



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
SUCCESSION NO. 89 OF 2010
IN THE MATTER OF THE ESTATE OF ANNELIES ANNA GRAFF (DECEASED)

E L N (minor suing through her mother

J N.....APPLICANT

VERSUS

BENARD HEINRICH GRAFF.....1ST RESPONDENT

PATRIC ELEXANDER BECKER.....2ND RESPONDENT

R U L I N G

The late Annelies Anna Graff died on 15th September 2010 in Spain. Her husband Petitioned this court for probate of written will. A grant was issued on 10th December, 2010 and confirmed on the same date. Mr. Kinyua, counsel for the Petitioner swore an affidavit on 29th September 2012 in reply to the objection proceedings. The matter is part heard by way of oral evidence.

Mr. Salim, counsel for the objector applied to have Mr. Kinyua cross examined on his affidavit sworn on 29th June 2012. Counsel maintains that Mr. Kinyua deponed on contested facts which are still pending in court. Mr. Kinyua filed the petition plus the affidavit in support seeking confirmation of the grant. In the certificate of urgency, Mr. Kinyua indicated that the deceased owned shares in Tropicana Hotels while in his affidavit he deponed that the deceased did not own any shares in those Hotels.

Mr. Salim contends that there is no evidence of ownership of Tropicana Hotels from the Registrar of companies. No Form C.R 12 has been exhibited. The position with regard to the ownership of Tropicana Hotels is conflicting hence the need to cross examine Mr. Kinyua.

Mr. Kinyua opposed the application. Counsel argued that he cannot be cross examined on what is contained in the certificate of urgency. The Petitioner swore the affidavit in support of the petition and it contains the shareholding of Tropicana Hotels Ltd. Further, the auditors of the company provided information relating to ownership of Tropicana Hotels Ltd. The company secretary provided a document indicating the shareholding and directors of the company. It is contended that the objector can conduct a search with the registrar of companies and obtain the form C.R 12. Mr. Kinyua maintains that he relied on formal matters to deponed the affidavit.

The dispute herein relates to an application by the deceased grandchild who is a minor and filed it through

her mother seeking nullification of the grant. The application is the subject of the dispute and is still pending. It is based on the contention that the applicant was a Dependant of the deceased. The matter is part heard and the objector's witness has already testified.

The affidavit in question was sworn on 29th June 2012. At paragraph 3, Mr. Kinyua avers that he has instructions from the Executor of the deceased's will. The Executor was in Germany. Paragraph 4 of the affidavit of Mr. Kinyua states as follows:-

4: I refer to the the last will and testament of Annelis Graff, deceased relating to her estate in Kenya and respectively make the following remarks

(i) Portion Nos 826 and 827 are the properties upon which the Executor and the Deceased had built their matrimonial home. It does not generate any income. Those 2 plots were left to the Executor under the Will.

(ii) The Will does not mention Eden Roc Hotel or Plot No. 775 and 776. Those 2 plots and Eden Roc Hotel are owned by Tropicana Hotels Ltd. The shareholders of Tropicana Hotels Ltd were at the death of the deceased Menyhart Beteiligungs GMBH of Germany who held 23,998 shares. Elaco Holdings Societe Anonyme of Luxembourg who held 136,000 shares and the Estate of the late Mrs Elsbeth Von Menyhart who held 2 shares. The deceased did not hold any shares at her death in Tropicana Hotels Ltd.

(iii) The total share of the company were 160,000 of Kshs.20 each and were all issued. The 2 shares held by the Estate of Elsbeth Von Menyhart in Tropicana Hotels constituted 0.00125% of the total shares held by that Estate.

(iv) There was no fraud, deception or violation of the Law of Succession Act on the part of the Court, the Executor or my firm in petitioning for and obtaining a Confirmed Grant. The Application for tor the issue of a Confirmed Grant was made under the provision of Section 71(4) of the Law of Succession Act which empowers the Court to issue a Confirmed Grant at the same time that a Petition is filed. The provisions of that Section were brought to the attention of the Judge and the Judge considered that Section before issuing a Confirmed Grant.

(v) The deceased, in her Last Will and Testament provided for her son Patric Alexander Becker. Patric Alexander Becker is the father of E L N, the Applicant in the Application dated 22/5/12.

Mr. Ahmed contends that Mr. Kinyua has to be cross examined as there is confusion relating to the ownership of Tropicana Hotels Ltd. When the Petition was filed on 24th November 2010, the Petitioner, Bernd Heinrich Graff swore an affidavit on the same date. Paragraphs 5 and 8 of the affidavit states as follows:-

“5. The deceased was a director in a company known as Tropicana Hotels Ltd. Patric Alexander Becker is the general manager of that company vehicle I am the sole surviving director. It has become necessary to make certain decisions to give that company direction. These decisions involve the raising of funds and cannot be delayed.”

