



**In re Estate of Abdulkarim Chatur Popat also Known as Abdulkarim Chaturbhai (Deceased)
(Succession Cause 346 of 2013) [2024] KEHC 1246 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 346 OF 2013**

G MUTAI, J

FEBRUARY 9, 2024

**IN THE MATTER OF THE ESTATE OF ABDULKARIM CHATUR
POPAT ALSO KNOWN AS ABDULKARIM CHATURBHAI (DECEASED)**

BETWEEN

**AZIM ABDULKARIM CHATUR POPAT 1ST APPLICANT
GULZAR ABDULKARIM CHATUR POPAT 2ND APPLICANT
KARIM SAIFUDDIN ANJARWALLA 3RD APPLICANT**

AND

**AZIM ABDULKARIM CHATUR POPAT 1ST PROTESTOR
JAMEEL AZIM ABDULKARIM CHATUR POPAT 2ND PROTESTOR**

AND

ALNASHIR ABDULKARIM CHATUR POPAT BENEFICIARY

RULING

1. The deceased left behind a Written Will dated 15th May 2008. In the said Will he appointed Adil Abdulkarim Chatur Popat, Gulzar Abdulkarim Chatur Popat and Karim Anjarwalla the executors and trustees thereof.
2. The Petition for Grant of Probate of the Written Will of the deceased was filed in this Court on 1st October 2013. The Grant was issued on 29th January 2014. The Executors thereafter filed a summons for confirmation of Grant of Probate of the Written Will of the deceased dated 22nd October 2014. This is the Summons that is presently before me.
3. On 3rd July 2023, a consent entered into by Alnashir Popat and Mrs. Gulzar Abdulkarim Chatur Popat was adopted by this Court. As Azim Abdulkarim Chatur Popat objected to the consent being adopted



by this Court, his Counsel was directed to file an objection and to serve the other parties. Summons for Confirmation of Grant was fixed for hearing on 17th July 2023. On this latter day, the said Summons weren't heard. Directions agreed to by the parties were, however, recorded. *Vide* the said directions, timelines within which further affidavits by Azim and his son Jameel were to be filed, as well as of the responses thereto, was agreed upon.

4. *Vide* a Notice of Preliminary/Objection/Grounds of Opposition dated 12th July 2023 and an affidavit sworn on 14th July 2023 in Vancouver, British Columbia, Azim objected to the Confirmation of Grant until there was, *inter alia* production to this honourable Court of a full and accurate inventory of assets and liabilities of the deceased and full and accurate accounts of all dealings, up to the date of account.
5. Jameel Popat, the son of the 4th Co-Executor, filed a Notice of Preliminary Objection Grounds of Opposition dated 24th July 2023, *Vide* which he averred that following the judgment of the Court of Appeal of 22nd October 2021, the testamentary freedom of the deceased was no longer intact. He objected to the production of the affidavit sworn by his father 9 years previously on the ground that it was made under duress. He also objected to the consent entered into by Gulzar and Alnashir on the ground that it was in violation of section 55(1) of the *Law of Succession Act*. He further objected to the consent on the ground that a section or class of beneficiaries of a will could not, to the exclusion of other beneficiaries, deal with or re-order bequests made by the deceased in his will. Lastly, the consent was founded on a Settlement Agreement dated 26th May 2023 “which is not available for review by either Court or other beneficiaries.
6. Alnashir filed a replying affidavit on 7th August, 2023 opposing the protest.
7. Adil Abdulkarim Chatur Popat filed a Replying Affidavit sworn on 9th August 2023, *Vide* which he opposed the protest filed by Azim and his son Jameel on the grounds that the objection was misguided. He deposed that the Court of Appeal did not dismiss the summons for Confirmation of Grant dated 22nd October 2014, nor did it declare the Written Will of the deceased herein to be invalid. Adil deposed that the issue of the quantum of Alnashir's reasonable provision was determined by consent between Alnashir and his mother, Gulzar; that being the case, inventory was moot. Azim could not plead on behalf of Alnashir Regarding the distribution of capital assets. In any event, assets would only be distributed once the grant of probate of the written will of the deceased was confirmed.
8. Adil further deposed that Azim swore the affidavit in support of the Summons for Confirmation of Grant and cannot now be heard in opposition to it.
9. Azim swore a Supplementary Affidavit on 13th September 2023, responding to the Replying Affidavits and reiterating his previous averments.
10. The summons for Confirmation of Grant was heard on 24th November, 2023. The following beneficiaries were present: Alnashir Abdulkarim Popat, Rahim Alnashir Popat, Adil Abdulkarim Chatur Popat, Gulzar Abdulkarim Chatur Popat, Alykhan Adil Popat, Alyssa Adil Popat & Alyana Adil Popat. Noorbegum Sadruddin Hasham couldn't attend Court as she was in India for treatment. The beneficiaries present expressed their consent to the confirmation of the grant.
11. On 19th December 2023, submissions in respect of the summons for Confirmation of Grant were made. There was no appearance on the part of Azim and his advocate.
12. Mr Mohamed Karega learned counsel for the 1st, 2nd and 3rd Co-Executors/Applicants submitted that the Will of the deceased was not contested; the grant issued on 29th January 2014 had never been set aside. There was no application for reasonable provision pending. There is a consent between



