



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
PROBATE AND ADMINISTRATION CAUSE NO. 20 OF 2006
IN THE MATTER OF THE ESTATE OF JASWANT SINGH BOOR SINGH DHANJAL
(DECEASED) OF MOMBASA

RULING

1. The deceased to whose estate the proceedings herein relate is Jaswant Singh Boor Singh Dhanjal of Mombasa who died on 26.10.04. From the record, the deceased died intestate and was survived by five children, Jaspal Kaur Nagi (Jaspal), Sukhwant Kaur Kundi (Sukhwant) Joginder Singh Dhanjal, the Applicant herein, Surjit Singh Jaswant Dhanjal (Surjit) and Daljit Singh Dhanjal, the Respondent herein. The deceased was also survived by three brothers namely Dalip Singh Dhanjal (Dalip), Narinder Singh Dhanjal (Narinder) and Baldev Singh Dhanjal (Baldev). A Grant of Letters of Administration was issued to the Respondent on 26.7.06 and confirmed on 20.4.07.

2. The Applicant is aggrieved that the Respondent entered into a Settlement Agreement dated 9.3.06 with the deceased's brothers before a grant of letters of administration was issued to him, by virtue of which assets of the deceased's estate were allegedly transferred. On 12.3.15, the Applicant filed a Summons dated 10.3.15 seeking the revocation of the Grant issued to the Respondent. Contemporaneously with the said Summons, the Applicant filed the instant Application of even date. In the Application, the Applicant seeks the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to make a declaration that the transfer of the deceased shares in Plots No. Mombasa/Block XIX/191, Mombasa/Block XIII/55, Mombasa/Block X/377, 6963 Section I MN and Mombasa/Block XIII/34 without grant of letters of administration intestate and confirmation of grant of letters of administration intestate from the names of Jaswant Singh Boor Singh Dhanjal is null and void.

4. That this Honourable Court be pleased to rescind the transfer and registration of Plots No. Mombasa/Block XIX/191, Mombasa/Block XIII/55, Mombasa/Block X/377, 6963 Section I MN and Mombasa/Block XIII/34 in favour of Dhanjal Properties Limited absolutely.

5. That this Honourable Court be pleased to Grant an Order directing rectification of the Lands Register in respect of Mombasa/Block XIX/191, Mombasa/Block XIII/55, Mombasa/Block X/377, 6963 Section I MN and Mombasa/Block XIII/34 by restoring the name of the deceased herein, as the legally registered owner of shares in respect of the subject lands.

6. That this Honourable Court be pleased to make a declaration that the transfers of the deceased shares in Dhanjal Investments Limited (18750), Dhanjal Properties Limited, (125), Jaypee & Sons Limited (1), Express Holdings Limited (1250) without grant of letters of administration intestate and confirmation of grant of letters of administration intestate from the names of Jaswant Singh Boor Singh Dhanjal is null and void.

7. That this Honourable Court be pleased to Grant an Order directing rectification of the Register of Members of Dhanjal Investment Limited, Dhanjal Properties Limited, Jaypee & Sons Limited, Express Holdings Limited by restoring the name of Jaswant Singh Boor Singh Dhanjal as the legally registered owner of 18750, 125, 1 and 1250 shares respectively of the above companies.

8. That this Honourable Court be pleased to make a declaration that the Settlement Agreement dated 9th March 2006 is null and void in so far as it sought to dispose of and transfer the shares of the late Jaswant Singh Boor Singh Dhanjal without grant of letters of administration intestate and confirmation of grant of letters of administration.

9. That this Honourable Court be pleased to grant an order compelling the administrator, Mr. Daljit Singh Dhanjal of the estate of the deceased to render a true, proper and comprehensive account of his administration of the estate of the deceased from the date of the deceased death to date.

10. That costs be in the cause.

The Applicant's Case

3. The facts of the case as outlined by the Applicant are that upon the death of the deceased on 20.10.04, the Respondent filed a Petition for Letters of Administration on 30.1.06. That before the same was gazetted, the Respondent entered into a Settlement Agreement dated 9.3.06 with the deceased's brothers wherein he disposed of the above listed assets of the estate of the deceased. That the Petition was gazetted on 17.5.06 while the Grant was issued to the Respondent on 26.7.06 and the Certificate of Confirmation of the said Grant on 26.4.07.

