



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL NO. 37 OF 2013 (OS)**

**IN THE MATTER OF CHANDRAKANT DEVCHAND MEGHJI SHAH (DECEASED)**

**PRIYAT SHAH AND MONA SHAH..... EX-PARTE APPLICANTS**

**AND**

**1. MUKESH MANCHAND SHAH**

**2. HARISH RAICHAND SHAH.....RESPONDENTS**

**RULING**

For determination before this court is the Notice of Preliminary Objection dated 18<sup>th</sup> February, 2014. The respondents have submitted that this court has no jurisdiction to entertain the originating summons dated 19<sup>th</sup> September, 2013 and filed in court on 223<sup>rd</sup> September, 2013. The preliminary objection is premised on the following grounds

**“1. This Honourable Court has no jurisdiction to hear or continue to entertain the said originating summons on the grounds that the applicants seek to question the validity of the deceased’s will and appoint themselves as administrators in place of the respondents.**

**2. The thrust of the application and the affidavit in support questions the integrity and transparency of the respondents and these are clearly issues of fact involving allegations of a breach of trust or an alleged willful default that will inevitably be disputed by the respondents.**

**3. This Honourable Court is effectively being asked to determine the manner in which the deceased’s estate is to be administered and distributed.**

**4. Resolution of matters involving serious issues of law and disputes of fact ought never to be entertained by way of an originating summons.”**

The application was disposed of by way of written submissions and on 8<sup>th</sup> May, 2014 both counsel appeared before the court in order to highlight their submissions. **MR. INAMDAR** and **MR. MARU** appeared for the respondent while **MR. ABEID** appeared for the applicants. I have carefully considered the written submissions which were filed in court, the authorities cited therein as well as the oral submissions made by both counsel.

The general thrust of this preliminary objection is that this court has no **jurisdiction** to entertain the originating summons dated 19<sup>th</sup> September, 2013 because that originating summons has **not** been filed in compliance with Order 37 of the Civil Procedure Rules. Mr. Inamdar submitted before me that the scope of Order 37 is limited and that it cannot be used to decide serious and disputed questions of law. The originating summons as filed he further submits seeks to question the validity of the deceased's will and to determine the matter of the administration of the estate. A look at the originating summons shows that it seeks determination of the following questions.

- “1. **Whether the deceased's will dated 25<sup>th</sup> July, 2011 is valid.**
2. **If found to be so, whether the heirs to the deceased can be ascertained from the will.**
3. **Whether the subject of the Trust created under the will can be ascertained.**
4. **Whether the apportioned bequests of the remainder of the estate to the respective heirs to the deceased beneficiaries can be ascertained.**
5. **Whether the Trust created under the will is in breach of the rules against perpetuity.**
6. **Whether as adults and only beneficiaries to the trust, the beneficiaries can by mutual consent dissolve the trust created in their favour.**
7. **The appointment of MONA SHAH and PRIYAT SHAH as administrators of the estate of the late CHANDRAKANT DEVCHAND MEGHJI SHAH (Deceased).”**

Indeed the central question which the originating summons seeks to have determined is quite evident from its heading which reads

**“In the matter of: The Will of the late CHANDRAKANT DEVCHAND SHAH (Deceased) DATED 25<sup>TH</sup> JULY, 2011 and ITS VALIDITY”**

Order 37(1) of the Civil Procedure Rules 2010 provides that

**“The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, or as ‘cestui que trust’ under the terms of any died or instrument or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out as of course an originating summons before a Judge sitting in chambers for such relief as of the nature or kind following as may by the summons be specified and as circumstances of the case may require that is to say, the determination, without the administration of the estate or trust any of the following questions**

- (a).....
- (b).....
- (c).....

**[my own emphasis]”**

Therefore from a clear reading of Order 37(1) it is quite correct as Mr. Inamdar asserts that an originating summons **ought not** be raised in order to make a determination of serious and disputed question. The present originating summons which seeks a determination of the validity of the will of the deceased does in fact seek a determination of a serious and disputed question.

However the crucial question here is whether the filing of an originating summons as opposed to a plaint ousts the jurisdiction of this court to hear and determine the matter. With profound respect to learned senior counsel I think not. A clear distinction must be drawn between wrong or erroneous procedure and lack of jurisdiction. The former is a curable defect whilst the latter is not curable at all. The same Civil Procedure Rules do themselves provide a remedy for failure to invoke proper procedure. Order 37 rule 19(1) provides

**“Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of those affidavits.”**

The mere fact that such a remedial provision is provided for in the Civil Procedure Rules makes it clear that lack of proper procedure is not fatal to a cause. I am further guided in this thinking by Article 159(1) (h) of the Constitution of Kenya which mandates Kenyan courts to deliver justice without undue regard to technicalities. A question of form is in my view such a technicality.

The questions raised in the originating summons e.g. validity of a will, share of the estate for determination are questions which the High Court does have jurisdiction under the Law of Succession to determine. The fact that these questions have been laid before the court using the wrong procedure does not take away the jurisdiction of the High Court to determine them. I am persuaded that wrong use of procedure does not invalidate the present proceedings. I therefore find no merit in this preliminary objection and I do hereby dismiss the same with costs to the respondent. The originating summons dated 18<sup>th</sup> February, 2014 is hereby converted into a plaint under Order 37 rule 19 Civil Procedure Rules.

**Dated and delivered in Mombasa this 23<sup>rd</sup> day of July, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Inamdar and Mr. Maru for Applicants

Mr. Halim for Respondents

Court Clerk Mutisya

Mr. Inamdar:

I seek leave to appeal this ruling and a stay of proceedings.

Court:

The court grants leave to appeal as well as a 14 day stay.

**M. ODERO**

**JUDGE**

**23<sup>RD</sup> JULY, 2014**