



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 2243B of 1995

IN THE MATTER OF THE ESTATE OF PARVATIBEN VIRJI SHAH (DECEASED)

KANTABEN PRANLAL SHAH.....APPLICANT

VERSUS

PRADEEP VIRJI SHAH.....1ST RESPONDENT

ASHOK VIRJI SHAH.....2ND RESPONDENT

RULING

On 12.08.05 the applicant filed summons dated 10.08.05 under sections 45 (a) & (b), 76, 94 and 95 of the Law of Succession Act, Cap.160 plus rules 49, 63, 67 and 73 of the Probate and Administration Rules applying for the following orders:-

1. That the respondents who are not citizens of Kenya or resident in the country be struck out as administrators herein.
2. That the respondents be compelled to give a full and accurate account for all estate monies, lands, share certificates, documents, certificates of deposit and assets in their possession since the beginning of the administration to the present.
3. That appropriate directions be issued on the issue of sub-division of the assets and monies of the estate.
4. That the respondents pay the costs of this application.

The application is supported by the applicants affidavits sworn on 10.08.05 and 23.05.06.

Hearing of the application was on 03.10.06 whereat the applicant was represented by learned counsel, Mr. J. Makori while the respondents were represented by learned counsel, Mr. E.A. Ongicho.

Applicant's counsel gave highlights of the applicant's case as under. It was the applicant's complaint

that the respondents proceeded to distribute the deceased's estate without the court's authority and that this is confirmed by the 1st respondent's affidavit sworn on 06.03.06. The applicant also complained that the distribution has totally disinherited her, contrary to sections 55 (1) and 83 of the Law of Succession Act. Section 55 (1) is to the effect that no grant of representation shall confer power to distribute any capital assets constituting a net estate or to make any division of property unless and until the grant has been confirmed as provided by section 71 of the Act. I pause here to note that the grant was confirmed on 11.04.97, so no contravention of section 55 (1) is apparent to me. And section 83 provides for the duties of personal representatives. Further, the applicant complained that the respondents who are not residents of Kenya have formed a company, Pravir Properties Limited and transferred capital assets of the deceased's estate to the company. It was also the applicant's complaint that the affairs of the estate have been abandoned to a person called Vimal Shah who has been intermeddling with the estate. Arising from the above complaints the applicant, through her counsel, urged the court to grant prayers 1, 2 and 3 in the summons dated 10.08.05.

On the other hand, respondents' counsel drew attention to a preliminary objection dated 12.10.05 and filed by his firm on 13.10.05. That preliminary objection is based on the following grounds, namely, that:-

1. The applicant herein is not an executor of the estate of Parvatiben Virji Shah.
2. The applicant misdirected the court to issue letters of administration intestate *de bonis non* (an administrator appointed to succeed a deceased administrator to complete the administration of an intestate's estate), contrary to the provisions of the Written Will.
3. The applicant's sworn affidavit is not accurate as to the status of the estate.
4. The applicant lacks *locus standi* to move this court.

Respondents' counsel relied on the supporting affidavit of the 1st respondent sworn on 06.03.06 and on the said 1st respondent's further supporting affidavit sworn on 17.03.06. The sum total of those affidavits is that the respondents were executors of the deceased's Will; that they fully distributed the deceased's estate in accordance with the law; and that no estate exists in the deceased's name. Accordingly, respondents' counsel urged this court to dismiss the summons dated 10.08.05 with costs.

I have given due consideration to the parties' respective cases and the competing documents and arguments in support thereof.

As I understand it, the applicant's case is that she has applied for the orders listed in her summons dated 10.08.05 as widow of her deceased husband Pranal Virji Shah and administratrix of his estate. It is the applicant's case, essentially, that her late husband was a beneficiary of the estate of the deceased herein Parvatiben Virji Shah and that the applicant's late husband was sidelined in the distribution of the estate of Parvatiben Virji Shah who was his mother. The applicant has, *inter alia*, annexed to her affidavit sworn on 23.05.06 an affidavit sworn on 15.10.01 by her late husband Pranal Virji Shah in support of his objection to the respondents herein plus Vimal J. Shah as well as Nalin Shah & Co. Accountants being administrators of the estate of Parvatiben Virji Shah (deceased herein). The objection seems to have been premised on the administrators as co-administrators being citizens of the United Kingdom having stayed there for over 32 years; that they could not administer the estate of the deceased herein without them being in this country; that their interest was to plunder and misapply the assets of the deceased's estate for their personal gain to the detriment of the beneficiaries. According to his affidavit sworn on 15.10.01, the late Pranal Virji Shah prayed that the court then should order finalisation of winding up and distribution of the estate of Parvatiben Virji Shah in terms of the orders sought in his then cross-application. That was in 2001.

The rejoinder by the respondents seems to be summed up by the affidavit of the 1st respondent sworn on 06.03.06 to the effect that Pranal Virji Shah the late husband of the present applicant had received from the estate of the deceased herein Kshs.11,281,425/=; that his share of the deceased's estate ran into

deficit of Kshs.4,068,790/= which is to be recovered from his estate. It is the case of the respondents herein that they have distributed the estate of Parvatiben Virji Shah in execution of her Written Will; that each beneficiary is entitled to equal share of the estate of Parvatiben Virji Shah; and that the said estate has been fully wound up by them as executors of the deceased's Written Will.

The application before me proceeded on the basis of affidavit evidence and submissions thereon. The parties made competing and incompatible arguments. This court was not there when the events in controversy took place. It has to be guided by the evidence on record. That evidence is irreconcilable and the court has to choose which set of evidence to go by. The applicant contends that the respondents are not citizens of or residents in Kenya and that, therefore, they should be struck out as administrators. On the other hand, the respondents state that they have distributed the deceased's estate in accordance with her Written Will which they maintain the applicant's late husband Pranalal Virji Shah did not contest and that there is no estate to distribute. I note from the Ruling dated 28.09.99 of Etyang, J (as he then was) that the mode of distribution (of the deceased's estate) was agreed upon on 23.04.95 and that there was no reason to go back on it by rejecting the said mode of distribution. Likewise I see from the affidavit of the 1st respondent sworn on 06.03.06 (paragraph 9) that each beneficiary is entitled to equal share of the deceased's estate. I accept the respondents' averment that they have distributed the deceased's estate in accordance with her Written Will. It was open to the deceased to appoint executors as she wished and the fact that they may not be citizens of or residents in Kenya would not necessarily invalidate their appointment or role as executors.

If the distribution of the deceased's estate was completed and the estate dissolved in 2001 as the 1st respondent deponed in his affidavit sworn on 06.03.06, which I accept, then the respondents have since become *functus officio* as administrators and the prayer for striking them out as administrators becomes impossible of implementation.

It is the respondents' case that the applicant's late husband did not object to the mode of distribution but the applicant disputes that. The applicant's late husband is no longer there to speak for himself over this protracted dispute. The passage of time and the death of the applicant's husband have complicated matters for the applicant and this court finds it impractical to give effect to the prayers sought in her summons dated 10.08.05. It is instructive to note from the respondents' averments that each beneficiary is entitled to an equal share of the deceased's estate. Unless there are cogent reasons to the contrary, which I am not seized of, it is difficult to quarrel with the principle of equal sharing.

The upshot is that I am not persuaded that the applicant has made out a case to warrant the granting of the prayers in her summons dated 10.08.05. Accordingly, the said summons is dismissed. As this is a delicate and emotive family matter, I direct that the parties shall bear their own respective costs of the summons.

Orders accordingly.

Dated at Nairobi this 22nd day of November, 2006.

B.P. KUBO

JUDGE