



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 264 of 1994**

**IN THE MATTER OF THE ESTATE OF CHANDRAKANT SHAMJIBHAI**

**GHEEWALA (the Deceased)**

**RULING**

**THE EVIDENCE**

This ruling relates to the petition of the Grant of Probate for the estate of the late *Chandrakant Shamjibhai Gheewala, (deceased)* who died on 26<sup>th</sup> February, 1984 in Nairobi. A petition for probate was filed in this court on 15<sup>th</sup> February, 1994 by Mukta Chandrakant Shamjibhai Gheewala in her capacity as the Executrix of the deceased will that was made on 4<sup>th</sup> May, 1976. The petitioner is also the widow of the deceased.

An authenticated copy of the original will of the deceased which was said to have been made on 4<sup>th</sup> day of May, 1976 was certified by the Deputy Registrar on 21<sup>st</sup> January, 1994 and was lodged with the petition.

In her supporting affidavit the petitioner listed the children of the deceased as follows:-

- a) *A son Elesh aged - 37 years*
- b) *A son Shrikesh aged - 27 years and*
- c) *A daughter Mamta aged - 24 years*

The petitioner then proceeded to list the inventory of the Assets and Liabilities of the deceased at the time of his death (including such assets as have arisen or become known since his death]

**ASSETS      ESTIMATED VALUE**

(a) Clothes, furniture and Household assets Kshs.150, 000/=

(b) Life Insurance policies:

(i) *Old Mutual Policy No.2362147/2520617 Value as at 23/8/93 Kshs.75, 852/45*

(ii) *Madison Insurance Co. Ltd.*

*Policy no.LD150640 Value as at 31.12.85 Kshs.73, 271/95*

(iii) Kenya National Assurance Co. Ltd. Policy No. EAK 3067422 Value as at 31.12.84 Kshs.30,000/=

(Plus bonuses)

(iv) Pan Africa Insurance Co. Ltd.

Ltd. Policy No. K/8907 Value as at 5/1/89 Kshs.27,000/=

Policy No. K/8916 Value as at 17/2/88 Kshs.25,000/=

(v) Norwich Union Life Insurance Co. Ltd. Policy No.1317852

Pension Scheme as at 16.10.86 Kshs.4,292/= p.a.

or a lump of Kshs.14261 plus Kshs.3,219/= p.a.

Policy No. A2229074 value as at 3.5.84 Kshs.20,791/=

Policy No. A2229075 value as at 3.5.84 Kshs.11,303/=

Policy No. A2229076 value as at 3.5.84 Kshs.54,681/=

Policy No. A2229076 Family

Security benefits Kshs.8,000/= p.a.

or a lump of kshs.78,080/=

(vi) Cannon Assurance (K) Ltd.

Policy No. 411-223042-90

value as at 3.6.85 Kshs.16,029/=

(vii) Phoenix Assurance Co. Ltd.

Policy No.1307262 £stg. 50,000

Policy No. 1307263 £stg. 100,000

(c) Shares in Kenyan Companies:-

(Balance sheet values)

One share in Nyacity Ltd. Kshs.3,547/= approximately.

Seven shares in Housing

Schemes ltd. Kshs.194,972/75

One share in Nyaku Ltd. Kshs.19,486/25

One share in Rural Housing

Estates Ltd. Kshs.91/30

*One share in Centre Park*

*Plaza Ltd. Kshs.1,258/95*

*165 shares in Hill*

*Properties Ltd. Dormant Company*

*Two shares in consolidated*

*Properties Ltd. Kshs.11,394 - approximately.*

*One share in Exports Ltd. Dormant Company*

*One share in Mutual Benefits Ltd. Dormant Company*

(d) Assets in Uganda value of which is uncertain and the exact beneficial entitlement of the deceased is under dispute.

(i) *Plot Nos. 18-20 Entebbe Road, Kampala held by Associated securities Ltd. in which the deceased was the registered owner of 1 share.*

(ii) *Plot no. 56, 58 and 60 Kampala Road, Kampala held by Unique Holdings Ltd. in which the deceased was the registered owner of 602 shares.*

(iii) *Drive in Cinema, Kampala which is held by Drive-In Cinema Ltd. in which the deceased was the registered owner of 1 share.*

(iv) *Amounts paid to clear indebtedness and for expenses to claim back the above properties.*

(e) Deceased's share of the one-fourth holding in the Trust Group of Companies held in the name of Maheshchandra Gheewala which in turn owned 60% of Insurance Company of East Africa Ltd., 100% of Trust Properties Ltd. and 100% of Riverside Apartment Ltd. and all the dividends and distributions therefrom and investments made therefrom. The amount due to the deceased can only be quantified after receipt of a full and true account from the said Maheshchandra Gheewala.

(f) Slamet Corporation deceased's – beneficial was ownership of 100%. But funds held by it are as nominee for the deceased and others. Deceased's entitlement is dependant on determination and finalisation of any valid and substantiated claims by others.

(g) Deceased's share of commissions in respect of Alcohol Project value can only be quantified after receipt of a full and true account from Maheshchandra Gheewala and others.

(h) Deceased's share of monies receivable relating to the transactions with the following companies:-

(i) *Technisucre*

(ii) *Mowlem*

(iii) *Fletcher & Stuart Ltd.*

(iv) *Fives Caile Babcock Ltd.*

Value of these can only be quantified after receipt of a full and true account from Maheshchandra Gheewala and others.

## LIABILITIES:

- (a) *Funeral Expenses*      *Kshs.5,000/=*
- (b) *Tax liability*      *Kshs.62,571/=*
- (c) *Owed to Pan African = Bank Ltd. Kshs.1,000,000/=*
- (d) *The deceased had contingent liabilities under guarantees totalling      Kshs.45,000,000/= approximate.*

Mahesh Shamjibhai Juthabhai Gheewala the deceased brother objected to the grant of probate being issued to the petitioner. The objector also filed a petition by way of cross application for a grant of probate in his capacity as the Executor appointed under a Will of the deceased dated 28<sup>th</sup> August 1974. The objector also presented the cross-petition in his capacity as the eldest living son and brother of the Gheewala Family. In the answer to his petition for a grant of probate, the objector listed the following grounds in support of his cross-petition.

- a) *That the court should pronounce against the alleged Will dated 4<sup>th</sup> May 1976 propounded by the petitioner.*
- b) *That the court should pronounce for the force and validity of the last will and testament of the said deceased dated 28<sup>th</sup> august, 1974.*
- c) *Further, or in the alternative, under the provisions of the Hindu law the assets claimed by the petitioner to form the deceased estate are, in fact, joint Family assets and that the deceased interests amounted only to an undivided interest and that there cannot be a Succession in respect of such an undivided interest.*
- d) *Under the Hindu Law, the deceased was the head of the joint family and all assets that came into his possession and control were held in trust for the members of the family as Karta.*
- e) *After the death of the deceased, the objector claim to be the head of the family, that is to say Karta, and all the assets of the joint family are to be administered by him on the same basis.*

The above grounds are further expounded in greater details by the facts deponed to in the objectors supporting affidavit which was sworn on 19<sup>th</sup> July, 1994. I will refer to the specific contents of the said affidavit later in this ruling. The record will show that there were other objectors' whose objections, were struck out so I will not concern myself with their objections. In the course of the hearing of this objection numerous applications were either orally made or filed. Numerous Rulings have been delivered within which certain issues that were raised were conclusively determined, and in this regard I will dwell in this ruling on the matters touching on the petition for grant of probate and the objection. Within this ruling, I will also touch on two issues where the ruling of this court was reserved. The 1<sup>st</sup> issue was whether the petition should be struck out on the grounds it is incompetent for failure to attach the original copy of the will of the deceased.

The second issue is whether, (*perhaps not relevant*) is whether the petitioner could close her case before giving her own evidence.

