



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1491 OF 2017

IN THE MATTER OF THE ESTATE OF GURDIAL KAUR SIHRA (DECEASED)

HARJINDER KAUR DHANJIL APPLICANT

V E R S U S

SUKHDEV KAUR SIHRA.....1ST RESPONDENT

MANJIT KAUR CHANA 2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 23rd January 2020 and filed on the same day, Harjinder Kaur Dhanjil (hereinafter the applicant) moved this court pursuant to Order 45 Rule 1 of the Civil Procedure Rules, Section 54 of the Law of Succession Act, paragraph 10 of the 5th Schedule and Rule 12 of the Probate and Administration Rules and, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act seeking orders that;

(a) This matter be certified urgent and the requirement of notice to parties be dispensed with.

(b) That the Honourable Court be pleased to issue an interim order staying execution of the orders of this court emanating from the Ruling delivered on 17th December 2019 appointing the Public Trustee to administer and petition for a grant of representation in respect of the estate of Gurdial Kaur Sihra, pending the interpartes hearing and determination of this application.

(c) That letters of administration Pendente Lite do issue to Mrs. Harjinder Kaur Dhanjil limited for the purpose of collection and preservation of the estate pending the hearing and determination of the review application and any other litigation relating to the obtaining of a full grant in the matter herein.

(d) That the court be pleased to fix an early interpartes hearing date as a matter of urgency for the review application as this Honourable Court may direct.

(e) That the Honourable Court be pleased to review, vary and or set aside the orders emanating from the Ruling delivered on 17th December 2019 appointing the Public Trustee to administer and petition for a grant of representation in respect of the estate of Gurdial Kaur Sihra.

(f) That this Honourable Court be pleased to grant such other directions as it may deem fit, to give effect to the justice of the matter.

(g) That costs of the application be provided for.

2. The application is hinged on the grounds set out on the face of it and an affidavit in support sworn by Harjinder Kaur Dhanjil a beneficiary to the estate who sought her appointment as the sole administrator in place of the Public Trustee.

3. In response to the application, Kulwant Singh Sihra another beneficiary to the estate filed a replying affidavit sworn on 9th February 2020. He basically supported the application and urged the court to appoint Harjinder Kaur Dhanjil as the sole administrator to the estate.

4. On the other hand, Sukhdev Kaur and Manjit Kaur Chana the first and second respondents respectively did file a Notice of Preliminary Objection dated 6th February 2020 stating that the application is incompetent, does not lie and is an abuse of the court process.

Brief Background of the Case

5. Briefly, the deceased herein died intestate on 21st October 2017 leaving behind eight survivors among them children and grandchildren. On 14th December 2017 Jagjeet Singh (a grandson), Sukhdev Kaur (daughter) and Manjit Kaur Chana (daughter) petitioned for a grant of representation. However, Kulwant Singh Sihra the only son to the deceased filed an objection against the Petition. Consequently, Kulwant Singh and his sister Harjinder Kaur Dhanjil the applicant in the instant application filed a cross Petition seeking grant of representation to issue to them jointly.

6. After hearing the objection, the court on 25th September 2018 upheld the objector's position that Jagjeet being a grandchild ranked below the deceased's children in order of priority pursuant to Section 66 of the Law of Succession. For reasons stated, the court also disqualified the Objector one Kalwant Singh Sihra on grounds of conflict of interest as he was involved in litigation against the estate prior to the deceased's death. Accordingly, the court allowed Sukhdev Kaur, Manjit Kaur Channa and Harjinder Kaur Dhanjil all daughters to petition the court for a full grant jointly and that upon gazettelement of the estate a grant of letters of administration to issue to them jointly.

7. However, the three proposed administrators could not agree hence rendering the operation of this Court's ruling and orders of 25th September 2018 useless. Due to those differences, the three proposed administrators could not make a step towards executing the said orders on grounds that Sukhdev Kaur and Manjit Kaur had refused to sign necessary forms for purposes of opening a joint account to deposit rent due to the estate and also petition for a full grant.

8. On 24th June 2019, Harjinder Kaur Dhanjil filed an application of even date seeking to be appointed as the sole administrator of the estate citing frustration of the other two proposed administrators who are said to be residents of U.K and therefore unable to administer the estate.

9. Having considered the application and the endless fight amongst the beneficiaries and more particularly the three proposed administrators all of whom have equal right to petition for a grant of representation, the court dismissed the application of 24th June 2019 on 17th December 2019 and proceeded to appoint the Public Trustee as the administrator so as to preserve the estate from waste and intermeddling.

10. It is this Ruling of 17th December 2019 that the applicant herein is through the application dated 23rd January 2020 is seeking to review and have her appointed as the sole administrator.

