



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 21 OF 1962

IN THE MATTER OF THE ESTATE OF NATHU KHAN (DECEASED)

MOHAMED SADIQUE KHAN.....APPLICANT

VERSUS

BASHIR AHMED.....1ST RESPONDENT

MOHAMED NAZIR KHAN.....2ND RESPONDENT

RULING

1. The late Nathu Khan died on 24/10/1962. That was when Kenya was still a colony. Indeed, the vintage ancestry of this cause gave the 2nd Respondent's attorney an opportunity to engage in a delicious technical argument: that the instant Application is defective for being in the wrong Court – now that the original will was probated in *Her Majesty's Supreme Court at Nakuru District Registry Probate and Administration*. That argument was shut down by my brother, Ndung'u J. in an earlier application. The Learned Judge quoted at length *Legal Notice No. 718 of 10/12/1963* which provided for the transitory provisions as the Country ushered in its Independence Constitution. In short, all proceedings before *Her Majesty's Supreme Court at Nakuru District Registry Probate and Administration* were deemed to be before the High Court of Kenya. I agree with my brother, Ndung'u J. on his interpretation of the Legal Notice and holding that this controversy is properly before this Court.

2. The brief history of the case is as follows. The Deceased left a valid will. It named three Executors – the two Respondents, who were children of the Deceased – and their mother, Gulam Fatma. The three duly probated the will and grant of probate issued on 07/12/1962. Little else happened in the cause primarily because the will created a Testamentary Trust and bequeathed all the real estate and personal property of the Deceased in the hands of the Trustees “*to sell, call in and convert the same into money with power to postpone the sale calling in and conversion thereof as they shall in their absolute discretion think fit without being liable for loss....*”

3. It would appear that there was an application before Lady Justice Omondi. This is by the rendition of the 2nd Respondent's lawyers in their Written Submissions (which cannot be a substitute for evidence under oath). A judgment was, apparently, delivered on 18/12/2014. “Apparently” is the appropriate word because I have not seen the application, proceedings or the judgment in the Court file and none were attached to the Replying Affidavit in this Application.

4. There, certainly, was an Application dated 20/04/2016 by the Applicant herein. It sought the following three substantive prayers:

- a) That the Respondent, Mohamed Sadique Khan herein do produce to the Court a full and accurate account of all dealings in respect of the estate to date.
- b) That the Court, being satisfied with the accounts rendered by the respondent, do proceed to dissolve the trust and distribute the remainder of the estate to the surviving beneficiaries.
- c) That the Court be pleased to distribute Nakuru Block 4/92 to the Applicant.

5. In a ruling dated 26/09/2018, the Learned Judge Ndung'u dismissed the Application primarily for two reasons:

- a) First, the Learned Judge found the Application to be incurably defective because it was brought against only one Trustee while two trustees are still alive. The Learned Judge found this to have visited unacceptable violence to the provisions of section 81 of the Law of Succession Act.

b) Second, the Learned Judge found that there was no justification to transfer Nakuru Block 4/92 to the Applicant as prayed as this would be directly militate against the terms of the Testamentary Trust.

6. In his remarks obiter, Judge Ndung'u alluded to the possibility that any claim the Applicant might have in the matter might be caught up by the doctrine of laches. He expressed himself thus:

I need to comment on the timing of the application before the Court. Quite clearly, the Applicant's claim is caught up by laches. There has been an unreasonable delay in pursuit of the right or claim herein. He has surely slept on his rights.

7. Before signing off, however, perhaps noting the unintended stridency of the obiter remarks, the Learned Judge offered a ray of hope to the Applicant:

That said, however, and noting that these are succession proceedings and that the executors are by law expected to finalise the administration of the estate, my view is that the applicant is not gagged by estoppel by laches and if he followed the correct procedure and sues the correct parties he could go ahead to hold the executors accountable in so far as the administration of the estate is concerned.