Several directions were given during the hearing of this very protracted litigation.

Firstly, directions were given by Hon. Pall J [*as he then was*] under the provisions of Rules 17[6] of the Probate and Administrative Rules. By a well reasoned ruling the Justice Pall determined the issues which formed the basis of the trial in this petition. The issues that were determined for trial relate to the genuineness and validity of the Will of the deceased propounded as propounded by the petitioner. Justice

Pall also made a determination that the issue[s] such as the Indian Joint Family Properties matters which properties were allegedly held in Trust by the deceased could not be determined within a this Succession Cause. Thirdly the Learned Judge determined the other issue for trial in this Cause was who should be issued with the grant of probate.

The matter was subsequently handled by *Hon. Kuloba, Judge [as he then was]* and the record will show the following directions were issued on 22<sup>nd</sup> October 1998 as follows:-

- a) *Interrogatories allowed to be answered within 30 days from 22<sup>nd</sup> October, 1998.*
- b) *Examination of the Will by Forensic Expert(s) be done within the same period unless extended on application on notice.*
- c) *Evidence by way of viva voce hearing for everyone.*
- d) *Parties to call such witnesses.*
- e) *They may be advised to call in the normal manner.*

The record will show the following interrogatories were put to the petitioner and she answered them as follows:-

#### ANSWER TO INTERROGATORIES

The answer of the Petitioner herein to the interrogatories of the objector Maheshchandra Shamjibhai Gheewala pursuant to an order of the court made on the 22<sup>nd</sup> October, 1998.

In answer to the said interrogatories I MUKTA CHANDRAKANT GHEEWALA MAKE OATH and say as follows: -

#### Interrogatory No. 1

I applied through Compendium Trust Company Limited as my special attorney for grant of letters of administration to the estate of the deceased Chandrakant Shamjibhai Gheewala in the year 1985.

#### Interrogatory No. 2

The Royal court of Jersey issued letters of administration on or about the 17<sup>th</sup> December, 1985.

#### Interrogatory No. 3

Before the said letters of administration were released the said objector obtained an injunction restraining the release of the said letter of administration to the Compendium Trust Company Limited.

#### Interrogatory No. 4

In the order of Justice the Objector did say that the Deceased had left a Will dated 28<sup>th</sup> August, 1974 and annexed a copy thereof thereto and further stated that he would apply to the Royal Court of Justice for probate thereof which the objector has not done.

#### Interrogatory No. 5

No and I was advised by my advocate there was no need to.

#### Interrogatory No. 6

The answer to interrogatory No. 5 is not in the affirmative.

Interrogatory No. 7

In the year 1986 my son Elesh gave me a copy of it. I cannot recall the day or the month.

Interrogatory No. 8

My son Elesh gave me the original will I think sometimes in 1993 but I cannot recall precisely the month or the day or the place.

Interrogatory No. 9

Nairobi, Kenya. I cannot recall my movements in different areas of Nairobi on 4<sup>th</sup> May, 1976.

Interrogatory No. 10

In the year 1986 as stated in the answer to interrogatory No. 7 above.

Interrogatory No. 11

In the year 1986 when the Objector produced a copy thereof in the Jersey proceeding. Enquiries were made of the Objector prior thereto but he had denied knowledge of any Will of the deceased.

Interrogatory No. 12

I have never seen the original of the Will of 28<sup>th</sup> August, 1974. I saw a copy of it when it was produced in the Jersey proceedings by the Objector in the year 1986.

Interrogatory No. 13

On 28<sup>th</sup> August, 1974 my husband and I were staying in England and I think probably in London.

Interrogatory No. 14 & 15

Disallowed.

Part of Interrogatory 16 allowed

The Will dated the 4<sup>th</sup> May, 196 is in the writing of the deceased and signed by him and is not a specimen according to the two attesting witness thereto.

After several applications for adjournments and counter applications which were all presented by the objectors, and after delivering several rulings *Kuloba, Judge* recorded evidence from the petitioner's 1<sup>st</sup> witness Gajendrakumar Jamnadas who was one of the attesting witnesses of the deceased Will made on 4<sup>th</sup> May, 1976. This witness gave evidence in chief and was partly cross-examined but the cross-examination was not completed by the counsel for the objector.

This matter was also before Hon. Aluoch, Judge who gave further directions on 15<sup>th</sup> January, 2001 as follows:-

- a) *The objection filed by Mahesh Gheewala and the widow of the deceased to be determined first.*
- b) *Both the brother of the deceased Manesh Gheewala and the widow of the deceased to be present in court to give evidence to assist the court in deciding who amongst the two should be issue with a grant of*

*probate to the deceased estate.*

*c) The application by the beneficiaries to await the outcome of the decision as to who is to administer the estate of the deceased.*

*d) Parties to take urgent dates for determination of order [a] and [ b] above.*

*e) No further applications to be filed.*

This matter was thereafter handled by another *Judge, Hon. Rawal J*, who recorded the evidence by the 1<sup>st</sup> attesting witness of the Will made on 4<sup>th</sup> May, 1976 a *Mr. Nahendra Ragani*. His evidence was recorded de ebenese when this matter came up for hearing before me for the first time on 13<sup>th</sup> October, 2003 the parties sought for further directions on how this protracted Succession Cause could be heard from where the other Judges had left the matter. After going through the submissions by both Counsel for the petitioner and the objector, and after perusing the records of proceeding, I made the following orders by way of directions.

*“I therefore direct that the original will be lodged with the Deputy Registrar for purposes of ensuring the security of the original and to safeguard the petitioner from suffering any prejudice should the Original Will be lost or destroyed while in the hands of the objectors advocates.*

*a) A certified copy of the Original Will shall be preserved which should, in the event of the Original will getting lost or destroyed while in the custody of the objector, the certified copy shall be used to obtain the probate and for all other purposes.*

*b) The Original Will shall be used only for purpose of inspection and examination by the objector’s Expert(s) and should not be used for any other purpose nor should the will leave the jurisdiction of this court.*

*This ruling was delivered on 5<sup>th</sup> December, 2003 when the parties Advocates recorded the following consent on how the Will shall be examined by the objector’s Forensic Expert.*

*By consent, the Original Will to be released to the objectors Forensic Experts on the day of the examination of the said will by Mr. Manek in the presence of Mr. Khan. Mr. Manek, if he wishes can be outside the premises where the will is being examined for as long as it takes to examine the Will by the Expert and after the conclusion of the exercise regardless of how long it takes the Original will be returned to Mr. Manek.”*

After these directions, the petitioner proceeded to call the third witness an Attorney from Jersey, Christopher Ronald De Jersey Renault An Advocate practicing in the Island of Jersey and a partner in the firm of Le Masurier, Gifford and Posh. The gist of the evidence by this witness was that his firm was instructed by a Compendium Trust to act for Mukta widow of the deceased in these proceedings and to apply for letters of administration in Jersey Court in respect of the deceased estate. This witness proceeded to make an application, but there were objection proceedings which were filed by the objector. In the course of the proceedings and in response to the allegations raised by the objector herein this witness sent a copy of the 1976 Will to the objector but blanked off the part of the will that contained the percentages of the estate bequeathed to each of the beneficiaries and the names of the attesting witness.

Mr. Renault explained to the court that in his view and the reason why he blanked off the information was because he thought at that particular moment, all the objector needed to be shown was existence of the 1976 Will, which was subsequent to the 1974 Will. The objector was objecting on the grounds that the deceased had left a will of 1974. In this regard this witness testified that he blanked off the part with the bequests and the names of the witnesses to protect the interest of his client at that stage of proceedings. Once the attesting witnesses gave their affidavits confirming the genuineness, and due execution of the 1976 will, this witness said he saw no prejudice in the objector knowing the full details of the 1976 Will. He

thereafter attached another copy which was not blanked to the answer and counter claim and a copy was supplied to the objector's advocate on 2<sup>nd</sup> June, 1986.

