



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 200 OF 2008

DIPA PULLING.....PLAINTIFF

VERSUS

SUCHAN INVESTMENTS LIMITED.....1ST DEFENDANT

SANDEEP RAJNI DESAI.....2ND DEFENDANT

NIRANJAN JASHBHAI DESAI.....3RD DEFENDANT

KEVIT SUBASH DESAI.....4TH DEFENDANT

RULING

Background:

This suit relates to all that parcel of land known as Land Reference No. 209/1916/6 (Original No. 209/1916/1/1) (hereinafter referred to as “the suit property”). The suit has been heard and determined. In a judgment delivered on 21st November, 2019, the court made the following orders;

- 1. I declare that Land Reference No. 209/1916/6 (“the suit property”) is owned by the plaintiff, the 1st defendant and the 2nd defendant as tenants in common in undivided shares of ½ for the 1st defendant and ¼ each for the plaintiff and the 2nd defendant.**
- 2. The plaintiff and the 1st and 2nd defendants shall discuss and agree on how to partition and allocate the suit property amongst themselves in accordance with their respective shares in the property within 90 days from the date hereof.**
- 3. In the event that the plaintiff and the 1st and 2nd defendants fail to agree on the partitioning of the suit property within 90 days given in the preceding order, a registered valuer agreed upon by the plaintiff and the 1st and 2nd defendants and failing agreement, a registered valuer appointed by the Chairman of the Institution of Surveyors of Kenya at the instance of any of the parties with notice to the other parties shall carry out a valuation of the suit property for the purposes of ascertaining its current market value and a reserve price in the event of a forced sale.**
- 4. The valuation costs shall in any event be shared between the plaintiff and the 1st and 2nd defendants in the ratio of the shares held by each in the suit property.**
- 5. Following such valuation, the suit property shall be sold by public auction or, by private treaty if agreed upon by the parties, subject to a reserve price fixed by the valuer as aforesaid and the proceeds thereof shall be shared between the plaintiff and the 1st and 2nd defendants in accordance with their shares in the property less auction or sale expenses if any.**
- 6. In case of an auction sale, the Deputy Registrar shall on application by either party with notice to the other parties appoint a licensed auctioneer to conduct the auction and the proceeds of sale shall be deposited in court for distribution to the parties in accordance with their shares in the property less auction expenses as aforesaid.**
- 7. The parties shall co-operate fully with each other in the sale of the suit property should it become necessary and shall make available, all documents in their possession which may be necessary to complete the sale.**

8. In the event that any of the parties fail to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document or instrument that may be necessary to facilitate the sale of the suit property and the distribution of the proceeds thereof in accordance with the orders made herein.

9. The plaintiff, the 1st defendant and the 2nd defendant or any of them shall be at liberty to purchase the suit property by private treaty if they all agree to such sale, and to bid at the auction sale.

10. Pending the partitioning or sale of the suit property as aforesaid, an injunction is issued restraining the 1st defendant subject to order number 11 below from destroying and/or demolishing the structures or buildings on the suit property without the consent of the plaintiff and the 2nd defendant.

11. In the event that the parties are unable to either partition or sell the suit property for whatever reason not attributable to any of the parties, the plaintiff and the 1st and 2nd defendants shall continue to hold the suit property as tenants in common in undivided shares and shall continue to occupy the property jointly in the same manner in which the property is occupied as of the date hereof and each party shall be at liberty to use and develop the portion in his possession until such a time that such partitioning or sale becomes possible.

12. The 1st defendant shall pay to the 2nd defendant a sum of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) as general damages for trespass.

13. Either party shall be at liberty to apply to court but limited only to procedural issues or matters arising from the foregoing orders.

14. Due to the nature of the dispute before the court, each party shall bear its own costs of the suit and the counter-claims.

From the record, this suit was filed by the plaintiff on 29th April, 2008 through the firm of Ransley, Mc Vicker & Shaw Advocates. The plaintiff is now deceased. Through a Notice of Change of Advocates dated 19th February, 2020 filed in court on 25th September, 2020, the plaintiff's legal representatives appointed the firm of Walker Kontos Advocates to act for the estate of the plaintiff in the suit in place of the firm of Ransley, Mc Vicker & Shaw Advocates.