4. The Applicant claims that the Respondent's action of transferring the above mentioned assets vide the Settlement Agreement before he was granted letters of administration in respect of the estate of their deceased father was invalid, null and void as it was done contrary to the express provisions of Sections 55 and 71 of the Law of Succession Act.

5. The Applicant further argues that the fact that the Respondent was not the administrator of the estate of the deceased was well known to the other parties of the Settlement Agreement as he is described therein as "acting in his personal capacity and as the intended sole personal representative of the estate of Jaswant Singh Dhanjal". The Application is supported by one sibling Sukhwant (the 2nd Interested Party) while opposed by the Respondent and two other siblings namely Surjit and Jaspal. The Application is also opposed by the deceased's two brothers Narinder and Baldev and Nirmal Singh Dhanjal, the Administrator of the deceased's third brother Dalip, now deceased (the 1st Interested Parties).

6. The Applicant further claims that the said Settlement Agreement contains a renunciation by the beneficiaries of their rights to the estate of the deceased but denies that he ever renounced his right to any property of his late father. That the other beneficiaries of the estate of the deceased were not party or privy to the Settlement Agreement. That the firm and Anjarwalla and Khanna Advocates who drew the said renunciation have never represented him.

7. The Applicant maintains that the alleged transfers were done pursuant to the Settlement Agreement that was entered into before the Grant was issued. He further argues that the 1st Interested Parties cannot claim to be innocent purchasers for value without notice as they were well aware of the death of the deceased and were part of the scheme to disinherit and defraud the other beneficiaries of the estate of the deceased. In a nutshell the Applicant contends that the Settlement Agreement and the alleged transfers

were done before a Grant was issued and contrary to the express provisions of Sections 55 and 71 of the Law of Succession Act and therefore void.

8. The Applicant further contends that the Respondent misrepresented to the Court at the time of Petition for the Grant and Confirmation thereof that the estate of the deceased was intact as evidenced in the list of assets. He prayed that the Court declares the Settlement Agreement dated 9.3.06 null and void and nullifies all dispositions made pursuant thereto.

The Respondent's Case

9. The Respondent opposes the Applicant's case. In his grounds of opposition, he argues that the Application is too late, bad in law and an abuse of the Court process. That the same issues have been raised in Winding up cause No. 5 of 2014 and that the Applicant has come to Court with dirty hands as he participated in the dealings with the properties listed in the Application. That the properties referred to belong to a company known as Dhanjal Brothers Limited (DBL) and the estate shares are intact and charged to banks with the Applicant's consent. He contends that the Settlement Agreement related to DBL and was ongoing in the lifetime of the deceased. That the settlement was as a result of directors who were pulling out of the DBL and had nothing to do with the estate of the deceased. The Respondent and the deceased were among the five directors and shareholders of the DBL.

10. The Respondent denies having disposed of any assets of the estate and avers that after paying off debts in DBL the same remains intact as one unit in DBL. He states that he the deceased and the 1st Interested Parties were shareholders and directors of the DBL. According to him, at the time of the death of the deceased, DBL was in the process of reorganization. That the other directors except the Respondent moved out of the DBL and each of them as well as the estate had to pay their liabilities. That DBL after payment of liabilities retained the properties known as L. R. Nos 8843/I/MN CR 24942, 9255/I/MN, CR 25902 and Mombasa/Block XIII/134.

11. The Respondent claims that when the 1st Interested Parties moved out of the DBL, they gave him their shares and transferred to him a property known as Kwale/Galu Kinondo/670 which was previously in the name of Dhanjal Investments Limited (DIL) which property does not constitute estate property.

12. The Respondent states that the Applicant signed a disclaimer to the estate just like other siblings who have not challenged the Settlement Agreement. That the Applicant filed winding up petition No. 5 of 2014 in respect of DBL in which he has not challenged the Settlement Agreement. He claims that the estate of the deceased is still intact including the shares in DBL. That the shares could not be shared amongst the beneficiaries as the properties they represent are charged to banks. The Respondent states that his actions were above board as they were sanctioned by family members, the Applicant included.

