



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO.227 OF 2010 (O.S)**

**IN THE MATTER OF THE ESTATE OF NATHU KHAN (DECEASED)**

**BETWEEN**

**MOHAMMED SADIQUE KHAN .....PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMMED NAZIR KHAN.....DEFENDANT/RESPONDENT**

**RULING**

The applicant Mohamed Sadique Khan, brought the notice of motion dated 29<sup>th</sup> July , 2013 *inter alia* praying that this court be pleased to issue an interim order allowing him to enter into and take Possession of the suit Property, to wit Nakuru Municipality Block 4/92 for his use and /or for its preservation.

The application, which is brought under section 3A of the Civil Procedure Act and Order 51 Rule I of the Civil Procedure Rules 2010; is premised on the grounds that the suit Property is registered in the name of Nathu Khan (the deceased herein); that upon the demise of the deceased in 1962, the deceased's estate, the suit property included ,was entrusted he deceased to Gulam Fatma (now deceased), Bashir Ahmed and the respondent as trustees of the will deceased; that of the out of the trustees of the deceased's will ,only the respondent resides in the jurisdiction of this court as the other surviving trustee (Bashir Ahmed) resides in United states.

It is the applicant's case that the trustees have not rendered any account in respect of the estate of the deceased and, in particular, the suit property. The applicant is also concerned about the state of the suit property ( he alleges that the property is in a deplorable condition) and the fact that it is occupied by a third party.

Urging that the application should, in the interest of justice be allowed, the applicant argues that no prejudice will be occasioned on the respondent if the application is allowed. On the contrary, he argues that unless the application is allowed, the suit property will be depleted. Depletion of the estate, he argues, will occasion great prejudice and loss to him and the other beneficiaries of the estate.

In the affidavit sworn in support of the application, besides reiterating the grounds thereon, the applicant maintains that the respondent has neglected the management and preservation of the suit property by leaving the same in the control and occupation of a third party.

The application is opposed through the replying affidavit of the respondent sworn on 31<sup>st</sup> October, 2013 and a notice of preliminary objection dated 11 October, 2013. From the replying affidavit and the notice

of preliminary objection herein, the respondent's case can be summarised as follows.-

1. That the application and the entire proceedings in this suit are *res judicata* Probate and Administration cause No.21 of 1962
2. That the proceedings herein are time barred or statute barred;
3. That the applicant has no *locus standi* to bring the instant Proceedings;
4. That the legal regime under which the application has been brought does not apply to the Subject estate;
5. The application or proceedings herein are unknown to law and/or procedure; and
6. That the application or proceedings are incompetent, bad in law and an abuse of the court process.

In support of the foregoing contentions the respondent has deposed that the deceased (Nathu Khan) died testate; that in his will the deceased had appointed his mother Gulam Fatma (now deceased); his brother (Bashir Mohamed) and himself as the executors of his will and appointed them the trustees of his estate; that upon demise of the deceased, the executors in accordance with the deceased's will, applied for the probate of the will vide Probate and Administration cause No. 21 of 1962 and that after they were issued with a grant of probate, the estate of the deceased devolved to them as provided in the will. Consequently, they administered the will as required of them and rendered accounts to the court as required law.

Contending that it is oppressive and inconceivable for the applicant to ask for documentations and records of accounts, fifty years after a grant of probate was issued to them, the respondent contends that the proceedings herein have been brought to vex him. He also argues that any application for accounts, if any, should have been brought under the 1962 Probate and Administration matter.

Arguing that the deceased's will granted the executors discretion to deal with the estate as they thought wise, the respondent explains that after educating all the children of the deceased and taking care of their mother (the deceased's wife) they resolved to indefinitely postpone the sale or disposal of the suit property owing to its sentimental value.

Contrary to the applicant's suggestion that the other remaining executor of the will of the deceased is no longer interested or involved in the management of the deceased's estate, the respondent explains that despite the fact that his co-administrator lives abroad (in the United States), his co-administrator is still actively involved in the management of the deceased estate and took part in the resolution to postpone the sale or disposal of the suit property.

Wondering why the applicant has not enjoined his co-administrator in the suit or even the other beneficiaries of the estate, the respondent refers to Nakuru HC. Succession cause No. 420 of 2008 which the applicant had previously filed against him, but withdrew after he demonstrated that the deceased had died testate and that he was an executor of the deceased's will, to argue that the applicant is out to settle scores with him by using the court process.

Faulting the applicant for having failed to raise any concerns he had over the administration of the deceased's estate and the trust created in respect thereof in the 1962 Probate and Administration cause herein, the respondent contends that the trust created in respect of the suit property cannot be discharged in the manner suggested by the applicant.

Concerning the allegation that the respondent has neglected the suit property and that it is in a deplorable state, the respondent denies those allegations and deposes that he will continue holding the suit property in accordance with the terms of the will.

Without denying the applicant's contention that he is a beneficiary of the estate of the deceased and that he's never benefited from the same, the respondent argues that it is inconceivable that the applicant would wait for nearly 50 years to realize his loss or grievances and purport to agitate the same.

Pursuant to an order given on 22/7/2014 to the effect that the application be disposed of by way of written submissions, advocates for the respective parties filed submissions which, I have read and considered.

### **Issues for the court's determination:-**

Through the respondent's submissions the following three issues have been framed for the court's determination?