The application before the court:

The application before the court has been brought by Ms. Virginia Wangui Shaw Advocate (hereinafter referred to only as "the applicant") through a Notice of Motion dated 8th April, 2021. The applicant has sought the following reliefs;

1. A charging order charging the plaintiff's share in L.R No. 209/1916/6 (Original No. 209/1916/1/1) (the suit property) to secure taxed costs of Kshs. 22,157,963.45/- pending the settlement of legal fees owed by the plaintiff to the applicant in this suit, and in JR No. 129 of 2009 and Civil Appeal No. 46 of 2012.
2. An injunction restraining the plaintiff's legal representatives from dealing with the plaintiff's share in the suit property in a manner likely to defeat the charging order pending the final settlement of the fees owed to the Applicant.
3. The costs of the application.

The application has been brought on the grounds that the applicant acted for the plaintiff in this suit from 2008 and that fees for services rendered is due to the applicant and has not been paid. The applicant has averred that the applicant also acted for the plaintiff in JR No. 129 of 2009 and Civil Appeal No. 46 of 2012 which concerned the suit property in which matters the applicant's outstanding fees amounts to Kshs. 22,157,963.45/-. The applicant has averred that she was instrumental in securing the plaintiff's share in the suit property. The applicant has averred that the plaintiff's share in the suit property is the only known asset of the plaintiff who until her demise was residing in the United Kingdom. The applicant has averred that she is entitled to a charge over the plaintiff's share in the suit property as a lien for the fees owed to it by the plaintiff.

The application is supported by the affidavit of the applicant, V. Wangui Shaw sworn on 8th April, 2021. In the affidavit, the applicant has stated that she is an advocate of the High Court trading as Virginia Shaw & Company Advocates. She has stated that she had personal conduct of this suit on behalf of the plaintiff from 2008 while she was a partner in the firm of Ransley, Mc Vicker & Shaw Advocates. She has stated that she is the surviving partner in the firm of Ransley, Mc Vicker & Shaw Advocates. She has stated that in addition to representing the plaintiff in this suit she also acted for the plaintiff in related matters namely, JR No. 129 of 2009 and Civil Appeal No. 46 of 2012 in which party/party bills of cost were taxed at Kshs. 13,487,046/- and Kshs. 5,447,463/- respectively. The applicant has stated further that the advocate/client bill of costs in JR No. 129 of 2009 was taxed at Kshs. 17,400,000/- while the applicant's advocate/client bill of costs in this suit was taxed at Kshs. 4,757,963.45/-. She has stated that the advocate/client bill of costs in Civil Appeal No. 46 of 2012 is yet to be taxed. She has stated further that the total amount owed by the plaintiff's estate to her is Kshs. 22,157,963.45/-. The applicant has stated further that on 6th July, 2020, the parties to this suit intimated to the court that they were at an advanced stage of selling the suit property by private treaty pursuant to the orders of the court made in the judgment of 21st November, 2019. She has stated that if the suit property is sold, the share of the plaintiff in the proceeds of sale would be given to the beneficiaries of her estate who reside in the United Kingdom. She has stated that she has a legitimate interest in the plaintiff's share in the suit property which should be protected by the court through the orders sought. She has annexed to her affidavit certificates of taxation of the bills of cost for the services rendered in JR No. 129 of 2009 and in the present suit.

Opposition to the application:

The application is opposed by the legal representatives of the plaintiff's estate through a replying affidavit sworn by the administratrix of the plaintiff's estate, Minar Katherine Holroyd on 2nd June, 2021. The said administratrix of the estate of the plaintiff (hereinafter referred to only as "the plaintiff" for ease of reference) objected to the application on various grounds. The plaintiff has contended that there was an agreement between the firm of Ransley, Mc Vicker & Shaw Advocates (hereinafter referred to as "the firm") that the firm would be paid by the 2nd defendant for the services rendered to the plaintiff in this matter. The plaintiff has contended that in view of that agreement, the taxed costs of Kshs. 4,757,963.45 due to the said firm herein is not payable by the plaintiff. The plaintiff has contended further that the applicant's application is premature in that the taxation of the applicant's bills of cost which have been taxed have been challenged by the plaintiff through references filed in this court. The plaintiff has contended further that the taxing officer declined on 2nd March, 2021 to tax the applicant's bill of costs in relation to the services that were rendered in Civil Appeal No. 46 of 2012. The plaintiff has contended further that the applicant can only maintain the present application after taxation of all her bills of cost. The plaintiff has contended further that save for the costs for the services rendered in this suit, the costs for the services rendered in other suits are outside the ambit of the orders sought by the applicant.

