REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
PROBATE AND ADMINISTRATION CAUSE NO.2572 OF 1996

IN THE MATTER OF THE ESTATE OF : DR. ARVINDER SINGH DHINGRA (DECEASED)

R U L I N G

This Succession Cause has been in the High Court since 1996, a considerably long time. I hope we shall soon see an end to litigation pertaining to it.

I find it necessary to give a brief history of what has transpired so far.

The court records show that the widow of the deceased Jaswinder Dhingra and family accountant, Abjid Singh Chandhry applied for letters of administration, intestate to the deceased's estate. The same was issued to them on 4th February, 1997.

The father of the deceased, Jaswant Singh Dhingra applied to have the Grant of Letters of Administration issued to the 2 petitioners revoked. There is no evidence on record to show that this application was heard. However, the parties appeared before Owuor, J (as she then was) on 2nd April, 1998, when she made the following orders, "After a long discussi on it is hereby ordered: -

1. That the estate be divided between the 2 parents of the deceased and his two daughters in equal shares.

2. That the advocates Mrs. Rawal and Mr. Oyatsi be joint Administrators confirmed Grant be issued in their names.

3. Matter to be m entioned on 29.4.98 for recording further order.

Order accordingly".

The deceased widow Jaswinder Dhingra felt aggrieved by the above orders, and on 16th April, 1998, she filed an application under R49 of the Probate and Administration Rules, seeking the following orders;-

1. "That the order made by this court on its own motion on 2nd April, 1998 as regards distribution of the estate of the deceased be reviewed and or set aside.

2. That the distribution of the estate of the late Dr. Arvind Singh Dhingra be ma de in accordance with the law as provided under Section 35 or Section 38 of the Law of Succession Act, Cap 160 Laws of Kenya.

3. The costs of this application be provided for".

The deceased's widow challenged the orders of Owuor, J (as she then was) through her lawyer Mr.

Oyatsi. She had various grounds which appear in her affidavit dated 15th April, 1996. The widow also filed a Notice of Appeal dated 18th December, 1998, but the appeal was not prosecuted for some time prompting the father of the deceased to move to the Court of appeal to strike out the Notice of appeal.

The Court of Appeal struck out the widow's Notice of Appeal in their Ruling of 16th November, 1999, for the reason that since the appeal was filed on 18.12.98, the respondent widow had neither filed a Record of Appeal, nor applied for extension of time.

In the meantime Owuor, J was elevated to the Court of Appeal. The records show that the advocates nevertheless requested that the matter be referred to the Learned Judge, now Judge of the Court of Appeal. This was done on 9th December, 1998, when the Judge dismissed the widow's application for review for the reason that her counsel was absent in court.

After this, on 25th November, 1999, Mrs. Rawal advocate (as she then was) moved the court under a certificate of urgency, seeking to have a sum of Kshs.3,266,461.70

> "***deposited in Akiba Bank Ltd, being part of the deceased's estate by urgently appropriated to the parents of the deceased according to their share in the estate quantified by the order of the court on 2 nd day of April, 1998".***

There was a second prayer to the effect that,

> "***a full and accurate inventory of the other assets and liability of the deceased be provided and the assets be distributed in accordance with the order of Hon. Lady Justice Owuor made on 2 nd day of April, 1998" and thridly, "That the confirmed grant be issued to the administrator of the estate".***

This application was heard by Mulwa, J who delivered a Ruling on 10th May, 1999. He refused to grant an order to release money to the deceased's parents, as to do so, amounted to execution of the orders of Owuor, J when there was still an application on record challenging those orders.

There is further evidence on the court file to show that Mr. Oyatsi for the widow, made another application to the Court of Appeal. This time it was for extension of time to file and serve a Notice of Appeal and appeal out of time, in "the intended Appeal against the Ruling of the High Court of Kenya at Nairobi (Hon. Justice E. Owuor) dated 9 th December, 1998".

The application was brought under Rule 4 of the Court of Appeal Rules, as is apparent from the Ruling, of A.B. Shah, Judge of Appeal dated 3rd February, 2000 sitting as a single Judge. The Learned Judge,

> ***"allowed the appeal an d ordered that the applicant (widow) do lodge her notice of appeal afresh within the next seven days and that the record of appeal be lodged on or before 10 th March, 2000".***

Indeed Notice of Appeal to the Court of Appeal in this file dated 4th February, 2000.

Despite having filed a fresh Notice of Appeal intending to appeal against the orders of Owuor, J (as she then was) of 2.4.98, the deceased's widow through her counsel still pursued the subsequent orders made by Owuor J.A on 9th December, 1998 dismissing her application for Review, on the ground on non appearance in court.

