



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 101 of 2014

IN THE MATTER OF THE ESTATE OF CHANDRAKANT DEVCHAND MEGHJI SHAH (DECEASED)

MONA SHAH

PRIYAT SHAHAPPLICANTS

VERSUS

HARISH RAICHAND SHAH

MUKESH MANCHAND SHAH.....RESPONDENTS

RULING

1. Chandrakant Devchand Meghji Shah, the deceased herein died on 7.8.13 at the Nairobi Hospital. He was survived by two children Priyat Shah and Mona Shah (the Applicants). Grant of Probate of Written Will (the Grant) was on 14.7.14 issued to Mukesh Manchand Shah and Harish Raichand Shah (the Respondents) the appointed as executors of the Will of the deceased.

2. The Applicants filed Originating Summons No. 37 of 2013 (the OS) seeking *inter alia* a determination on the validity of the will of the deceased. In a ruling of 20.2.17, the Court found that the trust and gifts to the Applicants contained in the Will of the deceased **failed for uncertainty. The failure resulted in the creation of an intestacy in respect of the entire estate of the Deceased.**

3. Following the ruling, the Applicants have filed the summons dated 30.5.18 (the Summons) seeking revocation of the Grant and that they be named administrators of the estate of the deceased. The ground upon which the Summons is premised is that pursuant to the ruling in the OS, the Grant has become inoperative and serves no useful purpose.

4. It would appear that the original file went missing and the Applicants filed an application dated 7.8.18 for reconstruction of the file. The Application was not opposed and was on 5.2.19 allowed. On the same day, the Respondents sought 14 days to file a response to the Summons which was granted and hearing fixed for 5.3.19. On that date, the Respondents had not filed a response as directed and sought a further 7 days which was opposed by the Applicants. Counsel for the Respondents informed the Court that the replying affidavit was ready and awaiting signature by their client who had been away and had only returned to the country the day before. The Court allowed the Respondents to file a response by close of business on 6.3.19 and the matter was to be mentioned on 7.3.19 to confirm compliance. On that day however, the Court was informed that the Respondents only managed to file the response that morning. They also filed an application seeking stay of the Summons and sought directions. The Applicants asked the Court not to admit the response. The Court however admitted the same as the delay in filing was just one day which was not inordinate.

5. The Respondents' response was by way of Grounds of Opposition dated 6.3.19. The Respondents contend that they have filed a notice of appeal and intend to appeal against the ruling of this Court in the OS. In light of the pending appeal, it would be in the interest of the justice that their application dated 6.3.19 seeking stay of these proceedings be heard before the Summons. The Respondents contended that the Applicants had made a prior application for revocation of the Grant which was dismissed by this Court and therefore the Summons is an abuse of the Court process.

6. Contemporaneously with the Grounds of Opposition, the Respondents filed an application seeking stay of the Summons pending the hearing and determination of their intended appeal to the Court of Appeal against the ruling in the OS.

7. The Applicants' opposed the Respondents application for stay of the Summons arguing that the same had been filed in bad faith with the intention of delaying the Summons. The notice of appeal against the ruling in the OS of 20.2.17 was filed on 3.3.17 and the Respondents have done nothing for 2 years. On the Respondents claim that the delay was caused by the loss of the file, the Applicants argued that the Respondents had not filed anything to demonstrate that they were pursuing the lost file. Given that the matter was not for hearing, the Court gave directions that the Summons having been filed first in time would be heard first and timelines for filing of submissions given. On the date for hearing, the Respondents sought leave to appeal the directions given by the Court that the Summons would be heard first. They

further stated that they would not resist the Summons. Leave to appeal was granted and the Court proceeded to hear the Applicants' submissions on the Summons.

8. I have given due consideration to the matter. The issues for determination are:

- i) Whether the Summons is an abuse of the Court process
- ii) Whether the Summons should be stayed pending the hearing and determination of the Appeal
- iii) Whether the Grant should be revoked
- iv) Whether the Applicants should be named administrators of the estate of the deceased

Whether the Summons is an abuse of the Court process

9. The Respondents contend that the Summons is an abuse of the Court process as the Applicants' previous application for revocation of the Grant was dismissed by this Court. The Applicants did indeed seek revocation of the Grant vide their application filed on 17.3.16. Their grounds were that Grant was obtained fraudulently by the concealment of material facts that the Applicants had filed Petition No 433 of 2013 for a Grant of Letters of Administration Intestate dated 22.11.13 as they had challenged the validity of the Will of the deceased in the OS which was pending before this Court. That the Respondents had filed an Objection dated 28.4.14 to the making of the Grant to the Applicants. According to the Applicants, the filing by the Respondents of the petition for the Grant despite having filed the objection in Cause No. 433 of 2013 and having knowledge of the existence of the OS was an abuse of the Court process. That as long as the Objection is still pending the Grant ought not to have been issued.