1. Whether or not the instant suit amounts to multiplicity of proceedings or suits?
2. Whether the plaintiff is entitled to be furnished with accounts as regards the administration of the estate of the deceased? And
3. Whether the plaintiff is entitled to the suit Property?

With regard to the 1st issue, counsel for the respondent explains that the subject matter in the instant suit arises from the same subject matter as Succession Cause No. 21 of 1962 to wit, the administration of the estate of the deceased person herein. The parties are the same, that is to , say, the applicant was a beneficiary in those proceedings and the respondent an administrator of the estate of the deceased. Counsel also pointed out that the applicant had, prior to institution of the current suit, filed Nakuru High Court Succession Cause No.420 of 2008 against the respondent raising similar issues, to support the respondents prayer for dismissal of the suit on the ground that it offends Section 6 of the Civil Procedure Rules.-

In a rejoinder, counsel for the applicant submitted that the instrument that gave the respondents power to administer the deceased's estate (the deceased's will), created a continuing trust and to date that trust has not been discharged. Referring to the provisions of Order XXXV1 Rule 1 of the repealed Civil Procedure rules, which are in *pari materia*, to those of Order 37 of the Civil Procedure Rules, 2010, counsel submitted that the purpose of those provisions was to cater for instances like the one herein and to provide justice for the beneficiaries.

In this regard, it is submitted that Order 37 of the Civil Procedure Rules provides an alternative avenue to approach the court using Civil Proceedings to seek accountability by trustees and administrators in order to secure the interest of beneficiaries in the estate.

Counsel further argues that, under Order 37 aforementioned, there is no limitation as to the manner in which a party can approach the court for remedies.

With regard to the instant suit, he explains that the trust in question is still in existence and that the legality of the will and the respondent's duties as a trustee are not in dispute or being challenged.

For the foregoing reasons counsel maintains that, the applicant's suit is proper and does not amount to multiplicity of suits as contended.

In determining this question I begin by pointing out that section 2(1) as read with sub section (2) of the Law of Succession Act subjects the Administration of the suit property herein to the provisions of that Act. The section provides:-

**2. (1) Except as otherwise expressly Provided in this Act or any other written law, the provisions of this act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of ntestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of**

**those persons.**

**(2)The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”**

Section 93 thereunder gives the Rules Committee power to make rules of procedure generally for the carrying out of the purpose and Provisions of the Act .

Pursuant to the Powers given to the Rules Committee under Section 93 above, the Probate and Administration Rules were enacted.

Order 63(1) Provides for the provisions of the Civil Procedure Rules together with the High Court ( Practice and Procedure) Rules applicable to Succession proceedings. Under that order the provisions of civil Procedure Rules applicable to Succession proceedings are orders V, X, XI ,XV, XVIII, XXV, XLIV and XLIX

From the foregoing, it is clear that Order 37 Rule 1, formerly order XXXVI Rule (1) is not one of the Civil Procedure Rules applicable to succession proceedings.

In his book, a case book on the Law of succession, W. M Musyoka, has this to say about estate accounts:-

**account for all payments, dispositions,retentions or reimbursements made by him to the person or persons to whom representation is afterward granted.”**

The foregoing provisions and, in particular, Order 63 of the Probate and Administration Rules which does not recognize order 37 of the Civil Procedure Rules as one of the provisions applicable to, succession proceedings, and in view of the provisions of Section 83 and 93 of the Law of Succession Act providing for the applicant's right to an account, as a beneficiary of the estate of the deceased, the question to answer is, What is the procedure for approaching the court for the said account?

There being no special provision under the Probate and Administration Rules for approaching court under Section 83 and or 92, the applicant ought to have moved the court under order 49 of the said rules. That order provides:-

**“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary be affidavit.”**

In applying the foregoing provisions of the law to the instant, suit, it is clear that the plaintiffs suit is incompetent having been brought under the wrong provisions of the law. In. this regard see **Official Receiver v Sukhdev (1970) E.A 243** where it was held:-

**I. Originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained;**

**II. It was not competent to obtain an originating Summons other than by consent order founded on breach of trust or wilful default.”**

From the foregoing, the respondent's contention that the applicant ought to have brought the application for an account under the 1962 probate and Administration matter, in my view, has merit. However, I cannot agree with the respondent's advocate's submission that due to inordinate delay, the applicant's application for an account is time barred. See Section 83(g) of the Law of Succession Act which excepts the application of the time stated therein to continuing trust. (the will hereto created a continuing trust in respect of the deceased's residuary estate, the suit property included).

**Whether the plaintiff is entitled to be furnished with accounts as regards the administration of the estate of the deceased?**

In view of the provisions of the law cited herein above and the uncontroverted allegation by the applicant that the respondents have never provided the beneficiaries of the estate with an account, I find and hold that, subject to the application being brought under the right provisions of the law, the applicant is entitled to an account in respect of the deceased's estate.

On whether the plaintiff is entitled to the suit property, having found the current application to be incompetent, I find and hold that it cannot be the basis of determining that question.

**Dated, Signed . and written at Bungoma this 18<sup>th</sup> day of December 2014**

**H. A OMONDI**

**JUDGE**

**Delivered and dated this 21<sup>st</sup> day of January 2015 at Nakuru**

**JANET MULWA**

**JUDGE**