13. For the Respondent, it was submitted that the conservatory orders sought cannot be granted as the properties in question do not belong to the estate of the deceased. That the proprietors of the said properties are not parties in the suit herein. The Applicant ought to have filed a substantive suit against the proprietors of the properties. Further, that the interlocutory prayer for conservatory orders pending hearing of the substantive application for revocation, the Applicant has failed to demonstrate that there is imminent threat of the Respondent committing the act sought to be restrained thereby rendering the prayer a nonstarter. It was further submitted that the Applicant lacks locus standi to litigate in respect of the shares of the deceased *vis a vis* third parties as he is not a holder of a grant of representation. That restraining orders may not be issued in succession proceedings against third parties. That there is no prayer for account in the substantive Application for revocation and therefore the prayer for account cannot be granted in the interlocutory application.

14. The Respondent is supported by his brother Surjit. In his Replying Affidavit sworn on 28.4.15, he stated that he signed the renunciation of his own free will as had been agreed upon by other family members including the Applicant. That he freely signed a renunciation of his rights over assets of the estate of the deceased to facilitate reorganization at DBL. That as a director of DBL, the Applicant has enjoyed benefits from it more than any other family member. He further claimed that the Applicant is

hoping to loot the company through these succession proceedings which are an attempt to run away from his own liabilities he has incurred as director and shareholder.

15. Jaspal a daughter of the deceased, in her Replying Affidavit sworn on 27.4.15 also supports her brother the Respondent. She too stands by the renunciation and disclaimer and states that she signed the same voluntarily

The 1st Interested Parties' Case

16. On behalf of the 1st Interested Parties, Nirmal avers in a Replying Affidavit sworn on 12.5.15 that the four brothers namely, the deceased, Dalip, Narinder and Baldev were shareholders and directors of a number of companies notably DBL and DIL. Upon the demise of the deceased, it became necessary to delink the brothers of the deceased on the one hand and the children of the deceased on the other from the share ownership and directorship of the two companies. That the Settlement Agreement was entered into for this purpose, with the children of the deceased referred therein as Group A to own and control DBL while his brothers referred to as Group B to own and control DIL. To achieve this, Group A was to cede to Group B all shares held by Group A in DIL while Group B was to cede to Group A all their shareholding in DBL .

17. The 1st Interested Parties claim that the Respondent was nominated as the proposed Administrator and representative of Group A. That all other children of the deceased had renounced their right to letters of administration of the estate of the deceased thereby representing to all that the Respondent was both the proposed administrator of the estate of the deceased and the family's representative in the Settlement Agreement. It is the submission of the 1st Interested Parties that the Applicant failed to produce evidence showing the assets of the estate of the deceased that were transferred before issuance of Grant and confirmation thereof as required under Sections 107 and 108 of the Evidence Act.

The 2nd Interested Party's Case.

18. The 2nd Interested Party, Sukhwant, is a daughter of the deceased and a sister to the Applicant and the Respondent. In her Replying Affidavit, she stated that the Respondent entered into the Settlement Agreement wherein he disposed of the properties listed in the Application without her consent. That she was not involved in the negotiation of the Settlement Agreement and denies renouncing her right to any of the assets of her father's estate. She averred that as a daughter of the deceased she is entitled together with her siblings to 1/5 share of her father's estate which she has not received to date. That she needs to receive her rightful share of her father's estate.

19. For the 2nd Interested Party, it was submitted that the Respondent entered into the Settlement Agreement and transferred assets of the deceased's estate contrary to the provisions of Section 55 and 71 of the Law of Succession Act as he had no grant of representation. That the dealings by the Respondent with the assets of the estate before grant was issued amounted to intermeddling under Section 45 of the Law of Succession Act. That the Settlement Agreement is illegal and any dispositions and made pursuant thereto are null and void. It was further submitted for the 2nd Interested Party that she was entitled to inherit he share of her deceased's father's estate.

