



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 91 OF 2016

IN THE MATTER OF THE ESTATE OF BRYCE WALLACE COWAN (DECEASED)

JOANNA SILVESTER APPLICANT

VERSUS

KORRINA SPYRATOS COWAN 1ST RESPONDENT

FIONA L.E. THOMPSON 2ND RESPONDENT

AND

ROBIN BALFOUR COWAN INTERESTED PARTY

RULING

The late Bryce Wallace Cowan died on 21.3.2016 at the Aga Khan Hospital in Mombasa. On 23.5.2016 Korinna Spyratos Cowan and Fiona Louise Elizabeth Thompson filed this succession cause seeking a grant of probate of the last Will and testament of the deceased. The record shows that the 1st petitioner (Korinna) is the deceased's widow. On 22.6.2016 one of the deceased's daughter from his first marriage, Johanna Silvester, filed an objection to the making of the grant citing several grounds. The cause was gazetted on 19.8.2016 and despite the objection a grant of probate of written Will was issued on the 21.9.2016. On 3.10.2016 the objector filed a petition by way of cross-petition for limited letters of administration as well as answer to the petition for a grant.

Parties herein entered into out of court negotiations for sometimes but the same were not fruitful. On 13.12.2016 this court gave directions to the effect that the objection was to proceed by way of oral evidence whereby the objector was to be the plaintiff and the petitioners to be the defendants. The case was fixed for hearing on 30.1.2017. On 26.1.2017 Robin Balfour Cowan filed his application seeking the following orders:

1. THAT the Grant of Probate of Written Will issued on the 21st day of September, 2016, by the Hon. Mr. Justice S.J. Chitembwe to **KORINNA SPYRATOS COWAN** and **FIONA LOUISE ELIZABETH THOMPSON** (hereinafter jointly referred to as "the Executors") be confirmed.

2. THAT Portion No. 12915 Malindi which has since been sub-divided into twenty one portions namely subdivision Nos. 15156 (Original No. 12195/2) Malindi to 15176 (Original No. 12195/22) Malindi be partitioned and **ROBIN BALFOUR COWAN** (hereinafter referred to as "the

Applicant”) be entitled to deal with his half (1/2) share of the properties, such partition of the land to be as agreed with the Executors and the Objector or as shall be most convenient taking into account existing structures on the ground.

3. THAT in the alternative and without prejudice to the foregoing, the Executors of the Will of the deceased herein be compelled and/or granted leave to execute the necessary transfer documents to the Applicant in respect of his half (1/2) share in Portion No. 12195 Malindi which has since been subdivided into twenty one portions namely subdivision Nos. 15156 (Original No. 12195/2) Malindi to 15176 (Original No. 12195/22) Malindi.

4. THAT the Executors of the Will of the deceased herein be compelled and/or granted leave to execute the necessary transfer documents in respect of the deceased’s 37, 938 ordinary shares in East Africa Breweries Limited; 13, 731 ordinary shares in NIC Bank; and 2,084 ordinary shares in Car and General Kenya Limited to the Applicant.

Robin is a younger brother to the deceased herein. His application is supported by his affidavit sworn on 26.1.2017. When the matter came up for hearing on 31.1.2017 Mr. Binyenya, counsel for Mr. Robin, urged the court to have the application heard first. This request was granted and the application was fixed for hearing on 16.2.2017.

Mr. Binyenya appeared for the applicant. Mr. Ole Kina appeared for the petitioners while Mr. Tim Byrant together with Miss Aoko appeared for the objector. Mr. Binyenya submitted that the deceased owned Plot No. Malindi 12195 with his brother Robin in equal shares. The applicant’s half share does not form part of the deceased’s estate. It is Robin’s request that his half share be given back to him so that he can enjoy its use. The objector’s problem is only limited to paragraph 5 of the Will. Counsel urged the court to partly confirm the grant to the extent of releasing the applicant’s half share. The objector and the petitioner can pursue their cause later.

Mr. Ole Kina supported the application and relied on the affidavit of Korinna Spyrtos Cowan sworn on 10.2.2017. Counsel submit that a grant was issued by this court in respect of the deceased’s estate. One of the properties stated in the Will is the land in dispute. In the petition the executors have sworn to administer only a half share portion of Plot No. 12195. The reason for that is that the property belonged to the applicant and the deceased. The title deed is unclear as to whether the ownership is in common or joined tenancy. The presumption in law is that it is tenancy in common. Since this is the lawful position, the executors cannot purport to administer that which does not belong to the deceased. The affidavit in support of the application confirms that the applicant’s property has been left intact.

