



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 25 OF 2003**

**SADRUDIN JAMAL JIVAN.....PLANTIFF**

**VERSUS**

**ROSHAN CHARANIA.....1<sup>ST</sup> DEFENDANT**

**SHASHI INSURANCE BROKERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The suit herein commenced by way of Originating Summons dated 13<sup>th</sup> October 2003. The plaintiff seeks orders relating to accounts in respects of some assets, inhibitions with regard to dealings relating to a specified landed asset and nullification of a conveyance relating to that asset, being LR No. 1870/V/67 Westlands.
2. The factual background to the suit is set out in the affidavit of the plaintiff, sworn on 13<sup>th</sup> October 2003, in support of the originating summons. The proceedings relate to Zarina Sadrudin Jamal (deceased), the late wife of the plaintiff, hereinafter referred to as the deceased, who passed away on 21<sup>st</sup> May 2000. The plaintiff is the administrator of her estate, having obtained representation thereto on 14<sup>th</sup> January 2002 in Nairobi HCSC No. 1817 of 2001. The deceased was, at the date of her death, an employee of the 2<sup>nd</sup> defendant. When the plaintiff sought to collect and gather the estate of the deceased herein in discharge of his duties as administrator, he established that LR No. 1870/V/67 Westlands, a property that she had been registered as a co-owner of a ½ share with the 1<sup>st</sup> defendant, had on 24<sup>th</sup> May 2000, just three days after her demise, been transferred to the name of the 1<sup>st</sup> defendant. He avers that the transfer was allegedly on the basis of an indenture signed by the deceased sometime before her death and he avers that she was in no condition at the time to sign such documents on account of ill-health. He also raises other issues surrounding the manner in which the indenture was prepared and executed. He complains that the 1<sup>st</sup> defendant and himself were not on good terms at about that time, and especially as she and her sisters had sought to have the deceased discharged from hospital when she had not fully recovered, which they eventually succeeded to do on 14<sup>th</sup> April 2000. He avers that he suspects that the 1<sup>st</sup> defendant caused the deceased to execute the said indenture at about that time.
3. Regarding the 2<sup>nd</sup> defendant it is averred that it refused to release to the plaintiff all the terminal dues accruing to the deceased. The matter was escalated to the District Labour Office at Nairobi for conciliation, whereupon the agents of the 2<sup>nd</sup> defendant indicated that they were not willing to pay the dues as they were not aware of who they were to pay even though they had been furnished with a copy of grant of letters of administration intestate with regard to the estate of the deceased.
4. Several documents have been annexed to the affidavit drawn in support of the suit. There is a certificate of death in respect of the deceased demonstrating that she died on 21<sup>st</sup> May 2000. There is a grant of letters of administration intestate dated 14<sup>th</sup> January 2002 as proof that the plaintiff had been appointed administrator of her estate. There is copy of indenture dated 23<sup>rd</sup> April 2000 conveying LR No. 1870/V/67 Westlands from the deceased to the 1<sup>st</sup> defendant. There is also copy of a caveat lodged on 13<sup>th</sup> May 2003 at the Lands office by the plaintiff regarding LR No. 1870/V/67 Westlands wherein he claims as beneficial owner and administrator of the estate of the deceased. There is a bundle of documents concerning the advocates who allegedly handled the conveyance of 23<sup>rd</sup> April 2000. There is also a bundle of medical and other documents relating to the hospitalization and treatment of the deceased at Aga Khan and Avenue hospitals of Nairobi. Lastly, there is a bundle of documents relating to the deceased terminal dues.
5. The 1<sup>st</sup> defendant entered appearance in the suit on 18<sup>th</sup> November 2003. I have scrupulously perused through the pile of papers before me and I have been unable to find any document, by way of reply or response, filed by the 1<sup>st</sup> defendant.
6. The 2<sup>nd</sup> defendant responded to the suit through an affidavit sworn on 21<sup>st</sup> November 2003 by Sashikant Shah, its managing director. He avers that the deceased worked for the 2<sup>nd</sup> defendant in the position of typist/clerk/secretary. Prior to her death on 21<sup>st</sup> May 2000, she had