The widow's Notice of Motion application to this effect is dated 20th April, 2000, but filed in court on 25th April, 2000. Apart from seeking the setting aside and or cancellation of the orders of 9.12.98, the widow also sought the re-instatement of her application for Review of orders of 2.4.98.

This application was heard by Commissioner of Assize Visram (as he then was). He delivered a

Ruling on 6th June, 2000 declaring that

> ***"The order of Owuor, J.A made on 9 th December 1998 (dismissing the widow's application for review) was a nullity as the Judge lacked the jurisdiction to make the orders".***

Commissioner Visram also reinstated the widow's application for Review of the orders of Owuor, J made on 2nd April, 1998, distributing the deceased's estate.

It was the application for Review which eventually came before me for hearing. Mr. Oyatsi still appearing for the deceased's widow argued that the orders of Owuor, J of 2.4.98, effectively distributed the deceased's estate and direct that a confirmed grant be issued in the joint names of the advocates for the parties, yet the orders were NOT BY CONSENT, and

> ***"however well meaning they were, they went beyond jurisdiction, as there was no application before court, praying that the Grant be issued to both advocates"***.

Secondly, Mr. Oyatsi argued that the Succession Act is clear about distribution of a deceased person's estate. He referred to Sections 35 and 38 of the Act which make provisions to the children and the widow respectively, and submitted that the orders of Owuor, J contravened these sections.

Mr. Oyatsi conceded that the deceased had differences with his wife but the two were neither divorced nor separated, and if the court wanted to take the matter of their difference into account, and assume that there was no wife then the whole estate should have devolved on the children as stipulated in Section 38 of the Succession Act.

Mr. Oyatsi made the following submission in conclusion,

> ***"We gave a figure of 25% to the parents and 75% to the children and widow of the deceased. Since there was no consent to distribute, the matter had to be resolved in the normal way. This is why we submit that there is an error of law on the face o f the record. Please review the order of 2.4.98 and set it aside."***

Mr. Ndege appearing for the father of the deceased relied on the replying affidavit dated 22.4.98 and submitted as follows in reply to the submission by Oyatsi.

> ***"The order of 2.4.98 was by consent in that though not stated on the record, it was an order recorded by court in the presence of all parties after a long discussion. There was no objection raised when the order was recorded, that it did represent the discussions before the Judg e…….. The Judge took into consideration the provisions of Sections 26, 27, and 28 of the Succession Act. Even if the order was not made by consent the Judge had a discretion. The Judge took into consideration the age of the parents, children and widow"***.

Mr. Ndege submitted further that this being a discretionary review remedy which the applicant widow is seeking, she has delayed the process for 3 years as she ran to the Court of Appeal. That she does not deserve the remedy in view of the fact that when this same application for review went before Owuor, JA neither the applicant nor her lawyer was present, and this resulted in the application being dismissed with costs on 9th December, 1998. Mr. Ndege challenged the widow's application brought under Rule 49 of the Succession Rules which he said was only an "enabling procedure", but does not provide a right of review.

Another point taken by Mr. Ndege was that the order sought to be revied was by consent. That this being so, the applicant has not shown any prejudice caused by the order of 2.4.98, and finally, he challenged Mr. Oyatsi whom he said was made an administrator of the estate of the deceased by the order of 2.4.98, to show court what steps he has taken towards administration of the estate. That as an

administrator, Mr. Oyatsi owed a duty to the beneficiaries and the court in that respect. In his final address by way of reply to the court, Mr. Oyatsi submitted,

> ***"It is true that the order of 2.4.98 was made after discussions. I submit that the re is a difference between discussions and agreement. Those discussions did not materialize into an agreement. On the contrary, there was a disagreement. Consequently, the duty of the court was to let the matter be heard and be determined in the normal way and not impose an order or agreement on the parties without considering the merits of the pleadings before court"***.

Mr. Oyatsi denied that the widow delayed in filing the application for review. He submitted that the orders were made on 2.4.98, and the present application was filed on 15.4.98.

I have gone through the pleadings and court orders and arguments by both learned counsel in great detail because of their importance. From the above, I consider that the crucial point which I have to address is whether the discussions undertaken before a Judge in the presence of all parties to a suit, or a cause, such as this one, amount to a consent of the orders made by court or not.

