



**In re Estate of Sobhajyachand Popatlal Padamshi Shah alias Sobhasyachand
Popatlal Shah (Deceased) (Succession Cause E1358 of 2022)
[2025] KEHC 1902 (KLR) (Family) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1902 (KLR)

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

FAMILY

SUCCESSION CAUSE E1358 OF 2022

EKO OGOLA, J

FEBRUARY 6, 2025

BETWEEN

JAYSHWIN SOBHAYYACHAND 1ST ADMINISTRATOR

POPATLAL SHAH 2ND ADMINISTRATOR

AND

HIMANSHU JAYANTILAL SHAH 1ST OBJECTOR

JITESH JAYANTILAL SHAH 2ND OBJECTOR

JUDGMENT

1. The deceased died intestate on 17th June 2021. The deceased was survived by his widow, Kantaben Sobhajyachand P. Shah and four children, namely Vaishal Sobhajyachand Shah, Jayshwin Sobhajyachand Popatlal Shah, Kuntesh Shah, and Nimish Shah.
2. The estate of the deceased comprised of the following; property known as LR No. 7158/49 Nairobi, Motor Vehicle Registration Number KAZ 501X, all shares in Bank of Baroda; and all funds held in Prime Bank.
3. Grants of Letters of Administration Intestate were issued on 11th October 2022 to Jayshwin Sobhajyachand Popatlal Shah.
4. The Objectors filed an Affidavit of Protest against Confirmation of Grant dated 23rd December 2022. He deposed that the deceased and the late Jayantilal Popatlal Padamshi Shah were brothers. The objectors are the surviving children of the late Jayantilal. The deceased and Joyantilal as brothers, bought joint shares at the Bank of Baroda sometime in 1999.



5. Joyantil died in March 2005 while the deceased died in June 2021. The issue before this court is that the petitioner claims that since his uncle, the late Jayantil preceded the deceased in death, 50% of the shares in the Bank of Baroda were transmitted to the deceased through the principle of survivorship. Therefore, the deceased estate owns all the shares.
6. On the other hand, the objectors argue that the two brothers bought the shares for the benefit of both families and they held the shares in trust for their beneficiaries. The objectors gave a brief family history. They stated that since 1970, their father, grandfather, and uncles have jointly owned several businesses. According to the objectors, it was an established understanding in the family that all businesses and investments were co-owned for the benefit of the families.
7. The objectors further argued that if there was a right of survivorship, the deceased would have exercised this right after the death of his brother.
8. The objectors submitted that they relied on the principle of equity, specifically on the doctrine of constructive trust. The objectors argued that there was constructive trust and legitimate expectation that the two families should benefit from the shares despite which brother died first.
9. The matter was canvassed by way of submissions. I have read and considered them.

Determination

10. I have considered the Affidavit of protest and the rival submissions. The issue for determination is whether constructive trust can override the principle of survivorship.
11. The principle of survivorship operates to remove jointly owned property from the operation of the Law of Succession upon the death of one of the joint tenants. The principle of survivorship also known as *jus accrescendi* operates as was explained in the case of *Isabel Chelangat vs Samuel Tiro (2012) eKLR*, as follows:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.”
12. On the other hand, constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to a property when one party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his benefit. Therefore, trust is a remedy against unconscionable conduct.
13. The Court of Appeal in the case of *Twalib Hatayan Twalib Hatayan & Anor vs Said Saggat Ahmed Al-Heidy & Others [2015] eKLR*, while dealing with the issue of trust, stated as follows:-

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. (see *Black’s Law Dictionary*) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a



trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment..."

14. In this instant case, the petitioner did not deny the family history as submitted by the objectors. For over 70 years, the entire extended family has jointly owned several businesses for the benefit of the family. Furthermore, the objectors submitted that both brothers contributed to the purchase of the shares. Both families have enjoyed the benefits of the said investments. I agree with the petitioner that all the shares were automatically transmitted to the deceased upon the death of his brother. However, both families continued to enjoy the benefits of the investment.

15. This court is persuaded that it would be unjust that after the death of the original proprietors of the shares, their surviving children opt to change the motion of things. The main role of this court is to ensure that substantial justice is accorded to all the parties in any matter. I find useful guidance in the sentiments of the Court of Appeal in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR. The court stated as follows:

“What is justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive a purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey – vs- Palmer* (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”

16. By virtue of the foregoing, the proprietary rights acquired by the late Jayantilal cannot be taken away by the fact that he preceded the deceased in death and that the principle of survivorship took effect. Justice and good conscience dictate that both families manage the two estates as if the deceased and the late Jayantilal were still alive.

17. From the foregoing, I order that the deceased's estate shall comprise 50% of the shares held in the Bank of Baroda. The remaining 50% shall be part of the estate of Jayantilal Popatlal Padamshi Shah. Costs be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025

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E.K. OGOLA

JUDGE

In the presence of:

Mr. Wasmala for the Petitioner

Mr. Omondi for the Objectors

Gisiele Muthoni Court Assistant

