



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

SUCCESSION CAUSE NO.793 OF 2013

IN THE MATTER OF THE ESTATE OF DHIRAJLAL BHAGWANJI SHAH -(DECEASED)

RUPAL SHAH

RAKHI BEDI.....APPLICANTS

VERSUS

RAMESH BHAGWANI SHAHRESPONDENT

RULING

1. The application before this court is the summons dated 30th October 2014. The applicants seeks orders that Ramesh Bhagwani Shah be removed as co-executor of the estate of Dhirajlal Bhagwanji Shah's estate and be replaced with Rupal Shah and Rakhi Bedi as co-executor jointly with Sejal Shah. That Ramesh Bhagwani Shah be ordered to account for and reimburse to the estate of the deceased US dollar 1,000,000.00 worth of shares of State Bank of India and British pounds Kshs. 350,000.00 transferred from Sabine Holdings Limited to various accounts and forthwith desist from interfering and or intermeddling with the said account and any other property of the deceased.
2. The application is grounded on grounds that the deceased died testate on 8th February 2013 naming Ramesh Bhagwani Shah and Sejal Shah as co-executor of his will dated 2nd March 2005. The co-executors applied for grant of probate of the will of the late Dhirajlal Bhagwanji Shah and the same was issued by this court but is yet to be confirmed. That the beneficiaries of the deceased's estate have learnt that the co-executor Ramesh Bhagwani Shah has been intermeddling with the free property of the deceased in contravention of Section 45(1) of the Law of Succession Act by transferring a sum of British Pounds 350,000.00 from Sabine Holding Limited to Meir Holdings Limited and US dollars 1,000,000.00 worth of shares of State Bank of India from Sabine Holdings Limited to Moghiben Sub Account which money and shares form part of the estate. That Sabine Holdings Limited is owned 99% by the deceased and 1 % by Sejal Shah while the said was just a co-signatory to the said account with the deceased and the transfer was done without any authorization neither by the court nor by the beneficiaries of the deceased's estate despite notice from the beneficiaries not to meddle or misappropriate the property of the deceased. That through the said conduct it is clear that the said Ramesh Bhagwani Shah is no fit to co-execute the deceased's estate and should not continue acting as such as the estate of the deceased continues to suffer loss due to the unlawful acts of Ramesh Bhagwani Shah.

3. In their affidavit in support of the said application, the applicants reiterate the averments of the grounds on the face of the application verbatim and added that Mr. Ramesh Shah was neither a shareholder or director and that he had no mandate to deal with money in the account, which belong to the estate of their father and that it was to be dealt with in accordance to the provisions of the will. That following the transaction they have changed the account mandate and removed Mr. Ramesh Shah from being a signatory in Sabine Holdings Limited and the three of them are the current signatories. That the respondent has placed himself in a conflict path with the interests of the beneficiaries and he should not be allowed to continue acting as such.
4. The co administrator Sejal Shah was served but did not respond to the application.
5. The respondent in opposing the said application filed his replying affidavit 13th February 2015. He avers that he is the younger brother of the deceased who died testate on 8th February 2013 leaving behind a will and testament made on 2nd March 2005. In the said will he had appointed the respondent and the deceased's wife Kachan Shan as executors however, the deceased's wife did not survive him and she was replaced with Sejal Shah the deceased's daughter. That subsequently the two executors petitioned for grant of probate with will noting the deceased's assets in their affidavit in support and they were issued with the said Grant on 19th July 2013 authorizing them to deal with all of the deceased's assets, save for immoveable property. The beneficiaries appointed the firm of Taibjee and Bhalla Advocates to act in the matter of the deceased's estate and it emerged that the beneficiaries had vast differences and opinions on how the estate of the deceased should be distributed despite the shares of the respective beneficiaries being specifically provided for in the deceased's will and testament and despite holding various meetings with family and well-wishers the beneficiaries would not agree. The advocate prepared a settlement agreement but the same remained in abeyance as he refused to sign the same since the terms were inconsistent with the wishes of the deceased. He denied the allegations that he had secretly withdrawn and transferred 350,000.00 pounds from Sabine Holdings Limited to Monghiben Sub account claiming that the same was transferred to Mier Holdings Limited in discharge of Sabine Holdings Limited's liability and that the 1,000,000.00 dollar worth of shares were transferred to his late mothers account as she was the beneficiary of the same. He sought to point out that Rupal and Rakhi's actions removing him as a signatory of the said bank account was tantamount to intermeddling with the deceased's free property, claiming that the application was aimed to remove him as an executor so that they may have free access to manage the asset. He further admits to withdrawing Kshs. 3,000,000.00- from the Site development Bank account, which he was a joint director with the deceased to meet short-term financial obligations but the same was refunded. He avers that the allegations of misappropriation and intermeddling with the estate of the deceased have no basis and urges the court to dismiss the application. He challenged the court's jurisdiction in dealing with this subject matter of this application and the executors and the trustees save for those provisions that continue to apply to them under the Act.
6. Rupal Shah in a supplementary Affidavit dated 22nd January 2015 avers that she is one of the directors of Site Development Company Limited in which the deceased was also one of the majority shareholders and Ramesh .B. Shah was a shareholder. That since the death of her father the respondent has conducted the affairs of the said company to her exclusion despite the fact that she is a director. She avers that the said company as at the time of the death of his father the company account with Guaranty Trust Bank (Kenya) Limited as at 24th January 2013 had Kshs. 19,306,195.68 but as at 31st October 2014 the said account only had Kshs. 437,710.18 adding that this was proof enough that the respondent was not suitable to act as a co-executor of the deceased's account. That on the 3/7/13 the respondent paid himself Kshs. 3,000,000.00 from the said company's account without approval of the Board of Directors and that his actions are thus prejudicial to the deceased's estate.
7. Parties filed written submissions. The applicants in their submissions in brief state that the conduct of the respondent has diminished the value of the deceased's two companies Site Development Company Limited and Sabine Holdings Limited which is not in general interest of the estate of the deceased and contrary to the fiduciary duty as an executor of the deceased's estate. In support of

