



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 576 OF 2016

SOPHINAH KALONDU MBITI.....PLAINTIFF

=VERSUS=

ARUN MAHENDRA ADALJA.....1ST DEFENDANT

KIRAN HIRJI SHAH.....2ND DEFENDANT

HIRJI LALJI SHAH.....3RD DEFENDANT

RANI SHAH.....4TH DEFENDANT

RULING

1. The dispute in this suit revolves around ownership of various properties, among them: (i) Horombo Villa Number 19 - Rosslyn Gardens, LR No 28431 (Original No 18/31); (ii) Town House Number 22 - Jambo Prestige, LR No 1870/111/550, Westlands Nairobi; (iii) Town House Number 6, LR No 7158/505-Marble Valley; (iv) LR No 7158/365 Clifton Villas; (v) LR No 7158/365 - Clifton Villas; (v) LR No 7158/366 - Clifton Villas; (vi) Type C Flat Number 4 Block A, LR NO1870/VI/61 (IR 92435/1); (vii) LR No 7158/608 - Clifton Villas (KIII); (viii) LR No 7158/237 - Clifton Villas; (ix) LR No 7158/238 - Clifton Villas; and (x) LR No 1870/111/447 - Shanzu Villas. The plaintiff contends that she is the sole registered proprietor and beneficiary of the first two properties. She adds that the rest of the properties are registered in her name and that of Dr Mahendra Krishnalal Adalja (the deceased) as joint tenants.

2. The 1st defendant is a son to the deceased and disputes the plaintiff's claim of ownership in and or beneficial interest in the said properties. He brought a defence and counter-claim countering the plaintiff's claim and claiming a counter relief against the plaintiff.

3. On 1/2/2018, Obaga J rendered a ruling through which the court preserved and directed appointment of estate managers to manage four of the properties, namely: (i) Horombo Villa No 19; (ii) Jambo Prestige Town House Number 22; (iii) Marble Valley Town House Number 6; and (iv) Clifton Villas (KIII) LR 7158/608, pending the hearing and determination of this suit or probate proceedings relating to the estate of the late Dr Mahendra Krishnal Adalja. Further, Obaga J restrained the plaintiff against interfering with the 1st defendant's quiet possession of Flat No 4A - East Church Road Flats, Westlands Nairobi.

4. On 24/5/2019, the Court of Appeal upheld Judge Obaga's orders and dismissed an appeal lodged by the plaintiff herein challenging the said orders.

5. Prior to the disposal of the said Appeal by the Court of Appeal, the plaintiff brought in this suit a notice of motion dated 30/5/2018 in which she sought the following verbatim orders:

1) That there be a stay of execution of the orders issued on 1st February 2018 pending the hearing and determination of this application.

2) That there be stay of execution of the order issued on 1st February 2018 pending hearing and determination of the High Court Succession Case No 315 of 2018

3) That this matter be transferred to the Family Divisions of the High Court for hearing and or consolidation with High Court Succession Case No 315 of 2018

4) That costs be provided for.