Counsel further submit that several issues have been raised in the objection. This include the mental capacity of the deceased when he signed the Will. Any finding on the issue of the Will does not affect the application in relation to the applicant’s half share. Whether the Will is adopted or not that issue will be dealt with later. All what the applicant is seeking is his half share as he is a sick man. He is being delayed in the enjoyment of his own right to property. The Will provides on how the property was to be subdivided. There are buildings on the property for both the deceased and the applicant. Issues of ademption will be dealt with later. The grant can be partially confirmed so that Robin can take his share.

Mr. Byrant and Miss Aoko submit that the application by Robin is jumping the gun. The grant issued to the Executors should not have been issued. There is a cross-petition and objection which have not been heard. The grant should be cancelled. Parties held mediation meetings and the case was to be heard when Robin filed the current application. The dispute is brought about by the Will which refers to 15 acres of land yet the application for probate refers to 7 ½ acres. The title refers to co-ownership. The new Land Act makes the ownership to be tenancy in common meaning that each one of the two holds a 50% undivided share. The Kenyan Law on ademption is provided under Rule 8 (1) of the second schedule to the Law of Succession Act. The property is specifically bequeathed in the Will. The objector is in agreement that the applicant is entitled to half undivided share. However, the Will makes reference to 15 acres. There is a failure in testamentary disposition.

It is further submitted the objector does not mind all the other properties going under testate. There is only one real property. The Will has a problem. Determination of the shares can only be dealt with under intestacy so that the law on distribution can be followed. The applicant lives on the suit land and there are three houses on the land. It is submitted that under rule 17 (11) and 17 (14) of the Probate and Administration Rules the grant ought not to have been issued since there was a notice of objection. All mediation meetings took place at Mr. Robin's residence and his interest was well articulated. Clause 5 of the Will attempts to dispose the real property as follows. 5 acres to Korinna and Olivia. 5 acres to Johanna and Lara Cowan. Another 5 acres which had been subdivided into 20 pieces of a quarter acre each to Korinna. The title deed gives the acreage as 6.352 hectares which translates to 15.69 acres. The applicant and the deceased each owned half share. Therefore, the deceased could not have made disposition in his Will totaling 15 acres as half of the property belongs to the applicant.

The summons by Robin does not cure the testamentary disposition failure. The summons is based on testate instead of intestate disposition. Counsel for the Executors prepared the Will and should not be allowed to introduce typing errors or excuses in the alleged Will. Counsels rely on the case of **EUNICE MUMBI GATHEE V JOHN KAMANDE KIMANI & ANOTHER [2012] eKLR**.

Although counsels for the objector have listed 11 issues as the ones to be determined by this court, I do find that most of those issues simply present the factual position and some of them can only be determined when the petition and the objection have been fully heard and determined. Some of the issues raised are similar and revolve around same legal position. The only issues for this court to determine is whether the grant issued by this court on 21.9.2016 should be revoked even before the objection proceedings have been heard and whether the application by Robin Cowan should be allowed whereby the said grant will be partially confirmed before the cause is heard and determined.

The background to this suit is the Will of the deceased that was done on 7.3.2016. Paragraph 5 of the Will stipulates as follows: -

My trustees shall hold the residue of my estate upon trust to retain or sell it and:

- a) To pay my debts and executorship expenses and any estate or other duty or tax payable on or as a result of my death and subject thereto to divide the same into three equal shares and to hold these;**
- b) As to the portion of Land Reference No. 12195 Malindi shown bordered RED in the plan annexed hereto measuring approximately five (5) acres with the family residential house thereon to my wife KORINNA SPYRATOS COWAN and my daughter OLIVIA SPYRATOS COWAN.**
- c) As to the portion of Land Reference No. 12195 Malindi sown bordered BLUE in the plan annexed hereto measuring approximately five (5) acres with a small cottage thereon to my daughters JOANNA SILVESTER AND LARA COWAN. I further direct that JOANNA SILVESTER shall solely administer LARA COWAN's share of the property as she may deem fit.**
- d) As to the remaining portion of Land Reference No. 12195 Malindi shown bordered GREEN in the plan annexed hereto measuring approximately five (5) acres which has been subdivided into twenty (2) pieces of a quarter of an acre each, I BEQUEATH any unsold plots to my wife, KORINNA SPYRATOS COWAN.**

From the Will the deceased's beneficiaries are: -

- i. Korinna Spyratos Cowan Widow**
- ii. Olivia Spyratos Cowan Daughter**

iii. Joanna Silvester Daughter

iv. Lara Cowan Daughter

v. Robin Balfour Cowan Brother

Paragraph 3 of the Will stipulates as follows: -

I wish to BEQUEATH to my brother ROBIN BALFOUR COWAN all my SHARES AND DIVIDENDS, whether they have been transferred into my name or not, PROVIDED THAT if my brother predeceases me or does not survive me for a period of thirty (30) days then I BEQUEATH all my shares and dividends to my wife KORINNA SPYRATOS COWAN.