The petitioner's next witness was Mr. Robert W. Radley, a Forensic Handwriting and Document Examiner based in the United Kingdom.

This witness was instructed by Counsel for the petitioner to examine the will of the deceased dated 18<sup>th</sup> May 1976 alongside other documents containing the known handwritings of the deceased and

Ø To offer an opinion as to the authenticity of the signature on the Will dated 4<sup>th</sup> May, 1976.

Ø To offer an opinion as to the writer of the main text of the Will in question.

Ø To examine the inks on the Will in question to determine how many different pens were responsible for the writing of the same.

Ø To examine, in particular, the four entries "25%" in order to determine whether there have been inserted at the time of writing of other details on the Will or whether there have been inserted at a later point in time.

Ø To comment generally as to whether the Will has been written up at one or more points in time.

According to Mr. Radley and the summary of his opinion was that the deceased wrote the signature on the will in question and the likelihood that this is a copy of a genuine signature may in his opinion, realistically be disregarded.

*Secondly*, Mr. Radley also opined that the deceased wrote the main textual details of the will (*i.e. excluding the witness details*)

*Thirdly*, when all considerations are taken into account, the ink analyses results are considered with a single ink having been used for all entries on the Will in question with the exception of the ink of the second witness which appears in a different ball point pen ink to the remainder.

*Finally*, this witness said that he found no evidence whatsoever to suggest that the Will has been written up on more than one occasion.

Mr. Radley produced the report as well as the schedule of documents that he relied upon to carry out this examination. It would be important to reproduce the entire report for the purposes of his ruling as it turned out this was a crucial witness in these proceedings.

*Robert W. Radley Report .....*

*Forensic Handwriting & Document Examiner*

ROBERT W. RADLEY

M.Sc., C. Chem., F.R.S.C., F.S.S Dip., F.A.E., R.F.P.

CHANDRAKANT SHAMJIBHAI GHEEWALA

(DECEASED)

Manek & Co

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P O box 14635 – 00800

Nairobi KENYA

*REPORT*

FOR THE CONSIDERATION OF THE COURT IN THE HEARING OF THE ABOVE MATTER

15<sup>th</sup> October 2004  
The Forensic Document Laboratory, Macartneys, Kings Road, Silchester, Reading RG7 2NS, England

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*Forensic Handwriting & Document Examiner*

ROBERT W. RADLEY

M.Sc., C. Chem., F.R.S.C., F.S.S Dip., F.A.E., R.F.P.

15<sup>th</sup> October 2004 Our Ref:RWR/CS/wlm/8611

REPORT

RE: CHANDRAKANT SHAMJIBHAI GHEEWALA (Deceased)

Whilst written instructions have been received from Manek & Co. Solicitors of Kenya

is matter, this report is addressed to the Court for its consideration on the hearing of the above case. I am a Registered Forensic Practitioner specialising in the examination of handwriting and documents with an extensively equipped laboratory at the above premises. I have been an independent expert in private practice for 28 years. My Curriculum Vitae is appended to this report (See Appendix A)

The following documents have been presented for examination.

SCHEDULE OF DOCUMENTS

QUESTIONED DOCUMENT

1. A will of Chandrakant Shamjibhai Gheewala dated 4<sup>th</sup> May 1976.

KNOWN WRITINGS OF CHANDRAKANT SHAMJIBHAI GHEEWALA

2. A photocopy British passport issued 30<sup>th</sup> August 1974.
3. A photocopy British passport issued 24<sup>th</sup> March 1971.
4. A photocopy British passport issued 25<sup>th</sup> March 1970.

KNOWN WRITINGS OF CHANDRAKANT SHAMJIBHAI GHEEWALA (continued)

5. A photocopy British passport issued 1<sup>st</sup> June 1965.

6. A Will of Chandrakant Shamjibhai Gheewala dated 26<sup>th</sup> October 1965.
7. A Will of Chandrakant Shamjibhai Gheewala dated 17<sup>th</sup> April 1970.
8. A Kampala Drive-In Cinema Limited Share Certificate dated 31<sup>st</sup> March 1964 relating to Share No.1.
9. A Kampala Drive-In Cinema Limited Share Certificate dated 31<sup>st</sup> March 1964 relating to Share No.2-91.
10. A Kampala Drive-In Cinema Limited Share Certificate dated 31<sup>st</sup> March 1964 relating to 92-111.
11. An airmail letter bearing two Kenya “1/-“ stamps addressed “Eleshkumara Gheewala Esq.”
12. A handwritten letter commencing “Dear Elesh, Well – How are you.”
13. A handwritten draft Will.
14. A handwritten note headed “SHANTIBEN MORJARIA.”
15. A ten page handwritten letter dated “8/5” with note attached “Help In Producing Peaceful Individual Existence.”
16. A sixteen page handwritten letter commencing “Dear Elesh, So now I come to ...” dated 8/5/77.
17. A handwritten note commencing “Total group Liabilities.”

KNOWN WRITINGS OF CHANDRAKANT SHAMJIBHAI GHEEWALA (continued)

18. A Will of Mukta Chandrakant Gheewala dated 30<sup>th</sup> December 1975.
19. A photocopy Educational Supply Association (East Africa) Limited cheque 230580616 dated 4.2.74.
20. A book of Share Certificates relating to Mutual Benefits Limited containing eleven Share Certificates dated from 20<sup>th</sup> October 1961 to 29<sup>th</sup> December 1964.
21. A Messrs. Chandrakant Bros. of Nairobi Inward Telegram form bearing handwritten numerals on the reverse.
22. A Fleetline Shorthand note book bearing some known handwritings.
23. A Tudor spiral bound note book.
24. A sheet of “The Bharat Agencies” headed notepaper bearing various handwritten entries.
25. A sheet of paper bearing two columns of numerals.
26. A sheet of paper bearing handwritten notes attached to which is a Tildiem 300 Post-It note.
27. An airmail letter addressed to E.S.A Limited stamp dated 3<sup>rd</sup> September 1974.
28. An envelope addressed to Mutual Benefits Ltd. dated 24.12.75.
29. A handwritten airmail letter stamp dated 16<sup>th</sup> April 1968 addressed to Bhupendia S Gheewala Esq.

30. A handwritten note commencing “7 Shops @ 2500/- each...”

#### KNOWN WRITINGS OF CHANDRAKANT SHAMJIBHAI GHEEWALA (continued)

31. A 2-page handwritten note primarily in pencil headed “Book Shops Limited.”

32. An International Certificate of Vaccination in the name of Shrikesh Gheewala dated 19.2.71.

33. An International Certificate of Vaccination in the name of Mrs. M.C. Gheewala dated 19.2.71.

#### INSTRUCTION

To examine the above documents in order to offer an opinion as to the authenticity of the signature on the Will dated 4<sup>th</sup> May 1976.

To offer an opinion as to the writer of the main test of the Will in question.

To examine the inks on the Will in question to determine how many different pens were responsible for the writing of the same.

To examine, in particular, the four entries “25%” in order to determine whether these have been inserted at the time of writing of other details on the Will or whether these have been inserted at a later point in time.

To comment generally as to whether the Will has been written up at one or more points in time.

#### SUMMARY OF OPINION

Further to my examination of the documents in question, a more detailed outline of which follows, my findings and opinions are summarised below. A Glossary of Opinion Terminology is attached at Appendix B.

1. I am of the opinion that Chandrakant Shamjibhai Gheewala wrote the signature on the Will in question and the likelihood that this is a copy of a genuine signature may be, in my opinion, realistically disregarded.
2. Chandrakant Shamjibhai Gheewala wrote the main textual details of the Will (*i.e.* excluding the witness details).
3. When all considerations are taken into account, the ink analyses results are consistent with a single ink having been used for all entries on the Will in question with the exception of the ink of the second witness which appears in a different blue ballpoint pen ink to the remainder.
4. I find no evidence whatsoever to suggest that the Will has been written up on more than one occasion.