- Gulzar and Alnashir which hadn't been set aside. He submitted that all the beneficiaries are in agreement that the grant ought to be confirmed. He urged the Court to confirm the grant.
13. Njoroge Regeru, SC, lead counsel for Alnashir, referred to the Written Submissions of 22nd September 2023, and the bundle of authorities. He submitted that all interlocutory applications had been dealt with and that all that remained was the confirmation of Grant.
 14. Mr. Regeru, SC, identified four issues as coming for determination, to wit, whether the Summons were properly before Court. He submitted that the summons were still live as they had not been disposed of. He, therefore, submitted that the Court wasn't functus officio. The second issue was whether the consent was entered into legitimately. Mr. Regeru submitted that the only reason the inventory was required was so as to determine the quantum of Alnashir's reasonable provision. Consent entered into by Gulzar and Alnashir made the issue moot. He submitted that the consent did not offend section 55(1) of the Law of Succession Act prohibiting the distribution of capital assets as the consent was expressly subject to the confirmation of grant.
 15. The 3rd issue was whether this Court has jurisdiction over offshore wealth. Mr. Regeru submitted that this Court has no jurisdiction.
 16. The 4th issue that he identified was whether this Court should confirm the grant. His answer was in the affirmative.
 17. To determine the protest and the summons for Confirmation of Grant, this Court is, in my view, called upon to consider and determine the following issues:-
 1. Whether the Summons dated 22nd October 2014 were properly before this Court;
 2. Whether full and accurate inventory of the assets were required before the summons dated 22nd October 2014 could be considered.
 3. Whether the Court has jurisdiction to determine questions regarding offshore wealth;
 4. Whether the consent entered into by Alnashir and Gulzar offends section 55(1) of the Law of Succession Act;
 5. Whether the protests have merit; and
 6. Whether the summons dated 22nd October 2014 should be allowed.
 18. The protestors aver that the High Court order allowing the summons for Confirmation of Grant dated 22nd October 2014 was set aside by the Court of Appeal on grounds, among others, that the same had been obtained by concealment of material information pertaining to the deceased's estate. This Court was referred to the orders that the Court of Appeal made that:-

“ ... the order allowing the summons for Confirmation of Grant dated 22nd October 2014 is set aside...

 - iv. In order for the Court to make a full and fair assessment of the provision due to the Appellant, we order that a full and accurate, current inventory and valuation report of the deceased's estate be filed with the High Court within 30 days from the date hereof;



- v. The matter is hereby remitted to the High Court Family Division at Mombasa for compliance with the above orders before any other judge with jurisdiction except M. Thande J”

19. Did the Court of Appeal dismiss or strike out the summons dated 22nd October 2014? My view is that it didn't. What the Court did was to set aside the order allowing the said summons. The logical effect of the said decision was that the summons was remitted back to this Court for reconsideration subject to the Court of Appeal's finding on the provision of accounts, current inventory, and a valuation report.
20. The Court of Appeal was clear that “the matter is hereby remitted to the High Court Family Division for Compliance with the above orders...”
- That being the case, the summons dated 22nd October 2014 are rightly before this Court.
21. This Court appreciates the doctrine of *functus officio*. The doctrine, however, does not apply in this case.
22. The decision in the Court of Appeal arose out of an appeal filed by Alnashir against the executors of the estate. The decision made by the Court of Appeal related to the issues raised by Alnashir and consequently determined his claim. The said decision was in personam and related to, and determined, his rights qua the estate. The Court of Appeal ordered that the quantum of reasonable provision available to him could only be determined if valuation and accounting was done.
23. In personam judgment affects only the parties that participated in litigation. I am guided in this by the decision of the Court in *Abubakar G Mohamed v Independent Electoral & Boundaries Commission* [2017]eKLR, where the Court stated as follows:-
- “the general rule is that orders which are personal in nature, or orders in personam, in legal parlance, do not effect third parties to the cause.”
24. Being an in personam order, it was open for Alnashir and Gulzar to enter into an agreement or consent regarding their respective entitlements to the estate. Upon the said consent being entered into and on its adoption by the Court, the issue of accounts and inventory became moot.
25. It is apparent that foreign-based assets are subject to documents that stipulate both the applicable law and the forum of dispute resolution.
26. I have not seen anything in the documents supplied by the protestors that would justify departure from the general rule that courts ought to uphold contractual jurisdiction clauses. That being the case, this Court, in my view, does not have jurisdiction over offshore wealth.
27. The settlement Agreement is clear that it is subject to the due confirmation of Grant. In light of this, I am not convinced that the consent entered into by Alnashir and Gulzar offends section 55 of the *Law of Succession Act*.
28. The grounds raised in the protests have been extensively litigated. I find and hold that protests have no merit. The same are dismissed with no orders as to costs.
29. All the beneficiaries, save for the protestors supported the confirmation of grant. Having dismissed the protests, this Court has no reason not to confirm the grant.
30. The upshot of the foregoing is that the summons for Confirmation of Grant dated 22nd October 2014 is hereby allowed. The grant issued on 29th January 2014 is, subject to the consent between Alnashir and Gulzar, adopted by this Court on 3rd July 2023, confirmed.



31. The Executors are hereby directed to complete the administration of the estate within 6 months from the date hereof in compliance with section 83 of the Law of Succession Act and to produce to this court a full and accurate account of the completed administration.

Orders accordingly.

DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

.....

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Mohamed Karega for the 1st, 2nd and 3rd Co-Executors/Applicants;

Mr. Njoroge Regeru & Ms. Amuka for Alnashir Popat; and

Ms. Akinyi holding brief for Mr. Macharia for Azim Popat and Jameel Popat.

