



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1774 OF 2009

IN THE MATTER OF THE ESTATE OF SHARRIFF MOHAMED NOOR (DECEASED)

RULING

1. Through summons dated 10th January 2017 but filed on 19th January 2017, Mehuba Gelani Kelil (hereinafter referred to as the applicant) moved this honourable court seeking orders as hereunder:

(a) That this honourable court do certify this Application as urgent and one deserving to be heard ex-parte in the first instance.

(b) That this honourable court do grant leave to join Khadra Shariff Ali as an interested party in this cause.

(c) That pending the hearing and determination of this application inter-partes, this honourable court do order that all proceeds of the rental income from the New Al-Noor Exhibition Limited's properties be managed jointly by all the administrators of the estate of the deceased or as shall be directed by this honourable court.

(d) That this honourable court do issue protection orders against the step daughters, Towhida Awo Shariff and Isha Awo Shariff who are the co-administrators together with their mother, Khadra Shariff Ali prohibiting them against interfering with the assets of the estate of the deceased pending the hearing and determination of this application inter-partes.

(e) That this honourable court do order Towhida Awo Shariff and Isha Awo Shariff who are the co-administrators together with their mother, Khadra Shariff Ali to account for all sums collected from the commercial property, Land Reference No.209/15037 known as New Al-Noor Exhibition, Accra Road, Nairobi.

(f) That this honourable court do order that all proceeds of the rental income from the commercial property, Land Reference No. 209/15037 known as New Al-Noor Exhibition, at Accra Road, Nairobi be directed to a joint account where the applicant is a mandatory signatory jointly with the other administrators namely, Towhida Awo Shariff and Isha Awo Shariff and all payments with regard to the estate including all liabilities be paid from the said account.

(g) That this honourable court do order that the certificate of confirmation of grant made on 17th July 2012 be amended to include the Eighty Five Thousand (85,000) shares of the deceased in Safaricom Limited and be distributed between the beneficiaries herein.

(h) That an order do issue restraining the respondents and their mother, Khadra Shariff Ali

from leaving the jurisdiction of this honourable court pending the hearing and determination of this application.

(i) Any other orders that are deemed just and expedient that will meet the end of justice.

(j) Costs of this application be paid for by the said Towhida Awo Shariff and Isha Awo Shariff.

2. Application which is brought pursuant to Sections 4, 5, 83(g) and (h) of the Law of Succession, rules 49 and 73 of the Probate and Administration rules, is based on grounds on the face of it and affidavit in support deponed by the applicant in person on 28th December 2016.

3. In a nutshell, the applicant basically sought orders directing the respondents to account for proceeds and or benefits accruing from New Alnoor Exhibitions Company Ltd. being part of the deceased's estate which the respondents and their mother Khadra Shariff have been managing and benefiting from to the exclusion of the applicant their step-mother who is also a co-administrator and beneficiary.

4. In response to the application, the respondents herein Isha Awo Shariff and Towhida Awo Shariff filed two grounds of opposition on 27th February 2017 and a joint replying affidavit deponed the same day contending that the honourable court is devoid of jurisdiction to grant prayers 3, 4, 5, 6 and 8 as they relate to company affairs whose shares had been transferred to various beneficiaries as per the confirmed grant and that any dispute arising therefrom should be addressed as a commercial dispute under the Companies Act hence a civil suit.

5. Secondly, the respondents asserted that, the administration of the estate of the deceased has been finalized and therefore nothing remaining to administer save for prayer 7 with regard to inclusion of 85,000/= Safaricom shares which were left out during confirmation despite being part of the assets of the estate.

6. Briefly, the deceased herein Sharriff Mohamed Noor died intestate on 30th July 2009 leaving behind Khadra Shariff and Mehuba Gelan Kelil as widows plus thirteen children. A grant of letters of administration intestate was issued on 26th July 2010 jointly to Mehuba Gelani Kelil (widow), Towhida Awo Shariff (daughter) and Isha Awo Shariff (daughter).