#### EXAMINATION

##### THE QUESTIONED WILL

I took possession of the Will in question from Mr Ramesh Manek on Tuesday 20<sup>th</sup> July, returning it to him on Friday 23<sup>rd</sup> July 2004. The examinations were undertaken both at my hotel in Nairobi and, on 22<sup>nd</sup> July 2004, at the Nairobi Police Laboratory.

I confirm that the Will that I examined corresponds with the photocopy Will certified by Mr Antipas Nyanjwa as being the Will he examined.

The Will was presented inside a brown printed Will enveloped sealed with adhesive tape at one end. The tape appeared very old, discoloured and slightly shrunken. The initials “CSG” run across the flap but beneath the tape. The envelope has been opened at the bottom end.

The paper of the Will was identified by the watermark which denotes “HERTFORDSHIRE LEDGER MADE IN ENGLAND LAID PAPER.” From my records, I note that this make of paper was produced over a long period of time and appears to have been available from at least the late – 1960s.

All of the writings on the Will are in blue ballpoint pen ink with the exception of the pencilled initials “MSI (or 1)” at the top of the fourth side. The blue ballpoint pen inks look of similar shade to one another with the exception of the second witness signature which appears as a lighter colour than the remaining body of entries.

There are also minor shade differences of ink within the main text. For instance, the names Chandrakant Shamjibhai Gheewala start with the first few letters of the first name relatively dark and the remaining entries becoming progressively lighter. The same comment also applies to a degree to the second line of writing and the line commencing “My wife MRS. MUKTA C. GHEEWALA.” There is also consideration variation in apparent shade in the main bequest detail in that some of the entries, especially the words “all”, do appear slightly lighter to the naked eye in comparison with the surrounding words.

The writing of the textual entries appears spontaneously written although some entries do appear to be more deliberately written than others and consequently, appear to be written with greater pen pressure applied during the writing process.

In order to determine the relative degrees of pressure used in the writing of the entries throughout the document, I have examined the reverse of the page bearing the entries in darkened conditions and with an oblique light shining along the surface paper. In this way, one can observe embossings of the writings on the reverse side of the paper where the pressure is significant whilst other entries show considerably less embossing or in some instances, virtually none is detectable showing these to be written with varying lesser degrees of pen pressure than those identified by the heavy embossings.

It may be noted that generally speaking, increased concentration causes an unconscious increase in pen pressure whilst entries such as the signature, which would be completed as a reflex action and with little concentration required, would generally be expected to be written faster with lighter pressure and greater rhythm to the writing. That, indeed, is observed in this particular case.

It may also be noted that using a ballpoint pen as the writing instrument, heavier pressure can result in a heavier deposit of ink being placed on the paper.

It is noted that the first witness signature is fluently written in a blue ink similar to that of the main text whilst the second witness signature is written in a relatively delicate style of writing showing considerable rhythm to the writing and considerable variation of pen pressure throughout the entire writing.

### THE KNOWN WRITINGS

The comparison signatures correspond well one with another and although showing variations (as expected from an individual signing documents at different points in time), I can accept these as being the writings of one individual. That individual is identified as Chandrakant Shamjibhai Gheewala, as shown in his passport.

Similarly, the known writings are consistent one with another and again, I can accept these as being the writings of one individual. The handwritten signatures correspond with this writing and consequently, I take all of the “known writings” previously described in the Schedule of Documents as the work of Chandrakant Shamjibhai Gheewala.

### EXAMINATION OF THE SIGNATURE IN QUESTION

I have examined the questioned signature utilising specialised lighting and can find no indication of impression or handwritten guidelines which might be associated with a tracing process.

I have examined and compared the essential features of the questioned signature with the corresponding characteristics observed within the known writings. These features include the comparison of the structure of individual letterforms, relative proportioning of letters one to another, internal letter proportioning, slope variation of elements one to another, alignment, spacing of letters, pen pressure variation, fluency and line quality, together with other general writing habits.

I note a large number and variety of significant similarities between known and questioned signatures whilst I can find no significant differences of note.

Such is the number and nature of similarities, and in the absence of any evidence to the contrary, I am of the opinion that Chandrakant Shamjibhai Gheewala wrote the signature on the Will in question.

I have considered the possibility of someone having copied a genuine signature in the production of the signature in question. However, the close correlation of detail, fluency of execution and variation of pen pressure all contradicts this possibility and I can find no evidence to support any such proposition. Indeed, the likelihood of this signature being a copy of a genuine signature may, in my opinion, be realistically disregarded.

#### HANDWRITING EXAMINATION

I have again examined and compared the essential features of the writings of the main textual entries above the signature on the Will in question against the known writings of Chandrakant Shamjibhai Gheewala. The questioned entries comprise of block capital lettering, script and numerals.

From the overall examination of the textual details (i.e. excluding signatures and witness details), I note there is a close correlation in the essential structural detail between the Will writings and the known writings of the Deceased to the extent that I am of the opinion that Chandrakant Shamjibhai Gheewala wrote the Will text details.

In forming this opinion, I have taken particular note of the structural features of the four entries "25%" which I understand, it may be suggested have been added at a different point in time. Whilst these are written carefully, they are fluently executed and show slight variations one to another as one may expect as the result of a natural writing process. An individual, on repeating a particular entry or signature one after another, will show slight variations in the structuring of the letter/numeral forms etc. It is of considerable note from the handwriting comparison that there are variations amongst these four entries in the "2"s, "5"s and the "%" signs when compared one with another. These variants are also found in the known writings.

These entries, if taken individually i.e. disregarding the remainder of the surrounding text, might be regarded as relatively easy to copy, in general terms, as they are brief. However, it would be extremely unusual for a copier to attempt to introduce variants of, for instance, the different shapes of the "2" from the writings of Chandrakant Shamjibhai Gheewala, as the method commonly observed in such cases is that the copier will attempt to become proficient at one particular style of entry, i.e. copying a particular "2", "5" and "%" sign and will attempt to reproduce that single style repeatedly in this type of circumstance. It would be regarded as extremely unusual for a copier to attempt to deliberately change, in subtle ways, the design of the written elements from entry to entry.

Consequently, taken on an individual basis, I find the correlation of detail of the variations of the "2", "5" and "%" signs between known and questioned writings to be strong evidence supporting the proposition that these four entries were also written by the Deceased. I can find no evidence to support the proposition that these are copies of the general writing style of Chandrakant Shamjibhai Gheewala.

#### INK EXAMINATION

I have examined and compared the inks on the Will in question utilising the non- destructive instrumental techniques or microscopy, infrared luminescence and infrared reflectance.

In the light of my findings, it may be helpful to briefly detail what these techniques represent and the interpretation of results obtained as these are not necessarily straightforward in this particular case due to certain factors.

Utilising microscopy, the inks can be examined under high magnification (say, up to x40), where one can compare ink colours accurately whilst at the same time observing defects in ink flow which may be present as the ink is applied by the ball of the pen to the paper.

Infrared luminescence is a technique whereby one shines a specialised coloured light onto an ink on a document whilst observing the ink with an infrared sensitive camera fitted with specialised filters. The television monitor on which the image from the camera can be observed may show the writing as:

i) *black handwriting (said to be an absorbing ink – the coloured light being “soaked up” by the ink but reflected by the surrounding paper making the ink appear as black writing on the “write” paper)*

ii) *grey writing of different possible shades (a partially absorbing ink)*

iii) *the ink may disappear altogether (said to be “transparent” with all of the coloured light being reflected to the same degree as the reflection of the light on the surrounding paper)*

iv) *the ink may appear to be “white” (even though to the naked eye this may be a black ink, for instance). The white image is known as “Luminescence” which is the same as ultraviolet fluorescence (wherein, say, a white shirt washed in detergent may appear to “shine” to the naked eye if illuminated with ultraviolet light) but utilising this technique, the luminescence (fluorescence) is in the infrared (not visible spectrum) and hence requires a specialised infrared camera for detection as this cannot be seen with the naked eye, unlike ultraviolet fluorescence.*

Infrared reflectance is a similar process although natural white light, and not a coloured light, is used for illuminating the document. The inks will appear either black, varying shades of grey or will disappear (become transparent). One does not see the white (luminescent) image in this mode.

