



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 89 OF 2018

IN THE MATTER OF THE ESTATE OF HARILAL MULJI BHOVAN CHUDASAMA (DECEASED)

SHASHIKANT HARILAL CHUDASAMA.....PETITIONER

-VERSUS-

JASWANT HARILAL CHUDASAMA.....1ST OBJECTOR

NILABEN KARTIC SHAH.....2ND OBJECTOR

MUDHAKHANTA SURENDRA NATHALAL...3RD OBJECTOR

RASILA RAMESHCHANDRA SIKOTRA.....4TH OBJECTOR

HASMUKH HARILAL CHUDASAMA.....5TH OBJECTOR

RAMESH HARILAL CHUDASAMA.....6TH OBJECTOR

RULING

1. Shashikant Harilal Chudasama, the petitioner herein moved this court through a petition for letters of administration ad litem dated 19th January, 2018 and supporting affidavit dated 18th June, 2018 seeking to be appointed as legal representative of the Estate of the late Harilal Mulji Bhovan Chudasama for the purpose of substitution of the deceased as an interested party in a civil suit filed at the Environment and Land court at Nairobi being suit No. 1394 of 2016(O.S).

2. In his supporting affidavit, the applicant swore that the deceased died intestate on 11th October, 2002 and since then, none of his survivors has taken out a grant of representation to his Estate. At the time of the deceased's death, he was a co-owner of various properties with his siblings. One of the properties was LR. No. 209/3383 which he claimed was co-owned by himself, the 1st objector and the deceased. It was stated that his brother Jaswant Harilal Chudasama fraudulently transferred the deceased's interest in the property to himself without a confirmed grant resulting in a dispute.

3. The Petitioner claimed that a suit before the Environment and Land Court being E.L.C No. 1394 of 2016 (O.S), his brother had made a claim against him for adverse possession in respect of the remaining share of the property known as LR. No. 209/3383. He was therefore seeking to be enjoined in this case on his own behalf and as a representative of the deceased's estate to represent the combined interests in the suit. He asserted that he reached out to his siblings in an attempt to have them reach a consensus to his appointment to no avail.

4. In answer to the petition, Jaswant Harilal Chudasama, the 1st Objector herein, filed an affidavit in opposition to the petition dated 29th June, 2018. He stated that he was a son to the deceased who died on 11th October, 2002. The deceased was survived by Shashikant Harilal Chudasama, Rasila Rameshchandra Sikotra, Nilaben Kartic Shah, Mudhakhanta Surendra Nathalal Jethwa, Ramesh Harilal Chudasama and Hasmukh Harilal Chudasama. In his affidavit the 1st Objector denies that the deceased was a joint owner to LR. No. 209/3383 but admits that he and the Petitioner are adverse parties in ELC NO. 1394 OF 2016. He added that, the court in that suit directed that there be appointed a legal representative to the estate of the deceased to represent its interest in the suit.

5. He was apprehensive that the Petitioner had no intention of protecting the deceased's estate but rather to advance his own. He was adamant that the deceased had other sons and daughters who could adequately protect the estate interest in the suit before the Environment and Land Court. Further, that the Petitioner had never petitioned the Court for grant of Letters of Administration to administer the estate of their deceased father before the 1st Objector filed a case against him.

6. Nilaben Kartic Shah, the 2nd Objector and a daughter to the deceased swore an affidavit in opposition to the Petition for grant of Letters of Administration ad litem dated 30th July, 2018. She confirmed that the deceased died on 11th October, 2002. She stated that Jaswant Harilal Chudasama had been in continuous possession of the contentious parcel of land. As far as she was concerned, Jaswant was the owner of the property which was transferred to him by the deceased.

7. The 2nd Objector stated that she and her siblings had sought to be enjoined in ELC No. 1394 of 2016 as interested parties. The court granted that order and directed that they agree on who amongst them should be appointed as a legal representative of the estate. She deposed that all the siblings agreed that she was the best suited to represent the interest of the deceased's estate. Through a letter dated 6th May, 2018 from the Petitioner's Advocate, the Petitioner had no objection to the proposal for her appointment, although he wanted the case to be handled in a particular manner. She was apprehensive that the Petitioner's motives were not genuine in seeking to be appointed as the legal representative of the estate.

8. Mudhakhanta Surendra Nathalal Jethwa, Rasila Rameshchandra Sikotra, Ramesh Harilal Chudasama and Hasmukh Hariyalal Chudasama also filed affidavits in opposition to the Petition for Letters of Administration Intestate. They all reiterated the contents of the affidavit filed by Nilaben Kartic Shah supporting her claim to be appointed as the representative to the estate of the deceased.

9. The Petitioner filed a further affidavit dated 19th September, in support of his Petition. He reiterated the contents of his Petition and supporting affidavits. He further averred that the proposed legal representative was not a neutral party as she too was supporting the alleged illegality in the transfer of the property subject of the suit in ELC No. 1394 of 2016 (O.S). He asserted that he was the only one who could adequately protect his late father's interest in the suit.

