REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 85 OF 2019

IN THE MATTER OF THE ESTATE OF LAILA CHAGAN SIDI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR REVIEW

BETWEEN

SHAMSHUDIN JAFFERALI BOGHANI..............................PETITIONER

AND

RAHEMET NAZARALI also known as

RAHEMATBAI BAHADURALI ISMAIL NAZARALLY

nee **RAHEMUTBAI CHAGAN SISI**

alternatively, **RAHEMAT CHAGAN SISI.............................RESPONDENT**

RULING

[1] Before the Court for determination is the Notice of Motion dated **27 July 2020.** It was filed by the Petitioner/Applicant pursuant to **Rules 41, 49 and 63** of the **Probate and Administration Rules** for orders that:

[a] Spent

[b] Spent

[c] That the Court be pleased to review, vary and rescind and/or set aside the directions and/or orders issued on **26 June 2020** in relation to the Summons for Revocation of Grant dated **5 May 2020** filed by the Respondent.

[d] That consequent to prayer [c] above being granted, the Court do make orders to compel the applicant in the Summons for Revocation of Grant dated **5 May 2020** to appear before the Court in person to confirm to the Court that the averments in the Supporting Affidavit sworn on **5 May 2020** and the signature thereon is actually hers.

[e] That the Court be pleased to verify the authenticity of the Commissioner of Oaths/Notary Public before whom the Supporting Affidavit was sworn on **5 May 2020** from the necessary authorities in Canada.

[f] That the Respondent herein be compelled by orders of this Court to appear before it and to present her credentials and/or identification documents including a Kenyan identity card and passport owing to the numerous names she has purportedly used to identify herself in this court.

[g] That the application dated **5 May 2020** be heard by way of *viva voce* evidence.

[h] That if the Respondent fails/refuses and/or absents herself from attending court for hearing of the application dated **5 May 2020** then the same should automatically stand dismissed.

[i] That the Court do grant any other or further orders it deems fit and just to grant in the circumstances.

[j] That the costs of the application be provided for.

[2] The application was premised on the grounds that the Supporting Affidavit filed by the Respondent in support of her application dated **5 May 2020** is suspect and should be subjected to verification by this Court as to authenticity and validity; and, to buttress that ground, the Petitioner relied on his Supporting Affidavit filed herein on **27 July 2020** wherein he averred that the alleged Respondent relocated to Canada shortly after Kenya's independence and has never come back to Kenya for over 55 years now. He stated that, as a family, they have never received any communication from the Respondent and therefore it is not clear whether she is alive or dead. Thus, it was the apprehension of the Petitioner that the Summons for Revocation dated **5 May 2020** may have been filed by an imposter for fraudulent purposes; granted that the house of the deceased had been broken into and crucial documents stolen therefrom, including the deceased's Will.

[3] In a Replying Affidavit sworn by the Respondent on **21 August 2020,** she refuted the Petitioner's allegations and averred that the prayer for her personal attendance in court is actuated by malice and bad faith since the Petitioner well knows her age and health condition; and that in any event, she would not be in a position to travel on account of the ongoing Covid-19 pandemic. She further averred that, having adverted to her relocation to Canada, the Petitioner was well aware of her interest in the deceased's estate and ought to have included her in the Petition; and that he only failed to do so out of a fraudulent intent. She accordingly prayed for the dismissal of the instant application terming it an abuse of the process of the Court.

[4] The Petitioner filed a Supplementary Affidavit sworn on **17 September 2020** reiterating that his application was made in good faith and in the interest of justice, prompted by the Respondent's silence for over 50 years. He asserted that it is strange for a family member to remain silent for many years only to emerge and claim inheritance. He further averred that the need for cross-examination is well explained in his Supporting Affidavit and denied that he is aware that the Respondent is alive as he has never received any communication from her since she left the country.

[5] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **4 August 2020**. **Ms. Luseria** for the Petitioner filed her written submissions on **17 September 2020** basically setting out the provisions of **Rules 47 and 73** of the **Probate and Administration Rules** with regard to the powers of the Court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. Counsel also quoted verbatim the provisions of **Rule 41,** dealing with the procedure for the hearing of an application for confirmation, to buttress her argument that *viva voce* evidence is admissible in succession cases. Counsel also cited **Re Estate of George Nderi Nguu (Deceased)** [2011] eKLR; **Re Estate of M'Ringera M'Kungania (Deceased)** [2017] eKLR and **Gerald Macharia Njogu vs. Samuel Macharia Murimi** [2016] eKLR to buttress the Petitioner's quest for *viva voce* evidence. She concluded her submissions by urging the Court to find that the matters raised in the Summons for Revocation are weighty and therefore not suitable for canvassing on the basis of affidavit evidence.