8. In a way, the Applicant took up the Judge's advice in bringing the present Application. The Application is drawn as Summons for Revocation and names the two remaining Executors as Respondents. It seeks the following substantive prayers:

a) Spent.

b) That this Honourable Court do grant leave to the Applicant herein to effect service of the motion herein upon the 1st Respondent, Bashir Ahmed by way of substituted service as the said Respondent is a resident of the United States of America.

c) That the grant of probate issued to Gulam Fatma, Bashir Ahmed and Mohammed Nazir in this matter on the 7th December, 1962 be annulled and or revoked and a fresh grant be issued to the Applicant herein.

d) That this Honourable Court be pleased to order the Respondents herein to produce to this Honourable Court a full and accurate inventory of the assets and liabilities of the estate of the Deceased and a full and accurate account of all the estate.

e) That the costs of this application be provided for.

9. The Court permitted the Applicant to serve the 1st Respondent by substituted service. The 1st Respondent never entered appearance. The 2nd Respondent, however, entered appearance and through their counsel, vigorously resisted the Application.

10. The Application was argued by way of written submissions. I have read the submissions by both parties and I find it unnecessary to rehash them here. The following four issues emerge. Each of them is easily answered. They are:

a) First, whether the matter is in the correct Court. I have already answered this in the affirmative in the first paragraph of this ruling.

b) Second, whether this Application is barred by the Statute of Limitations.

c) Third, whether the Application is debarred by the doctrine of res judicata.

d) Fourth, whether the Applicant has satisfied the conditions for the grant of the orders for revocation or annulment of the grant of probate.

e) Fifth, whether the Applicant has justified the request for rendering of accounts.

11. The 2nd Respondent argues that this Application is caught up by the Statute of Limitations. As I understand it, the 2nd Respondent argues that by dint of section 83(e) of the Law of Succession Act, the Application should have been filed within six months of the grant of probate. He further argues that by dint of section 4(4) of the Limitations of Actions Act, the action should have been filed within 12 years of the grant of probate.

12. The 2nd Respondent's protestations on limitations are misplaced for two reasons. First, as our decisional law has consistently held, the Statute of Limitations does not apply to succession matters stricto sensu. See, for example, In re Estate of Devchand Lagdhir Shah (Deceased) [2018] eKLR; In re. Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR and In re Estate of Charles Ngotho Gachunga (Deceased) [2015] eKLR. Second, even the Statute of Limitations were to apply, it could be argued that it has not run out since the case pleaded at bar could be said to be a continuing cause of action. This is because the Applicant is demanding for certain rights he believes he has under the Testamentary (Irrevocable) Trust created by the will of the Deceased. The Trustees have a continuing obligation to the beneficiaries – including the Applicant – until the Trust is dissolved. Each failure by the Trustees to abide by their obligations or the terms of the Trust, a new cause of action arises. Hence, in as long as the Testamentary Trust remains in place, each beneficiary has a right to enforce their rights under the Trust and the Statute of Limitations is no bar to such an action against the Trustees.

13. Does the doctrine of *res judicata* bar the Applicant from bringing the present Application? The 2nd Respondent thinks so. He claims that the same issues were raised in two previous applications which were decided by the Court. As I pointed out above, I have been unable to find any proceedings or judgment on one of the applications alleged by the 2nd Respondent. The 2nd Application is the one that gave rise to the

ruling by Ndung'u J. dated

26/09/2018. Does that ruling render the present application res judicata? I do not think so for three reasons:

- a) First, the present application is against both executors of the will as opposed to the 2nd Respondent only.
- b) Second, the Application dated 20/04/2016 was somewhat different from the present one: the main issue in the previous application was whether the Trust should be dissolved and the remaining property distributed to the Applicant. The main issue here is whether the grant of probate should be revoked or annulled and whether the Respondents should be ordered to account for the assets of the estate.
- c) Third, in any event, the Application dated 20/04/2016 was not resolved on its merits but on the technical objection that it was not properly founded in the absence of the 1st Respondent.

14. With the technical objections out of the way, we can delve into the substantive issue. Has the Applicant satisfied the Court that the grant of probate should be revoked or annulled?

