



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA A

AT MOMBASA

SUCCESSION NO. 426 OF 2011

IN THE MATTER OF THE ESTATE OF HIMATLAL JEVALTAL MEHTA (DECEASED)

RULING

1. Himatlal Jevatlal Mehta, the deceased herein died on 2.4.10. A grant of probate of the written will of the deceased (the Grant), was on 14.6.12 issued to Bharat Himatlal Mehta (Bharat), Ketan Himatlal Mehta (Ketan) and Maria Carmen Fernandes (Maria), the executors named therein. The Grant was thereafter confirmed on 15.8.13 and the certificate of confirmation dated 23.8.13 was issued.
2. By an Application dated 3.2.20, Bharat and Ketan, the Applicants, seek that the certificate of confirmation of grant be rectified to include funds lying in the deceased's bank account SB 1101076300 with Bank of India, Mombasa. They also pray that Maria be removed as an executor.
3. In their joint affidavit sworn on 27.8.19, the Applicants averred that the said bank account was not included in the inventory of assets of the deceased, at the time the executors applied for the Grant. It is necessary therefore that the funds are included, to enable the distribution of the same. The Applicants stated that Maria declined to join them in this Application claiming that the bank account in which the funds lie, was correctly excluded in the list of assets, as the same was held jointly by her and the deceased. This is contained in her letters dated 8.1.19 addressed to Ketan and reiterated in another dated 10.3.19. The Applicants' case is that the Bank *vide* a letter dated 14.8.18 confirmed that Maria was a mandate holder and not a joint account holder, which letter was exhibited. Also exhibited are other documents from the bank confirming this position.
4. The Applicants further contend that Maria's role as executor is conflicted as she claims as hers, the funds in the said account. To the Applicants therefore, Maria ought to be removed as an executor.
5. In spite of service, Maria did not respond to the Application.
6. I have considered the Application, the supporting affidavit as well as the submissions on behalf of the Applicant. Although the prayer is for rectification, it has not been brought under Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. This is in fact an application for inclusion of omitted assets and not rectification. Although Maria insists that she held the account jointly with the deceased, the exhibited documents indicate the contrary. There is an instructions form by the deceased dated 11.3.99 to the Bank stating ***"MANDATE GIVEN TO MS. MARIA CARMEN FERNANDES"***. There is also a letter from the deceased to the Bank dated 28.10.02 stating that the signatories to the account are himself and Maria. The deceased further stated ***"By any chance, if M C. Fernandes is not recorded as the signatory, kindly add her as signatory."*** By a letter dated 14.8.18 addressed to Maria, the Bank informed her that its advocate had advised:

"Ms. Carmen Fernandes was listed as mandate holder to the account. The law states that the death of the principal account holder, (ie Dr. Hematlal J. Mehta) the mandate has no right to continue operating the account."

7. It is clear from the foregoing that the deceased held the account solely, but had given a mandate to Maria to operate the same. The mandate authorised Maria to operate the account on behalf of the deceased. Had Maria been a joint account holder with the deceased, there would have been no need for a mandate to be given to her by the deceased. In the absence of any response from Maria, the evidence before the Court remains uncontroverted. In the premises, I am satisfied that Maria was not a joint account holder but just a mandate holder. As such, her claim to the funds in the said account is without any basis.
8. I now turn to the prayer of removal of Maria as executor. The Applicants contend that there is conflict of interest on Maria's part. This is because Maria lays claim on the funds in the bank account, as the sole surviving account holder. The Applicants have moved this Court under Rule 73 of the Probate and Administration Rules which sets out the inherent power of the Court and guides on applications not provided for.

9. Rule 73 provides:

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.

10. While the above provision restates the inherent power of the Court to do justice and to prevent abuse of the process of the Court, it does not give guidance on applications not provided for in the Rules. The guiding provision is Rule 49.

11. The Law of Succession Act and its Rules make no provision for “removal” of an executor as sought by the Applicants herein. The only way a person to whom a grant of representation in respect of the estate of a deceased person has been issued, can cease to be a legal representative, is through an application for revocation of such grant. Section 76 of the Act and Rule 44 of the Rules make provision for revocation of a grant of representation.

12. Our Courts have consistently that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of the relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

13. The Applicants, in seeking the “removal” of Maria as an executor, ought to have strictly followed the laid down mechanism provided under the Act and Rules. As stated, “removal” of an executor, is unknown in law. Accordingly, the prayer sought by the Applicants herein cannot be granted.

14. I have looked at the cited case of Rupal Shah and Another v Ramesh Bhagwani Shah [2015] eKLR in which Ougo, J removed an executor who she found unsuitable and substituted 2 others for him. With profound respect, I find that the decision to remove and substitute the executor, is not anchored in law. Indeed, without the revocation of the grant, the unintended outcome of the orders therein, is the existence of 2 grants in respect of that estate, which is a legal anomaly.

15. In the end, in exercise of the inherent power of the Court, I do make the following orders which I deem necessary for the ends of justice:

i. The certificate of confirmation of grant dated 23.8.13 is hereby cancelled. A fresh certificate of confirmation of grant shall be issued which shall include the funds in account SB1101076300 with Bank of India, Mombasa.

ii. The prayer for removal of Maria Carmen Fernandes as executor, is hereby declined.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of July, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**