



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 721 OF 2017**

**SHILPAN PATEL.....PLAINTIFF**

**(suing as the Executor of Nataverbhai Prabhudas Vallabhai Patel)**

**VERSUS**

**DEVIKA SHAILESHKUMAR PATEL.....1<sup>ST</sup> DEFENDANT**

**SHAILESHKUMAR NATAVERBHAI PATEL.....2<sup>ND</sup> DEFENDANT**

**SHANIL VIRAJ PATEL.....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 20<sup>th</sup> January 2020 brought under Order 11 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules 2010; Section 1A, 1B, 3A and Sections 22(a) and 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, and the inherent power of the court.
2. It seeks orders:-
  1. *Spent.*
  2. *The defendants be and are hereby ordered, within 14 days of the date of the order, to produce to the plaintiff for his inspection, the original transfer dated 6<sup>th</sup> June 2011 and registered on 23<sup>rd</sup> June 2014; allegedly executed by Nataverbhai Prabhudas Vallabhai Patel (the deceased), purportedly conveying the suit property to the 1<sup>st</sup> defendant as trustee for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in terms of the notice to produce for inspection attached hereto.*
  3. *In default of compliance with order 2 above, the defence filed by the 1<sup>st</sup> to 3<sup>rd</sup> defendants, and the 4<sup>th</sup> defendant be struck out with costs.*
  4. *Costs of this application be provided for.*
3. The grounds are on the face of the application and set out in paragraphs (1) to (8).
4. The application is supported by the affidavit of Shilpan Patel, the plaintiff/applicant herein sworn on the 11<sup>th</sup> January 2020.
5. The application is opposed. There are grounds of opposition filed on behalf of the 1<sup>st</sup> – 3<sup>rd</sup> defendant/respondents, dated 27<sup>th</sup> November 2020. There are also grounds of opposition filed on behalf of the 4<sup>th</sup> defendant/respondent dated 30<sup>th</sup> November 2020.
6. There is also the Notice of Motion dated 2<sup>nd</sup> December 2020 brought under section 3A and 6 of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.
7. It seeks orders:-

1. *That there be a stay of proceedings/further proceedings in this matter, that is ELC Cause No 721 of 2017 pending the hearing and determination of the Milimani High Court Succession Cause No 3097 of 2014.*

2. *That the costs of this application be provided for.*

8. The grounds are on the face of the application and are set out in paragraphs (3) to (11).

9. The application is supported by the affidavit sworn by Shaileshkumar Nataverbhai Patel, the 2<sup>nd</sup> defendant/applicant herein on the 8<sup>th</sup> December 2020.

10. The application is opposed. There is a replying affidavit sworn by Shilpan Patel the plaintiff/respondent on the 21<sup>st</sup> January 2020.

11. On the 16<sup>th</sup> December 2020 the court directed that these two applications be heard together. It also directed that they be canvassed by way of written submissions.

#### **The Plaintiff's submissions**

12. They are dated 11<sup>th</sup> February 2021. The application before court is for inspection. He has relied in **Mulla's Code of Civil Procedure 18<sup>th</sup> Edition page 2065** which states:-

*".....But how is inspection to be obtained? If A wants to inspect documents in the possession of B which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by B. A must, therefore call upon B to produce the documents".*

13. The plaintiff has called for the defendants to produce the original Transfer for inspection. He has put forward the cases of **Garden Estate Ltd vs Gulbano Hussein Jan Mohamed and Others ELC 466 of 2008**, **Diamond Concrete Co. vs Patel & Another [1969] EA 518**; **NSSF Board of Trustees vs Dr. Sally Kosgei & Another [2005] eKLR**; **Wendy Martin vs Il Ngwese Company Ltd & 2 Others [2005] eKLR**; **Amos Weru Murigu vs British American Tobacco**.

14. It is critical that the transfer document be produced to the plaintiff for inspection. The plaintiff has written letters dated 15<sup>th</sup> May 2019 and 18<sup>th</sup> October 2019 to have the transfer document produced for inspection. The defendants have not responded to these letters. No justifiable reasons have been proffered by the defendants to deny the inspection. He prays that the application be allowed as prayed.