their argument for conflict of interest they relied on the case of **Boardman -vs- Phipps [1967]2 AC 46** which states that anyone who is in a fiduciary must not place himself in a position where his own interest may come into conflict with the interests of his principal. Adding that a person in fiduciary should not be allowed to enter into engagements, which he has a personal interest conflict with the interest of those whom he is bound to protect. There also relied on the case of **Master of the High court v Executor (Estate of Late Jericho David Mstaebule (1620/2012) 2014, SZHC** the court in quoting, the law and practice of administration of Estates 4th Edition page 107 where it was stated that, ***“The executor acts upon his responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and his method of administration and makes him subject to the supervision of the master in regard to a number of matters.”*** It was submitted that the respondent has raised various claims against the estate of the deceased in a manner that clearly puts him in conflict with the interest of the estate. They added that in a letter dated 10th December 2013 through his advocates he claims 50% share of the Site Holding Limited, which was owned 99% by the deceased, and 1% by Sehal Shah this they submit is a clear demonstration of conflict of interest. They also relied on the case of **Re the Estate of TNN (deceased) [2014] EKL**R where it was held that a trustee stands in fiduciary position with regard to trust property and the beneficiaries. He holds the property for the benefit of the beneficiaries rather than for his own benefit. He should not act in a manner, which prejudices the interest of the beneficiaries. It was submitted further that the respondent had admitted that on 3rd July 2013 he paid himself Kshs. 3,000,000/- from the account of Site Development Limited unlawfully without approval of Rupal Shah, that following the death of the deceased Ramesh Bwagwanji Shah and Rupal Shah become the only directors and shareholders, with Rupal Shah holding 40% shareholding in the said company. It was submitted that the disposal of assets before confirmation of grant without authority contrary to section 55(1) of the Law of succession, which prohibits the distribution of assets or division of property before confirmation of a grant, further that section 83 of the Law of succession Act, Cap 160 requires the personal representatives within 6 months to produce in court an accurate inventory of assets and liabilities and full and accurate account of all dealings therewith up to the date of the account, something the respondent is yet to do. They urge the court to invoke the power granted to this court under Section 94 Law of Succession Act, Cap 160, and Rule 73 of the Probate and Administration Rules to make the necessary orders for the ends of justice and to prevent abuse of the court process.

