REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 85 OF 2019

IN THE MATTER OF THE ESTATE OF LAILA CHAGAN SIDI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR REVIEW

BETWEEN

SHAMSHUDIN JAFFERALI BOGHANI.....PETITIONER

AND

RAHEMET NAZARALI also known as

RAHEMATBAI BAHADURALI ISMAIL NAZARALLY

nee **RAHEMUTBAI CHAGAN SISI**

alternatively, **RAHEMAT CHAGAN SISI.....APPLICANT**

RULING

1. This ruling is in respect of the two applications dated **7 December 2020** and **8 December 2020, respectively**. The application dated **7 December 2020** (the 1st application) is expressed to have been filed pursuant to **Section 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya;** and **Rule 73** of the **Probate and Administration Rules.** It seeks variation of the order made herein on **22 October 2020** by which directions were given for open court *viva voce* hearing. In lieu thereof, the applicant seeks that she be allowed to participate in the proceedings virtually. She also prayed that the costs of the application be in the cause.

2. In support of the application, the applicant relied on her affidavit, sworn on **28 November 2020** and particularly her averment that she is over 85 years old and currently resides in Canada. She further averred that she has health-related challenges that make it impossible for her travel out of her country of residence. Additionally, the applicant deposed that there are travel restrictions in Canada for persons of advanced age, like herself, due to the prevailing global COVID-19 pandemic; and therefore that it will be practically impossible for her to travel to Kenya to attend the hearing physically. She annexed a copy of her passport to the supporting affidavit as **Annexure RN1.**

3. The aforementioned application was followed, in quick succession, by the 2nd application, dated **8 December 2020**; which seeks the following orders:

[a] Spent

[b] That the petitioner be ordered to produce before the Court a full and accurate account of the estate of the deceased, **Laila Chagan Sidi**, from the time of her demise to date.

[c] That all the rental proceeds in respect of the deceased's estate to wit:

[i] KAPSABET MUNICIPALITY LR. NO. R/281

[ii] KAPSABET MUNICIPALITY BLOCK 1/431

[iii] KAPSABET MUNICIPALITY BLOCK 1/432

Be deposited in a joint interest earning account in the names of both counsel on record for the parties pending the hearing and determination of the objection application dated **5 May 2020** and or the Succession Proceedings.

[d] That the costs of the application be in the cause.

4. The 2nd application was filed pursuant to **Sections 47 and 83(h)** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules,** and was premised on the grounds that the deceased died intestate on **8 July 2017;** and that a Grant of Letters of Administration in respect of her estate was made to the petitioner herein on **17 September 2019**. It was thus the contention of the applicant that, given that the said grant has been challenged, there is a high likelihood that the estate will be wasted in the absence of any form of accountability by the petitioner. She further asserted that the continued collection of the estate assets by the petitioner is unfair and amounts to unjust enrichment since the petitioner does not qualify to benefit from the estate under **Section 39** of the **Law of Succession Act**; and therefore that there is need for the respondent to not only account for the estate; but also for an order to preserve the estate pending further orders of the Court. The applicant was of the assertion that no prejudice will be suffered by the petitioner if the orders sought are granted in the interim.

5. The 2nd application is supported by the applicant's affidavit sworn on **28 November 2020**, wherein she averred that the petitioner does not dispute the fact that she is a sister to the deceased. She accordingly averred that it would only be just and fair that the orders sought in the application be granted, pending the hearing and determination of the objection application and thereafter the succession proceedings.

6. The petitioner/respondent opposed the two applications and, to that end, filed separate Replying Affidavits, sworn on **28 January 2021**. In response to the 1st application, he averred that the applicant is not one to be taken seriously, given that her name, as indicated on her passport varies from the name on the doctor's documents that she has exhibited in proof of her allegations of sickness. The respondent added that, in any case, the medical report filed is not clear on the alleged advice not to travel. He further asserted that the applicant availed no proof whatsoever of any prevailing travel restrictions in Canada, as alleged by her.

7. In response to the applicant's averments in paragraphs 8, 9 and 10, the respondent asserted that the instant case is peculiar in nature, owing to the fact that the applicant's identity and relationship to the deceased has been put to question. He further averred that, as a person who has never been in contact with the deceased or her family members for 50 years, the applicant is suspect and ought to avail herself for interrogation by the Court to verify her identify; an opportunity that may not be afforded *via* video link. Thus, the respondent concluded his averments by stating that the reasons given by the applicant in favour of hearing via video link are insufficient and ought to be rejected.

