



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Probate & Administration 189 of 2011

IN THE MATTER OF: The Estate of PRANJIVAN JESANG DEVJI CHUDASAMA (Deceased)

RULING

This ruling relates to a Notice of Preliminary Objection dated 8th February 2012. The same was filed by one Rajesh Pranjivan Chudasama (hereinafter referred to as the Respondent.) The Respondent was represented at the hearing of the objection by the Learned Counsel Mr. Inamdar, while Sailesh Pranjivan Chudasama, (hereinafter referred to as the applicant) was represented at the hearings by the Learned Counsel Mr. Ogunde. Mr. Inamdar submitted that the main issue of the Preliminary Objection relates to the jurisdiction of the Court. He argued that, the Court is obliged to deal with the issue of jurisdiction once it is raised. This is because, the Court has to determine first whether it has the jurisdiction to hear the matter. He further argued that, the issue of jurisdiction can be raised at any stage of the trial and at the earliest. In this regard he relied on the case of -

“the owners of the motor vessels –Vs- Caltex Oil (K) Ltd 1989 KLR. 1”

The Preliminary Objection, he submitted is based on four grounds. That, the 1st ground relates to the issue of whether the applicant herein has the *Locus standi* in this matter. In this regard he argued that, the applicant is neither an appointed executor under a WILL or appointed as an administrator *ad colligenda bona*. He stated that, this is absolutely fundamental because, if the applicant has no *locus standi*, then the whole proceedings herein would be a nullity *ab inito*. He submitted further that, the applicant has applied to be appointed as an administrator but that application is yet to be heard and determined thus, he has no *locus standi*. He invited the court to note that there is the difference in relation to the authority and the powers of an executor appointed under the WILL and the administrator appointed under a Court order. In this regard he relied on the case of:

- **Kathari –Vs- Quaresha & Anor.**

EARL (1967), and

- **Section 80 of the law of Succession Act.**

He submitted that, an administrator has no power to do anything including bringing a cause of action until the grant applied for is issued. That, any action brought before the grant is made becomes incompetence. He relied on the case of:

- **Otieno –Vs- Ougo and Anor. EALR (1986 – 1989).**

On the 2nd ground, the Counsel submitted that, the Law of Succession Act, and the Probate and Administration Rules do not provide or allow the grant of an injunction order. That Rule 63 of the Probate and Administration Rules precludes the application of Order 40 of the Civil Procedure Rules that relates to injunction. In this regard, he relied on the cases of:

- **Re Estate of Kilingu (Deceased) KLR 2002 Vol. 2.**
- **Estate of John Kamau Mriamo(Deceased)**
- **Rose Wanjiku Kamau –Vs- Nganga Mugwe HC. Succession Cause No. 1317 of 191.**
- **Gabriel Ndungu Githua –Vs- National Bank of Kenya HCCC. NO. 645 of 2005 (NBI).**

On the third issue, the Counsel submitted that, the injunction issued herein on the 2011 ex parte was issued in a vacuum, in that, there was no suit in place. In this regard, the Counsel relied on the case of:

- **Isaac Ndung’u Muchemi – Vs- Marula Estates Ltd Civil Application No. 111 of 1995.**

He further submitted that when the injunction was extended on the 6th May 2011, it was an extension in vain, as the injunction order had already expired. In this respect, the Counsel relied on the cases of:

- **Omega Enterprise (K) –Vs- K.T.D and the two others. Civil Appeal No. 59 of 193, and**
- **Mrs. Rahab Wanjiru Evans –Vs- Esso (K) Ltd. Civil Appeal No. 13 of 1995.**

On the final ground, the Counsel submitted that, the order issued by the Court requiring that oral evidence be adduced in support of the application before it, should, take into the decision in the case of:

- **James Kamangu Ndimu –Vs- Margaret Wanjiku Kariuki & Another. HCCC. No. 1 of 2007.**

He submitted the power of the Court to order for oral evidence be adduced, should be sparingly invoked.

