



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 2759 OF 2002
IN THE MATTER OF THE ESTATE OF N H S (DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY N S S (MINOR SUING BY NEXT FRIEND A S P)

N S SAPPLICANT

(MINOR SUING BY NEXT FRIEND A S P)

AND

MUKESH KUMAR HIRJI PUNJA SHAH...1ST RESPONDENT

KANJI DAMJI PATTINI.....2ND RESPONDENT

ABDUL JANMOHAMED.....3RD RESPONDENT

R U L I N G

1. The Chamber Summons dated 18th June 2010 has been brought under **Order XXXI Rules 1(1) and (2) of the Civil Procedure Rules and Section 34, 63(e) of the Civil Procedure Act (Cap. 21 Laws of Kenya), Sections 26, 27, 28, 29, 45, 47, 79, 82, 83, 84, 94 under the Law of Succession Act (Cap. 160, Laws of Kenya and Rules 49,59,60,61,63 and 73 of the Probate and Administration Rules 1980.** In the main the Applicant seeks orders of court for interim maintenance of N S S a minor child, and for the Trustees to be compelled to provide particulars of the assets and liabilities pertaining to the Estate from 11th January 2000 when the deceased died to date. She further seeks orders to compel the Trustees to render accounts of the assets and liabilities of the Estate to date.
2. The grounds of the application as contained on the face thereof are that the Applicant is the mother of N S S, the minor grandchild of the deceased herein who died on 11th January 2000. That a grant of letters of administration with written Will annexed was issued on 10th January 2003 to the Executors of his Estate and a certificate of confirmation of the said grant issued on 6th January 2004. The Applicant alleges that from the date of confirmation of grant, the Trustees who are the Administrators/Executors of the Will have not proceeded diligently with the administration of the Will and have defaulted (save for one off-payment in respect of school fees), in effecting payment

- for maintenance, education and upkeep of the minor as required of them under **clause 3(ii)** of the Will.
3. The Applicant being the mother of the minor has real fear and apprehension that her daughter's inheritance rights are being adversely affected. That it is only just that the court intervenes immediately in order to preserve the subject matter and to prevent the Applicant from suffering selective prejudice, irreparable loss, hardship, harm and damage at the hands of the Trustees of the Will.
 4. The Applicant argues that if the orders are not granted the minor will not benefit from the Estate, which may be wasted and beyond the reach of the Applicant and to the detriment of the minor.
 5. The application is supported by the affidavit of the Applicant sworn on 18th June 2010. She deposes that she has been sustaining the minor from her own income since 2002 to date, and that she has not received any support financially or otherwise from the Estate. That she has been paying her school fees, all related expenses including but not limited to extra-curricular activities, maintenance and medical insurances from the year 2002 to date. The Applicant also deposes that she has included in the expenses schedule, the projected expenses of the minor up to the year 2021 to cater for University Education and the grand total of sums already expended, which adds up to Kshs. Forty-eight million, eight hundred eighty thousand, three hundred (48,880,300.00) only.
 6. The Applicant avers that despite the fact that she has shouldered the onerous and dutiful responsibility of paying the minor's school fees and other maintenance expenses for a period exceeding ten years, the Respondents have neglected to provide for school fees and other maintenance expenses for the minor as required under the provisions of the Will. She argues that she has endeavoured to fulfil personal responsibilities to the best of her financial resources and capability.
 7. The Applicant avers that according to the Will of N H S (deceased), made on 14th day of May 1999, the minor grandchild has been provided for and the Respondents are obligated to maintain the child.
 8. Counsels filed written submissions which covered a slew of other issues in the Estate. The court however, confined itself to the paragraphs in those submissions that refer to the maintenance of the minor dependant only.
 9. Mr. Billings submitted that the court should, in the first instance, make provisions for reasonable payment out of the Estate for the Applicant's immediate financial needs and invoked section 47 of the law of **Succession Act** and **Rule 73** of the **Probate and Administration Rules**.
 10. Mr. Billings contended that the Estate should pay reasonable maintenance and upkeep for the minor for reasons that the immediate and reasonable expenses required for the minor's education and maintenance expenses computed on a monthly basis are in the region of Kshs.105,225.00. That the two sons and other family members who were or are maintained out of the income of the Estate do not qualify for maintenance. Counsel submitted that the minor's school fees at the [particulars withheld] of Kenya is Kshs.1,653,000.00 per annum, and the Respondents should be compelled to deposit a reasonable sum so that the minor's education is not jeopardized, since the Respondents have no goodwill towards the education and maintenance of the minor.
 11. Counsel argued further that a sequence of events culminated in the Respondents filing serial applications in order to pre-empt the application of the minor. That the nature of the applications and the remedies/orders sought are clear and plain evidence of the existence of a conspiracy/collusion between the Respondents and the widow and her two Adult sons against the minor.
 12. Mr. Joshi opposed the application on behalf of the Respondents in his submissions dated 13th July

