REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSES NO. 712 OF 2007 AND 941 OF 2011

IN THE MATTER OF THE ESTATE OF MANUBHAI KHODIDAS RATHOD (DECEASED)

ROHIL SATISH KHODIDAS.....1ST APPLICANT

JOSHNABEN CHAGANLAL RATHOD.....2ND APPLICANT

VERSUS

BABULAL CHANDULAL RATHOD.....1ST RESPONDENT

APA INVESTMENT CO. LTD.....2ND RESPONDENT

RULING

1. The deceased Manubhai Khodidas Bhavan died on 15th March 1992. He left one property known as L.R NO. 209/40/5. On 18th June 2007 a grant of letters of administration intestate was issued to his grandsons Babulal Chandulal Rathod (the 1st respondent) and Kirti Chaganlal Khodidas (who has since passed on). The grant was confirmed on 22nd July 2008, and the property ordered to go to the 1st respondent absolutely. He later sold the property for Kshs.44 million to APA Investment Co. Ltd (the 2nd respondent).

2. On 18th February 2011 the 1st applicant Rohil Satish Khodidas (who is the great grandson of the deceased) went to the ELC Court and filed Originating Summons No. 68 of 2011 (which is now Succession Cause No. 941 of 2011) seeking answers to a number of questions. They included:-

(a) whether he, as a heir, was entitled to benefit from the estate of the deceased;

(b) whether the 1st respondent had properly obtained grant of letters of administration of the estate; and

(c) whether the sale and transfer of the property by the 1st respondent was proper.

The summons were brought against the 1st and 2nd respondents. His case was that the deceased had left a written will ("MKR 9") and therefore the estate was not available for intestate succession; that, the deceased had left 16 beneficiaries (grandchildren and great grandchildren) to the knowledge of the 1st respondent and yet the respondent had gone ahead to petition for the grant and get the property without reference to them, and without seeking their consent, with the effect that he had disinherited them; and that the 1st respondent had lied to the court about certain material facts to be able to get the grant and to transfer the family property to the 2nd respondent. It was said that an application for the revocation and/or annulment of the grant had been made in the Succession Cause.

3. Indeed, on the same day that the Originating Summons was filed, the same 1st applicant filed an application for the revocation and/or annulment of the grant claiming that the same has been obtained by the making of false representations, fraud, concealment of material facts, and that the proceedings leading to the grant were defective in substance. The 1st applicant repeated what he had said in the Originating Summons, but added that all these beneficiaries lived in the house on the property and that they learnt of the succession proceedings when the 2nd respondent came to evict them after he bought the property. On 21st May 2014 a similar application to revoke and/or annul the grant was filed by Joshnaben Chaganlal Rathod (the 2nd applicant) against the respondents on the same grounds. He filed it as a grandchild of the deceased. The application was filed on his own behalf and that of three grandchildren Satish Chaganlal Rathod, Geeta Chaganlal Rathod and Anant Chaganlal Rathod.

4. On 28th July 2014 it was agreed that the applicants and the 1st respondent be appointed the co-administrators of the estate of the deceased.

5. On 22nd August 2014 an application dated 24th June 2014 was filed by the 2nd respondent seeking that the Originating Summons be struck out with costs. The affidavit in support was sworn by Walid Khalid Abdulkarim (a director of the 2nd respondent). His case was that the 1st applicant was not an executor or administrator of the estate of the deceased, and neither was he a creditor, devisee, legatee, heir or legal representative or a trustee and therefore was not entitled to bring the Summons; that the 2nd respondent had a good title by virtue of **section 93** of the **Law of Succession Act (Cap 160)** and the title they had got could not be impeached; that the 1st applicant was not one of the persons entitled to benefit from the estate, being a great grandson, and that the originating summons was therefore an abuse of the process of the court.

6. Lastly, on 18th September 2014 the 2nd respondent filed Summons seeking that the sale and subsequent registration and transfer of the property in the name of the 2nd respondent be declared null and void and of no consequence and the ownership of the property be ordered to revert to the applicants as joint administrators of the estate of the deceased. The grounds were that the grant and confirmation were obtained fraudulently and through misrepresentation of material facts; that the sale was shrouded with misrepresentation, illegalities and fraud; the 1st respondent had consented to the applicants being co-administrators, and therefore he had himself faulted the grant; and that the sale had been done without the consent of the applicants as co-administrators. The 1st applicant supported the application by the 2nd applicant. The 1st respondent opposed the application by the 2nd applicant. He explained that the reason why he, along with Kirti Chaganlal Khodidas, went to court and petitioned for the grant without the rest of the family was because the matter was urgent, and the rest of the family refused to take part; that the lease of the property of the estate expired on 1st April 2003 and that he was the one (because the rest of the family was unwilling) who got the lease extended; and that any rights, interest or title of the deceased to the property were extinguished by the expiry of the lease and it was therefore gracious on his part to save property by extending the lease. The 2nd respondent opposed the application by the 2nd applicant. Their case was that the applicants should seek legal redress, if any, from the 1st respondent as they were an innocent purchaser of the suit property for value without notice, as they bought the property on the strength of a valid grant of representation issued by a competent court. The applicants opposed the bid to strike out the originating summons.

