possess the required freedom from coercion, importunity and/or other influences; the deceased had appointed Jaswant Singh Rai as executor and trustee and in the same Will appointed the same person and Virinder Goswami as trustees; that the deceased was engaged in litigation with the objectors over Rai Plywoods (Kenya) Limited at the time he made the Will, and that there was an undertaking he had made to court not to interfere with the company assets at the time he made the Will.

3. On 21st July 2020 the court begun taking oral evidence on the question of the validity of the deceased's Will. It received the evidence of Sarjit Kaur Rai. Quite unfortunately, she died in January 2021. The matter is part-heard in that regard.

4. The present application by the objectors is dated 6th October 2020. It is a chamber summons that sought the following orders:-

“2) That this Honourable Court be pleased to adopt the objectors'/applicants' further list of documents dated 29th September 2020.

3) That the executor be compelled to produce a list of all the deceased's assets to enable the court determine the suit with utmost fairness and just.

4) That this Honourable court be pleased to summon the Company Secretaries of Rai Investments Ltd, namely, MLR Associates, Certified Public Secretaries C/o LR 1870/1/248 Mwanzi Road, P.O. Box 42027-00100 GPO Nairobi to appear before this Honourable Court to among others produce all the Company's Minutes, Minute Books, all board resolutions, Shares Register from the year 1992 to date and all other relevant company records pertaining to the above herein.

5) That Company Secretaries of Rai Investments Ltd namely MLR Associates, Certified Public Secretaries, C/o LR 1870/1/248 Mwanzi Road, P.O. Box 42027-00100 GPO Nairobi to appeal during the hearing hereof as a witness in this matter.

6) That this Honourable Court do issue an order compelling MLR Associates, the Company Secretaries for Rai Investments Limited to provide the objectors/applicants all the Company's Minutes, Minute Books, all board resolutions, Shares Register from the year 1992 to date and all other relevant company records pertaining to the above herein pending the determination of this application.”

5. In the supporting affidavit sworn by the 2nd and 3rd objectors, they complained that the executor had deliberately and maliciously failed to disclose the entire estate of the deceased. They had discovered that some assets had been omitted by the executor in the inventory. In respect of Rai Investments Limited, the deceased had on 24th September 1999 sworn that he owned 103, 162 or 42.72% of the company's shares, whereas the executor had stated in the inventory that the deceased's shares were 16,932. They had found out that the deceased and the executor were shareholders of Rai Holdings Limited in Kampala in which the deceased held 2% shares and which company had bought 51% in Kinyara Sugar Works at USD 33,500,000 about September 2006. Secondly, the deceased and the executor were shareholders in Rai Agro Industries Limited in Sangrur in India. Thirdly, there were Stonybrook Limited and Waterloo Limited both registered in Cayman Islands and in which the deceased, executor and objectors were equal shareholders. The other company was Rai Management and Technical Services Limited registered in Jersey and which owed substantial shares in Rai Agro Industries. They had also found the deceased held account at Citibank N.A 41 Berkeley Square London and Citibank N.A. New Delhi with substantial monies. Then there was EPZ Malawi in which the deceased and executor were directors and which had a debenture of USD 6,000,000.

6. The response by the executor was by way of grounds of opposition dated 22nd October 2020. The grounds were as follows:-

“1) The application offends the provisions of section 70 of the Law of Succession Act (Cap 160 Laws of Kenya) (“the LSA”).

2) The application is premature as the named Executor in the Last Will and Testament of Tarlochan Singh Rai (Deceased) has petitioned this Honourable Court for a Grant of Representation while the objectors have filed a response by cross-application for grant where the validity of the said Will is contested; therefore the only matter for consideration by this Honourable Court at this stage of objection proceedings is whether the Grant of Representation ought to be issued to the petitioner as per the Will.

3) The orders sought in the application have no bearing on the validity of the Will and therefore cannot be granted by the Honourable Court at this stage of the proceedings.

4) The application seeks to raise issues in respect of the assets owned by the Estate and makes unsubstantiated allegations of intermeddling, the said issues are to be dealt with under specific provisions of the LSA and do not fall within the purview of objection proceedings as envisioned under section 68, 69 and 70 of the LSA.

5) The application seeks orders in respect to the status of affairs and shares of Rai Investments Limited which is also the subject of contestation by the Objectors in their proceedings against the deceased being Civil Appeal No. 63 of 2011; Jasbir Singhai & 3 Others – Tarlochan Singh Rai & 13 Others filed by the objectors against the deceased and in which the Court of Appeal directed that the matter be referred to Arbitration, an order which the objectors have not complied with to date. The application is accordingly a collateral attach in aid of other proceedings.

6) The application seeks to introduce matters related to Rai Investments Limited and not the Estate of the Deceased and the

beneficiaries in the Will or as determined by this Honourable Court.

7) The application is incurably defective, bad in law and ought to be dismissed in *limine* by this Honourable Court.”