8. The respondent in his written submissions raised various issues. Whether the US Dollar 1,000,000.00 worth shares in State Bank of India and British Pounds 350,000 held by Sabine Holdings Limited forms part of this estate? He submitted that the applicants have not shown any evidence of the deceased's shareholding in the said companies adding that the deceased in any case would only be entitled to the shareholding held in the said company. Further he submitted that the Power of Attorney dated 13th November 2013 from Sabine Limited to the respondent gave him various powers to deal with the assets and the conduct of the said business as per items (i) to (v) and which included power o him to transfer company shares in State Bank of India to Monghiben account as the said shares belonged to his late mother. Similarly, he had authority to settle all debts by the company, which included British Pounds 350,000.00 owed to Mier Holdings Limited. He submitted that the transactions by Site Development Ltd was done purely for investment purposes as authorized by its Memorandum and Articles of Association. As per 95% of the company's audited account. He added that the 1st applicant allocated 5,000 shares of the said company to Neel Shah so that each of the brothers had equal shares showing that the brothers had equal shareholding in the said company. It was submitted that this court does not have power to remove an executor as per Section 45(1) and (2) of the Law of Succession, Cap 160. He submitted that his efforts to have the grant confirmed have been frustrated by the applicant's claim of assets not forming the deceased's assets and major differences between the beneficiaries. He submitted that Section 76 grants this court the power to revoke a grant of administration either on its own representation or upon an application by a party upon meeting the grounds set out which he argues in this case have not been met on this she relied on the case of **Estate of Patrick Mbugua Njoroje (deceased) P & A No. 659 of 1989** where it was held that, ***“applications based on section 76***

.....must be based on the grounds set out in that provision otherwise they fail.”

9. I will first deal with the issue of jurisdiction. The Law of Succession Act empowers this Court to deal with succession matters the matter before his court relates to the estate of Dhirajlal Bhagwanji Shah. I agree that section 76 sets out the grounds upon which a grant may be revoked. The deceased left a will the applicants' are dissatisfied with the administration of the respondent and has raised issues on his conduct. The applicants have moved the Court under sections 45 (1) (2) that provides for protection of a deceased's estate in cases where there is intermeddling with the property of the deceased, the others are Rules 49 ad 73 that guide on applications not provided for and the courts inherent power to make such orders as may be necessary for the ends of justice. This court therefore has the jurisdiction to decide the matter before it.
10. The deceased to whom this succession cause relates died testate on 8th February 2013. The deceased in his will appointed **Ramesh Bwagwanji Shah** and **Sejal Shah** as he executors. Via a petition dated 15th April 2013, the two executors petitioned for a grant of probate, which was issued to them by this court on 19th July 2013. The executors in their affidavit in support of the petition for grant of probate listed three beneficiaries **Sejal Shah, Rupal Shah and Rakhi Bedi**. The said affidavit also listed the following assets as the ones surviving the deceased. 2,500 shares in Ardee's Property Limited on Land reference Number 209/80/22, 1/3 share of land reference 1870/11/37 on General Mathenge Road, 26,000 shares in the bank of Kigali, 50,000 shares in Brawirwa (BLR) Limited. 1,095,000 shares in Stanbic Bank Uganda Limited, 10,000 shares in site Development Limited and motor vehicle registration numbers KAJ 500G, KAJ 055A and KAC 500R all valued at an estimated cost of Kshs. 150 million the same did not mention any liabilities surviving the deceased. The applicants and the respondent in their affidavits have mentioned that there is a company Sabine Holdings Ltd, which was owned by the deceased with him holding 99% shares and the 1st applicant 1% share. It is from this said company's account that 350,000.00 British Pounds had been transferred by the respondent. From the parties affidavits it is apparent that this being an asset by the deceased was omitted from the list of assets in the affidavit in support of the petition for grant of probate. Further the shares with State Bank of India from which the respondent transferred 1,000,000.00 shares was also not listed neither is the share that is said to belong to the deceased's late mother mentioned as it stands I find that the parties have not listed all the assets surviving the deceased.
11. On the issue of whether the applicants have raised valid questions on conflict of interest, I find that the respondent being an executor puts him in a fiduciary duty to safeguard the interest of the deceased as far as the administration of his estate is concerned. The respondent has laid a claim against the deceased's estate by claiming that the 1,000,000.00 dollars, worth of shares that were held by the deceased for State Bank of India belonged to the deceased's mother this in my view creates conflict as he seems to advance his personal interests as opposed to those of the deceased's estate. As such I find that this coupled with him transferring funds without authority makes him unsuitable to be a co-executor of the deceased's estate and I substitute him with the **Rupal Shah** and **Rakhi Bedi**. The three **Sejal, Rupal** and **Rakhi** shall within sixty days from the date of this ruling apply to have the grant confirmed.
12. The respondent is also required by this court to submit a true and accurate inventory of assets and liabilities of the account of the deceased and a full and accurate account of all dealings therewith up to the date of the account as provided for under Section 83(e), within 60 days from the date of this ruling. The respondent and applicants therefore are required to meet and appoint a qualified accountant to undertake the said accounts at the cost of the deceased's estate. Cost in the cause. It is so ordered.

Dated, signed and delivered this **18th** day of **November** 2015.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicants**

.....**For the Respondent**

..... **Sejal Shah**

Ms. Charity

Court Clerk