It is unfortunate that I do not have the benefit of the discussions which went on before the learned Judge. The parties too do not seem to have disclosed in their affidavits what exactly went on whilst they were in the Judge's chambers. Their lawyers keep referring to "discussions". I will pose here for a minute and consider the fact that what was before court as at that date (2nd April, 1998), was the deceased father"s "chamber summons for Revocation of Grant".

By that time, the deceased's widow and family accountant had already petitioned the court of grant of letters of administration, intestate, to the estate of the deceased. They also filed summons for confirmation of grant. In the affidavit of the deceased father which supported the summons for revocation, he disclosed that he had, together with his wife petitioned for letters of administration to the estate of their deceased, son in Succession Cause No.916 of 1994, and the deceased's estranged widow had filed objections to that petition on 28th September, 1995, and the same had not been heard as it had been marked stood over generally on 8th Feburary, 1996 by Oguk, J

Though I have not read the deceased father's petition filed in Succession Cause No. 916 of 1994, it is quite clear to me from his affidavit that the list of assets and liabilities he gave differs from that given by the deceased's widow in this file.

The deceased's father laments in his affidavit in support of summons for revocation that he does not know the second petition, described as Abjid Singh Chandhry, the "family accountant", and if a Grant of Letters of Administration is issued to him jointly with the deceased's widow, this ***"shall be totally unjustified and unproper ".***

With this kind of averments from the deceased's father who has also petitioned for a Grant to administer the deceased's estate but further and most important without knowing the details of the discussions which went on before the Judge, I am unable to find that the said discussions amounted to a consent by the parties resulting in the orders recorded in court on 2.4.98

. One of the orders recorded as I have already stated was to the effect that,

> ***"That the advocates Mrs. Rawal and Mr. Oyatsi be joint administrators confirmed grant be issued in their joint names".***

This order directed that the 2 advocates be joint administrators yet they have not petitioned for the grant.

An order that a confirmed grant be in the joint names of the 2 advocates who both had not petitioned for a grant therefore went against the Probate and Administration Rules, and for that reason, and relying on Sec.76 of the Succession Act, I proceeed to revoke that Grant where the 2 advocates were appointed

joint administrators with directions that a confirmed grant be issued to them.

Section 76 reads,

"A Grant of Representation whether or not confirmed may at any tim e be revoked or annulled if the court decides either on application by an interested party or of its own motion (a) that the proceedings to obtain grant were defective in substance".

I find the proceedings of 2.4.98 in so far as the appointment of the 2 administrators and direction to confirm grant to have been defective in substance and I have proceeded to revoke that grant of my own motion.

Having, I now have to set aside any orders issued following that Grant. One such order distributing the estate.

I have proceeded to set aside this order because it did not take into account the provisions of Sections 27, 28, 35 and 38 of the Succession Act, on distribution.

Now that I have revoked the grant and set aside the order on distribution, I have to make 3 propositions for the parties and their advocates to consider.

First it came out during submissions of Mr. Oyatsi that "they were offering a percentage of 75% of the estate to the widow and children, and 25% to the deceased's parents. I do not know whether this was acceptable to the deceased parents. On my part, I would suggest that the percentages should be varied to read 65% of the estate to the widow and children, and 35% to the deceased's parents. This is because litigation in this Succession Cause has gone on for long and taken a toll on the deceased's aged parents. There is evidence that the deceased's mother is very sick and needs specialized treatment (operation) overseas. If this first proposition is acceptable to both parties then the Grant of Letters of Administration issued to the widow of the deceased and family accountant should be confirmed after a true and accurate list of assets and liabilities of the estate has been drawn up so that the net intestate value of the estate can be distributed as follows:- 65% to the widow and children of the deceased and 35% to the deceased's parents.

This first proposition would in my view be quick and would bring this dispute to a speedy conclusion, and both parties would get their respective shares of the deceased's estate. The first Succession case filed by the deceased's parents would then have to be withdrawn as the dispute would have been resolved.

If this first proposition is acceptable by both parties then that would be the end of the matter. If, however, it is not acceptable by both parties then I have a second proposition to put forth, and that concerns the two Succession Causes filed on behalf of the deceased's estate.

The second proposition is this, that the parties and their advocates might have to consider consolidating the two files, which have both got applications for Revocation of the Grants issued in both files. Thereafter they have to decide whether to decide how to handle the objections. This proposition would be complicated, long and may not altogether work, but it is upto the parties to decide.

The 3rd proposition as I see it is for the parties to file appeal or appeals from my decision to revoke the grant and set aside the mode of distribution. The parties do not have to accept any of my three propositions.

Dated at Nairobi this 3rd day of May, 2001.

JOYCE ALUOCH

PUISNE JUDGE