



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Prob & Admin Cause 118 of 1989

IN THE MATTER OF THE ESTATE OF HUSSEINBHAI KARIMBHAI

ANJARWALLA

RULING

Husseinbhai Karimbhai Anjarwalla (the deceased) a Shia Muslim of the Dawood Bohra Sect, died on 19.2.1989. He was survived by his wife Mehmuda, one son Salim (Saleem) and two daughters Salma and Tahzin (Tehzeen) who were all adults.

The deceased left a written will appointing the executors of his estate and directing how it shall be distributed. A grant of probate was issued by this court on 10.1.1990 to Mehmuda and Saifuddin Karimbhai Anjarwalla a brother to the deceased and a partner in the law firm of Anjarwalla Abdulhussein & Co Advocates. The third proposed executor filed a Deed of disclaimer before the grant was issued. The grant was confirmed on 23.7.1990. It is common ground that Saifuddin died on 7.4.1995 and that Mehmuda subsequently became the sole lawful executrix of the deceased's will.

The execution of the will had not been completed by the time the second administrator expired on 4.9.95. It has not upto now been completed as there arose serious disagreements between Mehmuda and her son Salim, the advocates who were initially handling the matter of the estate, M/s Anjarwalla Abdulhussein & Co. Advocates, various companies in which the deceased had an interest, and other persons whom Mehmuda believed held the property of the estate but had refused to release it or the details thereof. As a result she could not prepare the accounts of the estate and/or distribute the same effectively. She took out an originating summons against those persons, 16 of them, seeking to force them to release information on property of the estate to enable her to carry out her duties as the executrix. She had appointed a firm of accountants to prepare the estate account but they could not proceed without such information. The originating summons filed was no 1/97.

Preliminary objections were raised by some of the parties on the propriety of proceeding by way of originating summons and for other reasons. The objections were upheld by Ang'awa J in her ruling dated 25.7.97 but she gave leave for "the originating summons to be filed by way of plaint", under Order 36 Rule 10(1) of the Civil Procedure Rules. There are assertions that the matter is still live and pending hearing and determination, and counter-assertions that it is not. That however is not the matter before me and I need not say anything more about it.

What is before me and the subject matter of this ruling is a chamber summons dated 26.6.97 (before the ruling in the originating summons aforesaid), taken out by Salim seeking orders that his mother, Mehmuda, should:

“provide full and detailed accounts including income and expenditure of the estate of the deceased”

and in default that she should be condemned to criminal action. The sections of the law relied on are sections 45, 94, 95 of the Succession Act and Rules 49, 58, 59 and 63 of the Probate and Administration Rules thereunder.

Learned counsel Mr Master appeared for Salim although the application was filed through Rustan Hira, Advocate. In essence it is submitted that Mehmuda as the sole surviving executrix of the estate has the sole possession of all books of accounts of the estate and has control of bank books and all other income. She has nevertheless failed to provide full and final accounts of the estate or to distribute the same to the beneficiaries one of whom is Salim. Mehmuda is also accused of wasting the estate by filing the suit she filed in court and other actions details of which were not given. She does not know, it is alleged, what she wants in filing those suits.

Mehmuda on her part, this time representing herself after apparently losing faith in the various advocates hitherto acting for her, pleaded that she has always been ready to complete the administration of the estate but has met hostility, harassment, trickery and stone-walling from the very people she trusts to assist her in finalizing the affairs of the estate, principally her son Salim. She still has a suit pending seeking from various persons details of the estate’s property in order to complete the accounts and distribution of the property. She referred to various correspondence highlighting the basis for her enquiries in relation to those properties. The application, she says, is therefore unmeritorious, misconceived and sub judice.

I have considered three submissions.

Section 94 and 95 of the Succession Act which are relied on provide:

“94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.”

95(1) Any personal representative who, as regards the estate in respect of which representation has been granted to him –

- (a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subject any such asset to loss or damage; or
- (b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or
- (c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or
- (d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.”

It is not the complaint of the applicant in terms of section 94 that the executrix has neglected to get in any asset forming part of the estate. On the contrary it is his complaint that she is trying too hard to do that and thus taking too long to finalise execution of the will. It is not his complaint that the assets have been misapplied either. It is rather that the executrix has intermeddled in the estate hence the call for her punishment under section 45. But section 45 cannot apply to one who is lawfully allowed to deal with the affairs of the estate. The plain reading of the section makes that clear.

Section 95 provides for offences by personal representatives and imposes a burden on the party alleging

commission of those offence to prove means rea. That is why the various offences are prefixed “willfully” or “knowingly”. The particular offence cited here is under (b). Before that provision can be invoked however, it must be shown that the court has made an order on its own motion or on application of any person interested in the estate for the filing of the accounts. Invoking section 95 without compliance with section 83 would in my view be premature.

In my assessment the application does not lie under the three sections of the Succession Act cited and I would dismiss it with costs.

Having said that however, it is not lost to me that it is the duty of the personal representative of a deceased under section 83 as amended by Act 18/86:

“(g) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(h) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration”

The grant herein was confirmed on 23.7.1990 which is more than 9 years ago. I do not see on record any compliance with these provisions above. In the result I order on my own motion in accordance with section 83(g) that the executrix shall file with the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of the account.

The executrix has a duty under the same section inter alia to get in all free property of the deceased and is at liberty to reasonably exercise those powers in pursuit of such property. Indeed it is an offence under section 95 to willfully or recklessly neglect to get in any asset forming part of the estate. Pursuit of such duty does not however preclude the executrix from filing, accounts as required by law. She has a period of 90 days from the date hereof to comply with the order. The matter will be mentioned on 29.05.2000 to confirm compliance.

Dated at Mombasa this 28th day of February 2000.

P N Waki

Judge