15. As regards the defendant's Notice of Motion of 2<sup>nd</sup> December 2020, the plaintiff submitted that the 1<sup>st</sup> – 3<sup>rd</sup> defendants have not demonstrated that these proceedings are frivolous, vexatious, harassing or manifestly groundless. The plaintiff is the executor of the estate of the deceased and he has no personal interest in this matter. He has put forward the case of **Erastus Ndegwa Wangai & 3 Others vs KLM Royal Dutch Airline & Another [2020] eKLR**. He prays that the application be dismissed with costs.

#### **The 1<sup>st</sup> – 3<sup>rd</sup> Defendants' Submissions**

16. They are dated 17<sup>th</sup> March 2021. As regards the Notice of Motion dated 2<sup>nd</sup> December 2020, the defendants submit that the plaintiff's cause of action in this matter solely depends on the validity of the will and/or validity of the bequest of the suit property in the said will. The 2<sup>nd</sup> defendant has challenged the will in the family court hence the issue of the validity of the will must just be determined. The jurisdiction of this court does not include the determination of validity of wills.

17. They have relied on Section 6 of the Civil Procedure Act. These proceedings sought to be stayed to enable the Family Court to first determine the question of validity of the will aforesaid. They have put forward the case of **Benja Properties Ltd vs Savings and Loans (K) Ltd [2005] eKLR**; **Muturi Investments Ltd vs NBK [2006] eKLR**.

The succession cause was filed in 2014 while the instant suit was filed in 2017, it follows that this suit ought to be stayed to allow the succession cause to be determined first. They have put forward the case of **Nguruman Ltd vs Jan Bonde Nielsen & Another [2017] eKLR**.

18. As regards the plaintiff's Notice of Motion dated 20<sup>th</sup> January 2020, the defendants submit that certified copies of the said Transfer have been filed in court and served upon the plaintiff. They rely on Section 68 of the Evidence Act. They have also put forward the case of **the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (Deceased) [2016] eKLR**. The transaction was handled on behalf of the 1<sup>st</sup> – 3<sup>rd</sup> defendants by Geoffrey Oriaro Advocate, deceased. The fact of the death of the said counsel is not disputed and indeed the plaintiff's counsel is aware of it.

19. The plaintiff has not demonstrated that the said documents are in possession of the 1<sup>st</sup> – 3<sup>rd</sup> defendants which is a requirement for orders of inspection to be issued. They have put forward the case of **NSSF Board of Trustees vs Dr. Sally Kosgei & Another [2005] eKLR**.

They pray that the Notice of Motion dated 2<sup>nd</sup> December 2020 be allowed and the one dated 20<sup>th</sup> January 2020 be dismissed with costs.

20. I have considered the two applications and the affidavits in support. I have also considered the grounds of opposition and the affidavits in response, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

- (i) *Whether the Notice of Motion dated 20<sup>th</sup> January 2020 is merited.*
- (ii) *Whether the Notice of Motion dated 2<sup>nd</sup> December 2020 is merited.*
- (iii) *Who should bear costs of the applications?*

21. The Notice of Motion dated 20<sup>th</sup> January 2020 seeks that the original transfer dated 6<sup>th</sup> June 2011 and registered on 23<sup>rd</sup> June 2014 be availed for inspection.

Section 22(a) of the Civil Procedure Act provides that:-

***“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—***

***“(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;”***

Order 11 rule 3(2) (d) provides that:-

***“order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case”.***

22. I have gone through the supporting affidavit of Shilpan Patel, the plaintiff herein, sworn on the 11<sup>th</sup> January 2020. He has annexed three letters dated 15<sup>th</sup> May 2019, 15<sup>th</sup> May 2019 and 18<sup>th</sup> October 2019. The letters are addressed to M/S Julius Juma Advocates for the 1<sup>st</sup> – 3<sup>rd</sup> defendants by the firm of Hamilton Harrison & Mathews for the plaintiff. In the said letters, the plaintiff seeks to be furnished with the original transfer for inspection. It appears there was no response from the 1<sup>st</sup> – 3<sup>rd</sup> defendants’ counsel, hence the plaintiff filed a notice to produce dated 22<sup>nd</sup> October 2019. It is the plaintiff’s case that the same has not been acted upon hence this application.