7. The Court asked Counsel to file written submission on the application to strike out the Originating Summons and on the application to nullify the sale and transfer of suit property to the 2nd respondent. I have considered them.

8. An application to strike out a suit challenges the legal sufficiency of a suit, and the court has undeniable authority, at any stage of the proceedings, to order striking out on any sufficient ground, including the following grounds:-

(a) want of jurisdiction; or

(b) the suit discloses no reasonable cause of action in law; or

(c) the suit is scandalous, frivolous and vexatious; or

(d) it may prejudice, embarrass or delay a fair trial of the action; or that

(e) the suit is otherwise an abuse of the process of the court.

In **D.T, Dobie and Company (Kenya) Ltd –v-s Muchina [1982]KLR 1)** it was decided that the court ought to act very carefully and cautiously and must endeavour to consider all the facts relevant to the case when dealing with an application to strike out, which is a summary procedure. The court should not engage in a trial before the main trial. The power to strike out is permissive and confers a discretionary jurisdiction to be exercised in regard to the quality of pleadings and all the circumstances relating to the pleadings. Striking out should be done only in plain and obvious situations. If the pleadings before the court have some semblance of quality, or there is a possibility that life can be injected into the case by an amendment, the case has to be saved from the drastic action of striking out. The exercise of extreme caution comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. But at the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter **(Crescent Construction Company Ltd – v- Delphis Bank Ltd, [2007]2 EA 119).**

9. The 2nd respondent basically state that they are an innocent purchaser for value without notice, and therefore that they have acquired a good title under **section 93** which cannot be impeached. The simple answer is that, it is a question of fact whether he was unaware that he was buying a property in which lived all these members of the family of the deceased. It will have to be shown that he did not know that these members had any claim to the property. Evidence will have to be called to show that he paid a fair value for the property. Lastly, that throughout the transaction he acted in good faith. I say all these because the applicants' case is that the actions leading to the sale were fraudulent as against the respondents. The incidents of fraud have been given. They have to be proved by the calling of evidence. In short, a case for striking out has not been made out at this stage. There is a substantial case that has been made in the Originating Summons.

10. In reaching this conclusion, I bear in mind that the ELC case and the present Cause are going to be heard together. This is because the ELC case (now Cause No. 941 of 2011) basically challenges the grant that was issued to the respondent that resulted in the sale of the property to the 2nd respondent. It challenges the 2nd respondent's claim under **section 93**. These are the same issues that have been raised by the application brought by either applicant for the revocation and/or annulment of the grant.

11. Which brings me to the application by the 2nd respondent to nullify the sale and transfer of the property to the 2nd respondent by the 1st respondent. Again, this issue is quite substantial and cannot be dealt with in a summary way. The court will have to receive evidence from all the parties before it can determine whether or not to impeach the title that the 2nd respondent has. This is, once again, the title that the 2nd respondent got courtesy of the grant that was issued to the 1st respondent, a grant that the applicants are challenging. The application for revocation and/or annulment challenges the grant and the sale and transfer.

12. In the premises, the application dated 24th June 2014 by the 2nd respondent to strike out the Originating Summons dated 18th February 2011 by the 1st applicant is dismissed with costs. Further, the Chamber Summons dated 18th September 2014 by the 2nd applicant seeking to nullify the title of the 2nd respondent to the suit property is dismissed with costs.

13. Lastly, in order to do substantial justice to the dispute in this case, I direct that the Originating Summons and the two applications for revocation and/or annulment will be heard together. The applicants and their witnesses will present their case, after which the respondents and their witnesses will testify. I direct that within 14 days Counsel either agree on the issues for determination, or file their respective issues for settlement. This matter will be mentioned on 24th September to take a hearing date.

DATED at Nairobi this 30th day of July 2015

A.O. MUCHELULE

JUDGE

DELIVERED at Nairobi this 31st day of July 2015

L. ACHODE

JUDGE