Results for a single ink may change when a series of different filters are placed over the camera, e.g. for sequential initial observations with filters of different wavelengths, an ink may appear black and with the next filter, grey and with the next filter, light grey and with the next filter, may disappear. Different ink compositions will generally show different effects when a series of different filters are used dependent upon the constituents of the ink.

The results for a single ink when comparing infrared luminescence and infrared reflectance may be different even when the same camera filter is used as reflectance and luminescence results may be thought of as independent of one another. Consequently, one has a number of permutations and combinations of different lighting and filters which will give rise to a large number of observations which may clearly differentiate between inks if they are of different chemical compositions and therefore have different responses under the varying filter and lighting conditions.

If after using all the available combinations of lighting and filters, two entries on a document cannot be differentiated one from another, the evidence would be regarded as consistent with the same pen having been used. However, that is not conclusive evidence as two pens of the same manufacturer may give the same results (although the ink flow properties, i.e defects in the application of the ink to the paper by the ball, and also the amount of ink applied to the paper, may be significantly different from pen to pen and may therefore differentiate between different writing instruments).

The results of my analyses show that the main body of entries on the Will, i.e excluding signature and witness details, show little difference between the inks. There are minor variations in the degree of

“grey” colouration from the infrared examination but this appears to be very much in line with the slight differences that are apparent in the visual shade of the same inks.

If the apparent visual differences in the shade of different parts of the writings one to another are the result of differing amounts of ink applied to the paper due to

- i) *poor or irregular ink supply from the pen reservoir to the ball of the pen, coupled with*
- ii) *differing amounts of ink deposited due to different pen pressures*

Naturally, these differing amounts of ink on the paper will also have a quantitative effect on the amount of light being absorbed when infrared techniques are applied. This in turn will slightly modify the level of “grey” image seen on the television monitor. Consequentially, minor differences observed in the grey level of entries when viewed in infrared are not considered of relevance in these circumstances and certainly not considered as being evidence of different inks being employed on the document. This phenomenon is well illustrated by considering the variations of “grey” levels of images especially where this is shown along apparently continuous lines of writing such as the three word name at the head of the document, the left hand word being a slightly darker grey than the images of the subsequent names.

There is also a further issue concerning slight differences in the level of “grey” lines observed with the infrared techniques for different entries as seen on the television monitor. The entries that are very heavily impressed into the paper (and some of these writings are sufficiently heavy to show considerable embossing on the reverse) may also have an additional effect on the level of grey observed by the camera. There is a well known observation that where one has heavy grooves in a paper caused by heavy pen pressure, the illumination, unless falling from directly above the impression (which it does not within the infrared apparatus), may cause a slight shadow (as seen by a grey image) to fall within the groove. This will have an additive effect to the infrared “grey” ink lines observed. Indeed, this is one of the basic principles of reading indented writing in a paper surface using a light shining at an oblique angle which makes the writing impressions visible by casting a shadow into them and allowing them to be read.

Consequently, observations have to be considered in the light of: -

- i) *different entries having slightly differing amounts of ink on the paper*
- ii) *the fact that the ink of different entries may be either in heavy grooves or having been made in the writing process.*

From my observations relating to the main portion of the text, I am of the opinion that the evidence is consistent with a single ink having been used. I find no demonstrable evidence when all matters are taken into consideration to suggest that the main body of the text is composed of more than one ink.

With regard to the signature ink of the testator, under filters of high wavelength (which tend to produce lighter and lighter grey appearances to entries with the progressively higher wavelengths used), this entry can be shown to be extremely faint, bordering on transparent (“invisible”) with the highest wavelength filters, much lighter than the main textual details. However, the signature is rapidly and fluently executed and of light pen pressure and therefore, the above considerations come into play when the response of the signature ink is compared against the response of other entries made at heavier pressures. Again, in my opinion, this does not constitute evidence of different inks having been used on the document.

The first witness signature and detail cannot be distinguished from the responses obtained from the testator’s signature ink whilst the second witness signature appears to be a different blue ballpoint pen ink to the remaining entries on the document.

I have paid particular attention to the ink of the four entries “25%” when comparing these against the surrounding words of the text and can find no appreciable difference between them.

It is noted that there are several microscopical defects that are apparent from the examination of the ink stroke in the main body of the Will and the testator's signatures. It is of note that such defects, although not particularly unusual, do occur throughout the entire body of the writing including the four "25%" entries and the testator's signature. These observations may be regarded as limited evidence supporting the proposition that the same pen has been used. Although the evidence is far from conclusive.

#### DATING OF THE WRITING ON THE WILL IN QUESTION

There are no reliable techniques to enable the absolute dating of ink on a document and it is therefore not possible to date when the entries on the will in question were written. However, I understand that it may be suggested that some of the entries, especially the percentage figures, may have been added at a substantially different point in time to the writing of the main text. This is not borne out by visual inspection, the infrared luminescence and infrared reflectance examinations nor by examination of ink flow characteristics or defect characteristics. A further consideration is that if these entries were made at a substantially different point in time to the main text, e.g. 1986 as opposed to 1976, what is the likelihood of the writer coincidentally finding an identically matching ink unless the same pen was used. It might be considered likely that if such entries were inserted at a significantly later point in time, the same pen may not have been available and therefore a different pen used. In this case, discernible differences in ink composition as shown by either infrared luminescence or infrared reflectance, significant differences in shade of ink, differences in defect characteristics of the ink strokes etc might be expected to be found. However, there is no such evidence on the document presented. The fact that the second witness signature appears in a different ink is not, in my opinion, significant when considering when the entries may have been written.

Such observations of witnesses using their own pens is not unusual, in my considerable experience of examining Wills over the last 30 years (mainly in the UK but occasionally cases from overseas), and consequently I attach no significance, especially with regard to the timing of such writings, to this observation. The preference for the particular individual to use their own pen to sign documents is a personal trait, a personal choice. There is certainly no scientific criteria on examining the document to suggest that the witness signatures were appended on another date relative to the testator's signature.

#### CONSIDERATION OF WRITING IMPRESSIONS ON THE DOCUMENT IN QUESTION

The ESDA technique reveals writing impressions on documents which have been caused by one document having been written upon whilst physically resting on top of the document under examination. The writing process consequently imparts impressions of the writing onto the document below leaving visible indented writing impressions in the underlying paper surface or electrostatic writing impressions invisible to the naked eye which can be highlighted with the ESDA technique.

No significant extraneous impressions were revealed on examination of the document in question with respect to the main pages. There is an impression which may represent a partial impression of the initials on the envelope although due to the poor quality of the impressions, this evidence is far from conclusive. No other significant impressions were raised and no markings or impressions of relevance were found associated with the signature (such as tracing guidelines etc).DECLARATION

#### 1, ROBERT WILLIAM RADLEY DECLARE THAT:

1. I understand that my duty in my providing written reports and giving evidence is to help the court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion.
3. I have endeavoured to include in my report those matters, of which I have knowledge or of which I

have been made aware, that might adversely effect the validity of my opinion. I have clearly stated any qualifications to my opinion.