15. Section 76 of the Law of Succession Act is in the following terms:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

16. From the face of the Summons for Revocation, the Supporting Affidavit and Written Submissions of the Applicant, he seeks to rely on two grounds to urge the Court to revoke the grant of probate:

- a) First, the Applicant says that the Respondents have been unable to proceed diligently with the administration of the estate of the Deceased.
- b) Second, the Applicant seeks to show that the Respondents have failed to produce a full and accurate inventory of the assets and liabilities of the Deceased and a full account of all the dealings therewith up to date.

17. From the Applicant's own affidavit, the first ground appears eminently pre-textual. The Applicant explains that the estate has been almost fully dissipated through sale of various assets of the estate. He may not be happy with the decisions made by the Trustees, but it is disingenuous to say that the estate has not been administered diligently. Both parties are agreed that the only asset remaining in the estate is one parcel: Nakuru Municipality Block 4/92. Given that the Deceased had quite a number of assets, it is hyperbolic to claim that the Executors of the will did not diligently execute the will.

18. What about the second ground – that the Executors have not filed in Court full and accurate inventory of the assets and liabilities of the Deceased and a full account of all the dealings therewith up to date? It is true that section 83(e) now requires that such an inventory be filed in Court within six months. It is also true that the Court can provide for a different timeline for the filing of such an inventory. It is further true that this only became the law in 1981 – 19 years after the grant of probate in this case was issued. It would, of course, have been impossible for the Respondents to comply with a law which did not yet exist!

19. Does this mean that the Respondents and other Personal Representatives to estates who were appointed before 1981 are exempted from compliance with section 83 of the Law of Succession Act? Far from it. As the governing law, all Personal Representatives who are administering estates today are bound by the terms of the Act after 1981. It, however, means that beneficiaries and third Parties cannot hope to deploy a “technicality” of formal non-adherence to the law to revoke grants issued before 1981.

20. Where does this leave things? The resolution is a segue to the final issue raised in the case: whether the Respondents should be required to provide a full and accurate inventory of the assets and liabilities of the estate of the Deceased and a fully and accurate account of all of the estate. Of course the Respondents should! That is what the law provides and that is what they are obligated to do. It is no answer to the legal obligation to say that the grant was issued more than sixty years ago. Neither is it satisfactory to say that the Applicant is aware of the ways in which the estate was utilized. The Applicant, as a beneficiary to the continuing trust established under the will, is entitled to the information. This is an instance of the fiduciary relationship between the Trustees and the beneficiaries. See, for example, *Albert Kigera Karume & 2 others v George Ngugi Waireri & 3 others (sued as Trustees of the Njenga Karume Trust & another; Grace Njoki Njenga Karume & 7 others (Interested Parties) [2020] Eklr; In the Matter of GW & another (Minors) [2016] eKLR; Re Eunice Wanjeri Njenga [2013] eKLR).*

21. It is only upon being furnished with such information that the Applicant can determine if his rights have been infringed or not. Additionally, compliance or non-compliance with an order to provide such information could be a ground for the Applicant to apply for either a dissolution of the Testamentary Trust or the revocation of the grant of representation issued by the Court.

22. It follows that while the Applicant has not raised sufficient grounds for the Court to revoke or annul a grant of probate issued more than sixty years ago over an estate which has largely been distributed, he has certainly laid ground for an appropriate order to issue compelling the Respondents, in their capacities as Executors of the will of the Deceased and Trustees in the Testamentary Trust established therein. The Applicant is entitled to that order.

23. Consequently, the Summons dated 10/12/2018 will be disposed off as follows:

a) An order hereby issues that the Respondents herein to produce, within ninety (90) days hereof, to this Honourable Court a full and accurate inventory of the assets and liabilities of the estate of the Deceased and a full and accurate account of all the estate.

b) The prayer requesting the grant of probate issued in the cause to be revoked or annulled is hereby declined.

c) This being a family matter, each party will bear his own costs.

24. Orders accordingly.

Dated and delivered at Nakuru this 8th day of October, 2020

JOEL NGUGI

JUDGE