



Malde (Suing as Executor of the Will of Lalitaben Kantilal Shah - Deceased) v Spire Bank Limited (Successor in Title to the Southern Credit Banking Corporation Limited) (Civil Case 278 of 2017) [2023] KEHC 23655 (KLR) (Commercial and Tax) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 278 OF 2017
JWW MONG'ARE, J
OCTOBER 13, 2023**

BETWEEN

**DINIT VIRCHAND MALDE (SUING AS EXECUTOR OF THE WILL OF
LALITABEN KANTILAL SHAH - DECEASED) PLAINTIFF**

AND

**SPIRE BANK LIMITED (SUCCESSOR IN TITLE TO THE SOUTHERN
CREDIT BANKING CORPORATION LIMITED) DEFENDANT**

JUDGMENT

1. The Plaintiff in this matter suing as an executor of the Will of Lalitaben Kantilal Shah (deceased) moved the Honourable Court by a plaint dated 5th July 2017 seeking for judgment against the Defendant as follows:-
 - a. An account as at 26th September 2007 of all the proceeds of the sale of LR.NO. 209/75/15 by the Defendant while exercising its statutory power of sale.
 - b. An order for payment by the Defendant to the Plaintiff of all sums found to be due from the Defendant to the Plaintiff on the taking of the accounts under (a) above.
 - c. Damages
 - d. Costs of this suit.
 - e. Interest on (b) above at commercial rates from 26th September 2007 up to the date of filing the suit.



- f. Interest on (b) (c), (d) above at court rates from the date of filing suit until payment in full.
 - g. Any other or further relief that this honourable court may deem fit and just to grant.
2. On 15th August 2017 the Defendant filed a defence to the suit denying the Plaintiffs claim and seeking to have the Plaintiff's suit dismissed with costs. The matter proceeded to a full hearing and the Plaintiff called two (2) witnesses while the Defendant called one (1) witness to testify.
3. PW1 was the daughter of the Late Kantila Hunja Shah and Lalitaben Kantilal Shah, Nayna Kantilal Shah. She confirmed that she had prepared a witness statement which she wished to rely on. She adopted the same as her evidence in chief. It was her testimony that the property subject matter of this suit was owned by her parents, Kantilal Hunja Shah, father, who died in 2004 and Lalitaben Kantilal Shah, mother, who died in 2007, and that the same was registered in her mother's name Lalitaben Kantilal Shah. She testified that her late mother willed the house on Land Reference 209/75/5 to her and the Plaintiff was appointed by the said will to administer the estate of her mother, which included the suit premises. She produced the Will as evidence which was part of the Plaintiffs' bundle of documents. She further testified that she had lived in the premises before they were sold but was asked to vacate the house by the Bank after the sale. She informed the court that she was aware that the property was sold for Kshs.50,000,000/- and that the Bank was to give her and her brother the balance from the sale after repayment of the loan. She confirmed to the court that the said balance due to them was Kshs.20,000,000/-. She informed the court that to date nothing has ever been paid to them. She testified that she did not see or receive any notices from the bank or any other communications.
4. The Plaintiff testified as PW2. He confirmed he had prepared and filed a witness statement dated 30th June, 2017 which he wished to rely on as evidence in chief. He also produced the Plaintiff's list and bundle of documents dated 5th July 2017 which he wished to rely on. The said list and bundle having been produced and marked as Plaintiffs exhibit 1 was admitted as the Plaintiff's evidence in chief. Among the documents produced by the Plaintiff was a copy of the title for the suit property which showed that the property was originally registered in the name of his uncle, Kantilal Hunja Shah and upon his demise the same transferred to Lalitaben Kantilal Shah. He confirmed that the two were now deceased and that they were his relatives.
5. PW2 informed the court that the late Lalitaben Kantilal Shah who died in 2007, left a will that named him as the executor of the said will. He confirmed to the court that the property had been charged to Southern Credit Bank, successor in title to the, the Defendant, previously on 5th December, 2003 for a sum of 90 million among other securities. He informed the court the Bank had sold the property for Kshs.50,000,000/- to recover the sum of Kshs.29,954,779/- as per its demand notice dated 21st March, 2005. He produced the said demand notice. He also produced a copy of the Auctioneers Notice that was pasted on the suit premises which also indicated that the property was being sold to recover the sum of Kshs.30,044,045/-. He later learned that the property had been sold and transferred but the bank never wrote to them again after the sale. The Plaintiff's testimony was that the beneficiaries of the Estate of Lalitaben Kantilal Shah were entitled to the balance of the sale proceeds. He testified that Kshs.20,000,000/- remained after the loan was repaid. He urged the court to also award them damages, interest from 26th September 2007 when the property was sold on the balance and costs.
6. The Defendants called one witness. Mercy Mwobobia testified as DW1. She informed the court that she was the Debt Recovery Manger of the Defendant. She confirmed that she had prepared a witness statement on 29th August, 2022 and wished to adopt the same as her evidence in chief. She also



produced the Defendant's list and bundle of documents which were produced and marked D1-18. She testified that Spire Bank was the successor in title of the Bank previously known as Southern Credit Bank Limited. She further testified that Spire Bank Limited had now been sold to Equity Bank Limited which had taken over its assets and liabilities.