been hospitalized in several hospitals within Nairobi, suffering from terminal breast cancer, and during intervals when she was not in hospital she stayed with the 1<sup>st</sup> defendant or with her brother. The 2<sup>nd</sup> defendant met her medical bills in hospital at her request. He states that he also paid her money for her upkeep through her sister-in-law named as Shyama Shamsheer Lalani. He also states that he witnessed the deceased append her signature to the indenture the subject of these proceedings, and that he also signed the said document as an attesting witness. He avers that after her discharge from the Aga Khan and Avenue hospitals the deceased was not taken to her matrimonial home by her husband, instead she was taken to the home of the 1<sup>st</sup> defendant who was her sister. She was only accepted by her husband after one of her other sisters intervened, whereupon she was moved to his home where she eventually died. He asserts that the deceased was in her sound mind when she executed the indenture. He states that no terminal benefits were due to the account of the deceased as all the monies payable had been expended on her medication and treatment. He avers that upon her demise the plaintiff had even approached the 2<sup>nd</sup> defendant to express gratitude and to make an offer to pay the money, which offer the 2<sup>nd</sup> defendant turned down. He asserts that he never was furnished with a copy of the grant of letters of administration intestate. He avers that no terminal dues were payable upon the deceased's demise taking into account her prolonged leave on medical grounds and on account of her hospitalization and other expenses. He denies that he ever said that the 2<sup>nd</sup> defendant was willing to pay the dues but did not know who to pay. He has attached to his affidavit medical records of the deceased's illness, medical bills and invoices, and receipts of payment to her account.

7. Directions were never given on the manner of the disposal of the suit, although the parties were on 2<sup>nd</sup> December 2003 in agreement for disposal by way of *viva voce* evidence.

8. The matter was disposed of by way of oral evidence. The first witness on the stand for the plaintiff was Malikit S. Riyat, a medical specialist in cancer and blood disorder. He testified on 19<sup>th</sup> June, 2007. He was the one who attended to and treated the deceased of cancer. She had terminal cancer of the breast. He described her general condition as weak. He said that he was never invited to comment on her mental condition, and that he was never called upon to witness execution of any document during her hospitalization. He said he was aware of the disputes over her discharge, his own opinion being that it would have been dangerous for her to be discharged at that stage. He said, however, that he was not aware of the domestic disputes between the deceased and the plaintiff. He said that the deceased was depressed and was therefore not talking much. He confirmed that the deceased was on the final days of her terminal illness and the family probably wanted to be with her during final days.

9. The plaintiff was the next witness. His testimony largely mirrored the averments made in his affidavit in support of his originating summons. He said that the 1<sup>st</sup> defendant made an indenture while the deceased was in hospital, whose effect was to transfer the deceased's property to the 1<sup>st</sup> defendant. He stated that the deceased had died at his home, although upon her discharge from hospital she had been taken to the home of her sister, the 1<sup>st</sup> defendant. He asserted that her discharge and accommodation at the 1<sup>st</sup> defendant's home was done without his knowledge and permission. He said that he was in good terms with the deceased, adding that their relationship was not restrained. He said it was his sisters-in-law who were bringing trouble while the deceased was admitted in hospital. He said some of the medical bills were settled by the defendants and some by himself.

10. The 1<sup>st</sup> defendant did not offer any evidence.

11. The 2<sup>nd</sup> defendant called two witnesses. The first was Shaskant Meghji Shah, the managing director of the 2<sup>nd</sup> defendant. His testimony largely mirrored the averments made in his replying affidavit. He said that the deceased used to be taken to hospital by her brother, and that upon discharge at one point she went to live with him. He explained that when the deceased was taken ill all her salary cheques were cashed and expended to settle her medical bills. He stated that he also utilized his own money on her treatment. He then went on to state the amounts that he spent at the various hospitals on her account. He asserted that he did not owe her anything, saying that she did not work for a long time due to her illness. He said that the deceased's terminal benefits were never worked out, in any event they had been paid to her, saying that she had been overpaid. He denied paying the same to the 1<sup>st</sup> defendant despite his advocate's letter on record saying so. He explained that nothing was paid to the 1<sup>st</sup> defendant even though she was also involved in the matter.

12. He said that he was aware that she executed an indenture sometime in April 2000 while under admission at the Aga Kahn Hospital. He said that he was party to the execution of the document. He was the one who inserted the date, and he signed the same as a witness, and the deceased thumb-printed it. He testified that the ink pad used on the occasion was obtained from the nurses, and that it was he who read the document over to the deceased before she thumb-printed it. He described her as having been able to talk, was in her full senses and able to understand things. He said that there were about six persons present, including himself, the 1<sup>st</sup> defendant and a nurse. He denied colluding with the first defendant, saying that he had no vested interest in the matter, and that she was present as a close family member. He explained that it was the 1<sup>st</sup> defendant who was taking care of her and therefore the deceased decided to give her everything. He said that he did not know who prepared it. When shown copy of the indenture, he stated that the same indicated that it had been drawn by the 1<sup>st</sup> defendant, then the 1<sup>st</sup> defendant's name was cancelled and replaced with that of Muri Mwaniki Advocates. He could not confirm whether the cancellation was there at the point he signed the document. He said that he did not know whether the advocate who signed the indenture was present in person, saying that he did not know Ongicho, advocate, and he did not know whether he was present. He said he could have been present, as there were other persons present at the event that he did not know. He said the documents were given to him by the 1<sup>st</sup> defendant, and no one was introduced to him as an advocate. He stated that the plaintiff had literally left or abandoned the deceased. He said that he could not say when the document was presented at the Lands office for registration.