7. The said grant was confirmed on 17th July 2012 and the estate shared out by consent. Among the assets shared out was the 800 shares owned by the deceased in New Al Noor Exhibitions co. Ltd. As per the confirmed grant, the beneficiaries of the said shares are listed as follows:-

(a) Mehuba Gelan Kelil – 100 shares

(b) Naima Awo Shariff – 46 shares

(c) Hayat Awo Shariff – 46 shares

(d) Mohamed Amin Awo Shariff – 94 shares

(e) Fathiya Awo Shariff – 46 shares

(f) Abnoor Awo Shariff – 95 shares

(g) Isha Awo Shariff – 46 shares

(h) Ismahan Awo Shariff – 46 shares

(i) Zahara Shariff Awo _46 shares

(j) Towhida Shariff Awo – 46 shares

(k) Umulkheir Awo Shariff – 46 shares

(l) Summayah Shariff – 46 shares

(m) Imrana Shariff – 51 shares

8. It is the applicant's contention in her aforesaid affidavit that the respondents who are her step-daughters together with their mother Khadra Shariff Ali, have been collecting rent from New Al Noor Exhibitions Co.ltd premises which is a commercial property consisting of shops and stores let out to tenants. That the respondents have failed to account for 4 million shillings collected per month since the death of the deceased.

9. She (applicant) further stated that, the respondents have denied her access to the said property and that she has been deprived of her only source of livelihood hence unable to meet her daily expenses, medication and school fees for her children.

10. The applicant indicated several dates when the respondents allegedly withdrew various amounts of money from the company's account as follows:

(a) On 24th April 2012 Kshs.18,900,000/=

(b) On 26th July, 2012 5,000,000/=

(c) On 11th June 2012 20,000,000/=

(d) April 2012 2,000, 000/=

11. In his oral submission, Mr. Hassan counsel for the applicant reiterated the averments contained in the applicant's affidavit. Counsel urged the court to direct the respondents to submit audited statement of accounts in respect of the subject property since none has been filed from the time of confirmation of the grant. Learned counsel relied on several authorities listed in the applicant's list of authorities filed on 13th March 2017 all illuminating on the statutory duty bestowed upon the administrators in the administration and management of the estate.

12. Among the cases referred to in espousing the statutory duty in submission of audited accounts is- **In the Estate of Teresia Wanjiru Thuo (deceased) (2016) eKLR, Veronicah Wangui Kararaho vs Betty Wanini Kararaho and Another (2011) eKLR and Mary Wangari Kihika vs John Gichuki and 2 Others (2015) eKLR.**

13. On the other hand, the respondents opposed the application vide their joint affidavit aforementioned urging that, pursuant to the confirmation of grant, each beneficiary was allocated his or her respective shares and a transfer to that extent effected and executed at the companies registry as evidenced by the Registrar of Companies letter dated 23rd February 2017. The respondents therefore asserted that, any dispute arising out of proceeds earned by the company is no longer a succession matter but instead a commercial dispute which should be handled by the relevant court with jurisdiction.

14. Concerning prayer 7, both parties agreed that there was need to include 85,000/= Safaricom shares which were inadvertently left out as part of the assets of the estate.

15. In his oral submission, Mr. Sumba for the respondent also reiterated the averments contained in the respondents' replying affidavit urging that company affairs and or disputes can only be arbitrated upon in a civil court based on the articles and memorandum of association. Mr. Sumba opined that, the prayer for audited accounts is not among the prayers listed in the application. He further stated that, the applicant

being one of the administrators should be the first person to account for the estate in case of wastage where appropriate.

16. I have considered application herein, supporting affidavit, grounds of opposition, replying affidavits, annexures thereof and oral submissions by both counsels. Issues for determination are:

(a) Does this court have jurisdiction to entertain this application and grant the prayers sought? If so, are the respondents bound to render an audited statement of accounts?

(b) Is there a justiceable cause of action to warrant joinder of Khadra Shariff a beneficiary of the estate as a party?

(c) Can the court include assets left out as part of the estate?

17. As stated earlier, a certificate of confirmation of grant was issued on 17th July 2012. Among the three administrators is the applicant and the respondents herein. Khadra Shariff Ali mother to the respondents is alleged to be colluding with the daughters (respondents) in wasting the estate in this case New Al Noor Exhibitions Company Ltd activities.

18. The duty to manage estate affairs is the sole responsibility of the personal representatives. Section 83(e) of the Law of Succession provides that personal representatives shall have the following duties:

(a)

(b)

(c)

(d)

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

(f)

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

(h) To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account”.