20. At the close of submissions in this matter, DBL applied to be enjoined as an interested party which application was granted by a ruling of this Court of 16.6.16. On 11.7.16, the DBL was granted 2 weeks to put in a Replying Affidavit and Submissions to the Application herein. However by 5.9.16 when the matter was mentioned, DBL has not filed any papers. The opportunity was then closed to DBL for noncompliance with the directions of the Court.

21. A look at the record reveals that a Petition for Grant of Letters of Administration for the estate of the deceased was filed by the Respondent on 30.1.06. The Petition was accompanied by the renunciation of the Applicant herein, Jaspal, Sukhwant and Surjit. The list of assets of the estate as set out in Form P & A 5, the affidavit in support of the Petition include:

Dhanjal Brothers Limited	1125 shares
Dhanjal Properties Limited	125 shares
Dhanjal Investment Limited	18,750 shares
Chania Estuary Dev. Limited	1,250 shares
Whitehart Holdings Limited	1 share
Idolo Enterprises Limited	1 share
Express Holdings Limited	1,250 shares
Pesce Enterprises Limited	1 share
Chempac Limited	1 share
Tiwi/Diani Complex/138	
Tiwi/Diani Complex/287	
Tiwi/Diani Complex/116	
share in Mombasa/Block XIX/134	
share in Mombasa/Block XIII/55	
share in Mombasa/Block XIX/191	
share in Mombasa/Block X/377	
share in 6963 Section I MN	
share in Mombasa/Block XIII/34	
share in Plot No. 8732, Section I MN	

Although the shares in Jaypee & Sons Limited are the subject of the Application herein, they are not listed in the Petition as assets of the estate of the deceased.

22. Having set out the respective parties' case above, I will now consider the issues for determination.

Whether the Applicant has legal capacity to file the Application herein.

23. It was submitted for the 1st Interested Parties that the Applicant being a beneficiary and not the holder of a grant of representation lacks legal capacity to file the instant application. That only the Respondent who is holder of the grant can institute proceedings on behalf of the estate. The case of John Kasyoki Kieti v Tabitha Nzivulu Kieti & Annah Ndivele Kieti [2001] eKLR, which was cited to buttress this submission is distinguishable as the Plaintiff therein had filed a civil suit against other beneficiaries without being a holder of a grant of representation. Indeed Mwera, J. stated

“Although the preliminary point is upheld this court sees no reason to strike out the suit sterile as it is. Parties would do well to withdraw it and move by way of succession.”

The Applicant has moved the Court within the Succession Cause herein and in my view correctly so.

24. Further, the substantive application herein is the Summons for Revocation of grant. The current application is an interlocutory within the substantive Application. Rule 44(1) of the Probate and Administration Rules

“Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief ...” Emphasis added

25. Section 83(h) provides the duties of personal representatives as inter alia :

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account” Emphasis added

26. The Applicant is an interested party and a person interested in the estate of the deceased. As such, he is entitled under the above provisions to file the substantive application as well as the interlocutory application herein. Further, the Respondent as the Administrator of the estate of the deceased is required under Section 83 (f) subject to section 55 to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts of the estate and the income therefrom, according to the respective beneficial interests therein as set out in the Certificate of Confirmation of Grant. Given that the Applicant claims that the Respondent acted contrary to the legal requirement, the Applicant was well within his legal right, to file the Application herein.

27. In the Estate of James Shiraku Inyundo, Nbi HCCC No. 920 of 1986 Kuloba, J actually stated that ***“where administrators are not committing any wrong to the estate, they must be left to administer the estate in the best interests of the estate and the beneficiaries.”*** In the instant case, it is quite clear that the Administrator, the Respondent herein has not administered the estate in the best interest of the estate or beneficiaries in that he done contrary to what is clearly stated in the Certificate of Confirmation of Grant.

28. Whether the Settlement Agreement is void.

It was submitted that the Settlement Agreement dated 9.3.06 between the Respondent and Dalip, Narinder and Baldev acting as “the intended sole personal representative” of the estate of the deceased is void. The Grant of representation was issued to the Respondent on 26.7.06. It is trite law that for an agreement to be valid, parties thereto must have legal capacity to enter into the same. At the time the Settlement Agreement was executed, the Respondent not being the holder of the grant of representation of the deceased’s estate had no legal capacity to enter into the Settlement Agreement.