There are certain facts which are not in dispute. These are: -

1. That the applicant Robin Cowan is entitled to half share of Plot No. 12195 Malindi.
2. That the applicant Robin Cowan was bequeathed all the deceased's shares in various companies.
3. That the grant can be partially be confirmed to the extent that Robin Cowan gets the shares bequeathed to him.
4. That the deceased and Robin inherited Plot No. 12195 Malindi from their parents and they are all equal shareholders of the property.
5. That although the deceased in his Will bequeathed 15 acres to some beneficiaries, he could not have done so as he was only entitled to half share of the property.

The original objection to the making of the grant by Joanna dated 22.6.2016 gives the grounds of objection as follows: -

- a) **That what is annexed is not the last and final Will of her father Bryce Wallace Cowan.**
- b) **That what is annexed as the final will contains in clause (5) thereof a provision that attempts to dispose of property that was not the free property of the testator/deceased, hence not available for distribution by the testator to any beneficiary.**
- c) **That both Korinna Spyratos Cowan and Fiona Louise Elizabeth Thompson lodged this application for grant without informing and/or consulting Joanna Silvester and her two sisters.**
- d) **Korinna Spyratos Cowan and Fiona Louise Elizabeth Thompson have wrongly stated in their application that the document annexed contain a true and last Will of the deceased.**
- e) **That the last and final Will of Bryce Wallace Cowan was not freely written as he was weak both in body and mind by disease.**

When the objector filed her cross-petition for limited letters of administration, it was stated that the petition was grounded on the following: -

1. **These letters of administration sought are limited solely to those properties of the deceased that lawfully pass under intestacy, being:**
 - a) **That parcel of land known as Portion No. 12195, being that interest in land registered in the Coast Land Registry as C.R. No. 66184 measuring 6.352 Ha. (certificate of title was registered in said registry on 21st December, 2015). The reason**

for this is that Plot 12195 has been adeemed, and cannot be disposed off as requested by the deceased in his Will exhibited to the said petition. Plot 12195 therefore can only be disposed off under the intestacy provisions of the Law of succession act (Cap 160);

b) Two flats of the deceased in South Africa, not captured in the deceased's Will neither the petition filed in this court file.

2. With respect to the other portions of the estate of Bryce Wallace Cowan, deceased, which are properly testate, no objection is presented to this Hon. Court preventing the granting of probate to the listed petitioners.

The dispute therefore simply revolves around the distribution of Plot No. 12195 Malindi. The objector acknowledges the fact that her deceased father only owned 50% of that property. Parties are in agreement that although the title deed to the property does not indicate whether the ownership was joint tenancy or ownership in common, section 91 (8) of the Land Registration Act 2012 makes the ownership to be tenancy in common. The section stipulates as follows: -

“On and after the effective date (which was 2nd May, 2012), except with leave of the court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of the court, shall take effect as tenancy in common.”

Apart from the above, it is clear that the deceased and Robin inherited the property from their parents. Each is entitled to an equal share. Paragraph 5 of the Will makes a reference to 5 acres being bequeathed to the widow and her daughter Olivia. The same paragraph bequeaths 5 acres to the objector and her sister Lara Cowan. According to the objector that gives a total of 10 acres yet the entire land is 16 acres. While the objector appreciates that fact, she is still disputing the application by Robin to the effect that he be given his lawfully entitled half share of Plot No. 12195 so that he can deal with it as he wishes. The objector is not opposed to Robin getting the company shares. The position taken by the objector is that there is a failure of testamentary disposition in that the deceased could not have bequeathed more than what he owned.

Section 23 of the Law of Succession Act provides for failure of disposition. The second schedule to the Law of Succession Act expounds the provisions of section 23. Section 8 of the second schedule stipulates as follows: -

1. If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect by reason of the subject thereof having been withdrawn from the operation of the Will; and where a gift fails on this account it is said to be “adeemed”.