The plaintiff has contended further that the application is misconceived in that the legal representatives of the plaintiff's estate have not been given adequate time upon their appointment to be able to ascertain the full extent of the deceased's estate an exercise which they are supposed to undertake within a period of 6 months. The plaintiff has contended that given time, the plaintiff is likely to find more evidence disputing the plaintiff's liability for the costs claimed by the applicant. The plaintiff has contended further that the applicant has not served the plaintiff with the certificates of cost which are the basis of her application. The plaintiff has averred that the plaintiff has intention of settling all verified debts of the plaintiff's estate to the extent of the estate. The plaintiff has averred that the sum of Kshs. 22, 157,963.45/- claimed by the applicant is yet to be verified since there are references pending.

The plaintiff has contended further that the application is a gross abuse of the process of the court in that the applicant has been clogging the court with multiple frivolous and untimely applications. The plaintiff has contended that prayer 4 of the application if granted would undermine the judgment of this court delivered on 21st November, 2019 in that it seeks to prevent the plaintiff from selling the plaintiff's share in the suit property.

The plaintiff has contended further that the application is incompetent. The plaintiff has contended that the application has been filed in contravention of section 52 of the Advocates Act, Chapter 16 Laws of Kenya. The plaintiff has contended that the applicant, Virginia Wangui Shaw Advocate is trying to benefit from the services rendered by the firm of Ransley, Mc Vicker & Shaw Advocates (the firm). The plaintiff has contended that the firm of Virginia Shaw & Co. Advocates was established in 2016 several years after the institution of this suit and as such the firm was never instructed to act for the plaintiff in the suit. The plaintiff has averred that there was no retainer between the applicant and the plaintiff. The plaintiff has averred that the applicant did not file a notice of change of advocates from Ransley, Mc Vicker & Shaw Advocates (the firm) to signify that the applicant had taken over the conduct of this suit on behalf of the plaintiff. The plaintiff has contended that the plaintiff never issued instructions to Virginia Wangui Shaw Advocate in her personal capacity to act for the plaintiff in this matter. The plaintiff has contended that the plaintiff at all material times issued instructions to the firm. The plaintiff has contended that Virginia Wangui Shaw Advocate has irregularly and unlawfully decided to sideline the estates of the other partners in the firm in these proceedings so as to confer a personal benefit on herself. The plaintiff has contended that the bills for the services rendered herein should have been raised and taxed by the firm and not Virginia Shaw & Co. Advocates. The plaintiff has contended that the application is not properly before the court. The plaintiff has contended that the orders sought cannot be granted prior to the determination of the reference that has been filed against the taxation of the bill of costs for the services rendered in JR No. 129 of 2009 and the joinder of the estates of the other partners in the firm to the present application. The plaintiff has contended that the applicant will not suffer any prejudice if she waits for the determination of the pending references.

Determination:

The application was heard on 3rd June, 2021 when Ms. Shaw who is the applicant appeared in person while Ms. Omamo appeared for the plaintiff/respondent. In their submissions, counsels reiterated the contents of the affidavits in support of and in opposition to the application that I have highlighted above at length. It is not necessary to repeat the same here. I have considered the application and the response thereto by the plaintiff. I have also considered the submissions by the advocates for both parties. The following is my view on the matter.

The application was brought principally under section 52 of the Advocates Act, Chapter 16 Laws of Kenya which provides as follows:

52. Charging orders

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice, be void as against the advocate:

Provided that no order shall be made if the right to recover the costs is barred by limitation.