29. By entering into the Settlement Agreement by which assets of the estate of the deceased were, or were to be disposed, the Respondent intermeddled with the estate of the deceased as contemplated in Section 45 of the Law of Succession Act which provides:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

30. **Musyoka, J in** In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR had this to say concerning Section 45:

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence”.

31. It was submitted that Applicant was a voluntary party to the memorandum of understanding dated 25.11.05 the precursor to the Settlement agreement. That the Applicant did not in his deposition controvert this assertion. It matters not that the Applicant acquiesced to the Settlement Agreement if at all he did. In the cited case of Peter Ombui Nyangoto v. Elizabeth Matundura & Another [2013] eKLR, in which the property of the deceased therein was transferred before a grant was issued, the Court of Appeal opined

“The second respondent's active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity”.

32. Likewise in the instant case, the Settlement Agreement which purported to deal with the assets of the estate of the deceased before grant was issued was in complete violation of the law of Succession Act and the acquiescence of the Applicant did not and cannot make it legal.

33. Whether any assets of the estate have been transferred before confirmation of grant

The Applicant seeks a declaration that the transfer of these properties without a confirmed grant from the estate of the deceased is null and void for contravening Sections 55 and 71 of the Law of Succession Act. He also seeks rescission by the Court of the said transfer and registration of the said properties in favour of Dhanjal Properties Limited. The Applicant further seeks grant of an order for the rectification of the lands register by restoring the name of the deceased. It was submitted for the 1st Interested Parties that none of the properties had been transferred. This is confirmed by the official searches annexed to the supporting affidavit of the Applicant for the three pieces of land namely Mombasa/Block X/377, Mombasa/Block XIII/55 and Mombasa/Block XIX/191 done in February 2015. The searches indicate that the said properties are in the names of the deceased and his three brothers Dalip Narinder and Baldev as tenants in common in equal shares.

34. The search for Mombasa/Block XXIII/34 shows that the same was registered in the name of Baldev Singh Dhanjal in 2008. Though this property is listed as one of the assets of the estate of the deceased in Form P & A 5, no title was produced showing that the deceased had an interest in the same prior to 2008. Indeed the Settlement Agreement, indicates that the registered proprietor of the property is Ramadhan Hussein Ramadhan (as administrator of the estate of Hussein Ramadhan, deceased). The Court is unable to see the nexus between the deceased and this property and none has been provided by the Applicant.

35. A copy of transfer in respect of Subdivision No. 4692/VI/MN dated 17.5.08 between Dhanjal Properties Limited and DBL is annexed to the Applicants affidavit. This property however is not among those that are the subject of the Application herein nor indeed among the listed assets of the estate of the deceased. I am satisfied that no evidence was produced to persuade the Court that any of the immoveable assets of the estate of the deceased have been transferred before confirmation of grant or at all. In view of the foregoing, prayers 3, 4 and 5 which were considered together due to their conceptual similarities, cannot be granted.

36. On the moveable assets, the 1st Interested Parties concede that the deceased's shares in DIL were transferred by the Respondent to the deceased's brother Dalip (now deceased). However, they submit that the transfer of the said shares was done as provided by the Companies Act. The Share transfer form was executed by the Respondent and Dalip on 31.1.08 and stamp duty thereon paid on 12.5.08 to complete the transaction as provided by law.

37. It was further submitted that the Applicant did not in his supplementary affidavit negate or deny the averment by the 1st Interested Parties that the transfer of shares was done after confirmation of the Grant. This being the case, the Applicant is in law deemed to have fully admitted the correctness of the said averment. To buttress this submission the case of Kegenyi v Musairamo (1968) EA 43 was cited. It may well be true that the Court must accept the truth of averments that are uncontradicted and unchallenged on

oath. The Court is satisfied that the transfer of the shares that the deceased held in DIL were transferred to Dalip in 2008 long after the Grant issued to the Respondent was confirmed on 20.4.07. However, there is more to the matter.