23. I have gone through the 1<sup>st</sup> – 3<sup>rd</sup> defendants’ statement of defence dated 25<sup>th</sup> January 2018. In paragraph 15 (XVI) the defendants state:-

***“That on 18<sup>th</sup> April 2011 the deceased executed two instruments of transfer of the suit property with one instrument of transfer conveying the property from Mr. Sahota to himself while the other conveyed the suit property from himself to the 1<sup>st</sup> defendant as trustee for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein”.***

24. It is clear that this instrument is very crucial in these proceedings. The plaintiff is within his right to seek that it be availed for inspection. In the case of **Garden Estate Ltd vs Gulbano Hussein Jan Mohamed and Others [2010] eKLR** cited by the plaintiff, Onyancha J (as he then was) held as follows:-

***“In the case before me, the plaintiff’s claim is based on the title documents the defendants/applicants want to inspect. The plaintiff had pleaded them and in fact annexed photocopies thereof to the affidavit of Robert Otachi who deposed the same on behalf of the plaintiff. The applicant/defendant served the required notice for inspection...and the plaintiff does not deny this..The plaintiffs do not even say that the documents in question are not relevant. They do not even answer the defendant’s serious allegations that the documents are forgeries or that they have been selectively altered or unlawfully varied or modified... I have come to the conclusion, and it is my finding that the plaintiffs have no good or sufficient reason for not availing the documents required for inspection by the defendants. It will be fair and just that the plaintiff avails the documents for inspection without further delay”.***

25. Also in the case of **NSSF Board of Trustees vs Dr. Sally Kosgei & Another [2005] eKLR** Azangalala J held as follows:-

***“Before inspection can be ordered of any document the applicant must establish the following:-***

1. *That he served a valid notice under rule 15 of order 10 of the Civil Procedure Rules.*
2. *That the party served has omitted to give notice of time for inspection or has objected to give inspection as provided in order X rule 16 and 17(1).*
3. *By affidavit that he is entitled to inspect the document.*
4. *By affidavit that the document is in the possession or power of the other party”*

I find that the plaintiff has demonstrated the need to inspect the said document.

26. The defendants submit that they do not have in their possession the said transfer hence they cannot avail it. They have not denied that they got the letters requesting for the same from the plaintiff's counsel which they offered no response. There is nothing to demonstrate that they are not in possession of the said transfer. None of the defendants have sworn an affidavit to confirm that the said document is not in their possession.

27. I find that the defendants have not tendered any justifiable reason to deny the said application. I find merit in this application and the same is allowed.

28. The defendants' Notice of Motion dated 2<sup>nd</sup> December 2020 seeks stay of these proceedings. I have gone through the supporting affidavit of Shajleshkumar Nataverbhai Patel the 2<sup>nd</sup> defendant herein sworn on the 8<sup>th</sup> December 2020. He has attached summons for revocation of grant of probate in High Court Succession Cause No 3097 of 2014. The same is dated 20<sup>th</sup> January 2018. He has not sworn an affidavit to explain what steps he has taken to prosecute the said application. The instant suit was filed in 2017. The 1<sup>st</sup> defendant has all along participated in the proceedings herein.

29. I find that this application is coming too late in the day. It has been brought with the intention of further delaying the expeditious hearing of this matter. According to **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 37 page 330 and 332 at Paragraph 442 and 443** relied on by the plaintiff, it states:-

*“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly and only in exceptional cases.....it will be exercised where the proceedings are shown to be frivolous vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not or probably would not, succeed but that he could not possibly succeed on the basis of the pleadings and the fact of the case.*

The defendants have not demonstrated what prejudice they will suffer if these orders are not granted.

30. In conclusion, I find that the plaintiff will be greatly prejudiced if these proceedings are stayed as he will have to wait for a long time for the issues herein to be determined. I find no merit in this application and the same is dismissed with costs.

31. The plaintiff's Notice of Motion dated 20<sup>th</sup> January 2020 is allowed in the following terms:-

*(a) That the defendants do produce to the plaintiff for inspection the original Transfer dated 6<sup>th</sup> June 2011 and registered on 23<sup>rd</sup> June 2014 allegedly executed by Nataverbhai Prabihudas Vaillabhai Patel (the deceased) conveying the suit property to the 1<sup>st</sup> defendant as trustee for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants within twenty eight (28) days from the date of this ruling. In default, the defences by the 1<sup>st</sup> – 3<sup>rd</sup> defendants and the 4<sup>th</sup> defendants shall stand struck out with costs.*

*(b) That costs of this application be in the cause.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 17<sup>th</sup> day of June 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Mwihuri for the Plaintiff

No appearance for the Defendants

Phyllis – Court Assistant