2. There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.

The objector further maintains that the grant ought not to have been issued since there was an objection. I do agree with that position as it is in line with the provisions of rule 17 (11) and 17 (14). The two rules stipulate as follows: -

11. So long as an objection which has been lodged has not been withdrawn pursuant to sub rule (10) no grant shall be made by any registry to the estate of the deceased prior to the expiration of the period for the filing by the objector of an answer and cross-application specified by the court under section 68 of the Act.

14. No registrar shall make a grant if he has knowledge of the existence of an effective objection lodged in any registry in respect of the estate of the deceased:

Provided that an objection shall not operate to invalidate a grant made not less than twenty-one days after the period specified for inviting objections under section 67 of the Act but before knowledge or notification of the lodging of the objection is received by the registrar making the grant.

The cause was filed in this court on 23.5.2016. It was gazetted on 19.8.2016. The objection was filed on 22.6.2016 before the grant was gazetted. It is therefore clear that since the objection had not been withdrawn the grant ought not to have been issued on 21.9.2016. The best practice in succession matters is to have a grant in place and thereafter deal with the issue of distribution of the estate. A grant which has not been confirmed cannot enable the administrator or the executor to transfer the property to another person. Whenever the grant is revoked at the initial stage parties engage in litigation at that stage until a fresh grant is issued. Thereafter parties engage in a second round of litigation revolving around the distribution of the property. This process makes succession matters stay pending in courts for very long time. The overriding objective in a succession matter is the distribution of the deceased's estate. All what has to be ascertained is the estate itself and the beneficiaries. Once that is done then the court in an intestacy distributes the estate. Where the Will is not opposed then the grant shall be confirmed as per the Will. Where the Will is being opposed then parties can be heard and the court ultimately decide as to whether to distribute the estate under testacy or intestacy. That will depend on whether the Will is held to be valid or not.

The objector clearly is in agreement that Robin is entitled to his half share. According to her if Robin takes his half share then the remaining land should be distributed through intestacy. The objector does not state how many acres she would like be distributed to her and her blood sister. In whatever manner the dispute is determined the end result would be that Robin will get the shares of the companies and his half share in Plot No. 12195. That is the obvious fact which all the parties are in agreement. Since the objection has not been heard and determined, it would be prudent to accord the objector an opportunity to state her position on the estate and its distribution. The objector introduced two flats located in South Africa as part of the deceased's estate. It is also my view that the issue as to whether the disposition failed due to the deceased disposing what he did not own can only be deliberated during the hearing of the objection. At this moment the court has to see how to deal with Robin who is suffering from a chronic disease (muscular dystrophy). The applicant is on a wheel chair and requires both medical treatment and homecare.

When the petition was filed a list of the assets was tabulated. The list contain the following shares: -

a. 37,938 ordinary shares at East Africa Breweries Ltd each share valued

Kshs.296.00 as at 6.5.2016	Kshs.11,229,648.00
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b. 13,731 shares at NIC Bank each share

Valued at Kshs.37.50 as at 6.5.2016	Kshs. 514,912.50
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c. 2,084 shares at Car & General each

Share valued at Kshs.34.00 as at 6.5.2016	<u>Kshs. 70,856.00</u>
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TOTAL	<u>Kshs.11,815,416.50</u>
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Given the above scenario, I do find that the grant can be confirmed partially to the extent that the executors secure the above shares and give the proceeds to Robin. That way Robin will be able to obtain some money that can sustain him for some time while the other part of the dispute is being heard and determined. The objector is in agreement to this position although she would like to be enjoined in the grant. My view is that since the Will has not been invalidated, enjoining the objector in the grant would be tantamount to adding a third executor. The objector can only come in when the objection is heard and determined. The partial confirming of the grant is made so as to facilitate Robin obtaining the shares so

that he can cater for himself. There is no dispute in the manner in which the deceased bequeathed the shares to his brother Robin.

In the end, I do find that the application dated 26.1.2017 partially succeeds. The grant issued on 26.9.2016 is partially confirmed to the extent of the shares. Prayer four of the application dated 26.1.2017 is hereby granted. The rest of the disputes shall go to full hearing. The executors of the Will shall execute the necessary documents and transfer the shares to the applicant (Robin). Parties shall bear their own costs.

Dated, signed and delivered in Malindi this 30th day of March, 2017.

S.J. CHITEMBWE

JUDGE