38. The share transfer form clearly indicates that the transfer was “in consideration of certain agreements made in a Settlement Agreement”. Given that the Settlement Agreement is void for want of legal capacity on the part of the Respondent to enter into it, all transactions undertaken pursuant thereto are void. This includes the transfer of the deceased’s shares in DIL by the Respondent to Dalip.

39. Further the Applicant denies signing the renunciation of his entitlement to certain assets of the estate of the deceased and claims that the Respondent used to bring him signature pages of documents to sign allegedly for purposes of opening bank accounts. That he only got to learn about the Settlement Agreement when the same was filed in a bundle of documents in Winding Up Petition No. 5 of 2014. A similar disclaimer was signed by Surjit, Sukhwant and Jaspal. Sukhwant also denies signing the disclaimer. I have looked at these disclaimers which were incorporated in the Settlement Agreement. In the disclaimer, each of these beneficiaries disclaimed all their entitlement to rent and other income and dividends and distributions derived from the following assets of the estate of the deceased:

- i) Title No. Mombasa/Block X/30
- ii) Title No. Mombasa/Block XIII/55
- iii) Title No. Kwale/Diani Complex 116, 138 and 287
- iv) Title No. Mombasa/Block XIX/191
- v) Title No. Mombasa/Block X/377
- vi) L. R. No. 6963, Section I, M. N. Mombasa
- vii) L. R. No. 8732, Section I, M. N. Mombasa
- viii) 18,750 shares in Dhanjal Investments Limited
- ix) 125 shares in Dhanjal Properties Limited
- x) 1 share in Jaypee & Sons Limited
- xi) 1,250 shares in Express Holdings limited.

40. The disclaimers also provided that the beneficiaries authorized the Respondent who was described therein as the “intended administrator of the estate” to deal with the beneficiaries’ interest in the said assets as he deemed fit. It is noted that of the above assets, property no i), iii) and x) were not included in the list of assets of the estate in Form P & A 5. The Respondent filed his Summons for Confirmation of Grant on 8.3.07. The mode of distribution of the estate of the deceased as set out in the affidavit in support of summons for confirmation of grant sworn by the Respondent, provided that each of the beneficiaries were to get 1/5 of the estate of the deceased. This mode of distribution is contained in the Certificate of Confirmation of Grant. It is not clear why the Respondent did not file the disclaimers signed by his siblings at the time he filed the Summons for Confirmation of Grant filed yet they had been signed in January 2006. Had he done so, the mode of distribution of the above assets would have taken the disclaimers into consideration. The estate of the deceased may therefore only be distributed according to the certificate of confirmation of grant issued on 26.4.07. Any other dealing with the estate of the deceased is and will be contrary to law.

41. As required by law, the Certificate of Confirmation of Grant lists the beneficiaries and the assets of the estate of the deceased and the share of each beneficiary. Notably, the 18,750 shares in DIL were not

listed in the certificate of confirmation nor were they listed in the affidavit in support of the confirmation. It is not clear from the record why this particular asset was excluded from the assets for distribution. The import of the exclusion is that the Respondent as administrator of the estate of the deceased had no authority to deal with the said shares without making a formal application to Court to have the said omitted shares included in the Confirmation. Even if the said shares were included, the Respondent still did not have any legal basis to transfer the said shares to Dalip who was not listed as one of the beneficiaries of the estate.

42. The proviso to Section 71(2) of the Law of Succession Act states:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares”.

Rule 40(4) of the probate and Administration Rules provides:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined”.

43. When the grant herein was confirmed, the identification and shares of all persons beneficially entitled to the estate were ascertained and determined. The beneficiaries of the estate are the five children of the deceased and each beneficiary was to get 1/5 share of the estate. The deceased died intestate. Section 38 of the Laws of Succession Act clearly provides that where, as in this case, ***“an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”***. Dalip is not a child of the deceased. He is therefore not beneficiary of the estate. The transfer of the shares of the deceased in DIL by the Respondent to Dalip was therefore done in contravention of the Law of Succession Act.

44. The 1st Interested Parties seek refuge in Section 93(1) of the Law of Succession Act which provides:

“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act”.

