



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION

SUCCESSION CAUSE NO. 1284 OF 2015

**IN THE MATTER OF THE ESTATE OF THE LATE RAJNI VALLABHDAS KARIA (ALIAS
RAJNI VALIABHDAS KARIA) (DESEASED)**

KETAN MORJARIA APPLICANT

AND

HEMLATA RAJNIKANT KARIA RESPONDENT

RULING

INTRODUCTION

Rajni Vallabas Karia died on 8th August 2014.

The subject of the Ruling is the Summons Application dated 29th June 2016 filed by the Applicant who seeks the following orders:

- 1. That the Joint Executors of the Deceased's true Last Will and Testament dated 15th October 2008 be directed to file for probate thereof in the High Court at Uganda.**
- 2. That further orders as may this Honourable Court deems fit in the circumstances.**
- 3. The cost for this Application be provided for.**

BACKGROUND

The deceased was a citizen of United Kingdom. He died on 8th August 2014 at 27 Jellicoe Gardens Stanmore, England. The deceased was also domiciled in Kampala, Uganda. The deceased's widow and son reside in the UK. The deceased's Will dated 15th October 2008, was drawn in England. The deceased's daughter and son-in-law reside in Uganda. The deceased's Estate comprises of assets in Kenya, Uganda, England and India. Following this Court's Ruling delivered on 14th June 2016, this Court directed that the Parties make a formal application for the determination of the question of the appropriate jurisdiction in which Probate in regard to the deceased's Estate is to be taken. The foregoing thus prompted the Applicant to file the present Application.

THE APPLICANT'S CASE

The Applicant contended that following the Order of this Court issued on 14th June 2016, the Joint Executors of the Deceased's true Last Will and Testament dated 15th October 2008 have been unable to agree on the forum for the filing of the probate proceedings in respect of the deceased's Estate. That the Republic of Uganda is the most convenient forum for the filing of the probate proceedings due to the fact that the deceased was domiciled in Uganda for more than a quarter of a century until the time of his death; was tax resident for more than a quarter of a century until the time of his death; the larger portion by value of his assets are in Uganda; and there is no inheritance tax in Uganda and therefore, the whole of the benefit of the Estate will accrue to the beneficiary without the penalty of taxation.

The Applicant asserted that he together with the Joint Executor herein, are enjoined by both the law and their moral obligations to ensure that as much of the deceased's Estate and the filing of probate proceedings in any other jurisdiction other than Uganda is gross dereliction of such duty and obligation.

In his Affidavit in support sworn on 29th June 2016, the Applicant deposed that on 16th June 2016, he wrote to his co-executor, Mr. Jay Rajni Karia, drawing his attention to the Ruling of this Court and that they endeavour to agree on the forum to which they should apply for Probate of the deceased's valid Will of 15th October 2008. That he proposed to Mr. Jay Karia that they should meet in London on 8th July 2016 for them to make a plan for an application for Probate to be filed in Uganda since it is the appropriate forum.

Accordingly, that on 20th June 2016, he received a response, through an email from Mr. Jay Karia on behalf of himself and his mother, suggesting that they should meet in the offices of Mrs. Karia's solicitors on 22nd July 2016 in order to discuss the matter. In the Applicant's view, Mr. Karia and his mother are intent on filing an application for Probate in the United Kingdom and that is why Mrs. Karia has appointed a solicitor therein. In that regard, he contended that the only asset that the deceased had in the United Kingdom is the residence that he had brought for Mrs. Karia and which automatically devolves to her and that there are no other property assets of the deceased therein.

Furthermore, that the greater part, by value of the deceased's assets, comprise of a substantial shareholding in Orient Bank Limited, a financial institution licensed and operating in Uganda. That Mrs. Karia and Mr. Jay Karia have disclosed in writing their intention of disposing of their shareholding in the said Bank at the earliest opportunity and have further taken steps to put that intention into effect.

It was the Applicant's other position that if the said shares were to be subject to Probate in the United Kingdom as a consequence of letters of Administration being granted there, the sale would attract heavy Capital Gains and Inheritance Taxes which would significantly diminish the value of the deceased's Estate. Additionally, that to acquiesce in an application for Probate in the United Kingdom would be reckless, and a dereliction of his duty as a Joint Executor to conserve as much of the Estate as possible for the benefit of the Beneficiary.

The Applicant through learned Counsel asserted that the Respondent is estopped from claiming any other forum as they filed the matter in this Court. They are pre-empted from turning around to now claim that the choice of forum should be UK.

For the foregoing reasons, the Applicant urged the Court to allow the Application and grant the orders sought therein.

THE RESPONDENT'S CASE

In response to the Application, Hemlata Rajnikant Karia (hereafter 'the Respondent') filed an Affidavit in response sworn on 17th August 2016. She stated that she is the widow to the deceased and his sole beneficiary of the deceased's Will dated 15th October 2008.