7. For the record, the assets listed in the executors petition dated 14th March 2017 were as follows:-

- a. Rai Plywoods (K) Ltd 803,644 shares par value 20;
- b. Rai Produces Ltd 43 shares par value 20;
- c. Rai Holdings Ltd 4,000 shares par value 20;
- d. Rai Agriculture Enterprises Ltd 105,000 shares par value 20;
- e. Ra Investments Ltd 16,932 shares par value 20;
- f. Rai Ceramics Ltd 1 share par value 20;
- g. Tulip Properties Ltd 61,501 shares par value 100; and
- h. Rai Expo Park Ltd 1 shares par value 100;

The deceased owned:-

- a. House in Kampala, Uganda – 14 McKenzie Vale, Kampala
- b. House in Runda, Nairobi – LR No. 7785/271; and
- c. House in Waterloo, Canada, 472, Alexmuir Place, Waterloo, SL3 8EN, Ontario, Canada.

He held bank account No. 2652348 at Barclays Bank, Enterprise Road, Nairobi. The estimated value of his assets was Kshs.329,048,844/25. He had no liabilities.

8. The objectors were represented by M/s Thongori (SC) and M/s Sheila Sheikh, and the executor by M/s Lubano for Mr. Oraro (SC). Counsel filed respective written submissions and orally addressed the court.

9. The objector's submitted that, since the factual position as contained in their supporting affidavit and annexures was not challenged, there were three issues raised in the grounds that ought to be determined: whether the objectors' application offends the provisions of the **Law of Succession Act**; whether the application is premature; and whether the application had any bearing on the validity of the Will. Both sides addressed these issues in one way or another, in the written and oral submissions. I will adopt the issues, and address them. But not necessarily in the order proposed.

10. I indicated in the foregoing that the court had begun taking oral evidence to determine the whether or not the Will left by the deceased was valid. The grounds on which the objectors wanted the Will to be invalidated were basically that some beneficiaries had either not been provided for by the Will, or had not been sufficiently provided for; the Will was vague, inconsistent and uncertain; the deceased did not possess the required freedom to make the Will; there was an issue with the appointment of executor and/or trustees; and that the deceased had offended a previous undertaking in relation to Rai Plywoods (Kenya) Ltd. On the face of things, the present application raises a substantially different issue: that the executor has not provided a complete list of assets in the inventory, or has understated some of the assets. To that extent, therefore, the application has no bearing on the issue of validity of the Will whose hearing has already begun.

11. However, is it true that the issues raised by the present application are premature? In prosecuting this issue, counsel for the executor submitted that where, like in this case, an answer and a cross-application have been filed in response the court should proceed to determine the dispute regarding who should get the grant. **Section 69(2) of the Law of Succession Act (Cap 160)** was made reference to. So that there is better appreciation of the submissions, I reproduce **section 69** of the **Act** which deals with the procedure after notice and objections as follows:-

“1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”

12. The application has stated to be brought under **section 70** of the **Act** which provides-

“Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation—

(a) examine any applicant on oath or affirmation; or

(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or

(c) issue a special, citation to any person appearing to have reason to object to the application.”

13. It is clear that **section 70** is a follow-up of **section 69**, regarding procedure to be followed before a grant is issued. The procedure is followed whether or not there is dispute as to the grant. What the court should do before it issues a grant is indicated in **(a), (b)** and **(c)** of **section 70**.

14. The objectors deliberately made sure that their objection to the Will and the present application were differently grounded. If they successfully invalidate the Will, then there will be no basis to ask the executor to avail any information regarding the estate to court. This is because his execution duties will have gone with the Will. If the Will will be invalidated, then the estate will be intestate and the court will appoint an administrator or administrators in the intestate cause. It will be the responsibility of those administrators to give a full and accurate inventory of the assets of the deceased. In this case, the objectors are saying that the deceased did not leave a valid Will, and therefore the executor was not properly appointed by the deceased, but, at the same time, are asking the executor to account to them on the matter of inventory. It is infact to this extent that the present application has a bearing on the question of the validity of the Will.

15. If the executor is ultimately issued with a grant of probate, his duties under **section 83** of the **Act** will set in. **Section 83** provides as follows:-

“Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

16. In **Re Estate of David Kyuli Kaindi (Deceased) [2016]eKLR**, the court was addressing the responsibility of an executor or representative to account when it stated as follows:-

“The personal representative must give an account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles that he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving the court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this stage should also state the assets that generate income, stating how much has been collected and how it has been utilized.”

Under **section 83(h)**, any interested party may apply to court for an order that a personal representative renders a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of account. It is common ground that the executor has not yet been issued with a grant of probate.

17. Now that the objectors are armed with information that either some estate has been left out of the inventory or some of it has been

understated, they should wait to see if, when the executor gets a grant of probate, he will in his gathering and collection of the assets and liabilities of the deceased, omit or understate some of it. He will on application under **section 83(h)** of the **Act** be brought to account.

18. To cut a long story short, **section 70** of the **Act** does not give the court the jurisdiction to grant the orders sought. **Section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules** only come into play when an applicant cannot find an appropriate **section** or **rule** to anchor his application. Lastly, the applicable provision is **section 83** of the **Act**, but it can only come into play after an executor or personal representative has been appointed. The application is therefore premature.

19. I hope of have said enough to show that the application is not merited. The same is dismissed.

20. Since the parties are siblings, each side will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021

A.O. MUCHELULE

JUDGE