10. Parties filed written submissions in support of their cases. The 2nd to 6th objectors submitted that the Petition was incompetent having been brought under the wrong provisions of the Law which merely invoke the inherent powers of the court. Further, that the Petitioner failed to demonstrate that he had the best interest of the estate in seeking the orders. Finally, they submitted that it would not be in the best interest of the beneficiaries of the estate for the Petitioner to be granted the orders sought, as he intended to drag the family into unnecessary legal battles. They prayed that the Petition be dismissed with costs.

11. The 1st objector submitted that the claim over parcel no. 209/33383 was time barred as it contravened Section 7 of the Limitation of Actions Act which provides for action for recovery of land. This therefore rendered this Petition also time barred. He submitted that he and the Petitioner being adverse parties in ELC NO. 1394 OF 2016, and his appointment as a representative of the estate which is an interested party in the suit would be prejudicial to the 1st Objector.

12. On the other hand, the Petitioner submitted that although he invoked incorrect provisions of the law in bringing this Petition, this does not warrant its dismissal. He asserted that there was no bad faith, neither was the Petition intended to mislead or cause injury or prejudice the objectors. He referred to the provisions of **Article 159(2) (d)** of the Constitution of Kenya. He also submitted that although allegations had been made that he lacked the good will to represent the interest of the deceased in the suit, no evidence had been tendered of any malicious intent. He contended that the other objectors were not genuine since they seemed to support the 1st objectors claim to the property indicating that this demonstrated bias and should disqualify them as they would not be impartial. He urged the court to grant him the prayers as sought in the Petition.

13. I have considered the petition, the affidavits sworn in its support and in opposition to the Petition and the submissions made by the parties. The Petitioner's prayer is for a grant of letters of Administration ad litem to be made to him in his deceased father's estate. It is not clear why in seventeen years, the beneficiaries have not petitioned to have an Administrator appointed in the estate, or to have the estate administered. Rule 12 of the Probate and Administration Rules provides:

12. Application for limited grant under Fifth Schedule to the Act

An application for a grant of representation to be limited in any of the several respects described in the Fifth Schedule to the Act shall be by petition in the appropriate Form and shall be supported by such evidence by affidavit in Form 19 as is required by these Rules including such evidence as is sufficient to establish the existence of the facts and circumstances relative to the particular respect in which the grant is to be limited.

14. It is clear from the foregoing that an application for a limited grant such as the present application shall be by way of petition. The Law of Succession Act under Section 66 provides as follows:

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.

15. The foregoing provision gives this Court final discretion to determine to whom a grant of letters of administration shall be made. In the present case, the Petitioner and the 2nd Objector have expressed a willingness to act in the management and administration of the affairs of the estate of the Deceased and in particular to defend the existing suit. What is in issue is who should be appointed to be the legal representative of the estate.

16. The Petitioner argued that he was best suited to be appointed the legal representative because he wished to represent the interests of the estate. On the other hand, the 1st Objector opposed the Petitioner's proposed appointment contending that they were adverse parties in ELC NO. 1394 OF 2016 and this would be prejudicial to him. The 2nd to 6th Objectors were also not in favour of the appointment of the Petitioner as a legal representative of the estate of the deceased and were apprehensive that he would not advance the interest of the estate in the suit but

rather his own.

17. From the evidence, it is clear that all objectors had agreed on the appointment of Nilaben Kartic Shah as a representative of the estate of the deceased. In reference to a letter dated 6th May, 2018 from the firm of Kamau Kuria and Company Advocates to the 2nd to 6th Objectors attached to the affidavits sworn by the 2nd to 6th Objectors, it would seem that even the Petitioner was agreeable to his sister Nilaben being appointed as the administratrix of their father's estate. However, this was with a condition that he would defend the suit filed and file a counter claim.

18. Although a lot of evidence has been adduced in relation to the disputed property, this Court lacks jurisdiction to pronounce itself on the allegations and counter allegations made by the parties in respect of the parcel of land in issue. The Petition before this Court can only be determined in respect of who should be appointed to represent the estate of the deceased in the suit before the Environment and Land Court.

19. The Petitioner and the 1st Objector being adverse parties in the suit are not well suited to represent the estate of the deceased, as their individual interests may overlap those of the estate, or may lead to a conflict of interest. Further, it will be prejudicial on one party if the other is appointed to represent the interests of the estate in the suit.

20. It must be remembered that a grant of letters of Administration *ad litem* is a limited grant for purposes of filing or proceeding with a suit. It does not confer on the Administrator the right to distribute the estate of the deceased or the proceeds of the suit represented.

21. Having taken all factors into account and in exercise of the discretion granted to this Court by Section 66 of the Law of Succession Act, I therefore make the following orders which are necessary for the ends of justice to be met:

a) Grant of Letters of Administration *ad litem* be and is hereby made to NILABEN KARTIC SHAH, limited only for the purpose of continuing with the prosecution of Environment and Land court Case No. 1394 of 2016 (O.S) filed at Nairobi.

b) Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF JUNE, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of Advocate for the Petitioner

In the presence of Advocate for the 1st Objector

In the presence of Advocate for the 2nd, 3rd, 4th, 5th and 6th Objectors.