4. When I have used any information obtained or supplied for the consideration and formation of opinions, I have indicated the source of such details.
5. I have not without forming an independent view included or excluded anything which has been suggested to me by others including my instructing lawyers.
6. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any corrected or qualification.
7. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

ROBERT W. RADLEY

Forensic Handwriting & Document Examiner

After the evidence of Mr. Radley the petitioner closed her case. This indication by Counsel for the petitioner that he did not intend to call the petitioner sparked off a protest and an application by counsel for the objector seeking for orders that the objector be compelled by the court to give evidence in support of the petition so that she could offer crucial information on the Will. Secondly, Counsel for the objector asked this court to dismiss the petition for being incompetent. I will refer to the issues which were raised in this regard in the course of this ruling.

On the part of the objector, his case was supported by the evidence of Mr. Antipas Nyanjwa M.A Criminology and Forensic Science (Sagar), a Forensic Document Examiner and a Superintendent of Police attached to the Forensic Document Examination Laboratory at the CID Headquarters, Nairobi. His report is dated 1<sup>st</sup> March, 2004 which he said was made pursuant to a request made to the CID laboratory over a forged document. Mr. Nyanjwa received the will and Testament dated 4<sup>th</sup> May, 1976 of Chandarakant Shamjibhai Gheewala and compared the disputed hand written entries especially on the share of assets and the witness signatures. He testified that he examined the Will under the infrared illuminations spectrums using the video spectral comparator with spotlight at 360 nanometers, from which he could detect some differences in the pigments of the ink used, and in his opinion the will is a forgery.

It is important to reproduce this entire report in this ruling.

Antipas Nyanjwa Report .....

ANTIPAS NYANJWA

M.A. Criminology & Forensic Science (Sagar)

Forensic Document Examiner

C.I.D. Headquarters, Milimani Road, P.O Box 30036 – 00100,Nairobi – Kenya.

Tel. ++254 20 2713330, Cell: 0721379292

Introduction

I wish to report that my full names are Antipas Nyanjwa, I am a Superintendent of Police, who is attached

to the Forensic Document Examination Laboratory at the C.I.D Headquarters, Nairobi, as a Forensic Document Examiner.

I refer to your request dated 23<sup>rd</sup> February 2003, and the subsequent High Court order to this office for forensic analysis and comparison of the disputed handwritten entries especially on the share of assets and the witness signatures on the Will and Testament dated 4<sup>th</sup> May, 1976 of Chandrakant Shamjibhai Gheewala (deceased).

### Qualifications

That I hold a masters degree in Criminology and Forensic Science from the University of Sagar, in India and that I have also been trained as a forensic document examiner at among other places, The Interpol Headquarters, Lyon France, The National Police Headquarters, Jerusalem Israel, The Federal Police Headquarters in Sydney Australia, The National Authority for the Investigation & Prosecution of Economic & Environmental Crimes, Oslo, Norway, and also at the Zurich Canton Police Headquarters, Switzerland.

That I have been a forensic document examiner since 1996 and up to now that is my full time occupation.

### Request and Items Received

That upon the request made to this laboratory, I received in original the Will and Testament dated 4<sup>th</sup> May, 1976 of Chandrakant Shamjibhai Gheewala (deceased) for forensic analysis and comparison of the disputed handwritten entries especially on the share of assets and the witness signatures.

That the Will and Testament is forwarded to me by Mr. Ramesh Manek who has not provided me with the previous or known handwritings of Mr. Chandrakant Shamjibhai Gheewala (deceased) because he has none.

Upon the request made to this laboratory, I examined the disputed entries and I made the following forensic observations: -

1. Under the infrared illuminations spectrums using the video spectral comparator with a spotlight at 360 nanometers, I could detect some differences in the pigments of the inks used.
2. To be specific I found the ink used to write 'Kenya May 4<sup>th</sup> seventy six and the words my wife Mrs. Mukta C. Gheewala and all the entries of asses sharings to be different from all other inks use in the Will and Testament.'
3. I could also detect a varied ink composition on the pens used to append the witness signatures which was unusual and could only show that the signatures were not appended at the same time.
4. When I also subjected the same Will and Testament to Electro Static Developer (ESDA) examination, I could detect a varied pen pressure on all those entries. The words 'Kenya May 4<sup>th</sup> seventy six and the words my wife Mrs. Mukta C. Gheewala and all the entries of asset sharing showed more pronounced pen pressure than the rest of all other entries.

### Opinion

I find all these variations unusual as they display differences in the age of the writings and they can only give credence to the fact that the Will and Testament of Chandrakant Shamjibhai Gheewala (deceased) could not have been executed at the same time.

It is therefore my opinion that the will is a forgery.

In my examination I have eliminated all the natural variations that usually occur during writing, especially as a result of voluntary intoxication by alcohol, poor eyesight, sickness, old age, the writing instrument, the surface beneath the paper, natural ink failures, natural habits etc.

And I have also taken into consideration certain individual characteristics in the handwritings, like the character arrangements, character formations and their constructions, character slant and slopes, spacing, baseline alignment, character initialisation and their terminal strokes, writing quality, line quality, pen fluency, character connections, general resemblance, pen speed, pen pressure and natural pen lifts and ink failures, before arriving at my opinion.

I forward herewith a signed report of my findings for your necessary action.

The Will and Testament of Mr. Chandrakant Shamjibhai Gheewala (deceased) in original is returned to Mr. Ramesh Manek.

ANTIPAS NYANJWA

FORENSIC DOCUMENT EXAMINER

For: DIRECTOR CRIMINAL INVESTIGATIONS ISSUES TO BE RESOLVED

Upon consideration of the above evidence, the central issue to be resolved are;

- 1.) *Whether the Will propounded by the petitioner is genuine and valid.*
- 2.) *Who should be issued with the grant of probate.*
- 3.) *Whether the petitioner's petition is incompetent and bad in law.*
- 4.) *Whether the objector should be entitled to the grant of probate as sought in the cross-petition.*
- 5.) *Whether failure to call the petitioner as a witness renders her petition incompetent null and void.*
- 6.) *Who should bear the costs of this litigation.*

The applicable law:

The deceased in this case the late Chandrankart Shamjibhai Gheewala died on 26<sup>th</sup> February, 1984 while domiciled in Nairobi – Kenya.

The Law of Succession Act Chapter 160 of the Laws of Kenya whose date of commencement is 1<sup>st</sup> July, 1981 is the Law applicable to this Cause.

Section 2(1) of the said Act provides as follows:-

*“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”*

Thus, this being a petition for probate of a written a Will, the law applicable is as provided under Part 11 of the Act. Section 5(1) of the Act provides:

*“Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by Will, and may thereby make any disposition by reference to any secular or religious law that he chooses.*

5(3)

*Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the Will, in such a state of mind, whether arising from mental or physical illness, drunkenness or from any other cause, as not to know what he is doing.*

4. The burden of proof that a testator was, at the time he made any Will not of sound mind, shall be upon the person who so alleges.

#### Formalities of a Will

11. No written Will shall be valid unless –

- a) The testator has signed or applied his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator:-
- b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- c) The Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator a personal acknowledgement of his signature or mark, or of the signature of that other person, and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

The procedure for the application of a grant of probate of a Will is provided for under Section 51(1) (3) of the Act.

*“Where it is alleged in an application that the deceased left a valid Will:-*

- a) If it was written, the original Will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either –
  - i) *an authenticated copy thereof shall be so annexed; or*
  - ii) *the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;*

b) .....

4. No omission of any information from an application shall affect the power of the court to entertain the application.”

#### Section 53

“A court may;-

- a) Where a deceased person is proved (whether by production of a Will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the Will applies either:-
  - (i) *If there is no proving executor, letters of administration with the Will annexed.”*

In the present case, there was an objection and an answer and cross-petition, this court therefore

proceeded to determine the dispute. Under the provisions of Section 70 of the Act, a court may, before making a grant of representation;—

a) *examine any applicant on oath or affirmation; or*

b) *Call for further evidence as to the execution or contents of the Will or some other Will, the making of an oral Will, the rights of dependants and of persons claiming interests on intestacy or any other matters which appears to require further investigations before a grant is made.”*

#### Analysis of the Evidence and Findings:

In further analyzing the evidence before this court, the first issue to deal with is the validity of the Will, which is dated 4<sup>th</sup> May 1976. The objector’s objection and cross-petition did not provide to this court the Will purportedly written by the deceased and dated 28<sup>th</sup> August, 1974. The objector did not propound this will at all, and therefore, I will deal with the petitioner’s Will dated 4<sup>th</sup> May, 1976.