She deposed that following the Ruling by this Court delivered on 14th June 2016, she is aware that there was communication between the Joint Executors herein towards having a meeting to resolve the impasse on where to petition for grant of Probate pertaining to the deceased's Estate.

According to her, since she is a sole beneficiary, she prefers to petition for grant of Probate in the United Kingdom and then sealed in Kenya, Uganda, India or any other jurisdiction where his husband had assets because of the convenience of the United Kingdom jurisdiction to her. Further, that his solicitors in the UK have already begun the process of applying for the grant of Probate and hence the same should be a straightforward application.

That the exposure to inheritance tax is not governed by the place where Probate is obtained and that the Estate of a non-UK domiciled individual, such as the deceased, will be liable to the said tax on the assets situated in the UK. In that regard, it was her deposition that the deceased's shares at Orient Bank would not attract any such taxes or capital gains as alleged by the Applicant. That in any event, there is no incidence of an intended sale of the deceased's shares as alleged.

The Applicant argued further that the High Court in the UK would only issue Probate in respect of the deceased's Estate while the resealing and eventual transmission of the assets would be done in whichever jurisdiction where the assets are, including Uganda. The Applicant pointed out that the Applicant has alleged that a large portion of the deceased's assets are in Uganda and yet he did not adduce any evidence of the assets that comprise of the deceased's estate in Uganda in comparison with regard to the value of the said assets that are in Kenya, UK and India.

Additionally, she asserted that she does not have much money and cannot afford to get into a long legal battle. That she has already expended a tidy sum towards legal fees so far and she would like to recover the deceased's assets as quickly as possible. Furthermore, that because of her financial resources are being stretched and she is at the moment unable to obtain her husband's assets so as to provide for herself and her family. She stated further that the Applicant's intentions in bringing the present Application are not pure as he holds some of the deceased's assets and he was involved in business ventures with the deceased and hence he is more knowledgeable of the deceased's assets. That she has on several occasions inquired about the deceased's properties but the Applicant has been evasive or not responsive and she even at one point requested for the deceased's share certificate for the shares at Orient Bank for her safekeeping until the Probate matters are settled, but no response has been forthcoming.

In her view, the present Application, the Applicant's conduct and the intention to apply for probate in Uganda infer that the Applicant does not have her best interest and the interests of the deceased at heart. Accordingly, that the responsibility of Joint Executors is to collect in and distribute the deceased's Estate and hence, they ought not to have any personal interest in the Estate other than their role to administer the Estate in its best interest.

The Respondent finally submitted that Mr. Jay Karia and her are resident in the UK while the Applicant, though being resident in Uganda, regularly visits the UK. In her view therefore, it would be convenient to have the grant of Probate processed in the UK which is the most appropriate jurisdiction. The Respondent in that regard urged the Court to reach a decision that will satisfactorily conclude the present matter and avoid more costs and delay while dismissing the Application herein and direct that Probate be taken out in the United Kingdom.

The Respondent through learned Counsel stated that although the Law of Succession does not expressly provide for executors dispute resolution **Section 47 of the Act and Rule 73 of Probate and Administration Rules** donate to the Court such jurisdiction. Therefore the Court ought to determine the appropriate forum to hear and determine this dispute.

DETERMINATION

Based on the Parties' respective pleadings, as I have reproduced above, the key issue for determination is, which is the appropriate forum for petitioning for grant of Probate with regard to the deceased's Estate

herein. In that regard, the Applicant submits that the same should be taken in Uganda while the Respondent asserts that the same should be taken in the UK. In that context, there is no consensus or agreement between the Parties as to the choice of forum and choice of law to hear and determine the grant of Probate of the deceased's Estate.

Therefore, this Court shall invoke the doctrine of *forum non conveniens*. This doctrine of *forum non conveniens* was discussed at length by the House of Lords in **SPILIADA MARITIME CORPORATION VS CANSULEX LTD** [1986] 3 ALL ER 843 (HL) and it was partly stated at 853 – 854 thus:

“... whether the Latin tag ‘forum non conveniens’ is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of ‘mere practical convenience’. Such a suggestion was emphatically rejected by Lord Kinnear in Sim v Robinow (1892) 19 R (Ct of Sess) 665 at 668 and by Lord Dunedin, Lord Shaw and Lord Sumner in the Societe du Gaz case 1926 SC (HL) 13 at 18, 19, and 22 respectively. Lord Dunedin said, with reference to the expressions forum non competens and forum non conveniens:

‘In my view, “competent” is just as bad a translation for “competens” as “convenient” is for “conveniens”. The proper translation for these Latin words, so far as this plea is concerned, is “appropriate”.’

Lord Sumner referred to a phrase used by Lord Cowan in Clements vs Macaulay (1866) 4 Macph (Ct of Sess) 583 at 594, viz more convenient and preferable for securing the ends of justice, and said: ‘... one cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as “more convenient, that is to say, preferable, for securing the ends of justice,” I think the true meaning of the doctrine is arrived at. The object, under the words “forum non conveniens” is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends.’