8. In respect of the 2nd application, the respondent denied that any wastage of the estate has occurred. He further asserted that the applicant is not a legitimate beneficiary to the estate of the deceased; and therefore has no right to demand for accounts. At paragraph 5 of his Replying Affidavit to the 2nd application, the respondent denied that the applicant is a sister to the deceased as alleged by her. He added that she is just a distant relative whose real identity is yet to be established by the Court. In his view, therefore, the applicant is not entitled to benefit from the estate of the deceased owing to the fact that she never cared about the deceased's welfare when she was alive. He added that at no time did he acknowledge that the applicant is a sister to the deceased. He therefore urged for the dismissal of the 2nd application, adding that, in any case, the application for accounts is premature.

9. Pursuant to the directions given herein on **1 February 2021**, the two applications were canvassed by way of written submissions. Accordingly, counsel for the applicant filed her written submissions on **5 March 2021**, reiterating the applicant's stance that the applicant's *viva voce* evidence be taken *via* video link on account of her advanced age and ill health. Counsel urged the Court to take into account that the applicant is now resident in Canada and that it will be practically impossible for her to travel to Kenya in the wake of the global COVID-19 pandemic.

10. In respect of the 2nd application, counsel underscored the fact that the applicant, as a sister to the deceased, ranks higher in the order of priority provided for in **Section 38** of the **Law of Succession Act;** and therefore there is need for the respondent to give an account of his administration of the estate to date; and to deposit the rental income from the estate in a joint interest-earning account in the joint name of counsel for the parties pending the hearing and determination of the Summons for Revocation of Grant dated **5 May 2020**. **Ms. Odwa** relied on **Re Estate of Philip Njoga Kamau** [2020] eKLR and **Re Estate of Philip Nthenge Mukonyo** [2016] eKLR (reported as **Stephen Musembi Ngui (deceased) & 2 Others vs. David Mutiso Nthenge** [2016] eKLR) to buttress her submissions and urged the Court to allow both applications in the interest of justice. I note, however that, in the first authority, **Re Estate of Philip Njoga Kamau** *(supra)* the application was for leave for the administrator to sell motor vehicles that were wasting away, pending the hearing of the objection application. Its facts are therefore different from the facts of this case.

11. **Ms. Luseria**, learned counsel for the respondent relied on her written submissions dated **10 March 2021**. In respect of the 1st application, she submitted that the importance of the applicant's attendance for purposes of *viva voce* evidence, including cross-examination to test the veracity of her evidence, is in the fact that her identity is in question. She added that it is curious that she has emerged to claim an interest in the estate of the deceased after 50 years of absence. Thus she reiterated the respondent's apprehension that the applicant is an imposter and an opportunist, out to defraud the deceased's estate.

12. It was further the submission of **Ms. Luseria** that the applicant has failed to present cogent evidence to prove, either that she is advanced in age, or even that she is ailing and therefore not able to travel to Kenya for the hearing of her application. She pointed out that the exhibits relied on by the applicant do not specifically indicate that she has been advised against travelling to Kenya on account of ill health. Accordingly, counsel urged the Court to find that, given the circumstances of this case, the need for the applicant to avail herself for the purpose of giving *viva voce* evidence outweighs her apprehensions; and therefore that the 1st application ought to be dismissed with costs.

13. As for the 2nd application, **Ms. Luseria** made reference to **Section 79** of the **Law of Succession Act** to emphasize the point that, having been issued with Grant of Letters of Administration, the respondent is the duly appointed administrator of the deceased's estate and therefore has the mandate to receive the rental income accruing from the properties left behind by the deceased. In her submission, the applicant has not provided any justification why the funds should be channeled to a joint account in the names of counsel; as no evidence of misappropriation was adduced by the applicant. Counsel cited **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others** [2009] eKLR in support of her posturing.

14. It was further the submission of **Ms. Luseria** that the prayer for accounts is misconceived in so far as it is premature. In her view, accounts can only be sought at the conclusion of the objection proceedings. Further, she relied on **Re Estate of Ezra Kipngeny Arap Mboga** [2019] eKLR, for the proposition that a non-beneficiary cannot call for a statement of accounts. Thus, counsel urged the Court to find that the applicant has not furnished the Court with sufficient evidence to warrant the issuance of the orders sought. She accordingly prayed that the two applications be dismissed with costs.

