



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 998 OF 2006

IN THE MATTER OF THE ESTATE OF CKK (DECEASED)

RBK

(suing as a legal representative of the late Dr. WK

and also in her own personal capacity)..1ST APPLICANT

CKK ESTATES (1973) LTD.....2ND APPLICANT

SKK.....3RD APPLICANT

SNK.....4TH APPLICANT

PWK.....5TH APPLICANT

MECOL LIMITED.....6TH APPLICANT

N TEA FACTORY LIMITED.....7TH APPLICANT

VERSUS

IWK.....1ST RESPONDENT

PMK.....2ND RESPONDENT

RULING

1. The deceased was a former Provincial Commissioner. He died on 20th February 2004. During his life, he was polygamous. His first wife G died living him with six sons (Dr. WK, JM, PM, LK, WK and EN) and four daughters (MW, MW, IW (1st respondent) and RG). In 1960, he married his second wife MN with whom he got one son (PM – 2nd respondent) and one daughter (JW).

2. On 8th March 1994 the deceased and MN divorced. At the time the deceased died, there was pending between him and MN applications under **section 17** of the **Married Women's property Act, 1882** for the sharing of moveable and immovable matrimonial property.

3. The deceased was said to have left a written Will dated 16th June 1999 through the firm of M/s Kaplan & Stratton Advocates. WK, PM and PM petitioned the court for the grant of letters of administration with Will annexed. The grant was issued to them on 23rd November 2006. In May 2007 MN sought to have the grant revoked for having been obtained fraudulently by concealing material facts. It was her case that the 84 year old deceased was suffering from Alzheimer's disease and was incapable of making or executing the Will dated 16th June 1999; that the properties mentioned in the Will were subject to court proceedings at the time and could not therefore be devised or bequeathed; and that the only valid Will left by the deceased was the one dated 5th May 1975. Her assertion of incapacity was backed by the medical reports of Dr. F.G. Njenga and Dr. S. Mwinzi.

4. On 11th November 2010 the administrators, all the daughters of the deceased, the rest of the sons and MN made a joint application for injunction to restrain Dr. WK from collecting rent from some property in Embu registered in the name of Kakoi Development Company Limited, Geminia Insurance Company Limited and some bank accounts. Dr. WK opposed the application on the grounds that the companies were juristic persons separate from the deceased and could not form part of the his estate, and only the shares held by the deceased could be amenable to inheritance. A ruling was delivered on 23rd February 2012. The court noted that since the applications did not seek the confirmation of grant or proof of the Wills, the issue of the validity of the Wills and the shares was left to be determined at a future don test.

5. On 26th March 2012 Dr. WK petitioned the court for letters of administration on the basis that the deceased left a valid Will dated 16th September 1999. On 13th August 2012, the administrators, joined by all daughters, the rest of the sons of the deceased and MN filed an objection to the petition on the grounds that the deceased lacked the capacity to make the Will, and that since Dr. WK held a power of attorney from the deceased in respect of all his affairs and was the sole beneficiary of the alleged Will, it would be improper to give him the grant. Dr. WK died on 27th August 2012. His estate applied for substitution by his widow RBK (1st applicant).

6. On 3rd May 2013 parties consented to file affidavits indicating their preferred mode of distribution. When the matter came up on 27th February 2014, the 1st respondent, WK, S K (3rd applicant) and PM (2nd respondent) were appointed as administrators of the estate of the deceased. Parties were asked to file written submissions on the validity of the Wills dated 5th May 1975 and 16th June 1999, and in regard to whether the transfer of the 14999 shares of CKK Estates (1973) Limited to Dr. WK in 1994 was valid and whether the said shares formed part of the estate of the deceased.

7. On 22nd January 2015 JK delivered a ruling in which he found that, due to Alzheimer's disease, the deceased had no mental capacity to make an elaborate Will running to 9 pages on 16th June 1999 and therefore the Will was invalid; and that the deceased had no mental capacity in 1994 to transfer the shares of CKK Estates [1973] Ltd (the 2nd applicant) to Dr. WK. It was held that it was Dr. WK who had caused the said shares to be fraudulently transferred to himself with the aim, initially of frustrating the claim lodged by MN, but later with the aim of depriving his siblings of their inheritance of the parcel of land that the shares represented. It was ordered that, because the transfer was a nullity, the shares should revert to the estate of the deceased for distribution. The Will of 5th May 1875 was found not to be valid because it had not been witnessed.