Applicant's Submissions

11. The applicant filed her submissions dated 26th June 2020 through the firm of C. M. Advocates and Company. Counsel for the applicant submitted that the Preliminary Objection raised does not meet the threshold of what constitutes a Preliminary Objection as held in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (1969)EA 696** and **Hassan Ali Joho and another v. Suleiman Said Shaban and 2 Others Petition No. 10/2013 (2014)eKLR** where the court held that:-

“Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

12. As to whether the applicant Harjinder Dhanjil should be issued with letters of administration Pendente Lite, counsel urged the court to use its discretion under Section 54 of the Law of Succession to grant a Limited Grant to the applicant to safeguard the interest of the estate which is being wasted by some of the beneficiaries.

13. Concerning the issue as to whether the applicant has met the threshold for review of the orders of this court issued on 17th December 2019, counsel submitted that the applicant has met the conditions set out under Section 16 and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

14. According to learned counsel, the appointment of the Public Trustee will only apply if those in order of preference under Section 66 of the Law of Succession do not exist. That under Section 66, priority in appointment of administrators is given to spouses, the children, beneficiaries and then Public Trustee as the fourth in ranking. The court was urged to find that the appointment of a Public Trustee while the children are alive is erroneous hence an error on the face of the record thus justifying review of those orders.

15. That the applicant has shown willingness to comply with orders of the court to administer the estate but the other two proposed administrators have refused to cooperate hence the need to appoint the applicant.

Respondent's Submissions

16. Through the firm of Shabana, the respondents filed their submissions dated 20th March 2020. Counsel submitted that the applicant has not met the threshold for review of the court's order and that the applicant has not established existence of an error apparent on the face of the record or mistake or discovery of any new evidence or facts which did not exist after due diligence. In support of this proposition, reliance was placed on the holding in the case of **In the matter of the Estate of Livingstone M'Mungania (Deceased) (2018)eKLR**.

17. Ms. Shabana submitted that the allegation by the applicant that the court erroneously appointed the Public Trustee is not an error on the

face of the record hence an abuse of the court process by challenging the discretion of the court.

18. Regarding stay of execution orders counsel submitted that there is no substantial loss likely to be suffered if review orders are not granted. To support this argument, counsel referred the court to the decision in the case of **Machira T/A Machira and Company Advocates v. East African Standard (No. 2) H.C.C.C No. 612/1996**. M/s Shabana was of the view that, the impugned orders were intended to preserve the estate from wastage and not to jeopardize the estate.

19. Touching on issuance of grant of Limited Grant of Pendente Lite, counsel submitted that it applies only where there is a Will in place and its validity is in issue. That it does not apply in this case as the estate is intestate.

20. Finally, counsel urged the court to extend timelines within which the Public Trustee can petition for a grant or amend the said order and proceed to appoint the Public Trustee as the administrator and direct them to take charge of the estate.

Determination

21. I have considered the application herein, responses thereto and rival submissions by both counsel. Issues that arise for determination are;

- (a) Whether the applicant has met the threshold for grant of stay orders.**
- (b) Whether the applicant has met the threshold for grant of review orders.**
- (c) Whether the court can grant Pendente Lite limited grant to the applicant.**

22. Before I proceed to determine the three issues above stated, I would like to address the Preliminary Objection raised by the respondents stating that the application is incompetent and an abuse of the court process. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (supra)** the court had this to say;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

23. The impugned orders dated 17th December 2020 appointing the Public Trustee as the administrator of the estate is a matter of discretion of the court under Section 66 of the Law of Succession. The issue of stay and review is provided in law under Orders 42 and 45 respectively of the Civil Procedure Rules hence the court has jurisdiction to entertain the application herein.

24. For the above stated reasons, I do not find any basis for raising a Preliminary Objection which if successfully argued, the application would be fully disposed of. The application ought to be determined on merit and the preliminary Objection is misplaced in the circumstances as some facts have to be ascertained. In my view, whether the application amounts to abuse of office or is incompetent is a matter to be determined upon canvassing the application on merit.

Whether the applicant has met the threshold for grant of stay orders

25. The orders giving rise to the application for stay were issued in the Ruling dated 17th December 2019. The orders made on that day and therefore sought to be stayed are;

- (a) The Public Trustee be and is hereby nominated and/or appointed to petition for a grant of representation in respect of the estate of Gurdial Kaur Sihra.**
- (b) That the Public Trustee to move with speed and file the said petition within forty five (45) days and thereafter proceed to gazette the estate for purposes of obtaining a grant of Letters of Administration Intestate.**
- (c) That pending gazette of the estate and formal appointment of the Public Trustee as the administrator, the Public Trustee shall take charge of the estate to avoid wastage.**

26. The principles guiding grant of stay of execution orders are anchored in Order 42 Rule 6(2) of the Civil Procedure Rules which provides that an application for stay pending appeal shall not issue unless;

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and;**
- (b) such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.**
- (c) there is any other sufficient reason or cause**

27. In the case of **Vishram Ravji Halai v. Thornton and Turpin Civil Application No. Nai. 15/1990 (1990)KLR 365**, the Court of Appeal stated that, whereas the Court of Appeal's powers to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so

under Order 41 Rule 6 of the Civil Procedure Rules is fettered by the conditions namely; establishment of a sufficient cause, satisfaction of a substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay. Similar position was held in the case of **Kenya Red Cross Society v. Mbondo Katheke Mwanja (2019)eKLR**.