In reply thereto, the applicant’s Counsel Mr. Ogunde submitted that the Preliminary Objection is an attempt to re-argue or rehearse matters raised in the application dated 5th July 2011, which application the Court has already heard and determined by giving directions. He argued that if the respondent is dissatisfied with the orders the Court gave, then the only recourse open to him is to appeal or seek a review. He submitted that, with due respect, the respondent is abusing the court process. However, he conceded that the issue of the jurisdiction of the court can be raised at any time and ought to be addressed first.

He opposed the submission that, the injunction order was issued in a vacuum, and argued that, the applicant filed a petition for a limited grant alongside the application for an injunction. That, indeed the Respondent has even applied that, the said Petition be struck out. The Counsel objected to the submission that their application for injunctive orders was made purely under the Civil Procedure Rules. He argued that, the applicant cited Rule 49 of the Probate and Administrative Rules 1980 and all the enabling provisions of the law. The Counsel further submitted that, Rule 73 of the Probate and Administration Rules gives the Court power to make orders to meet the end of justice. He insisted that, the court has jurisdiction to hear the matter and the parties should be given an opportunity to argue the matter based on the facts and the law.

He denied that, the injunction order was extended while it had expired, submitting that, the order was so extended when the court realized the file had not been transferred to Mombasa from Nairobi on time as ordered by the Judge. That, the extension of the order was thus in the interest of justice under Rule 73 of the Probate & Administrative Rules, and due to the fact that it was the court registry that delayed to transfer the file.

Finally he submitted that, the proceedings herein were instituted the way they are because, the applicant did not know of the WILL and the Estate was being wasted. He argued that the real issues ought to be dealt with, disregarding technicalities. He told the Court, the real issue is whether, the WILL herein made provisions for all dependants. He invited the Court to invoke Rule 73 of the Probate and Administrative Rules to determine the main issues on merit.

In final reply, Mr. Inamdar denied the submission that, the Respondent was re-arguing the application. He submitted that, this is the first time the respondent was raising the issue of jurisdiction and without jurisdiction the Court cannot continue with the matter. He further submitted that, the issue of *Res-judicata* does not apply in this matter and so the Respondent could not appeal or seek for review as the court has not made final orders herein. He refuted the argument that the respondent was abusing the court process.

On the issue of the Petition, the Counsel argued that the same has not been heard and therefore the applicant has not been appointed an administrator yet. He further submitted that the applicant did not cite Rule 73 of the Probate and Administration Rules, in the application under consideration therefore an order for injunction could not be given. Neither was Section 26 of the Law of Succession cited, because that is the Section that gives the specific format to be used. That Rule 49 of the Probate and Administration Rules covers a situation where no specific form is provided. Finally the Counsel submitted that the issue of re-extension of the injunction herein ought to be reconsidered and dealt with.

I now turn to deal with the issues raised. The first issue seems to be simple and straight forward. It relates to the issue of the jurisdiction of the Court. In particular, as to when can a party raise the issue of jurisdiction and what is the role of the court once that issue of jurisdiction is raised. I must highly commend the Respondent's Counsel for the extensive research, on the issues canvassed and the authorities cited herein.

In the cited case of:

“Owners of the Motor vessels “Lillian S” -Vs- Caltex Oil (K) Ltd. Civil Appeal No. 540 of 1989”

The Judges of Appeal Nyarangi, Masime and Kwach (as they then were) held that,

“a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue straight away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of procedure pending other evidence. A Court of law lay down tools in respect of the matter before it the moment, it holds the opinion that it is without jurisdiction”

The Court went on to observe that –

“It is for that reason, that a question of jurisdiction once raised by a party or by a Court on it's own motion, must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court. A party who fails to question the jurisdiction of a Court may not be heard to raise the issue after the matter is heard and determined.”

