



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 661 OF 2018**

**IN THE MATTER OF THE ESTATE OF ROBERT TIMOTHY GACHECHEH (DECEASED)**

**MARIE-JOSEE GACHECHEH.....ADMINISTRATOR**

**VERSUS**

**MARIE-ANNICK GACHECHEH.....1<sup>ST</sup> RESPONDENT**

**MARC TIMOTHY GACHECHEH.....2<sup>ND</sup> RESPONDENT**

**JOSEPH KENYUA GACHECHEH.....3<sup>RD</sup> RESPONDENT**

**MARIANNE MUTHONI GACHECHEH.....4<sup>TH</sup> RESPONDENT**

**AND**

**LANDECO LIMITED.....INTERESTED PARTY**

**RULING**

1. This matter came up for hearing of the summons for confirmation of grant on 7<sup>th</sup> October, 2020. The deceased, Robert Timothy Gachechek died intestate. At the hearing, Mr. Mongeri learned counsel for the 1<sup>st</sup> Respondent raised an objection on the ground that it would be prejudicial to the 1<sup>st</sup> Respondent's case, if the issue of the shares held in Landeco Limited (hereinafter referred to as the company) is not tried before this court or any other court seized of jurisdiction since the company forms 90 per centum of the deceased's estate. That the proceedings ought therefore, to be stayed until the issue of the shares in the company is determined.

2. According to Mr. Mongeri, the deceased herein was the sole investor in the company and the estate therefore owns 100% share of the company. This he said would be demonstrated during the testimony of the 1<sup>st</sup> Respondent.

3. In support thereof, Mr. Kisaka learned Counsel for the 2<sup>nd</sup> Respondent submitted that this cause deals with the deceased's estate and the issue of the shares of the company cannot be separated from this cause since it constitutes the deceased's estate. Counsel contended that the deceased had 30 per centum shares in the company which shares should be distributed amongst the beneficiaries. He urged that this court is clothed with jurisdiction to hear and determine the issue of the shares in the company.

4. In opposition, Ms. Mogire learned counsel for the 3<sup>rd</sup> Respondent, submitted that the company is a going concern and it is therefore the shareholders who determine how to deal with their shares. Counsel asserted that while Mr. Mongeri has alluded to fraud and stated that the shares are contested, those are issues which are a preserve of the Commercial Court. She asserted that the issue of the shares of the company had been raised by the 1<sup>st</sup> Respondent in this cause as a delaying tactic and urged the court to proceed with the hearing of the summons for confirmation of grant.

5. According to Mr. Chacha Odera learned Counsel for the 4<sup>th</sup> Respondent, the factual basis upon which the 1<sup>st</sup> Respondent moots a case for the estate's 100 per centum shareholding in the company is in her affidavit dated 25<sup>th</sup> November, 2019. In the affidavit, the 1<sup>st</sup> Respondent states that even if it was to be assumed that her father allocated shares to her siblings, they hold those shares in trust for the deceased's estate, since the deceased was the sole investor in the company. Further that the Respondents did not invest any amount of money in the company.

6. It was Mr. Chacha Odera's submission that an investor and a shareholder are not one and the same. That an investor puts in money

whereas a shareholder is recognized as holding shares in the register. Counsel urged that **section 105** of the **Companies Act** provides that those who appear in the registers as shareholders are the owners of the shares so indicated unless the contrary is proved.

7. In opposing the argument that the shares therein were held in trust, Mr. Chacha Odera submitted that **section 104(1)** of the **Companies Act** specifically provides that a company shall not accept, or enter into its register a Notice of Trust implied or otherwise. That the section creates a criminal offence of such act. Counsel urged that if the argument is upheld, it will occasion a crime under **section 104(2)** of the **Companies Act**. Further that if there was a defect in the Register, the **Companies Act** under **section 860 – 864** provides various ways of rectifying such defect.

8. It was Mr. Chacha Odera's statement that when the shares were allotted, the **Companies Act** then provided that a company could not have a single shareholder. Counsel asserted that to imply that the Administrator, Mrs. Gacheheh did not invest in the shares in the company, or that she could not own shares in a company is sexist. He urged that the only shares available for distribution in the estate of the deceased are the 30 per centum shares which were held by the deceased. Further that it was in order for a person to gift shares in a company at no consideration.

9. Submitting on behalf of the Administrator, learned Counsel Ms. Wambugu echoed Mr. Chacha Odera's submissions and stated that what Counsel Mongeri is seeking, is for this court to lift the corporate veil and interrogate the shares in the company from the time of its inception up to the time when the 3<sup>rd</sup> and 4<sup>th</sup> Respondents came on board.

10. Ms. Wambugu proposed that since this court has power to distribute the shares that the deceased held, the court should go ahead and distribute the 30 per centum shares which were held by the deceased equally to all the beneficiaries, as proposed by the Administrator. She however asked the court to bear in mind that there are surviving shareholders in the company.