Evidence was given by the two attesting witnesses Gajandrakumar Jamnadas and Nahendra Rajani. The first witness did not complete his evidence by way of cross-examination, as the record will show his evidence was characterized by objections and applications for adjournments. Eventually this witness did not complete the cross examination and his evidence can be treated as incomplete. This witness had also sworn an affidavit on 6<sup>th</sup> May, 1986 confirming that he was present when the deceased executed the 1976 Will.

The other attesting witness, Najendara Sargani completed his evidence and he also confirmed that he was present together with Gajandrakumar Jamnadas when the deceased executed the 1976 Will.

Counsel for the objector urged this court to ignore the evidence of these attesting witnesses for reasons that G. Jamnadas did not conclude his evidence and Rajani’s evidence was recorded by a Judge who had been disqualified from hearing the matter.

Since G. Jamnadas did not complete his evidence by way of cross-examination that evidence may be ignored. However it is important to observe that when this evidence is weighed, I find no inconsistencies that arose during cross-examination and there was no evidence available from the objector that negated this evidence, moreover this witness also swore an affidavit in support of the evidence that he was present when the deceased executed the 1976 Will. There is no single witness who turned up to controvert his evidence. Having said that, I have also, taken into consideration the holding in the case of Triloknath Bhandari & Another Vs S.R. Gautama [1964] E.A page 606 where it was held by the Court of Appeal that

*“The denial of the right of the appellants’ Counsel to cross-examine the respondent on vital issues rendered the trial unsatisfactory; the appeal would therefore be allowed.”*

It is for the above reasons that I will not attach any weight on the evidence of [PW1]

As regards the evidence by Rajani [PW 2,] Counsel for the objector urged this court to disregard the same on the grounds that his evidence was recorded by *Hon. Justice Rawal* who was disqualified on the grounds of conflict of interest.

With tremendous respect to Counsel for the objector, I have gone through the records of proceedings and I see no order whereby the Hon. Judge disqualified herself from handling this matter on the grounds of conflict of interest. The record shows that the Judge heard a lengthy application for her disqualification which she dismissed. Subsequently, and for reasons that she was in another Division of the High court, the Criminal Bench she declined to deal with the matter which was referred to the Hon. Chief Justice for directions. I therefore find the evidence of PW2 admissible.

The evidence of Christopher Ronald Renaulf an Attorney from Jersey was not challenged at all, but this related to an application for grant of Letters of Administration which the petitioner applied for before a Jersey Court. The issue that was raised by the objector was why the petitioner failed to disclose to this court about the proceedings in Jersey Court and why she applied for Letters of Administration in Jersey Court Intestate.

In dealing with the two issues arising from the evidence of (PW 3) Mr. Renaulf, his evidence was attacked by the objector by way of submissions. These are matters which the objector ought to have been tackled by way of evidence and not submissions. Moreover, the matters that were filed in Jersey Court have no relevance to this present Court as that application was in a different Court, in another Country, outside the jurisdiction of this Court. It is also worthwhile to point out that the directions had been given, that this matter, be determined by way of viva voce evidence and the objector did not attend court to offer an explanation or to prove what went on before the Jersey Court which in his opinion was illegal. The relevance that I see from the evidence of PW 3 is in regard to the copy of the Will that he blanked out certain information and thus is has to do with credibility and consistency on the existence of 1976 Will which emerged after the proceedings had been filed in Jersey Court.

The evidence of *PW4 Robert W. Radley* has been reproduced in this ruling. There are several salient matters that I wish to highlight and for purposes of bringing them into a clear perspective, it is important to consider them alongside the evidence of *DW1, Mr. Antipas Nyanjwa* whose report has similarly been reproduced in this ruling.

Mr. Radley was instructed by Mr. Manesh Counsel for the Petitioner who supplied him with a copy of the Will of the deceased dated 4<sup>th</sup> May, 1976 which he referred to as the questioned document. Mr. Radley was also supplied with a total of 33 documents with known handwritings of the deceased his instructions were.

Ø To examine the above documents in order to offer an opinion as to the authenticity of the signature on the Will dated 4<sup>th</sup> May 1976.

Ø To offer an opinion as to the writer of the main text of the Will in question.

Ø To examine the inks on the will in question to determine how many different pens were responsible for the writing of the same.

Ø To examine, in particular, the four entries “25% in order to determine whether there have been inserted at the time of writing of other details on the Will or whether there have been inserted at a later point in time.

Ø To comment generally as to whether the will has been written up at one or more points in time.

The instructions given to *Mr. Nyanjwa (DW1)* were as follows:-

*“That upon the request made to this laboratory, I received in original the Will and Testament dated 4<sup>th</sup> May, 1997 of Chandrankart Shamjibhai Gheewala (deceased) for Forensic analysis and comparison of the disputed handwritten entries especially on the share of assets and the witness signatures.”*

*“That the Will and Testament is forwarded to me by Mr. Ramesh Manek who has not provided me with the previous or known handwritings of Mr. Chandrakart Shamjibhai Gheewala (deceased) because he has none.”*

It is noteworthy that Mr. Nyanjwa did not have the known handwritings of the deceased which he could have used to determine whether the Will was written and executed by the deceased. Indeed more significantly, Mr. Nyanjwa did not offer any opinion on whether the testator’s signature on the will of 1976 was that of the deceased. Mr. Nyanjwa indicates that he was not given the known handwritings of the deceased but no attempt was made by counsel for the objectors to request for the known handwritings

of the deceased.

Considering that directions were sought by counsel for the objector at every stage, it is not clear why counsel for the objector did not deem it fit to obtain the necessary documents that would assist their expert witness conduct a thorough examination of the disputed Will and come up with a report that is empirical. As it is stated in the text book on the Principles and Precedents of the Art of Cross-examination, tenth edition by BK Somasekhara page 1002

*“The real nature of disputed writing in most cases must finally and legally be determined and shown by actually comparing it with other writings which are proved or admitted to be genuine.”*

The same learned author on page 1004 opines that

*“Although the court cannot play the role of a handwriting expert. The correct principle of law is that the testimony of the handwriting expert should be taken as a guide and with its assistance the court should apply its own observation to the disputed writing and come to its own conclusion as to whether the particular writing is to be assigned to a particular person.*

*It is however, the settled view that it will not be safe to base a conviction on the uncorroborated testimony of a handwriting expert. (Kameshwar vs State [1957] Cr LJ 376; Shyam Kishorelal Vs State [1957 All WR 558).”*

The report by Mr. Nyanjwa states that he examined the disputed entries and made the following forensic observations:

Ø Under the infrared illuminations spectrums using the vided spectral confer at or with a spotlight at 360 Nanometers, I could detect some differences in the pigments of the inks used.

Ø To be specific I found the ink used to write “Kenya May 4<sup>th</sup> Seventy Six and the words my wife Mrs. Mukta C. Gheewala and all the entries of asset sharing to be different from all other inks used in the Will and Testament.”

Ø I could also detect a varied ink composition on the pens used to append the witness signatures which was unusual and could only show that the signatures were not appended at the same time.

Ø When I also subjected the same Will and Testament to Electro Station Developer (ESPA) examination, I could detect a varied pen pressure on all those entries. The words ‘Kenya My 4<sup>th</sup> seventy six and the words my wife Mrs. Mukta C. Gheewala and all the entries of asset sharing should move pronounced per pressure then the rest of all the entries.