Therefore, I concur with the submission of the Respondent's counsel that, indeed the issue of jurisdiction should be raised at the earliest time in the proceedings and the Court then has to deal with it right

away. The Counsel for the applicant Mr. Ogunde conceded to the same.

I now turn to the issue of *locus standi* of the applicant to participate in these proceedings. The simple argument by the Respondent is that, since the applicant has merely filed a petition to be appointed as an administrator of the estate of the deceased and that application has not been heard, he has no capacity to file or prosecute the application herein dated 3rd May 2011. I have already analysed the submissions by the Respondent's counsel and the authorities relied on. I have also analysed the reply to this submissions by the Applicant's counsel. I find from the record that, the applicant moved the court by filing a Probate and Administration **Cause No. 816 of 2011**. Alongside that cause, he filed a certificate of urgency and Summons (under Rule 49 of the Probate and Administration Rule and under the inherent power of the Court as well as all other enabling Provisions of the Law). He also filed a Petition for letters of Administration *ad colligenda bona* (under Section 67 of the Law of Succession Act.) The petition is dated 3rd May 2011, the summons dated 3rd April 2011 (but I think the date of April might have been an error. It was filed on the same day the Petition was filed and stamped 4th May 2011) The Certificate of Urgency was dated 3rd May 2011. The application was heard and Orders given on the 6th May 2011 as per the order signed by the Deputy Registrar. The file was ordered transferred to Mombasa. It was so transferred. In the meantime the interim orders were extended on the 12th July 2011, then to the 25th May 2011, further to 23rd June 2011 and 13th September 2011 and no more. I have chosen to analyse the events herein, because, there is a dispute as to whether the petition dated **3rd May 2011**, filed by the applicant was ever heard and allowed. If not, the submissions by the Respondent is that he does not have the capacity to bring the application dated 3rd May 2011. In fact on the 5th July 2011, the Respondent filed a Chamber Summons under Section 47 of the Law of Succession on Act Cap 160 Laws of Kenya and Rule 49 and 59 (1) of the Probate and Administration Rules and all the other enabling provisions of the law. In that application, the Respondent is seeking inter alia that;

“the honourable court be pleased to strike out the Applicant’s petition filed herein on 4th May 2011 and to nullify the grant of letters ad colligenda bona (if any) issued to the applicant herein.”

Once again, that application by the Respondent has not been fully heard. Apparently, the applicant's petition and the succession cause herein was ordered to be consolidated, following the hearing of the Chamber Summons filed by the applicant and dated **17th August 2011**. In that application several issues were identified for determination. Once again the respondent filed grounds of opposition to this application dated 17th August 2011 protesting the consolidation of the suits. However, the record shows that on the 12th September 2011, the Court ordered the

“Succession Cause 175/2011 and Succession Cause no. 189/11 be consolidated and heard as one since they relate to the estate of the two deceased person”

This order has not been set aside or reviewed, therefore as it stands, the two petitions herein the succession cause 175/201 and 189/2011 are to be heard as one.

That brings me back to the issue at hand, that is, does the applicant therefore have *locus standi* to prosecute the application herein dated 3rd May 2011. The Respondent submitted that until the petition is heard, the applicant has no *locus standi*. I was referred to several authorities and I have considered them. In the case of **Katheri -Vs- Qureshi and Anor**. The court distinguished the power of an executor and an administrator. It was held that:

- **Where a person dies leaving a WILL appointing an executor, the person so appointed as executor represents the estate of the deceased as from the date of the death of the testator.** (emphasis mine)
- **It is elementary law that an executor title dates from the death of the deceased and springs from the WILL not from the grant of probate.**

- **An executor's action before probate is valid in themselves without recourse to any doctrine of relation back and they have effect by virtues of the WILL.**
- **Probate is merely the authentication of the WILL in such cases, and if the WILL is ultimately proved no one can question the validity of such acts.**
- **An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title.**

The position of the administrator differs in that:

- **His rights date from the grant of letters of administration and any prior acts of administration from the grant of letters of administration can only be validated by the doctrine of relation back from grant. (emphasis mine)**

I was also referred to the case of **Otieno -Vs- Ougo and Anor.** In this case it was held that:

- A party entitled to administration can do nothing as an administrator before letters of administration are granted.
- That Section 80(2) of the Law of Succession Act provides that a grant of letters of administration with or without the WILL annexed shall only take effect as from the date of the grant.
- In contrast, section 80 (i) of the Law of Succession Act, provides that a grant of probate shall establish the WILL as from the date of death, and
- Shall render valid all the intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.
- Thus an executor can bring an action before probate, but
- The administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception.

It therefore follows that a party who has petitioned for letters of administration will have to await the issuance of the same before he can acquire the *locus standi* to bring a cause of action. That supports the Respondent's position.

The 3rd issue raised relates to the injunction orders granted herein, and the order issued by the court requiring the parties adduce oral evidence to support their pending applications herein. I have indeed considered the submissions tendered by both parties in relation to these issues. Indeed I have read through all the authorities cited.

Basically I am dealing with a notice of preliminary objection. A preliminary objection relates purely on the issue of law. The issue of the injunction orders is a subject of the application dated 3rd May 2011 and supported by an affidavit sworn by the application dated 3rd May 2011. The respondent filed a replying affidavit to it dated 7th July 2011, and in addition, the respondent has filed a Chamber Summons dated 7th July 2011, supported by his affidavit sworn on the same day. These applications are still to be fully heard and determined. Therefore, I shall not descend into that arena by dealing with those issues under a Notice of Preliminary Objection. Similarly the order issued by this Court herein relating to *viva voce* evidence in my opinion cannot be set aside on a Notice Preliminary Objection. It can only be set aside, reviewed or confirmed upon a proper formal application being filed.

However, the main complication in this matter is that, it's not possible to order the petition filed by the applicant be struck out, for two reasons:

- The said petition has been consolidated with that of the Respondent as per the court order dated **12th September 2011**.
- The same is the subject matter of prayer (4) of the application dated 5th July 2012,

Indeed as stated the order of consolidation has not been set aside or reviewed, therefore striking of the petition will not be possible due to the consolidation.

To give direction in this matter, I order that the parties should move with speed and prosecute all the pending applications herein. Filing of the applications on top of others will only waste time and make them incur costs. In total we now have:

- The consolidated petitions filed by the applicant and the respondent
- The applications dated 3rd May 2011,
- The application dated 5th July 2011, and
- The application dated 17th August 2011.

I think in the interest of justice, the parties need to deal with these applications expeditiously to pave way for the determination of the main issues herein. As things stand now, none seems to be benefiting from the proceeds of the estate (whether properly entitled or not). The Bank accounts for example are said to have been frozen a year ago, that does not seem to serve the interest of the rightful heirs of the Estate. Both parties should purpose to move this litigation. The Preliminary Objection is thus not allowed for reasons stated above.

Orders accordingly.

G. NZIOKA

JUDGE
11.6.2012

Dated, signed and delivered on this 11th day of June 2012 at Mombasa.

G. NZIOKA

JUDGE
11.6.2012

In the presence of:

Mr. Khagram for the applicant.

Ms. Andagi for the Respondent

G.NZIOKA
JUDGE
11.6.2012

Ms. Andagi – I wish to apply for copies of proceedings and ruling of today and leave to appeal and for an informal stay of proceedings for 21 days pending filing of formal stay of the proceedings.

Mr.Khagram – I have no objection to the copies of the proceedings being granted and I also apply for copies too. I have no objection to the application for leave. I am holding brief for Walker Kontos and I was directed to take a mention date, but I leave it to the court's direction.

Court – The copies of the proceedings and ruling be supplied to both parties. The leave to appeal is granted, and so is the stay of proceedings for 21 days pending the filing of the formal application.

G. NZIOKA

JUDGE
11.6.2012