7. DW1 testified that the bank sold the property, subject matter of the suit herein in 2007, and that the same was sold for Kshs. 50,000,000/-. She produced a bank statement to show the two entries reflecting payments made on 17th September, 2007 and 26th September, 2007 respectively. She testified that at the time the property was sold by the Bank as charge, the amount outstanding was Kshs.33,170,113.30/- and a credit balance of Kshs.16,829,886.70/- as reflected in the Bank statements produced by the Defendants as part of their evidence.
8. Once the loan was cleared, the amount of Kshs.16,657,540 was held in the account and the funds were later transferred by the Bank to an account held by a related business, Converters E.A Limited . The said Company had provided a corporate guarantee to the loan held by the estate of the late Kantilal Hunja Shah. On Cross examination, DW2 confirmed that the suit property had been charged to secure loans by a company known as Kenpaper Limited which was a business originally operated by Mr. Kantilal Hunja Shah and his wife, Lalitaben Kantilal Shah. She confirmed that there had been only one loan secured by the charge registered against the suit property. She further testified that the business known as Kenpaper Limited, Malde Transporters and Africa Ware paper Limited were beneficiaries of the loan, secured by the charge on the suit property and other titles as well. She informed the court that Converters E.A Limited was not among the businesses whose loan had been guaranteed by the suit property
9. DW1 produced documents to establish that the property was sold and a transfer by charge registered against the title and that the purchaser first deposited Kshs.10,000,000/- on 17th September, 2007 and paid the balance of 40,000,000 on 26th September, 2007.

Analysis and Determination

10. I have considered carefully the pleadings and the evidence produced by both parties. I have also considered the submissions filed thereto by both parties and to my mind, the only issues that arise for determination is

“whether the Plaintiff is entitled to the prayers sought in the plaint.”
11. Two preliminary issue were raised by the Defendant in their submissions and responded to by the Plaintiffs in their supplementary submissions to wit:-
 - a. Whether the Plaintiff has capacity to bring this suit.
 - b. Whether the claim is statutorily time barred.
12. To answer the first preliminary issue; “Whether the Plaintiff has capacity to bring this suit” I note that the Defendant questions the capacity of the Plaintiff to bring the claim on behalf of the estate of the late Lalitaben Kantilal Shah. The Plaintiff produced in his evidence the will of the late Lalitaben Kantilal Shah, which appointed him the executor of her estate. There was no challenge during the trial as to the validity of the will by the Defendant. The Plaintiff also produced a copy of the title for LR. No. 209/75/5 which detailed that the property originally was registered in the name of the Late Kantilal Hunja Shah and after his death the same was transferred to the wife, the late Lalitaben Kantilal Shah. These facts were not controverted during cross examination or by way of any other evidence by the defence.



13. Section 80(1) of the *Law of Succession*, Cap 160, Laws of Kenya provides that “A grant of probate shall establish the Will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the Grant is made consistent with his or their duties as such”. Unlike in the cases of intestacy where a grant of Letters of Administration has to be granted before an administrator to the estate of the deceased can be allowed to collect and preserve the estate, an executor’s role is created by the existence of a valid will. Those duties and obligations kick in immediately upon confirmation of the testator’s passing as long as there exists a valid will that has not been challenged. In the case before me, I note that the validity of the will appointing the Plaintiff as the executor of the estate of Lalitaben Kantilal Shah has not been challenged. The same was produced as evidence in this case. Lady Justice Mary Kasango, in dismissing the Preliminary Objection raised in the related matter to the suit herein being HCC NO. 543 Of 2005, *Lalitaben Kantilal Shah v Southern Credit Banking Corporation Ltd*, agreed with the holding in the treatise by Williams on Wills, 7th Edition, page 225, that “..the executor derives his title from the Will and all the estate and interest in the testator’s property vest in him on the testator’s death, he can do any act before probate which is a mere authentication of his Title”. She further agreed that the applicable section in the case and issue of locus was Section 80(1) of cap 160. I agree with the findings of the learned Judge and hold that the Plaintiff has capacity to file the suit on behalf of the estate of the late Lalitaben Kantilal Shah.
14. The second preliminary issue is “Whether the claim is statutorily time barred.” It is a common ground that the property, LR. No. 209/75/5, subject matter of the suit herein was charged to secure a guarantee by the late Kantilal Hunja Shah to the loan advanced by the Defendant’s predecessor in title to companies related to the deceased. Upon his death, the said property was transferred to his wife Lalitaben Kantilal Shah. She then willed the property to her children, the Plaintiff’s PW2, Nayna Kantilal Shah, who prior to the sale of the house, resided in the said property. These facts have not been controverted in evidence by the Defendants and therefore remain as the true position. In his submissions, the Plaintiff argues that the suit is brought for the collection of the estate of the deceased.
15. The claim as brought for recover of sale proceeds is an action covered under section 19 of the *Limitation of Actions* which provides as follows:-
- “(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.”
16. In addition, section 23(3) of the *Limitation of Actions Act* provides that:
- (3) “Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:
- Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.
17. The suit as filed has been brought to recover the balance of the sale proceeds from a mortgaged property for the benefit of the estate of the late Lalitaben Kantilal Shah. The sale took place in 2007 while the suit was filed in 2017. It is therefore clear that the suit was filed within the time allowed by the law and