In the opinion of Mr. Nyanjwa, there were differences in the age of the writings and that gave credence to the fact that the Will and Testament of *Chandrakant Shamjibhai Gheewala (deceased)* could not have been executed at the same time and it is a forgery.

Thus, in the absence of known handwritings of the deceased, the examination by Mr. Nyanjwa centered on the differences in the pigments of inks used or the ink composition of the pens used and the pen pressures.

On the part of Mr. Radley, his report has included an in-depth examination of the questioned will, against the known writings of the deceased. He compared the essential features of the writings of the main textual entries against the known writings. He examined the inks on the Will in question utilizing the non-destructive instrumental techniques of microscopy, infrared luminescence and infrared reflectance. As regards the dating of the writing on the Will it was the opinion of Mr. Radley that, is not possible that the dates were inserted at a later date through the use of the same pen.

Having considered the evidence of the two expert witnesses, I find the report by Mr. Nyanjwa

unsatisfactory lacking support of material information.

In the result I find that the Will propounded by the petitioner was validly executed by the deceased and it was witnessed by the two witnesses. This now brings me to the issue of whether the petition by the petitioner is incompetent and bad in law.

The basis upon which this issue was raised is that the petitioner did not annex to the petition, the original will of the deceased. When the petitioner petitioned for the grant of probate she stated in the affidavit in support of the petition as follows:-

*“The document hereunto annexed is an authenticated copy of the true and original last written Will of the deceased made on 4<sup>th</sup> May, 1976 at Nairobi. I undertake when required by the court to produce the original thereof lest it be lost or misplaced in the court registry.”*

Under the Law of Succession Section 51 (3) (a) an application for the grant shall be annexed to original Will unless if the original Will is lost, destroyed or for any other reason the original cannot be produced then -

(i) *An authenticated copy thereof shall be annexed.”*

I find the reasons advanced by the petitioner in her supporting affidavit that the original Will might be misplaced or lost a plausible explanation given the sorry state of the file of papers in this file have been kept. In my view, this explanation fits the description provided for under Section 51 (3) (a) ....” If for any other reason the original cannot be produced.....”

The other issue that torched on the validity of the Will was the submission that the petitioner failed to disclose the full inventory of the assets of the deceased and secondly the petitioner was intermeddling with the estate of the deceased.

Firstly the objector did not give evidence before this court. Directions were given that evidence be given by way of *viva voce* evidence. The objector did not tell the court what assets have been left out of the inventory of assets. Regarding the allegation of intermeddling by the petitioner with the estate of the deceased, by making some payments from the deceased ‘s bank accounts. The Laws of Succession has laid down a detailed procedure of how a compliant of intermeddling with the deceased estate should be handled. Besides that Section 80 [1]

Gives directions as to when the grant takes effect.

*“A grant of probate shall establish the Will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties.*

I would also go by the submission made by Counsel for the petitioner that a prudent Executor such as a widow of the deceased can validly take on the responsibility of paying out debts in respect of the Testator’s estate pending the issuance of the grant.

The next issue is whether the petitioner’s failure to give evidence, was fatal and thus the grant or probate cannot be issued to her.

Counsel for the objector submitted that it was necessary for the petitioner to give evidence in court so that she could clarify certain issues as to why *inter alia*:-

Ø *She applied for Letters of Administration in Jersey Court?*

Ø *Why it took the petitioner about 10 years to apply for the grant of probate?*

*Ø Why the petitioner left out certain assets of the deceased and*

*Ø How the Will of the deceased was discovered among other questions.*

On the part of the Counsel for the petitioner Mr. Gautama he vehemently opposed this request on the grounds that: -

*Ø There is no contention that the petitioner was present when the Will was made, she was not an attesting witness and the issue for determination is the validity of the Will and therefore it was not necessary to call the petitioner as a witness.*

Furthermore, the provisions of Section 56 of the Law of Succession provides for the persons who are entitled to a grant.

56(1) No grant of representation shall be made –

*(a) to any person who is a minor, or of unsound mind, or bankrupt*

*or*

*(b) Counsel thus submitted that there is no allegation that the petitioner is a minor, or of unsound mind or bankrupt.*

The question I have addressed myself to, is what would have been the value of the Executor coming to court to give evidence if indeed she was not an attesting witness of the Will in question, for reasons best known to herself, she chose not to come to court and in my view that does not render her petition fatal.

Under Section 70 of the Law of Succession Act, the Court is empowered before making a grant of representation to examine any affidavit; or to call for further evidence as to the due execution or contents of the Will or some other Will.

In this case I have considered that the issue was the validity of the 1976 Will. In this case the evidence that was crucial, was in regard to its due execution and its validity. In this regard, I am persuaded by submissions by Counsel for the petitioner that it was not necessary to call the petitioner as a witness.

Before making a conclusion of who should be granted with the grant of probate, it is important to look at this case in two other perspectives.

Firstly, whether the grant should be issued to the objector. As I stated earlier, the objector did not present, or even attempt to propound the Will of 1974 where he is the Executor. Secondly, the issues raised in the objection regarding the ownership of the properties of the deceased under the Joint Hindu Family Properties, those are matters that should be determined by way of other proceedings. Throughout the hearing of this matter, the proceedings were characterized by emotional out burst, name calling and other unprofessional conduct such as Counsel for the objector walking out of court with such disrespect, which conduct ought to have been deemed as contemptuous. Not mentioning the systemic efforts by the objectors to ensure that the proceedings do not proceed. I think the objector may not like it, but this manner of conduct and tactics are to be deprecated. The result of which has been to delay the effectual conclusion of this matter, an abuse of the court process and also to undermine the administration of justice. One cannot appreciate the extent of the systemic ploys that was employed by the objectors in order to scuttle the hearing and effectual conclusion of this matter unless one reads the records of proceedings.

The trial of this case as in all succession matters ought not to have taken more than six (6) months but the records will show the matter took over ten [10] years.

This matter involves an estate of the deceased who was survived by a widow and three children, three of

whom are of the age of majority. Whichever way one looks at this matter it is the widow who has the priority over the objector. This court is empowered to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

See Section 47 of the Law of Succession Act and Rule 73 of the P & A Rules. Even if this court was to ignore the Will of the deceased, under the provisions of Section 66 of the Act the Court has the discretion to grant the Letters of Administration in the following order or preference.

(a) *Surviving spouse or spouses with or without association of others.*

From the pleadings filed by the objector, it is clear that his claim is in regard to Joint Hindu Family Properties. These claims as it was held by Pall J. are, a subject of separate proceedings either by way of a civil suit or under order XXXVI of the Civil Procedure Rules.

In this case it is important and also in the interest of justice that a grant of probate be issued to the petitioner. That way, the objector will be in a position to pursue his interests over the properties he claims were held in Trust as he may deem necessary and so that the estate of the deceased can be administered. Without an administrator there is nobody who is answerable for the estate of the deceased and this court is empowered to make such orders as it may deem necessary in the interest of justice and to prevent the abuse of the court process. Taking all the matters into consideration and the inherent powers of this court the grant of probate of the Will of the deceased made on 4<sup>th</sup> May 1976 should be issued to the petitioner.

I have similarly considered the option of a possibility of how this court could have issued the grant to both the petitioner and objector. However due to the acrimonious stance taken by both parties and which was evident during the hearing of this cause, it would not be possible for the objector to administer the estate of the deceased with the petitioner and that would be an exercise in futility. Besides, the law of succession gives priority to the spouse of the deceased. [see Section 66 of the Act].

I have considered all the material that was placed before me by way of evidence and submissions and I have come to the conclusion that the objection and cross petition by the objector should be dismissed with costs to the petitioner.

It is so ordered.

Ruling read and signed on this 13<sup>th</sup> day of November 2006.

**MARTHA KOOME**

**JUDGE**