28. The instant application was filed on 23rd January 2020 challenging orders issued on 17th December 2019. This period translating to about 36 days is not unreasonable. The application was therefore filed within reasonable time. Regarding furnishing security, the subject matter herein does not involve a monetary claim hence that requirement is not applicable in the circumstances.

29. Having eliminated the two grounds, I am left with the key factor that is, proof of substantial loss or any other sufficient cause. According to the applicant, failure to appoint an administrator from within the beneficiaries will subject the estate into waste. It is trite that appointment of administrators in an estate is within the discretion of the court. It is incumbent upon the applicant to prove that she is likely to suffer substantial loss as a result of the execution of the impugned orders.

30. It is not lost in my mind that grant of stay orders is a matter of discretion by the court seized of the matter. See **Hannah Ngina and 2 Others v Francis Kamau Thairu (2016)eKLR**. I am not convinced that the orders appointing the Public Trustee as the administrator will be prejudicial to the estate nor the applicant. The applicant has not specified the loss likely to be suffered in the circumstances. For those reasons the prayer for stay is not grounded on any cogent facts or factual basis and the same is disallowed. Equally, I do not find any sufficient reason or cause to warrant the orders of stay.

Whether the applicant has met the threshold for grant of review orders

31. It is settled law that review proceedings are not raised by way of an appeal. Review applications in probate matters are filed under Order 45 of the Civil Procedure Rules pursuant to Rule 63 of the Probate and Administration Rules. Order 45 Rule 2 (1) of Civil Procedure Rules 2010 provides that;

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

32. It must be born in mind that grounds for an order for review should be distinguished from grounds for appeal. See **National Bank of Kenya Ltd v. Ndungu Njau (1996)KLR 469** where the court held that:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”

33. In the case of **Abasi Balinda v Fredrick Kangwamu and Another (1963) EA 558**, the court held that;

“A point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal”

34. As stated above, the application herein was filed within reasonable time. The only ground relied upon is the argument that, the court erroneously appointed the Public Trustee as the administrator yet there are beneficiaries who rank in priority to the Public Trustee.

35. In my Ruling of 17th December 2019 I took into consideration court’s discretion in the appointment of administrators under Section 66 of the Law of Succession. The court also addressed the fact that spouses and children rank first in priority against the Public Trustee. **See In the Matter of the Estate of Aggrey Makanga Wairira Mombasa High Court Succession Case No. 89/1996** where the court stated that surviving spouses and children have priority over all other heirs of the estate of the deceased, in terms of the right to administration and shares of the estate.

36. However, where those entitled to administer the estate make it impossible to effectively administer the estate, the court has the discretion under Section 66 of the Law of Succession to appoint the Public Trustee. In this case, the court in detail explained and gave the reasons for the appointment of the Public Trustee. This was after the proposed three daughters to the deceased engaged in endless fight among themselves thus exposing the estate to waste. The appointment of the Public trustee is intended forestall any further wastage of the estate.

37. The order in question does not amount to an error as alleged by the applicant. The argument that the court ignored beneficiaries who rank first in priority is not correct. They were given an opportunity but they failed to exercise it as they shifted blames to each other. At best, the argument raised by the applicant can only amount to a ground of appeal and not apparent error or mistake as there is none.

38. I do agree with M/s Shabana for the respondents that this application is intended to further delay the matter. In my view, the Public Trustee is a neutral institution which will step in to protect the estate pending distribution of the estate. For those reasons, it is my holding that the application for review has no ground to stand on and the same is dismissed.

Whether Letters of Administration Pendente Lite can issue to the applicant

39. Grant of a Limited Grant of Pendente Lite is provided under Rule 10 of the 5th Schedule of the Law of Succession Act which provides that;

“Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.”

40. In this file there is no question touching on the validity of the will of a deceased person or revoking any probate. What is in issue is obtaining a grant. This court has already determined that question by nominating the Public Trustee. I cannot appoint another parallel centre of power in administering the estate. For those reasons, that prayer cannot issue.

41. Having held as above, it is my holding that the application has no merit and the same is dismissed. The orders of 17th December 2019 shall remain in force save to extend the timeline for the Public Trustee to act within 30 days and ensure that the estate is gazetted to facilitate issuance of the Grant of Letters of Administration and later Confirmation of the Grant.

42. Regarding costs, each party to bear own costs. Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2020.

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J. N. ONYIEGO

JUDGE