



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 104 OF 2016

PRIYAT SHAH1ST PLAINTIFF

MONA SHAH2ND PLAINTIFF

VERSUS

MYENDRA DEVCHAND MEGHJI SHAHDEFENDANT

RULING

1. Through an application dated 28th November, 2016 brought under the provisions of Order 2 rule 15(1) (a) and (d), Order 40 rule 7 and Order 51 rule 3 and 15 of the Civil Procedure Rules, 2010 the defendant/applicant seeks the following orders:-

(i) Spent;

(ii) That the *ex parte* orders of this Honourable Court given on 18th October, 2016 be discharged or varied or set aside with immediate effect on an *ex parte* basis under the proviso of Order 51 rule 3 of the Civil Procedure Rules 2010 upon such terms as this Honourable Court may deem just;

(iii) That this suit be struck out and/or dismissed with costs; and

(iv) That the costs of this application be paid by the plaintiffs/respondents.

2. The application is supported by the grounds on the face of it and the affidavit of Myendra Devchand Meghji Shah sworn on 29th November, 2016. The 1st respondent on 8th December, 2016 filed a replying affidavit. The parties thereafter filed their written submissions, which they highlighted.

APPLICANT'S SUBMISSIONS

3. Mr. Khanna's position was that the plaintiffs/respondents have no *locus standi* in this case and that they failed to disclose that there was a Probate & Administration matter No. 101 of 2014 involving the same parties and the Executors of the estate. He made reference to the affidavit of 31st October, 2016, to which a copy of the Chamber Summons dated 13th May, 2015 was attached and marked as exhibit MDMS-1. Counsel submitted that the contents of paragraphs 3 and 4 thereof are similar to the prayers in the plaint, which sought freezing orders of the accounts which have no bearing in this matter. It was submitted that prayer No. 3 of the said Chamber Summons involves the same parties in the plaint. Prayer No. 4 of the said application seeks an injunction while the plaint seeks a permanent and mandatory injunction in

paragraphs 28(c), (d), (e) and (g). There is no prayer for a temporary injunction. Mr. Khanna further argued that the allegation that the applicant was trying to dissipate the funds he holds in trust for the estate of the respondents' late father and that he had mixed the deceased's assets with his own was not supported by any documentary evidence. It was further argued that the respondents at the preliminary stage should have shown sufficient proof with proper documentation.

4. Counsel prayed for the interim orders issued to be discharged for failure by the respondents to disclose material information on the existence of another suit. He added that through his replying affidavit, the applicant has shown that the allegations against him have no substance whatsoever. Counsel submitted that the matter herein is the subject of the Probate and Administration cause which is yet to be heard.

5. Mr. Khanna referred to **Re the matter of Chandrakant Devchad Meghji Shah (deceased) ex parte applicants Priyat and Mona Shah**, Civil case No. 37 of 2013 (O.S.) where Judge Thande, found that the trust was uncertain thus null and void and so were the residue gifts. He stated that the Judge did not deal with the issue of the beneficiaries being appointed administrators. It was submitted that since the will was declared null and void, the deceased was presumed to have died intestate and the respondents should have applied for letters of administration before taking any action. In his view, the suit herein has been brought prematurely.

6. Counsel for the applicant cited the case of **Rejesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama** [2014] eKLR where the Court of Appeal stated that in succession matters a litigant is clothed with *locus standi* upon obtaining a limited or full grant of letters of administration in cases of intestate succession. He further submitted that page 11 of the said judgment states that it therefore follows that all orders including one freezing the deceased's bank accounts jointly held with the appellant obtained by the respondent were a nullity.

7. Mr. Khanna also made reference to communication made "*without prejudice*", which the respondents attached to the supporting affidavit (to the application dated 17th October, 2016) as exhibits PM4 and PM11, he stated that the said correspondence was aimed at trying to settle the matter, where Messrs Khagram and Balala were involved in negotiations. No settlement was concluded, thus the "*without prejudice*" communication was inadmissible. He prayed for the said documents to be expunged from the record. He added that correspondence made "*without prejudice*" is meant to compromise the proceedings and for that reason, such correspondence is subject to privilege from disclosure to the court by either party. He cited the case of **Unispan Limited vs Africa Gas & Oil Limited** [2014] eKLR to buttress that position.