[6] On behalf of the Respondent, written submissions were filed herein dated **5 September 2020** by **M/s Nyairo & Co. Advocates.** Their stance was that the Court has already given directions on how the application dated **5 May 2020** is to be handled; and therefore that the matter ought to proceed accordingly since both parties have already complied with the Court's directions and filed their written submissions. Counsel relied on **Shanaben Ramniklal Parmar & Another vs. Beatrice Waruguru Gitutu** [2007] eKLR to support the argument that, in an application for review, it must be demonstrated that there is an error or mistake apparent on the face of the record; or the disclosure of new facts which were not in the knowledge of the applicant or the Court when the impugned order was made. In the view of **Ms. Odwa**, no such justification was made in this instance. She pointed out that, in any case, there is no prayer in the subject application for the setting aside of the Court's directions dated **24 June 2020;** and that instead the application is in respect of non-existent orders of **26 June 2020.**

[7] With regard to the request for cross-examination, counsel took the view that cross-examination cannot be ordered in a vacuum; and that he who is making such a request is under obligation to state with precision what he wishes to examine the deponent on. She therefore submitted that the Petitioner's application is a total misconception of the law and is lacking legal basis. Counsel further urged the Court to disregard the request for verification of the existence of the Notary Public before whom the Supporting Affidavit of **5 May 2020** was sworn. According to her, the Petitioner is out on a fishing expedition and therefore ought not to be entertained. Thus, Ms. Odwa prayed for the dismissal of the application.

[8] The background to the application is that the Petitioner herein filed this Petition on **24 July 2019** in his capacity as the deceased's nephew. He deposed that the deceased died intestate while domiciled in Kenya; and that every person having prior or equal right to the deceased's estate had consented to or renounced such right. In the Affidavit in Support of the Petition, the Petitioner averred that the deceased had a brother and sister, **Hashen Sidi** and **Malek Sidi Chagan**, who died on **10 June 1998** and **23 January 2005**, respectively; and therefore that, as a nephew of the deceased, he was the only surviving relative and beneficiary. On that basis, he was issued with a Grant of Letters of Administration Intestate in respect of the deceased's estate on **17 September 2019** pursuant to **Section 39(1)** of the **Law of Succession Act, Chapter 160** of the Laws of Kenya; which Grant was confirmed on **26 November 2019.**

[9] It was against the foregoing backdrop that the Summons for Revocation of Grant dated **5 May 2020** was filed by **Nyairo & Company Advocates** on behalf of the Respondent, **Rahemat Chagan Sidi.** Her contention is that she is the only surviving sister to the deceased and therefore the rightful beneficiary to her estate. Consequently, it was her assertion that the Petitioner concealed crucial information from the Court and thereby obtained the Grant by fraudulent means. The Petitioner denied those allegations; whereupon directions were given on **24 June 2020** that the revocation application be disposed of by way of written submissions.

[10] The instant application seeks a review, variation or setting aside of those directions, to pave way for the disposal of that application by way of viva voce evidence. The Petitioner also prayed that the Respondent be compelled to attend court to confirm the averments set out in her affidavit in support of the Summons for Revocation and to prove her credentials before the Court. The Petitioner further prayed that the Court be pleased to verify the authenticity of the Commissioner of Oaths/Notary Public before whom the Supporting Affidavit was sworn on **5 May 2020** from the necessary authorities in Canada. Accordingly, the key issues for consideration in this application are:

[a] Whether sufficient cause has been shown for the setting aside of the orders made herein on **24 June 2020** in favour of *viva voce* evidence;

[b] Whether there is any justification for compelling the attendance of the Respondent for purposes of cross-examination;

[c] The propriety and justification for an investigation by the Court as to the existence of the Notary Public before whom the affidavit in support of the revocation application was sworn.

[11] For purposes of the **Law of Succession Act, Section 47** thereof is explicit that:

> **"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"**

[12] Consequently, the discretion of the Court to grant the orders sought in the instant application is unfettered; the primary consideration being the interest of justice. Indeed, in **Rule 73** of the **Probate and Administration Rules** it is provided that:

> **"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."**

[13] Thus, it is not strictly the case that the Petitioner needed to prove the existence of a mistake or error on the face of the record and therefore the case of **Shanaben Ramniklal Parmar & Another vs. Beatrice Waruguru Gitutu** [2007] eKLR which counsel for the Respondent relied on is inapplicable to the facts hereof. Similarly, the argument that the order of **24 June 2020** was by consent and can only be set aside on grounds which would justify the setting aside of a contract is untenable. I say so because that order did not compromise the application but was merely directory, to facilitate the expeditious disposal of the substantive application dated **5 May 2020.**

[14] More importantly, it has been demonstrated herein that when the directions of **24 June 2020** were given, the Petitioner was acting in person and therefore did not have the benefit of legal counsel. There can be no doubt that the allegations made in connection with the Summons for Revocation are weighty issues, involving allegations of fraud; which allegations entail proof slightly beyond a preponderance of evidence. In the circumstances, to seek that the application be disposed of by *viva voce* evidence the Petitioner cannot be said to be actuated by malice, for that is the primary way in which facts are tried before courts of law.

