



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.482 OF 2005
IN THE MATTER OF THE ESTATE OF AMAR KAUR SHARMA (DECEASED)

RULING

1. The application for consideration is the Notice of Motion dated 4th November 2015. The same is brought under Rules 22, 26 and 73 Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. The applicant seeks orders that;

- i. All deceased's Estate assets namely properties namely reference Numbers **36/1/429, 36/11/192, 36/11/193 and 209/2675** be sold at the current market value.
- ii. That should the said **Somnath Sharma** and **Purshottam Lal Sharma** decline to sign the sale documents the applicant, administrator herein be allowed to execute all the documents in respect of the documents in respect of sale of all the deceased properties namely Land Reference Number **36/1/429, 36/11/192, 36/11/193 and 209/2675** on behalf of the administrators.
- iii. That the proceeds of the sale to be received by **M/S Shanana Osman & Associates Advocates** on behalf of all the beneficiaries and subsequently on completion on the sale to be distributed to the beneficiaries as per their bequest as per the applicants supporting affidavit.
- iv. That should the said **Somnath Sharma** and **Purshottam Lal Sharma** decline to sign the sale documents, on receipt of the purchase price from the prospective buyers denoted in the affidavit herein Registrar of Lands is hereby ordered to effect transfer of properties Land Reference Numbers **36/1/429, 36/11/192, 36/11/193 and 209/2675** to the respective purchasers.
- v. That the cost of the application be provided for.

2. The application is based on grounds that the estate is at the risk of being wasted due to lack of co-operation of the two administrators namely **Somnath Sharma** and **Purshottam Lal Sharma** despite all efforts being made to amicably distribute the estate. That the beneficiaries **Vishnu Datt Sharma** and **Krishna Sharma** have since passed on and the beneficiaries of the respective estate have requested the surviving Administrators to distribute the estate by way of sale of all the assets the deceased and proceeds from the sale be distributed but the aforesaid **Somnath Sharma** and **Purshottam Lal Sharma** have declined to do so. That various offers have been received from serious buyers and hence without the court's intervention the beneficiaries are unable to sell the properties despite all interested parties being keen to dispose of the same. That the various assets of the deceased are in a dilapidated state and have received negative publicity in the media as well as have received various notices from the offices of the chief of Eastleigh, which is affecting the said assets adversely. That the beneficiaries are unable to safeguard, distribute deal and are at risk of their interests entitlements being affected unless the applicant herein the co-administrator application is heard. That various offers have been received from serious buyers and hence without the courts.

3. The respondent raised a Notice of Preliminary Objection on 16th September 2016 on grounds that; the application raised is not properly before the court an omission fatal to its validity. That **Amar Kaur Sharma** the deceased has no locus standi or authority to bequeath the private properties that had not come to her.

4. Aisha Ahmed a beneficiary of the deceased's estate filed her further affidavit dated 4th November 2016. She avers that the deceased prior to her demise had bequeathed her estate vide a grant of will dated 11th September 1984 and duly confirmed on 25th October 1985 in respect of the estate of Ajuyda Parshad Sharma in High Court succession cause no 508 of 1984 vide the said deceased's last will in testament pursuant to grant of confirmation of last will in testament dated 4th September 1980 in respect of Estate of Ajuyda Parshad comprising;

4.1 Land Reference Number

4.2 Land Reference Number

4.3 Land Reference Number

5. She avers that vide the said succession cause the property already moved to the deceased vide succession cause no. 508 of 1984 vide grant of letters of administration issued on 22nd May 2006 and confirmed on 6th May 2009 and hence they have locus standi to seek their bequest. Adding that irrespective of application to the Registrar for registration transmissions to Amar Kaur Sharma under the Land act the land will relate back Sharma.

6. Parties made oral submissions. The applicant reiterates averments as raised in the application adding that the administrators have refused to honour their obligation as administrators. The respondent on their part argue that 2 administrators have since passed on making it impossible to proceed with distribution of the deceased's estate adding that some of the assets in the confirmed grant do not form part of the deceased's estate.

7. In the case of **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows on preliminary objections: *“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract-giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”*

8. The preliminary raised is on issue of ownership of property forming part of the estate of the deceased. This in my view is based on facts and requires evidence to prove the same as such I find that the preliminary objection failing the test of being purely on a point of law fails and I dismiss the same with cost.

9. The deceased to whom this estate relates died on 25th February 1992. Four of her children namely **Vishnu Datt Sharma, Purshottam Lal Sharma, Som Nath Sharma** and **Krishna Lal Sharma** petitioned for grant of letters of administration intestates to the deceased's estate and were issued with the same on 22nd May 2006. On 13th February 2009, the administrators petitioned for the confirmation of the deceased's estate with proposal that all beneficiaries to the deceased get an equal share of the deceased's estate. The said grant of letters of administration was confirmed on 6th May 2009 as had been propose by the beneficiaries. Since the said confirmation and upon perusal of the file there has been no application of revocation of grant so confirmed by any party and no application as against the estate is pending. 8 years later the administrators are yet to conclude the distribution of the estate of the deceased. Section 83(i) provides that it is *"the duty of the personal representative to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration."*

10. The respondent argues that the matter has delayed as two of the administrators have died. However, Section 81 of the law of Succession Act provides that, where one or more administrators or executors dies, the powers and duties of administration shall vest in the surviving administrator or administrators. It provides that *"Powers and duties of personal representatives to vest in survivor on death of one of them Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:"*

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him."

11. There is no mention of a minor and as such, there is no creation of trust in regards to the deceased's Estate. As such the remaining 2 administrators in line with Section 81 are more that capable to finalise the distribution of the deceased's estate according to the wishes of the beneficiaries which in this case they urge the court to allow the sale of the assets forming the deceased's Estate. From the foregoing, I find that it is in order for the remaining administrators to expedite the distribution of the deceased's estate an conclude the same without further delay. I therefore order that;

- i. All deceased's Estate assets namely properties namely reference **Numbers 36/1/429, 36/11/192, 36/11/193** and **209/2675** be sold at the current market value .
- ii. Should the said **Somnath Sharma** and **Purshottam Lal Sharma** declined to sign the sale documents the applicant, administrator herein be allowed to execute all the documents in respect of the documents in respect of sale of all the deceased properties namely **Land Reference Number 36/1/429, 36/11/192, 36/11/193** and **209/2675** on behalf of the administrators.
- iii. The proceeds of the sale to be received by M/S Shabana Osman & Associates Advocates on behalf of all the beneficiaries and subsequently on completion on the sale to be distributed to the beneficiaries as per their bequest as per the applicants supporting affidavit.
- iv. Should the said **Somnath Sharma** and **Purshottam Lal Sharma** decline to sign the sale documents, on receipt of the purchase price from the prospective buyers denoted in the affidavit herein Registrar of Lands is hereby ordered to effect transfer of properties Land Reference Numbers **36/1/429, 36/11/192, 36/11/193** and **209/2675** to the respective purchasers.
- v. Cost in the cause. It is so ordered.

Dated, signed and delivered this 16TH day of May 2017.

R. E. OUGO

JUDGE

In the presence of;

Mrs. Shabana For the Applicant

Absent For the Respondents

MS. Charity Court Clerk