8. Counsel also made reference to the case of **Ocean Bulk Shipping & Trading SA vs TMT Asia Limited & Others** [2010] UKSC 44 where exceptions to the "*without prejudice*" rule are set out at paragraphs 30-32, wherein it was held that a settlement has to be concluded for communication made "*without prejudice*" to be relied on to show that the concluded agreement was based on misrepresentation, fraud or undue influence. Counsel also relied on the case of **Janet Osebe Gechuki vs The Commissioner of Customs & Excise & Another** [2011] eKLR on the "*without prejudice*" rule.

9. He prayed that the suit be struck out, the application herein be allowed and the orders issued pursuant to the application dated 17th October, 2016 to be set aside.

RESPONDENTS' SUBMISSIONS.

10. On the issue of non-disclosure of material information, Mr. Abed, Learned Counsel for the respondents submitted that the applicant did not indicate the material information that was not disclosed. He submitted that in paragraph 16(a) of the plaint, they disclosed about the existence of P & A 101 of 2014 and that the alleged non-disclosure did not affect the outcome of the orders granted *ex parte*. Counsel submitted that the applicant had not shown that there was a move to mislead the court so as to obtain *ex parte* orders. He stated that the respondents are the only heirs to the deceased's estate and had to move the court to safeguard the interest of the estate.

11. On the issue of *locus standi*, Counsel submitted that the application for which orders were granted was filed last year while the ruling by Judge Thande was delivered on 20th February, 2017. The respondent had not obtained a limited grant because there was a will. Mr. Abed urged the court to apply the provisions of sections 1A, 1B and 3 of the Civil Procedure Act to protect the litigants.

12. On the issue of the “*without prejudice*” rule, Counsel relied on the case of **Ocean Bulk Shipping & Trading SA vs TMT Asia Limited & Others** (supra) and more particularly, on the exception to the rule in that there was misrepresentation and fraud on the representation made by the applicant and his Advocate Mr. Samir Inamdar that the deceased’s and applicant’s joint bank account was guided by the rule of survivorship to the effect that on the death of one of the parties, the other would take up his share in the joint bank account.

13. Counsel further argued that the applicant admitted that he and the deceased owned a joint business and personal account. He referred the court to paragraph 5 of the applicant’s supporting affidavit and submitted that the application has no merit and the respondents should be given an opportunity to prosecute their case.

APPLICANT’S REJOINDER

14. Mr. Khanna referred to paragraph 27 of the plaint wherein the respondents aver that there is no other suit pending or finalized and that there have been no previous proceedings in any court between the respondents and defendant applicant over the same subject. He further submitted that the deceased died on 7th August, 2013 which was 3 years before this suit was filed. There was therefore no urgency in obtaining the orders herein. Further, the respondents were neither the Executors or Trustees of the deceased’s estate to bring the current suit.

15. Counsel stated that there is no reference on misrepresentation or fraud in the pleadings. He wound up by stating that in paragraph 5 of the applicant’s submissions, they are asserting the law that it is the surviving account holder who operates the joint bank account.

ANALYSIS AND DETERMINATION

The issues for determination are:

- (i) If the plaintiffs/respondents have locus standi to institute the present suit;
- (ii) If there was material non-disclosure on the part of the plaintiffs/respondents in obtaining *ex parte* orders;
- (iii) If correspondence made on “*without prejudice*” basis between the Advocates for the parties herein is admissible;
- (iv) If the *ex parte* orders issued herein should be discharged; and
- (v) If the suit herein should be struck out.

16. The respondents are the children of the late Chandrakant Devchand Meghji Shah who died on 7th August, 2013. The deceased left a will wherein he named his Executors and Trustees of the estate as Messrs Mukesh Manchand Shah and Harish Raichand Shah. Following his demise, Mombasa Civil case No. 37 of 2013 (O.S) in Re the matter of Chandrakant Devchand & Meghji Shah (deceased) *ex parte* applicants Priyat and Mona Shah, was filed. Hon. Judge Thande held that the will was valid, the heirs to the deceased’s estate were Mona and Priyat, but the trust and gifts to the children of the deceased were uncertain and the gifts therefore failed for uncertainty. This therefore created an intestacy in respect to the entire estate of the deceased. The said decision was delivered on 20th February, 2017.

17. On 18th October, 2016, the deceased’s children had filed a plaint where the applicant herein, who is

the deceased's brother, one Mr. Myendra Devchand Meghji Shah, is the defendant. They also filed a Notice of Motion under certificate of urgency whereby they sought *ex parte* orders. This court granted orders as prayed in respect to paragraphs 2 and 4 of the application dated 17th October, 2016. Mr. Khanna's argument is that the respondents had no *locus standi* to institute the suit herein and obtain the orders granted as the subject matter of the suit relates to the estate of a deceased person.