before the lapse of 12 years limitation set for similar claims by the act. I am therefore satisfied that the claim is not time barred.

18. The main issue therefore is “whether the Plaintiff is deserving of the prayers sought in his plaint filed 5th July 2017.” The prayers sought can be classified into three distinct claims;
 - a. A claim for accounts and payment the residue of the sale proceeds from the mortgaged property LR. No. 209/75/5 to the estate of the late Lalitaben Kantilal Shah.
 - b. A claim for Damages.
 - c. A claim for interest from the date of the sale of the property.
 - d. Costs.
19. It is common ground that the suit property was charged to guarantee a loan of Kshs.90,000,000/- to the various entities owned and or operated by the late Kantilal Hunja shah. As at the time the statutory notices were issued in 2005, the loan due was Kshs.29,954,779/-. This was the sum demanded in the first demand to the estate. Subsequently, the auctioneers posted a notice on the suit premises indicating that the loan was now Kshs.30,044.045/-. Statements produced in evidence by the Defendant show that as at 2007 when the auction was concluded, the loan balance was Kshs.33,170,113.30/-. The Defendant acknowledged in their testimony that pursuant to the sale, a credit balance of Kshs.16,657,540/- was available in the accounts of the deceased companies. This money was later and without authority or permission from the estate of the deceased applied by the Defendant to redeem loans unrelated to the transaction. No explanation was provided to explain why, the Defendant, who had earlier been able to trace the family members of Kantilal Hunja Shah, did not find it necessary to advise that there were funds due and available to them. I find that the Defendant acted callously in failing to establish who was entitled to these funds and alerting them that indeed there were refunds due to the estate after their loan was fully discharged. The Defendant confirmed that there was a net balance of Kshs.16,657,540/- that remained after the loan was fully repaid. I hold and find that these funds were the estate of Lalitaben Kantilal Shah and the same ought to be paid to the Plaintiff by the Defendant or its successor with interest from the date of the sale being 26th September 2007. The interest shall be calculated at the prevailing court rates until payment is made in full.
20. The second Claim is for Damages. It is not contested that the sale was done in exercise of the Statutory Power of Sale of the Defendants pursuant to a legal charge. Both parties confirm that the suit property LR. No. 209/75/5 was charged by the bank to secure a guarantee to a loan of Kshs.90,00,000/-. The Plaintiff acknowledges that the Notices were served upon the estate of the Lalitaben Kantilal Shah and that the Auctioneers Notice was indeed placed outside the suit premises on a conspicuous place of the wall. The Plaintiff was able to confirm from the auctioneers notice that the loan due was Kshs.30,044,045/- at the time. It is therefore clear that the sale was conducted pursuant to a legal charge and all notices necessary thereto were served upon the estate of the deceased. In the absence of an illegality in the sale, the plaintiff suffered no loss from the sale. I find therefore that the claim for damages has not been proved.
21. The Plaintiff urged the court to award it interest on the net sale proceeds from the date of sale. The same has been granted under item one above. The Plaintiff is entitled to the residue of the estate with interest from the 26th September 2007 till payment in full.
22. Costs follow the event. The plaintiff has been successful and is hereby awarded costs of the suit.



Conclusion and Final Disposition

23. I am satisfied that the Plaintiff has proved his case against the Defendants on a balance of probabilities and hereby enter Judgment in favour of the Plaintiff against the Defendant in the following terms:-

- i. The sum of Kshs.16,829,886.70/- being the balance from the sale proceedings of the property known as Land Reference 209/75/5 plus interest at court rates from 26th September, 2007 till payment in full.
- ii. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF OCTOBER 2023

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J. W. W. MONG'ARE

JUDGE