19. From the foregoing, the duty to account for the assets, liabilities and dealings of any estate purely lies on the personal representatives. There is no short cut about it. It is a statutory obligation to which the administrators of an estate must adhere to without any amount of discretion. However, in this case, there is no proof that Khadra Shariff had a duty to administer the estate. She is not bound to account for any assets or liabilities of the estate as that is the sole responsibility of the personal representatives. There is no proof either of any wrong committed by the said Khadra Shariff who in any event is a mere beneficiary. She is being condemned by virtue of being the mother to the respondents. The prayer to enjoin Khadra Shariff is unfounded and ill-advised hence the same is rejected. Accordingly, prayer two of the application is disallowed.

20. Regarding inclusion of the 85,000 shares in Safaricom which were inadvertently left out, the same is not contested. However, that prayer (prayer 7) was not accompanied by a consent by all beneficiaries on the mode of distribution. To that extent, the administrators are advised to file appropriate application for amendment or review of the confirmed grant so as to rectify the same thereby including the shares in question indicating the individual beneficiaries' share.

21. Does this court have jurisdiction to entertain this matter? According to the applicant, this court has jurisdiction under Section 83 of the Law of Succession. To the contrary, the respondents argued that, the administration of the estate has since been completed and each beneficiary allocated his or her fair share. To prove that assertion, the respondents in paragraph 5 attached a letter from the Registrar of Companies dated 16th December 2016 (annexure TAS 1) confirming that New Al Noor Exhibitions Ltd had filed annual returns as at 31st December 2015 thereby indicating the names of directors and beneficiaries among them the applicant, respondents and all beneficiaries as reflected in the confirmed grant.

22. The respondents further attached a copy of resolutions and cheques showing payments made to the applicant on various dates (see annexure TAS 3, 4 and 5). Whereas I agree that the representatives of the estate are under obligation to give a detailed audited statement of account regarding assets, liabilities and any dealings affecting the estate, the same is regulated with time frames.

23. A court cannot forever seek to enforce Section 83 of the Law of Succession where administrators themselves have completed the process of administering the estate. In this case, the disputed asset is New Al Noor Exhibitions Company whose shares have since been transferred to the respective beneficiaries as per the confirmed grant. Nobody complained on mismanagement or wastage of the estate until now long after the confirmed grant had been executed. It therefore follows that, any dispute regarding misuse or mismanagement of company affairs in this case New Al Noor Exhibitions Company is beyond the scope of a succession case. The transfer of shares to individual beneficiaries has not been disputed. The letter from the registrar is clear in that respect.

24. Accountability by the administrators is a joint effort. The applicant being one of the administrators is equally duty bound to account for the assets and liabilities of the estate where necessary (**see the Estate of Teresia Wanjiru Thuo (deceased) (2016) eKLR (Supra) and Rupal Shah and Another Rameck Bhagwani Shah (2015) eKLR.** Nevertheless, in this case, the applicant did not ask for accounts for a specific period. She only asked the court to grant orders directing the respondents and their mother Khadra Shariff to give an account regarding dealings and affairs of their company.

25. To that extent, I do agree with Mr. Sumba counsel for the respondents that prayers 3, 4, 5 and 6 cannot apply as the dispute purely falls within the purview of another court bestowed with the jurisdiction to hear civil disputes relating to commercial transactions with regard to company affairs.

26. As pertains prayer 8 seeking restraining orders against the respondents and their mother from leaving the country, there was no proof tendered to show that the respondents were due to leave the country with a likelihood of not returning. That prayer is equally disallowed as it is anchored on speculation. Even if they were to leave the country which is not proved, a company is a legal person different from its shareholders and directors. The company is still there operating as a going concern hence no cause for alarm. Any party aggrieved with the affairs of a company is at liberty to sue the company which is a separate legal entity from shareholders (**See Kenya National Capital Corporation Ltd. vs Integrated Wood Complex and Another (2005) eKLR) and Solomon vs Solomon(1897)AC22.**

27. Based on the foregoing reasons, it is my finding that the applicant has failed to prove her case on a balance of probability and the same is henceforth dismissed. This being a family dispute, each party shall bear her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JANUARY 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

No appearance for the Applicant

Miss Wasike holding brief for Sumba for the Respondent

Edwin..... Court Assistant