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word ‘convenience’ and to refer rather, as Lord Dunedin did, to the appropriate forum”. (Emphasis added)

The interpretation invoked by the House of Lords thus denotes that the doctrine of *forum non conveniens* is to the effect the question of whether a particular Court has the jurisdiction to hear a matter in terms of conflicting jurisdictions is one which is to be assessed and determined depending on its own special circumstances. Furthermore, the of the doctrine calls for the Court to determine the most appropriate forum for hearing and determining a dispute which shall enable the parties therein and the Court meet the ends of justice of a case.

It is incumbent for this Court to determine the most appropriate forum for the effective and efficient disposition of the matter at hand and that, which shall ensure that the case meets the ends of justice. Suffice is to quote the dictum by Fabricious J. in the South African High Court in **MULTI-LINKS TELECOMMUNICATIONS LTD VS AFRICA PREPAID SERVICES NIGERIA LTD AND OTHERS**, (35347/13, 30004/13) [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GP) (6 September 2013) where the Learned Judge opined thus:

“... it seems to me that one must determine the forum most suitable for the ends of justice and because pursuit of the litigation in that forum is most likely to secure those ends. The

appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the Court would look to all the connecting factors including all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business, etc....” (Emphasis added)

Within the Kenyan context, the law of Succession applicable is no different by and large from the law in England India and Uganda. They are all Commonwealth countries and any of the courts would be competent to hear and determine the matter. Relevant Kenyan Law with regard to this matter I will reiterate **Section 2** of the **Law of Succession Act**, which prescribes the universal application of the said law on all testamentary and intestate Estates after 1981. **Section 16** thereof recognizes the formal validity of Wills drawn out of this country and the law in force where such Wills are executed, where the deceased died, where he was a national, where he was domiciled or where the properties are situated.

It will be noted further that **Rule 30** of the **Probate and Administration Rules** prescribe that where evidence of law of a country outside Kenya is required on any application for a grant, the same may be deposed in an affidavit by any person who practices as a barrister, solicitor or advocate of the court outside Kenya. Furthermore, **Rule 42 (1)** therein grants the resealing of grants issued in another country of properties forming part of the deceased’s Estate that are situate in Kenya. The Appropriate forum would be Kenya due to the fact that both parties submitted to this Court’s jurisdiction. However, the Court is bound to determine the matter as per the Parties pleadings and prayers. None of the parties sought to petition the grant of Probate in Kenya. Furthermore their presence in this Court was by virtue of the deceased’s Will of 2005 drawn in Kenya which was revoked and set aside by consent of all parties

Other pertinent factors that this Court has taken into account are as follows;

The deceased died in England, he wrote the Will in force in England. The widow and son reside in England. The widow is at advanced age 72 years old and is the sole beneficiary of the deceased’s estate. It will be cumbersome physically and financially to travel and stay in Uganda while awaiting grant of Probate. This is coupled with the fact that she was not involved in her late husband’s businesses in Uganda and is not involved to date.

The Court notes that in the deceased’s Will dated 15th October 2008, the deceased owns freehold property known as 27 Jellicoe Gardens, Stanmore, Middlesex, HA7 3NS, situate in England. It is immovable property and therefore subject to the laws of the UK.

The Applicant brother in law and daughter of the deceased reside in Uganda. The Respondent confirmed apart from being one of the Executors of the deceased’s estate he was the deceased’s business partner. He is well versed with the business ventures that they both engaged in. The Court is mindful that the Applicant has a dual role; that of a business partner and that of being Executor to the deceased’s estate. It is possible to have conflict of interest, which would prejudice the sole beneficiary’s interest in the estate. To alleviate such possibility, the grant of Probate ought to be on neutral ground. Naturally, it would be convenient for Applicant to have the grant of probate in Uganda. Yet the Court finds that the convenience of the widow and sole beneficiary of the deceased’s estate overrides any other party’s convenience.

Whereas both Parties allude that the deceased owned properties in Kenya, Uganda and India, no further evidence has been adduced for instance listing the nature and type of any such assets. The Applicant on his part maintains that the larger portions by value of the deceased’s assets are in Uganda. What however emerges is that the only asset belonging to the deceased in Uganda, based on the material before the Court, is that the deceased owns certain shares in Orient Bank Limited, a financial institution licensed and operating in Uganda.

DISPOSITION

The Court holds that in light of the various factors considered above, the most appropriate, available and convenient forum for all parties in light of the present circumstances to petition for grant of Probate is the UK. The Grant that shall be issued in UK and be resealed in Kenya, Uganda, India and in the other

countries where it is alleged that other properties of the deceased are situate, if any.

Based on pleadings, submissions and findings above, I am inclined to dismiss the Application dated 29th June 2016.

Let each Party bear their own costs.

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 13th DAY OF OCTOBER 2016.

M. W. MUIGAI

JUDGE

In the presence of:

Mshweshwe for the Applicant

Mr. Okeyo for the Respondent