

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 SHAMJBHAI GHEEWALA
(DECEASED)**

RULING

(Ruling in Respect of Preliminary Objection raised by Petitioner against the Objectors Application dated 16th December 2003)

This matter was placed before this court for hearing on 13th October 2003. After listening to both counsel for the petitioner and objector on what further directions should be given on the hearing and determination of the case, I delivered a ruling on 5th December 2003 on how the hearing should proceed.

Upon the delivery of the ruling, the parties recorded the following consent on the modalities of how the original will shall be availed for examination by objectors expert;

The original will to be released to the objectors forensic experts on the day of the examination of the said will by him 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"End of quotes Meanwhile the objector filed an application dated 16th December 2003. The application is brought under section 51(3) of the Law of Succession Act, Rules 4(5) part II and Rule 7 (5) Part III and Rule 73 of the probate and Administration Rules. The objector seeks for orders that

The petition dated 3rd February 1994 filed by Mukta wife of C.S. Gheewala the petitioner herein be dismissed for non compliance with the mandatory provisions of the Law of Succession Act and the rules made there under.

At the hearing of the said application which was on the same date the matter was fixed for mention to establish when the objector's expert would examine the original will, the petitioner counsel Mr. Gautama took out a preliminary objection to the application dated 16th December 2003 on the following grounds which I summarize as follows:The consent order recorded by both parties on 5th December 2003 and sanctioned by the court precludes the objector from raising the issue of the original will in the application.He argued that the present application is an attempt to circumvent the consent order, and derail the effectual conclusion of this matter. Counsel pointed out that the matter should only have been brought up for mention to establish when the expert by the objector could examine the original will; the application is therefore meant to frustrate the consent order.

The non inclusion of the original will which is explained for in the petition for the grant of probate was cured by the consent order, and the current application would destroy the substratum of the consent order.The objector should therefore be precluded from bringing this application which is not based on good faith. It has taken the objector ten (10) years to bring the application.Secondly an order was made by the honourable Aluoch J. on 15th January 2001, whereby the learned judge ordered that no further applications should be made by any party. In view of this order counsel for the petitioner submitted that the application should be disallowed as it would amount to setting aside a consent order which can only

be done if there was an element of misrepresentation or fraud. The application is not based on principals of law, as Section 51 makes certain circumstances whereby the original will may not be produced. Such circumstances are disclosed in paragraph 2 of the petition. Counsel also requested the court to take judicial notice of the notoriety of documents and file that disappear from court and therefore understand the petitioner's reluctance to surrender the original will when she applied for probate.

Counsel for the objector, vehemently defended the application dated 16th of December 2003 and dismissed *the* preliminary objection. He conceded that the matter has taken inordinately too long but that should not stop this court from dealing with fundamental flaws in the petition that would render the petition incompetent and not worthy of wasting time.

Counsel submitted that the consent order has nothing to do with a petition that was filed in 1994 in blatant disregard of the provisions of the law. He argued that the petition is incurably defective. The consent order cannot be entered against the provisions of the law. He referred to Section 51 (3) of the Law of Succession Cap 160 and the P & A Rules. Although there is a provision as to why the original will cannot be produced, for any other reason, he submitted that this should be interpreted according to the Ejusdem genesis rule.

There are no circumstances that have been advanced such that the original will was either lost or destroyed. The petitioner did not seek for the dispensation of the court so that the production of the original will was done away with through the leave of the court.

I have considered the submissions herein very carefully, I have also considered the application dated 16th December 2003 against the grounds of preliminary objection raised. I had summarized the extensive steps taken in giving directions as to the hearing and determination of this matter by Hon. Justice Pall, - (as he then was) Kuloba J. and Aluoch J. I gave further directions, on the modalities of how the will should be examined so that the substantive matter being the petition for probate can be heard and determined. I am fully aware of the inherent powers vested in the probate and Administrative court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the court. I believe it is in the above spirit that on 15th September 2001, Hon. Aluoch J. who was seized with the matter ordered that there be no further applications. This order has not been reviewed, nor has it been set aside. Due to that particular order, barring further applications there is an application filed by the beneficiaries which is still pending. The question was asked if the court should review the order and allow applications when will the application by the beneficiaries be dealt with. I am of the view that allowing further applications herein shall delay the effectual completion of the matter. There are also reasons given by the petitioner as per paragraph 2 of the petition why the original will was not included.

I am not able to comprehend the nature of prejudice that the objector has suffered, after all the parties have agreed on how the original will can be produced for purposes of the forensic examination. I have also considered the broad principals and the role of this court. In a matter of this nature especially section 51(4) which clearly states that No omission of any Information from an application shall affect the power to entertain the application. In view of the above matters I would direct that the objector can argue the matters raised in the application dated 16th December 2003 during the hearing of the substantive matter. I decline to hear the application at this stage and direct that the parties do take a hearing date for the continued hearing of the petition for probate.

Costs of this preliminary objection shall be in the cause.

It is so ordered.

Ruling read and signed on 27th February, 2004.

MARTHA KOOME

JUDGE