15. I have given due consideration to the two applications in the light of the proceedings held herein to date. The record shows that the deceased died intestate on **8 July 2017**; and that the instant petition was thereafter filed by the respondent in his capacity as the deceased's nephew. Apparently, the deceased had no spouse or children of her own and, according to the respondent, her siblings, **Hashen Sidi** and **Malek Sidi Chagan** had predeceased her; having died on **10 June 1998** and **23 January 2005**, respectively. There being no objection to the issuance of Grant of Letters of Administration Intestate in respect of the estate of the deceased within the 30 days' period provided for by law, the respondent was issued with Grant on **17 September 2019.**

16. Thereafter, on the **16 October 2019**, the respondent filed Summons for Confirmation of Grant pursuant to **Section 71** of the **Law of Succession Act** and **Rule 40** of the **Probate and Administration Rules**; seeking that the Grant issued to him be confirmed notwithstanding that the period of 6 months from the date of issuance of Grant had not expired. His ground for so applying was that he is the only beneficiary. Before that application could be heard and determined, the applicant sought the intervention of the Court by filing the Summons for Revocation of Grant dated **5 May 2020.**

17. Directions were thereafter given, on **24 June 2020,** that that application be disposed of by way of written submissions. The respondent expressed surprise that an application for revocation should be filed herein by the applicant. He asked, vide his application dated **27 July 2020**, that the applicant be required to attend court to prove that she is not an imposter. That application was accordingly allowed **22 October 2020**. It was that ruling that provoked the instant applications.

18. It is true that, with the advent of the COVID-19 pandemic, virtual proceedings have become the new normal. Thus, in the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 dated 20 March 2020**, the Hon. The Chief Justice issued the general direction in Paragraph 6 thereof that:

> **"The Court may, in accordance with these Practice Directions…direct that the final address after the hearing shall be made and that the appeal, application, judicial review or constitutional petition shall be canvassed through written submissions in such format and length as the Court may direct taking into account the nature of the case."**

19. It was pursuant to that practice direction that the orders of **24 June 2020** were given; namely, that the application for Revocation of Grant be disposed of by way of written submissions. The respondent thereafter sought the variation of that order vide his application dated **27 July 2020** and the Court, having given consideration to the evidence and arguments presented by either party, the Court allowed the respondent's application for *viva voce* disposal of the said application. The applicant has no quarrel with that order. All she is asking for is that she be excused from making a physical appearance; and that her evidence be taken *via* video conference.

20. Needless to mention that under **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**, the Court has the requisite jurisdiction to make such orders in succession matters as the justice of the case may require. Thus, in **Section 47** of the **Law of Succession Act,** it is stipulated that:

> **"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"**

21. **Rule 73** of the **Probate and Administration Rules**, on the other hand, is explicit that:

> **"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

22. In addition to the foregoing provisions, **Rule 63** of the **Probate and Administration Rules** recognizes that the provisions of **Order 45** of the **Civil Procedure Rules,** are some of the specific provisions of the **Civil Procedure Rules** applicable to succession proceedings. It states that:

> **"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), … shall apply so far as relevant to proceedings under these Rules."**

23. Order 45 Rule 1 of the **Civil Procedure Rules**, provides that:

(1) any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

24. In the premises, the single issue for determination in respect of the 1st application is the question whether sufficient cause has been shown to warrant the review of the orders issued herein on **22 October 2020** so as to let the applicant testify by means of video link. It is instructive to note, in this connection, that long before the **Practice Directions of 20 March 2020** came into force, it was permissible, upon sufficient cause being given, for a party or a witness who is outside jurisdiction, to testify *via* video conference. Thus, **Section 63A(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, is explicit that:

"A court may receive oral evidence through teleconferencing and video conferencing."

25. In this regard, therefore, the Indian case of T**he State of Maharashtra vs. Dr. Praful** [2003] INSC 207 has been cited, with approval, in several local authorities for the holding that:

"Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other."