6. The said application is the subject of this ruling. It was supported by the plaintiff's affidavit sworn on 30/5/2018. Her case was that the court gave the above orders despite the fact that there was a will indicating that she was entitled to the suit properties. She contended that it would be fair and just for the Family Division of the High Court to hear and determine the issues relating to the suit properties to avoid conflicting decisions. Lastly, she contended that there was need to suspend the orders made on 1/2/2018 because they were punitive and the 1st defendant had misled the court into issuing them.
7. The 1st defendant opposed the application through grounds of opposition dated 15/11/2018. His case was that the applicant did not deserve audience of the court because she was in contempt of the order of 1/2/2018. Secondly, he argued that the estate of the deceased did not have executors/administrators. Thirdly, he contended that there was no nexus between the issues raised in this suit and the issues raised in High Court Succession Cause Number 315 of 2018. Fourthly, he contended that the immovable properties subject of the order of 1/2/2018 did not form part of the estate of the deceased. Lastly, he contended that the application under consideration was made in bad faith and was intended to avoid implementation of the orders of 1/2/2018.
8. The 2nd, 3rd and 4th respondents filed grounds of opposition dated 1/11/2018. Their case was that the application was inconsistent with the declarations made by the applicant in **Nairobi High Court Succession Cause No 315 of 2018**. They added that the parties herein were agreed that the immovable properties subject matter of the order of 1/2/2018 did not form part of the estate of the deceased. Further, they contended that the deceased's estate did not have administrators/executors. Lastly, they averred that the present application was made for the sole purpose of avoiding implementation of the order of 1/2/2018.
9. Parties further canvassed their respective cases through written submissions.
10. I have considered the application, the responses thereto, the parties' respective submissions, and the relevant constitutional and legal frameworks on the key questions falling for determination in this application. I have also considered the prevailing jurisprudence on the questions falling for determination in the application. Two questions fall for determination. The first question is whether a proper case has been made out for stay of the orders made on 1/2/2018. The second question is whether, in the circumstances of this case, an order of transfer should be made, transferring this suit to the Family Division of the High Court, for hearing and determination alongside **High Court Succession Cause No 315 of 2018** by the said Division of the High Court. I will make brief pronouncements on the two questions sequentially in the above order.
11. The first question is whether a proper case has been made out for stay of the order of 1/2/2018. This application was brought on 30/5/2018. In the same year, the applicant herein filed in the Court of Appeal **Nairobi Civil Appeal Number 52 of 2018**, challenging the orders made by Obaga J on 1/2/2018. The Court of Appeal fully heard the Appeal and rendered itself on the Appeal as follows:
- “All in all, we think the orders that were granted were merited to preserve the disputed properties as well as the income deriving therefrom, until the dispute is determined. We hasten to add that it makes sense to preserve the disputed properties and the income during the trial, so that none of the parties will be prejudiced pending the hearing and determination of the suit, the outcome of this suit notwithstanding. These orders in our view are not injudicious and we therefore find no justifiable reason for interfering with the Judge's direction”***
12. The tenor and import of the Appeal and the Judgment of the Court of Appeal is that prayers 1 and 2 of the present application raise an issue which was canvassed before the Court of Appeal and on which the Court of Appeal rendered itself and made binding findings. This Court cannot in the circumstances purport to review the binding Judgment of the Court of Appeal or craft orders which purport to overturn the Judgment of the Court of Appeal on the issue of stay of the impugned orders. Without saying much, my finding on the first question is that there is no proper basis for an order of stay at this point, given that the issue of stay was disposed by the Court of Appeal.
13. The second question is whether, in the circumstances of this case, an order of transfer of suit should be made, transferring this dispute to the Family Division of the High Court, for hearing and determination alongside **Nairobi High Court Succession Cause No 315 of 2018**. I have looked at the parties' pleadings in the two causes. The dispute in this suit relates to title to (ownership of) ten immovable properties (land and developments thereon). In his counter-claim, the 1st defendant has made parallel claim of title to the properties. The counter-claim is solely directed against the plaintiff. Nairobi High Court Succession Cause No 315 of 2018 on the other hand relates to the administration of the estate of the late Dr Mahendra Krishnalal Adalja (the deceased) who died on 14/1/2016. The applicant herein commenced the Succession Cause by taking out a citation on the ground that the respondents who were named as executors of the will of the deceased had failed to initiate probate proceedings. In response, the respondents herein presented a cross-petition and annexed thereto a different will. At this point, the estate does not have executors/administrators/personal representatives.
14. The broad jurisdiction of this court is spelt out under **Article 162(2) (b)** of the Constitution. That jurisdiction is limited to adjudication of disputes relating to the environment and the use and occupation of, and title to land. A detailed breakdown of this jurisdiction is set out under **Section 13** of the **Environment and Land Court Act**.
15. The respondents are categorical that the suit properties affected by the order made by Obaga J do not form part of the estate of Dr Mahandra Krishnalal Adalja (the deceased). Secondly, the suit herein is not directed at the estate of the deceased. It is directed at the defendants in their individual capacities. Thirdly, the counter-claim by the 1st defendant is not brought by the 1st defendant on behalf of the estate; it is brought by the 1st defendant in his personal capacity, and directed at the plaintiff in her personal capacity.
16. What emerges from the pleadings before court therefore is that, the dispute in this suit is about title to the suit properties, some of which the defendants have pleaded do not form part of the estate of the deceased. In the circumstances, I do not think it would be appropriate to transfer the dispute relating to ownership of the said properties to the Succession Court for adjudication. The proper court to determine disputes relating to title to land is this Court. The net result is that I do not find merit in the plea for transfer of this suit to the Succession Court of the High Court.
17. Lastly, the 1st defendant raised the issue of contempt in relation to the Order of 1/2/2018. In my view, the proper forum for venting this

issue is a formal application. I say so because grounds of opposition do not constitute evidence of contempt. The 1st defendant is at liberty to bring a formal application.

18. In light of the above finding, the plaintiff's application dated 30/5/2018 is rejected.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF JANUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Rebelo for the Respondent

Mr Kioko holding brief for Mr Mutua for the Plaintiff/Applicant

Court Clerk - June Nafula