18. Section 82 of the Law of Succession Act (Cap 160) Laws of Kenya provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:

(a) To enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

19. In the case of **Trovisk Union International and Another vs Mrs. Jane Mbevu**, Civil Appeal No. 145 of 1990, the Court of Appeal held that ***“where a party seeks to file suit on behalf of the estate of deceased person, he must of necessity obtain letters of administration.”***

20. The extent of the powers of an administrator to a deceased's estate were described by Musyoka J. in **Re The Estate of Thiong'o Nginyayu Muthiora** (Deceased) Succession Cause Number 2131 of 2011 as follows:-

“ he is the only person to be sued by third parties over the estate or to sue such third parties to protect the estate”

21. At the time the respondents' suit and application were filed, the matter before Judge Thande had not been determined. At the said time, the will of the deceased was considered valid and the persons who should have filed the suit herein should have been the Executors or Trustees of the will of the deceased. Since the respondents had not obtained letters of administration, they lacked *locus standi* to file this suit. Although Mr. Abed stated that the respondents are the only heirs to the deceased's estate and they had to move the court to safeguard the interest of the estate, however noble their intention was, their actions should have been within the confines of the law.

22. In the case cited by Mr. Khanna of **Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama** (supra) the Court of Appeal had the following to say on the issue of *locus standi*:-

“ In our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession. In Otieno vs Ougo & Another [1986-1989] EALR 468, this court differently constituted rendered itself thus:-

“ An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”
(emphasis added).

23. On the issue of non-disclosure of material information on the part of the respondent, and specifically about the existence of Mombasa High Court Probate and Administration Cause No. 101 of 2014, an application by way of Chamber Summons dated 13th May, 2015 was filed in the said suit. The respondents at paragraph 4 sought restraining orders that are also sought in paragraph 28 (c), (d) and (e) of the plaint against the applicant herein. Paragraph 28(g) of the plaint is similar to the prayer in paragraph 2 of the said Chamber Summons. Paragraph 28(b) of the plaint, in my considered view, is a recast of paragraph 3 of the Chamber Summons dated 13th May, 2015. If the respondents felt that their Chamber Summons application was wanting, they should have applied to amend the same instead of filing the application dated 17th October, 2016. The apparent danger of filing two applications before different courts, where similar orders are sought is that it can lead to conflicting orders being granted whose implementation might be impracticable.

24. The only mention made in the plaint about the existence of P & A 101 of 2014 is in paragraph 16(a) and (b) of the plaint where the plaintiffs cite the said case in correspondence that was exchanged "*without prejudice*" between the Counsel for the parties herein. However, in paragraph 27 of the plaint, the plaintiffs aver that there is no other suit pending or finalized and that there have been no previous proceedings in any court between the plaintiffs and the defendants over the same subject matter. Although Mr. Abed submitted that paragraph 16(a) and (b) gave adequate information and as such there was full disclosure of material facts, it is my finding that the said paragraphs did not adequately address the issue of pending suits or finalized suits and the prayers sought between the parties herein. I therefore find that there was non-disclosure of material information on the part of the respondents.

25. In **Nyanza Garage vs Attorney General Kampala** HCCS No. 450 of 1993, the High Court of Uganda held thus:-

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and/or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

26. That net effect of grant of the orders sought in the application dated 13th May, 2015 would be similar to that of the application dated 17th October, 2016. Filing of the latter application and the suit filed on 18th October, 2016 is an obvious case of the respondents filing a multiplicity of suits. Section 1B of the Civil Procedure Act provides that:-

“(1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) the just determination of proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of available judicial and administrative resources;

(d) the timely disposal of proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.” (emphasis added).

27. If this court was to allow the continuance of the suit herein, it would be acting counter to the provisions of section 1B (1) (b) and (c) of the Civil Procedure Act. Judicial time must be well managed and the courts must jealously guard against being flooded with a plethora of cases based on similar facts filed by the same parties.

28. I will not delve into the issue of the correspondence exchanged "*without prejudice*" or the issue of survivorship so as to give the parties an opportunity to canvass the same, if they so wish, before the judge hearing the succession cause. The upshot of the foregoing is that the suit filed on 18th October, 2016 is hereby struck out. Consequently, the orders issued by this court on 18th October, 2016 are automatically discharged. Costs are awarded to the defendant/applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Said Ali holding brief for Mr. Abed for the plaintiffs/respondents

No appearance for the defendant/applicant

Mr. Oliver Musundi - Court Assistant