26. Accordingly, in **Joan Marie Schultz vs. George Mburu Wachira & Anothe**r [2019] eKLR, wherein a similar application was made, **Hon. Sergon, J.** came to the conclusion that:

"…advancements in technology have the impact of dispelling the notion that it is compulsory for a party to be physically present in every instance for his or her evidence to be deemed to have been properly taken…not only will the respondent have every opportunity to cross-examine the applicant in a video conferencing setting, but that both the respondent and the trial court will be able to study the demeanour of the applicant while she testifies, hence the respondent does not stand to be prejudiced in my view…Looking at the circumstances of the matter, I am satisfied that video linking is the most expedient way of taking the applicant's evidence.

27. Similarly, in **Kuguru Food Complex Ltd vs. Mashreq Bank P.S.C.** [2019] eKLR, **Hon. Kasango, J.** held thus, at paragraphs 10 and 11 of her ruling, in a similar application where the witness had emigrated to the UK and was sickly and therefore unable to travel to Kenya to testify:

"…Video conferencing is an audio-visual medium which can enable, as in this case, the plaintiff's witness to engage in virtual face-to-face interaction with the learned counsels and the court. There is no impediment either to the court or learned counsel's perception of such evidence, when received through videoconferencing. Allowing video conference of the plaintiff's witness is vital because it means the difference between receiving that evidence and not receiving it. Video conferencing is also one way of ensuring a party has access to justice. In view of the above discussion, I find the plaintiff's Notice of Motion dated 15th August 2019 merited…"

28. In the instant matter, the applicant has demonstrated vide a copy of her passport that she was born on **21 March 1934** and is therefore about 87 years old presently. She has also adduced sufficient evidence to show that she is ailing at the moment. In particular, the report by her doctor indicates that she has been advised to avoid all long haul travel due to her health and the risk of COVID-19 exposure; and that she is in very high risk for COVID-19 complications if infected. Indeed, the fact that older ones with pre-existing medical conditions are more at risk of contracting and dying of the COVID-19 virus is a matter of general notoriety; a matter which the Court is entitled to take judicial notice of pursuant to **Sections 59 and 60(1)(o)** of the **Evidence Act**. Hence, it was not obligatory for the applicant to adduced evidence of specific restriction against her travel to Kenya by the Canadian government. Clearly therefore, sufficient cause has been shown for review. It is consequently my finding that the 1st application, dated **7 December 2020**, is meritorious and is hereby allowed.

29. As for the 2nd application, there is no gainsaying that, having been issued with Grant of Letters of Administration, the respondent has the right and mandate to administer the estate of the deceased in terms of **Section 79** of the **Law of Succession Act**. Nevertheless, such an appointment brings with it attendant responsibilities; including the duty to account to the Court and the beneficiaries of the deceased. It is for that reason that **Section 83(h)** of the **Law of Succession Act** provides that:

"Personal representatives shall have the following duties-

…

(h) To produce to the court, if required by the court, either of its own motion or on the application any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings

therewith up to the date of the account."

30. It is therefore misguided for the respondent to argue that he will only be required to account at the tail end of the administration. Having been entrusted with the administration of the deceased's estate, he is expected by law to account; and ought to be prepared to account at any stage of the process, as and when called upon to do so. In the instant circumstances, the applicant has called for such account and it matters not that in the respondent's thinking, the applicant is not entitled to a share of the deceased's estate. Indeed, at paragraph 5 of his Replying Affidavit to the 2nd application, the respondent conceded that the applicant is related to the deceased, albeit a distant one. That suffices for purposes of accounts; granted that the Court is yet to pronounce itself on the applicant's application for revocation of Grant, let alone her beneficial interest.

31. I however find it premature to issue an order that the rental proceeds be deposited in a joint interest earning account in the name of the parties. I say so because, so far, no indication has been given of misappropriation of the funds or breach of trust of any kind. Accordingly, that aspect of the 2nd application is, in my view, premature and is hereby deferred pending accounts.

32. In the result, the orders that commend themselves to me at this stage, and which I hereby grant in respect of the two applications, are as hereunder:

[a] That the orders made herein on **22 October 2020** to have the application dated **5 May 2020** heard in open court be and is hereby varied to the effect that the applicant is hereby granted leave to participate in the proceedings via video link.

[b] That the petitioner/respondent be and is hereby ordered to, within 30 days from the date hereof, produce before the Court a full and accurate account of the estate of the deceased, **Laila Chagan Sidi**, from the time of her demise to date.

[c] The prayer for the depositing of proceeds of rent from the estate is hereby deferred pending accounts.

[d] Costs of the two applications to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF MAY 2021

OLGA SEWE

JUDGE