8. With those findings, the court declared that the estate of the deceased was to be administered as if the deceased had died intestate, and would be distributed in accordance with the **Law of Succession Act**. Any claims about gifts *intervivos* would be established before the remainder of the estate of the deceased is distributed, but the parties were at liberty to file affidavits indicating their preferred mode of distribution for the determination by the court.

9. RK (the 1st applicant) was aggrieved and preferred an appeal to the Court of Appeal. Five other appellants joined the appeal against the administrators. The Court of Appeal heard the matter. It agreed with Justice Kimaru that the deceased did not have the capacity to make the Will, and therefore the Will dated 16th June 1999 was invalid.

10. However, the Court of Appeal set aside the finding that the deceased had no capacity in 1994 to gift the shares in the 2nd applicant company to Dr. WK. It also set aside the finding that the acquisition of the shares in the 2nd applicant by Dr. WK by way of gift *intervivos* in 1994 was fraudulent. The court held that –

“iv. The issue of the shares held by the deceased in the 2nd appellant, and any other limited liability companies, shall, if not agreed, be determined on available evidence during the administration of the estate in accordance with the law.”

11. The 1st respondent filed summons dated 31st May 2018 for the confirmation of the grant. She indicated her proposed mode of distribution in her supporting affidavit. On the same day, the 1st and 2nd respondents filed a joint affidavit indicating their joint preferred mode of distribution.

12. On 27th June 2018 Dr. Kamau Kuria (Senior Counsel) for the 1st, 2nd, 3rd and 5th applicants filed a notice of preliminary objection against the application for confirmation on the grounds that:-

(a) the application had been solely taken out by the 1st respondent without the concurrence of and/or consultation with the 3rd and 5th applicants who were the other administrators and this had incurably offended **section 81** of the **Act**; and that

(b) in the absence of the settlement in terms of the orders of the Court of Appeal, there was no grant to be confirmed.

13. On 31st July 2018 the 3rd applicant filed summons for the confirmation of the grant. He indicated his mode of distribution. On 28th August 2018 the 2nd respondent filed his summons for confirmation. He swore affidavit to indicate his mode of distribution.

14. Following direction by the court, on 17th December 2018 the 2nd, 6th and 7th applicants (6th applicant is Mecol Limited and 7th applicant is N Tea Factory Limited) filed the instant chamber application under **section 82** of the **Act** and **rules 41, 49** and **73** of the **Probate and Administration Rules**, the **Companies Act**, etc seeking stay of proceedings and the determination of the issue that this court lacks jurisdiction to make any determination on the issue of shares in CKK Estates (1973) Limited, N Tea Factory Limited and Mecol Limited on the grounds that:-

(a) the estate of the deceased does not own shares in the companies;

(b) the shares that the deceased owned in the companies were transferred, *intervivos*, by the deceased to Dr. WK;

(c) that the shares in the companies were duly transferred and registered in the name of Dr. WK and such transfer has since not been challenged nor set aside by the administrators of the estate of the deceased;

(d) that the Court of Appeal above set aside guidelines on how the transfer of these shares could be challenged;

(e) that there is a procedure on challenging the transfer of shares which has not been followed; and

(f) there are other pending suits on the issue by MN.

15. Along with the summons was a preliminary objection whose grounds were that the probate court lacks jurisdiction to distribute properties which are owned by a company because of the rule in **Salomon –v- Salomon (1897) A.C 22** and also in **Nairobi High Court Succession Cause No. 265 of 2009: In the Matter of the Estate of Gitere Kahura (Deceased)**; the probate court lacks jurisdiction to distribute any moveable and immovable properties which are not registered in the name of the deceased; and the probate court lacks the jurisdiction to distribute any shares in any company which are now registered in the name of the deceased.

16. The 1st respondent filed a response dated 19th December 2018 to oppose the application and the notice of preliminary objection. It was her case that the contention that this court has no jurisdiction to hear and determine the issue of gifts *intervivos* in the said companies was considered and determined by the Court of Appeal at paragraphs 54 and 55 of the judgment, and cannot therefore be raised again.