11. Ms. Wambugu contended that the orders of stay of proceedings sought by Mr. Mongeri are without basis, bearing in mind that this is a Family Court and there are other assets comprising the deceased's estate. Counsel asserted that if Mr. Mongeri wanted to approach the Commercial Court on the company ownership, he should do so, but that this court should proceed to distribute the rest of the assets comprising the deceased's estate.

12. Learned Counsel Mr. Mugun submitted on behalf of the Interested Party, the Company stating that it is a limited liability company with a life of its own. Counsel contended that their application to participate in these proceedings as interested parties on behalf of the Company was only with respect to the 30 per centum shareholding. Counsel accused Mr. Mongeri of trying to get in through the back door to have the court determine the issues that fall under company law in the Family Court.

13. In his rejoinder, Mr. Mongeri reiterated that if this court decides not to try the issue of the shares in the Company, then the court should stay the proceedings until the issue is settled in another court. This he said was especially so because the person who should protect the interests of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the company is conflicted.

14. From the record and the submission made by the Counsels on record, it is evident that Landeco Limited is a going concern. A limited liability company is a legal person separate from its members as was espoused in the celebrated case of **Salomon vs. Salomon & Co. Ltd [1897] A.C. 122**. Consequently, money that it owns or to which it is entitled is its property and shareholders, whether controlling or otherwise cannot legitimately lay a claim of right to it. (See – **Kawakanja Limited vs. Jane Gathoni Muraya Kanyotu & 6 others [2014] eKLR**).

15. The gist of the 1<sup>st</sup> Respondent's case is that the estate of the deceased owns all 100 per centum of the shares in the company. However, from the record, it is evident that the deceased only held 30 per centum shares in the company at the time of his death, and that there were other shareholders in the register and they held the remaining shares.

16. In law, the administrators of the estate would be entitled to have transmitted to them the shares held by the deceased in the company. This however presents a challenge in the instant case since there is contention with respect to the shares held by the deceased in the company. The 1<sup>st</sup> Respondent while contesting the shareholding in the company has alluded to fraud.

17. **Paragraph 90** of the **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 7(1)** states thus:

“Notwithstanding the effect of the company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature...”

18. From the foregoing, it is evident that the allegations raised by the 1<sup>st</sup> Respondent are tantamount to asking this court to interrogate the affairs of the company and subject it to strict scrutiny by lifting the corporate veil. Whereas the Counsels on record submitted extensively on the provisions of the **Companies Act No. 17 of 2015** to oppose the 1<sup>st</sup> Respondent's case, I will not belabour these arguments. It is noteworthy that this is a succession cause in the Family Court whose jurisdiction is limited to the administration of the estate of a deceased person.

19. **Section 3** of the **Law of Succession Act** defines “estate” to mean the free property of a deceased person and “free property” in relation to the estate of a deceased person means property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by death.

20. A reading of the definition reveals that this court can only therefore, deal with the assets which were held by the deceased as at the date of his death. These include what has been stated as 30 per centum shares in the company.

21. The upshot of the foregoing is that this court can only deal with the 30 per centum share of the deceased in the company as appears in the company register. The dispute on the shareholding in the company does not belong to the Family Court. It is therefore upon the 1<sup>st</sup> Respondent to raise the arguments advanced hereto with respect to the shareholding in the company in the appropriate forum.

22. The 1<sup>st</sup> Respondent also sought stay of these proceedings until the issue of the shareholding is put to rest. **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 37 at p. 330 para. 442**, elucidates on this thus:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.

23. Stay of proceedings is therefore a radical remedy which should only be granted in very exceptional circumstances. In the instant case, I find that to stay these proceedings would only serve to delay the conclusion of this succession cause. Additionally, the 1<sup>st</sup> Respondent has not demonstrated any exceptional circumstances to warrant the granting of the stay orders sought. This is especially so since there are other properties comprising the deceased's estate and which should be dealt with in the Family Court. The contention over the shareholding in the company is a different matter altogether which must be litigated in the appropriate forum before this court can effect the findings of that court, in so far as they touch on the assets of the estate of the deceased.

24. For purposes of clarity, I hereby decline to grant the orders of stay of proceedings sought in this matter and direct that the hearing of this cause shall proceed with the exception of the shares held in Landeco Limited, until the issue of the shareholding is heard and determined in the appropriate forum. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 2<sup>ND</sup> DAY OF DECEMBER, 2020.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the 1<sup>st</sup> Respondent.**

**In the presence of.....Advocate for the 2<sup>nd</sup> Respondent.**

**In the presence of.....Advocate for the 3<sup>rd</sup> Respondent.**

**In the presence of.....Advocate for the 4<sup>th</sup> Respondent.**

**In the presence of.....Advocate for the Administrator.**

**In the presence of.....Advocate for the Interested Party.**