2012. He urged that the Applicant has not disclosed to the court that the minor was a beneficiary of Sterling Pounds 13,000 (thirteen thousand), given to her in the settlement of lump sum maintenance paid to the Applicant when divorce was granted to her by the court. That in addition the minor was also a beneficiary of 50% of the Policy held by her father. He argued that the Applicant has not disclosed to the court how these sums of money were expended by the Applicant for the benefit of the minor and that the Applicant is not truthful and honest in bringing this application.
13. Mr. Joshi asserted that a sum of Sterling Pounds 13,000/= can cover the educational expenses of the minor. That the educational expenses and future projections exhibited in the Applicant's affidavit are excessive, exorbitant and farfetched. That the Estate may not have enough funds to cater for the needs of the minor since there are other beneficiaries to be catered for from the income of the Estate.
14. Counsel submitted that **Order XXXI Rule 1** is not applicable under the Law of Succession Act, and therefore, the present application is not properly before the court and should be dismissed. He urged that the Applicant has no cause of action against the Respondents, since **Section 30** of the **Law of Succession Act** provides that an application for provision must be made before the confirmation of grant under section 71 of the Act. The Certificate of confirmation of Grant was issued by the court on 6th January 2004.
15. Counsel stated that **clause No. 4** of the Will provides that none of the immovable properties which the deceased, co-owned with his brothers, Ashwin Kumar Hirji Shah and Mukesh Mumar Hirji Shah can be sold unless there is an agreement with the brothers and beneficiaries to sell them. That Mr. A H S is now deceased and it is not known who the Executors of his Estate are, hence the property cannot be disposed of. That the beneficiaries have to be maintained from the income of the Estate which, according to the counsel the trustees have done dutifully.
16. Mr. Joshi urged that, the Respondents have properly and dutifully administered the Estate and there is no urgency in the application filed by the Applicant herein.
17. The issue for determination is whether the monies claimed by the Applicant for the maintenance of the subject minor can lawfully be paid out of the Estate of the deceased.
18. From the outset it is acknowledged that the law applicable to this matter is **Cap 160 laws of Kenya** and not the **Civil Procedure Act**. It is however to be noted first, that the orders sought by the Applicant herein relate to a child. In law, in any matter concerning a child, the best interests of the child are paramount. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

“A child's best interests are of paramount importance in every matter concerning the child.”

The other relevant law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof, which provides that:

“(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child...”

These provisions of the law read together with **Article 159 (d)** of the **Constitution** compel this

Court, to consider the matter at hand because the interests of the minor in question are paramount.

19. Secondly, in making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit. See - **Section 27 Law of Succession Act.**

20. The Petitioner has come to court seeking that the subject minor dependant be availed provision from her grandfather's Estate as provided in the Will. The pertinent provision of the Will to the application before the court is to be found in **Clause 3(ii)** thereof, which states as follows:

“out of my net income and dividends as aforesaid I direct that my Trustees shall expend such sums as may be necessary in their absolute and unfettered discretion and in particulars (sic) in their opinion be deemed fit, just and prudent for the maintenance education and up-keep of my children BAIJUL and SAIJUL and all my grandchildren including any grandchildren that may be born after my demise PROVIDED HOWEVER that such sum of money to be expended upon maintenance and education under clause 3 thereof as aforesaid shall not at any time exceed the net annual revenue earned from my assets.”

It is therefore not in dispute that the will itself provides for the maintenance, education and up-keep of the minor herein.

21. The Will in question is not contested as being invalid, nor is it alleged to have been procured by fraud or undue influence. It is also not disputed that the other minor in the Estate of the deceased who attends school and other adult dependants are being provided for from the Estate. The payments that came to the minor from the divorce settlement of the parents, or the insurance policy are therefore neither here nor there

22. The contention is however that the requirements of the subject minor are excessive exorbitant and farfetched. Further that the Applicant has no cause of action against the Respondents, since **Section 30** of the **Law of Succession Act** provides that an application for provision of a dependant must be made before the confirmation of grant under **Section 71** of the **Act**. The Certificate of confirmation of Grant was issued by the court on 6th January 2004.

23. Three things are discernible from a reading of the Will. First, under **Clause 3(ii)** thereof, the deceased conferred upon the Trustees “absolute and unfettered discretion” to determine the amounts of money that would “in their opinion be deemed fit, just and prudent for the maintenance, education and upkeep of his minor grandchildren.”

24. Secondly, still under **Clause 3(ii)** of the Will, the beneficiaries have to be maintained from the net income and dividends of the Estate, with a caveat stating:

“PROVIDED HOWEVER that such sum of money to be expended upon maintenance and education under clause 3 thereof as aforesaid shall not at any time exceed the net annual revenue earned from my assets.”

25. Thirdly, under **Clause 4** of the Will the immovable property in the Estate which was co-owned by the deceased and his two brothers, cannot be sold without the two brothers and the beneficiaries being in agreement. One of the two brothers has since demised and it is not known who the Administrators of his Estate are.

26. **Section 30** of the **Law of succession Act** provides that:

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided

by section 71.”

Section 71 of the **Law of Succession Act** on the other hand provides as follows:

71. (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets. (emphasis mine)

It is evident therefore that the purport of **Section 71** is to empower the distribution of the Estate.

27. The distribution of the Estate herein has however, been rendered unattainable by the provisions of the Will. **Clause 5** of the Will provides that the disposition of the property of the Estate will take place only when the minors in the Estate attain the age of 21 years. The subject minor cannot however, be left in limbo because of the inability to distribute the Estate to date.

28. Without delving into the other provisions of the Will which appear to make the Execution thereof convoluted from the manner in which the Will was set up, the sum of Kshs.48,880.300/= prayed for on behalf of the minor does not appear to be justified. The court notes that it is said to be a projection of the requirements of the minor up to the year 2021. There is no proof that the Estate is capable of catering for such a payment as upkeep and maintenance for one dependant.

It is the considered view of this court that in the meantime, the grand children of the Estate ought to be considered **pari passu**. In the premise it is therefore ordered as follows:

- i. The Executors shall calculate all the sums of money that have so far been disbursed for the other minor from the Estate in respect of school fees, school related payments and maintenance, from the time of their grandfather’s demise to date.
- ii. An equivalent sum shall then be disbursed as a lump sum in respect of the subject minor herein.
- iii. Thereafter the Executors will continue to disburse whatever sums they have disbursed yearly to the 1st minor to the subject minor herein.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **22nd day of April 2016.**

L. A. ACHODE

JUDGE