17. JMK and the Estate of ENK, both beneficiaries of the estate of the deceased, filed joint grounds of opposition to the application and the objection. It was their case that the issue whether or not this court has jurisdiction to deal with the shares of CKK Estates [1973] Limited and other limited liability companies was *res-judicata* having been previously dealt with by Justice Kimaru in his ruling dated 22nd January 2015 and by the Court of Appeal in its judgment dated 15th December 2017. The two were represented by Mr. Njenga.

18. The 1st respondent was represented by Mr. Murgor. Counsel also represented the estate of WKK, the estate of PMK, MWK, MWK RWM and LKK. Their case was that the issue being raised had been dealt with by this court and by the Court of Appeal, and had been determined.

19. The 2nd, 6th and 7th applicants were represented by Mr. Gitau. For the record, they took a position similar to that of Dr. Kamau Kuria (S.C.) who acts for the 1st applicant, 3rd, 4th and 5th applicants.

20. MN's position was similar to that taken by the clients of Mr. Murgor.

21. Counsel filed written submissions which I have considered.

22. There is no dispute that the deceased owned shares in CKK Estates [1973] Limited, Mecol Limited and N Tea Factory Limited. Prior to his death all these shares were transferred to Dr. WK. It follows that at the time of his death the deceased did not own any shares in these companies. Before Justice Kimaru, the case by the estate of Dr. WK was that the deceased had transferred these shares to Dr. WK as gifts *intervivos*, and therefore the same were not part of the estate of the deceased to be shared among his beneficiaries. The administrators, on the other side, claimed that at the time of the alleged transfer the deceased had no capacity owing to sickness; that the transfer was a fraudulent transaction by Dr. WK. MN took a similar position. Justice Kimaru considered the matter and found that the transfer was a fraud on the part of Dr. WK to disinherit the beneficiaries of the estate of the deceased, and to deny MN her claim on the matrimonial causes that she had filed. The court found that at the time of the said transfer the deceased had no capacity owing to sickness.

23. The Court of Appeal dealt with the issue of transfer, now that the estate of Dr. WK had been aggrieved by the finding by Justice Kimaru. The Court noted that Justice Kimaru had arrived at the conclusion when no cogent evidence had been tendered; that the court had rushed, as it were, to arrive at the conclusion. In the words of the court, the High Court had acted in –

“a precipitate manner in dealing with the acquisition of the shares fraudulent and the deceased as having no capacity to gift them out during his lifetime in 1994, to one of his children.”

24. What did the Court of Appeal do? It set aside the declaration by the High Court that the -

“acquisition of the shares fraudulent and the deceased as having no capacity to gift them out during his lifetime in 1994, to one of his children.”

25. The Court of Appeal did not stop there. It directed that –

“the issue will be decided, if it arises, together with any protests that may arise in the course of confirmation of the grant under rule 40(6) of the P and A rules.”

26. In summary of the orders by the Court of Appeal, it was indicated as follows:-

“iv. The issue of the shares held by the deceased in the 2nd appellant, and any other limited liability companies, shall, if not

agreed, be determined on an available evidence during the administration of the estate in accordance with the law.”

27. For the avoidance of doubt, and the Court of Appeal made it quite clear, the shares of a deceased in a limited liability company are assets which the administrator can distribute in a succession cause.

28. Lastly, this is what the Court of Appeal stated:

“If the court holds that the shares were gifted to Wilfred, just as other gifts were made to the other beneficiaries, that would be the end of the matter. If they were not, then they vest in the administrators who may engage with the company or companies under the relevant Company Laws and Articles of Association to wrest them back to the estate.”

29. In conclusion, I find no merit in the chamber summons dated 14th December 2018 and filed on 17th December 2018 by the 2nd, 6th and 7th applicants and the preliminary objection dated 14th December 2018 by the 2nd, 3rd, 4th and 5th applicants. This court has jurisdiction to decide the question whether the deceased gifted the shares in the respective limited liability companies to Dr. WK. The summons and objection are dismissed with costs.

DATED and SIGNED at Nairobi this 20TH day of FEBRUARY 2019

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at Nairobi this 21ST day of FEBRUARY 2019

ALI-ARONI

JUDGE