It is not in dispute that the plaintiff instructed the firm of Ransley, Mc Vicker & Shaw Advocates (the firm) to act for her in this suit. It is also not in dispute that Virginia Wangui Shaw advocate (the applicant) was a partner in the firm. The applicant has claimed and it has not been controverted by the plaintiff that the applicant is the sole surviving partner in the firm. It is also not disputed that the applicant prosecuted this suit on behalf of the plaintiff up to its determination on 21st November, 2019. The applicant filed a bill of costs for the services rendered to the plaintiff herein in ELC Misc. Case No. 50 of 2020. The said bill of costs was taxed on 29th September, 2020 at Kshs. 4,757,963.45. There

is a reference pending in respect of that taxation. The taxation has however not been stayed, reviewed or set aside and as such the said amount is payable to the applicant. It is not disputed that the plaintiff's interest in the suit property was preserved through the instrumentality of the applicant through the firm. I am satisfied that the applicant has made out a case for the charging order sought against the plaintiff's share in the suit property to secure her taxed costs for the services rendered to the plaintiff.

The charge will however be limited to the costs for the services rendered herein only. I am not in agreement with the applicant that she is entitled to a charge also in respect of the services rendered in JR No. 129 of 2009 and Civil Appeal No. 46 of 2012. Section 52 of the Advocates Act is clear that a charge can only be ordered "*on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter.*" On this issue, I am in agreement with the plaintiff that orders for charges to secure costs for the services rendered in JR No. 129 of 2009 and Civil Appeal No. 46 of 2012 can only be made in those cases. Since this court is not seized of those matters, it is not able to determine whether the suit property was recovered or preserved in those suits through the instrumentality of the applicant herein.

I will also not venture into the issue as to whether or not the applicant had been instructed to act for the plaintiff in this matter in her personal capacity or whether the applicant can claim the fees due to the firm in her personal name. That is an issue that will be determined in the reference that the plaintiff has filed against the taxation in ELC Misc. Case No. 50 of 2020. I do not wish to prejudice the reference or to embarrass the court that will be seized of the matter. As things stand at the moment, the taxing officer has taxed and certified that costs are due to the applicant from the plaintiff. If I was to hold otherwise, I will be sitting on an appeal against the decision of the taxing officer which appeal is not before me for consideration.

Due to the foregoing, I am inclined to grant the orders sought but limited for the purposes only of securing the applicant's taxed costs for the services rendered herein. In the interest of justice, I will also stay any adverse action under the charge pending the determination of the reference that the plaintiff has preferred against the taxation in ELC Misc. Case No. 50 of 2020.

Conclusion:

In conclusion, I hereby make the following orders:

1. The share of the deceased plaintiff, Dipa Pulling in all that parcel of land known as L.R No. 209/1916/6 (the suit property) and in the proceeds of sale thereof should the property be sold is hereby charged in favour of Virginia Wangui Shaw advocate t/a Virginia Shaw & Company Advocates to secure a sum of Kshs. 4,757,963.45 being her taxed costs.
2. The applicant shall not enforce the charge for a period of 180 days from the date hereof or until the reference that the legal representatives of the plaintiff have filed against the taxation in ELC Misc. Case No. 50 of 2020 is heard and determined whichever is earlier.
3. The orders granted in 1 and 2 above shall not stop the sale of the suit property pursuant to the judgment delivered herein on 21st November, 2019 save that in the event that the suit property is sold, a sum of Kshs. 4,757,963.45 secured by the charge shall be deducted from the share of the sale proceeds due to the estate of the plaintiff and the same shall be deposited in court pending further orders on the disposal thereof.
4. An injunction is issued restraining the legal representatives of the plaintiff from dealing with the plaintiff's share in the suit property or in the proceeds of sale of the suit property in a manner likely to defeat the charging order herein.
5. The charging order shall stand discharged or set aside if the estate of the plaintiff settles the said costs of Kshs. 4,757,963.45 due to the applicant or such costs as may be determined in the reference filed by the estate of the plaintiff provided that the applicant would have exhausted her right of appeal or would not wish to appeal such determination.
6. Either party shall have liberty to apply limited only to the issues relating to the enforcement of the charge and the effect of the pending reference on the charge.
7. Each party shall bear its own costs.

DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

RULING DELIVERED IN OPEN COURT IN THE PRESENCE OF:

MS. OMAMO FOR THE PLAINTIFF

MR. KAMAU FOR THE 1ST DEFENDANT

MR. LESHAN FOR THE 2ND DEFENDANT

N/A FOR THE 3RD AND 4TH DEFENDANT

C. NYOKABI - COURT ASSISTANT