45. Section 93 has been the subject of judicial interpretation in a number of cases. The provision is intended to protect innocent third parties. Indeed Waki, J. stated in In the Matter of the Estate of Yusuf Mohamed, Mombasa High Court Probate and Administration Number 434 of 1995

“There is evidence which I accept, that the only asset of the estate has been sold to third parties and there are even ‘fourth’ parties involved as lenders of money on security thereof. There is no indication that those parties were privy to the irregularities alleged in the processing of the grant...” Emphasis added

46. Rawal, J.(as she then was) opined in In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR

“It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate. In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative”.

47. The fact that the Respondent had no grant of representation when the Settlement Agreement was entered into was well known to Dalip and to his brothers, Narinder and Baldev. They were not innocent third parties. The Respondent for his part was aware that the estate of the deceased was to be distributed among the children of the deceased in equal shares. Consequently, Section 93 cannot grant him immunity against challenges to the transfer of the shares in DIL to Dalip. I agree with Rawal, J. that Section 93 does not prohibit the discretion of this Court to invalidate this fraudulent action by the Respondent as personal representative of the estate. I also concur with Waki J. went on to say in the Yusuf Mohamed case (supra):

“The innocent third parties shall remain unaffected but the administrators cannot escape responsibility to the estate as provided for under section 83(g) of the Act which I invoke on my own motion and order that the Respondents do produce to the court a full and accurate account of all dealings therewith up to the date of the account.”

48. The Respondent had a statutory obligation as one of his duties as personal representative of the estate, to distribute the net intestate estate of the deceased according to the respective beneficial interests. Section 83(f) of the Law of Succession Act provides:

“subject to [section 55](#), to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be”; (Emphasis added)

49. The respective beneficial interests are clearly set out in the Certificate of Confirmation of grant. The question is, has the respondent complied with the clear provisions of the law? It would appear that he has not done so.

50. As regards the deceased’s shares in the other companies, namely Dhanjal Properties Limited, Jaypee & Sons Limited and Express Holdings Limited, no evidence was led concerning the alleged transfer thereof. The orders sought in respect thereof cannot therefore be granted.

Whether an order for rendering accounts should be granted.

51. It was argued for the Respondent that the prayer, in the interlocutory application, for an order compelling the Respondent to render a true, proper and comprehensive account of his administration of the estate should not be granted as no such prayer was made in the substantive application for revocation of grant. This Court notes that is a general principle of law that a prayer not contained in the substantive suit cannot be made in an interlocutory application therein. Doing so would be a departure from a party’s own pleadings.

52. However, there are three reasons why this Court would order production of account. First, the Court is empowered under Section 83(h) of the Law of Succession Act of its own motion, to require a personal representative of the estate of a deceased person to produce to the Court an account of the estate. The Section provides:

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account”

53. Secondly, the 2nd Interested Party claims that she is yet to receive her 1/5 share of the deceased estate. The account will shed light on what became of her share. Thirdly, it has become evident in the proceedings herein that there was no full disclosure of all the assets of the estate of the deceased. I am therefore persuaded that a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account should pave way for a full disclosure of the estate.

54. The Law of Succession Act jealously guards and protects estates of deceased persons and has made very specific and clear provisions as to how such estates are to be dealt with. Any dealings with the estate of the deceased person herein without the Grant of representation were not only void but illegal. Similarly the transfer of the assets of the estate of the deceased made outside the specific distribution set out in the Certificate of Confirmation of Grant dated 26.4.07 is both void and illegal having been made contrary to the Law of Succession Act.

55. Having made the above finding, I do make the following declarations and orders:

- i) The Settlement Agreement dated 9.3.06 is void *ab initio*.
- ii) The transfer of the deceased's 18,750 shares in Dhanjal Investments Limited to Dalip Singh Dhanjal is void.
- iii) I hereby direct the rectification of the Register of Members of Dhanjal Investments Limited, by restoring the name of Jaswant Singh Boor Singh Dhanjal as the legally registered owner of 18,750 shares therein.
- iv) The Respondent do produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account within 60 days of the date hereof.
- v) Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 13th day of October 2016

M. THANDE

JUDGE

In the presence of: -

- **for the Applicant**
- **for the Respondent**
- **for the 1st Interested Parties**
- **for the 2nd Interested Parties**
- **Court Assistant**