“8. There are only 2 beneficiaries under the last Will of the deceased. These are the deceased's son, Patric Alexander Becker and myself. There is no other beneficiary. The deceased had no other children other than Patric Alexander Becker. I am the sole executor of the Will of the deceased and I were the only directors of Tropicana Hotels Ltd, the owners of Eden Roc Hotel. It is necessary to give directions to that company and it may become necessary for me to transfer one of the shares held by the deceased in that company and to appoint another director or alternate directors. I feel that I do not have the energy or will to continue living in Kenya or to actively manage the affairs of that company.”

Similarly, the Petitioner filed a supplementary affidavit sworn on 29th November 2010. Paragraph 5 of the affidavit states as follows:

5. The deceased was a director of Tropicana Hotels Ltd, the company that owns Eden Roc Hotel, Malindi. The particulars of that company, its issued share capital, its shareholders, directors, secretary and auditors are as follows:-

(i) SHAREHOLDERS	NUMBER OF ORDINARY
SHARES HELD	
Estate of Elsbeth Von Menyhart	2
Menyhart Beteiligungs/gmbh	23,998
Elaco Holdings S.A	<u>136,000</u>
Total issued Share Capital	<u>160,000</u>

(ii) The Directors of the Company are Annelies Graeff (deceased) and myself while he Company Secretary is Jophece Obonyo Yogo , P. O. Box 80766 Mombasa

(iii) The Auditors of the Company are Peter Ruysenaars & Co. P.O. Box 83435, Mombasa

(iv) The authorised and issued share capital of the Company is Kenya Shillings 3, 200,000- divided into 160,000 ordinary shares of Kenya shillings 20/- each.

Given the above information and the evidence of Patric Alexander Becker, it is clear that all what Mr. Kinyua deponed was already part of the record. The issue of ownership of Tropicana Hotels Ltd was stated in the Affidavits of the Petitioner. The certificate of urgency dated 23rd November 2010 by Mr. Kinyua state that action was to be taken urgently in relation to a company called Tropicana Hotels Ltd, the owners of Eden Roc Hotel, Malindi. The certificate was in relation to the summons for the confirmation of the grant. It was supported by the Petitioner's affidavit sworn on 24th November 2010. Paragraph 9 of the summons indicate that the deceased was one of the only two surviving directors of Tropicana Hotels Ltd. That information is repeated in paragraph 5 of the Petitioner's supporting affidavit herein-above produced. The contention that its alleged Eden Roc Hotel was sold and therefore confusing since the deceased was a director, cannot be solved by cross examining Mr. Kinyua. This is part of the issues to be determined after hearing the witnesses.

Order 19 (3) (1) of the Civil Procedure Rules states as follows:-

3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

The requirement on affidavits is therefore to contain statements of information, sources of the information and belief in the source as well as the information itself. In the case of **PATTN V ALI & 2 Others [2005], KLR 270 at page 279** the court stated the following:

“There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the source of which he can disclose and state the grounds for believing the information.”

Order 19 rule (2) empowers the court to order the attendance of a deponent of an affidavit for cross examination. It is now well settled that the power of the court to make such an order for cross examination of a witness is discretionary. See **Kenya Electricity Generating Ltd & Others {2015} e KLR, Nancy Wanja Gatabaki V Ashford Muriuki Mugwuku T/A Ashford & Co. Advocates [2013] e KLR.**

Mr. Kinyua categorically stated in his affidavit that his client left for Germany in 2010. The Petitioner himself has stated in his affidavit that he is haunted by the memories of his late wife whenever he goes to their matrimonial home in Maqlindi and would not like to live in Kenya. At paragraph 7 of his affidavit sworn on 24th November 2010, the petitioner avers that he feels like he may be able to live with the loss of his wife if he were to relocate back to Europe. It is therefore clear that Mr. Kinyua's client was not available to swear an affidavit. The objection proceedings were instituted in 2012. This is after the petitioner had left for Germany. All what is stated in Mr. Kinyua's affidavit is information that forms part of the pleadings.

Mr. Ahmed, counsel for the applicant does not specifically mention which paragraphs of the affidavit he wishes to cross examine Mr. Kinyua on. Even if it is the entire affidavit, all what is contained therein is already stated in other documents already on record. I do find that allowing the request to cross examine Mr. Kinyua on his affidavit will not serve any purpose. The objector has already testified. If there was any concealment of some of the deceased's properties, that ought to have come out in the objector's evidence. Mr. Kinyua was only retained by the petitioner to file this cause and his affidavit deposes information which has come to his knowledge through the documents provided by his client as well as the petitioners averments.

In the end, I do find that the application to cross examine Mr. Kinyua Advocate lacks merit and is hereby disallowed. There shall be no orders as to costs.

Dated and delivered in Malindi this 24th day of March, 2016.

S.CHITEMBWE

JUDGE