[15] Hence, in **Gerald Macharia Njogu vs. Samuel Macharia Murimi** [2016] eKLR, **Hon. Mativo**, **J.** in allowing a similar application observed thus, which observations I entirely agree with:

> **"The law of evidence encompasses the rules and legal principles that govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation…When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy. I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides that a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary…The advantage of oral evidence is that the witness is available for cross-examination and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight."** (see also **Re Estate of George Nderi Nguu (Deceased)** [2011] eKLR and **Re Estate of M'Ringera M'Kingania (Deceased)** [2017] eKLR.

[16] It is therefore manifest that what the Petitioner is seeking is not just the summoning of the Respondent for purposes of cross-examination but the disposal of the entire application for revocation on the basis of *viva voce* evidence. I am, therefore, satisfied that there is merit in the prayer for the setting aside of the Orders issued on **24 June 2020** and would grant the same. While I note that in the application, reference was made to **26 June 2020** as the date of the impugned order, not much turns on that for the reason that it is true that the formal expression of the directions of **24 June 2020** were extracted and issued as an Order of the Court by the Deputy Registrar on **26 June 2020**. Accordingly, the argument by counsel that the application has no co-relation with the proceedings and directions of **24 June 2020** is untenable.

[17] Having found that a plausible justification has been made for the setting aside of the directions given herein on **24 June 2020,** by which the revocation application was to be canvassed by way of written submissions, in favour of *viva voce* evidence, it would be superfluous to grant prayers (d) and (f) of the application. There is, in my considered view, no justification for the issuance of an order compelling the attendance of the Respondent for purposes of cross-examination in the circumstances. In the same vein, prayer (h) is not only premature but entirely misconceived. That leads me to the last of the three issues aforementioned; namely, the propriety and justification for an investigation by the Court as to the existence of the Notary Public before whom the affidavit in support of the revocation application was sworn.

[18] Section 60 of the **Evidence Act** recognizes that there are certain matters which require no proof. In **Subsection (1)(k),** it stipulates that:

> **"The courts shall take judicial notice of the following facts—**
>
> **…**

the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

[19] Hence, the Court has no reason to doubt that the Notary Public before whom the affidavit of **5 May 2020** was sworn, namely: **Amin Savji, Notary Public 328 of Gilmore Avenue, Burnaby, British Columbia, Canada,** had the requisite qualification and license to administer oath and sign the jurat; and if it is the contention of the Petitioner that there is no such legal practitioner, then the burden of proof is on him to prove his assertion. In our adversarial system, as opposed to the inquisitorial judicial system in use in some jurisdictions, the Court is an impartial arbiter and has no business coming to the aid of one of the parties in proving his/her case. Hence, in **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others** [2016] eKLR, the Court of Appeal, in discussing this point cited with approval, the following excerpt from an article by **Sir Jack Jacob** entitled **"The Present Importance of Pleadings"** published in [1960] **Current Legal problems**, at page174*:*

It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved…"

[20] Likewise, in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** the Court of Appeal discussed **Libyan Arab Uganda Bank for Foreign Trade and Developmetn & Another vs. Adam Vassiliadis [1986] UG CA 6** wherein the Uganda Court of Appeal adopted the position taken by Lord Denning in **Jones vs. National Coal Board** [1957] 2 QB 55, that:

"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

[21] *The Court of Appeal proceeded to observe that:*

"…Lord Denning was of course alluding to the essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green MR who had explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict." (See Yuill vs. Yuill [1945] ALL ER 183)

[22] It is in the light of the foregoing that I find the Petitioner's prayer for an investigation by the Court flawed and untenable. That prayer must therefore fail; with the result that the only orders that commend themselves to me, and which I hereby grant in respect of the Petitioner's application dated **27 July 2020** are as hereunder:

[a] That the directions and/or orders granted herein on **24 June 2020** and issued on **26 June 2020** in relation to the Summons for Revocation of Grant dated **5 May 2020** filed by the Respondent be and are hereby set aside.

[b] That the application dated **5 May 2020** be heard by way of *viva voce* evidence.

[c] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF OCTOBER 2020

OLGA SEWE

JUDGE