10. The Court did after considering the application for revocation of grant dismiss the same. The Court found that the notice inviting objections to the Applicants' petition for grant in Succession Cause 433 of 2013 was published in the Kenya Gazette on 28.3.14. The petition by the Respondents for the Grant had been filed earlier on 11.3.14. There was nothing before the Court to cause it to doubt that the Respondents were aware of the Applicants petition when they filed their own. The Respondents objected to the applicants' petition because they had themselves applied for the Grant. The Court further faulted the Applicants for filing their own petition given that they were aware of the existence of the Will of the deceased, and had filed the OS.

11. The OS has been determined and the Court has found that the Will of the deceased is invalid for uncertainty of the trusts and gifts. This has resulted in the creation of an intestacy in respect of the entire estate of the deceased. The Summons seeking of the revocation of the Grant on grounds that it has become inoperative is not in my view an abuse of the Court process notwithstanding that the previous application had been dismissed. In any event the ground for revocation herein is completely different from the grounds in the previous application.

Whether the Summons should be stayed pending the hearing and determination of the intended appeal

12. In their grounds of opposition, the Respondents contend that they have filed a notice of appeal and intend to appeal against the entire decision of 20.2.17. Although the record shows that the notice of appeal was filed on 3.3.17, no evidence of filing of the appeal was available 2 years later. The Court finds that stay of the Summons pending the hearing and determination of an intended appeal the date of filing of which is unknown and which may never be filed will greatly prejudice the Applicants and occasion a miscarriage of justice.

Whether the Grant should be revoked

13. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act. The Applicants in seeking revocation of the Grant have invoked the provisions Section 76(e) of the Act which provides:

“ 76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(d) that the grant has become useless and inoperative through subsequent circumstances.

14. It is the Applicants' case that the Court having declared an intestacy over the estate of the deceased and having ascertained that the Applicants are the only beneficiaries of the estate, the natural step forward is to revoke the Grant. The Respondents had obtained the Grant on the basis of the Will. The Applicants challenged the validity of the Will in the OS. This Court did, in its ruling in the OS, find that the trust and the gifts in the Will failed for uncertainty, thereby creating an intestacy. In light of the intestacy created, the Grant based on a will that has been found invalid cannot stand. Presently, the estate of the deceased who died in 2013 has no personal representatives. It follows therefore that the Grant must be revoked if the estate of the deceased is to move forward.

Whether the Applicants should be named administrators of the estate of the deceased

15. The Applicants seek that upon revocation of the Grant they be named as administrators of the estate of the deceased. The Law of Succession Act of the Act has conferred upon this Court the final discretion as who a grant of letters of administration shall, in the best interests of all concerned, be made. Priority is given to beneficiaries in accordance with their beneficial interests in the estate. Section 66 provides:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person

or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

16. Part V of the Act has set out the beneficiaries in the order of priority. Section 38 provides:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

17. In the instant case, the deceased is survived only by the Applicants. Given that there are no other claimants to the estate of the deceased, and given that the Applicants seek to be named as administrators, the Court finds no reason why it should not exercise its discretion by appointing the Applicants as the administrators of the estate of their late father.

18. In the result I find that the Summons dated 30.5.18 has merit and I make the following orders in the interests of justice.

- i) The Grant of Probate issued to Mukesh Manchand Shah and Harish Raichand Shah on 14.7.14 be and is hereby revoked.
- ii) Priyat Shah and Mona Shah are hereby appointed administrators of the estate of the deceased Chandrakant Devchand Meghji Shah.
- iii) Priyat Shah and Mona Shah shall file ssummons for confirmation of grant within 21 days for hearing on 24.6.19.
- iv) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 31st day of May 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Applicants

.....for the Respondents

.....Court Assistant