13. The 2<sup>nd</sup> defendant's next witness was Ruth Wayua Masika, a secretary with the firm. She testified on how she used to work with the deceased, how and when she fell ill and how she then stopped working.

14. At the close of the oral hearing, the parties were directed to file written submissions. There has been compliance. Both sides have filed their detailed written submissions, complete with the authorities that they rely on to advance their respective positions. I have read through them and noted the issues identified by them and the arguments advanced to address those issues. I shall bear the same in mind in my determination of the matter at hand.

15. Before I address the issues that are raised in the matter before me in the suit, that is as to whether LR No. 1870/V/67 Westlands, formed part of the estate of the deceased and whether the deceased was entitled to terminal benefits from her employment with the 2<sup>nd</sup> defendant which the 2<sup>nd</sup> defendant ought to settle, I shall first of all deal with an issue that the parties have not raised, relating to jurisdiction.

16. The proceedings herein were initiated in 2003. The first witness in the matter testified in 2007, while the rest followed in 2013 and 2016. The case against the 1<sup>st</sup> defendant turns on LR No. 1870/V/67 Westlands. The deceased was owner of ½ share thereof, three days after her death the same was transferred to the name of the 1<sup>st</sup> defendant. That would mean that the dispute turns on ownership of the said property as between the estate of the deceased and the 1<sup>st</sup> defendant. The evidence on record points to an indenture executed by the deceased, in favour of the 1<sup>st</sup> defendant, two weeks or so before she died. The plaintiff contends that that transfer was fraudulent given the circumstances under which it was made. He invites the court to nullify the same. On the case against the 2<sup>nd</sup> defendant, the plaintiff argues that there was an employer-employee relationship between the deceased and the 2<sup>nd</sup> defendant out of which accrued terminal benefits from her death, which became payable to her estate. The 2<sup>nd</sup> defendant conceded the employment relationship and the fact that the deceased was entitled to terminal benefits, but denies owing any terminal benefits to the estate arguing the same were exhausted on the medical care of the deceased.

17. The issues the subject of these proceedings arose during the time of the old or retired Constitution of Kenya. The determination thereof is happening under the auspices of a new Constitution which came into force in 2010. The provisions of the new Constitution have a profound effect on the matters at hand, more on the jurisdiction of this Court to deal with the issues arising. The new Constitution made provision for creation of courts of equal status to this Court and vested them with exclusive jurisdiction over matters some of which this Court had jurisdiction over under the old Constitution. The new Consultation took away jurisdiction from the High Court over the matters. Jurisdiction is everything, and a court can only entertain matters over which it has jurisdiction. Where it has no jurisdiction it must down its tools.

18. The provisions of the new Constitution that have a bearing over the matters at hand are Articles 162(2) and 165(5), which state as follows –

*‘162(2). Parliament shall establish court with the status of the High Court to hear and determine disputes relating to –*

*(a) employment and labour relations; and*

*(b) the environment and the use and occupation of, and title to, land ....*

*165(5). The High Court shall have no jurisdiction in respect of matters –*

*(a) ...*

*(b) falling within the jurisdiction of the courts contemplated by Article 162(2).’*

19. The question that I should answer first regarding LR No. 1870/V/67 Westlands is whether I have any jurisdiction to make any orders at all with respect thereof in view of the provisions in Articles 162(2) and 165(5) of the Constitution. The starting point should be with the Law of Succession Act, Cap 160, Laws of Kenya. The matter herein is brought by the administrator of the estate of the deceased. He claims on behalf of the estate, and his argument is that LR No. 1870/V/67 Westlands is estate property. He appears to say that a probate court does have jurisdiction over estate property, and therefore this court does have jurisdiction to address issues relating to LR No. 1870/V/67 Westlands.

20. The law relating succession or inheritance concerns distribution of property. Property is at the heart of succession or inheritance. Indeed, the question succession or inheritance would only arise where a dead person had property. A dead person without any property or assets has no estate. There would be no succession or inheritance therefore with regard to such a person who has no estate or property. The effect of that would be that the High Court may not have jurisdiction with regard to property in the context of Article 162(2)(b) of the Constitution, but it does have jurisdiction over property on aspects that revolve around succession following the death of the owner thereof. What the High Court cannot determine is a question relating to ownership or use or occupation of land. What should happen where such an issue arise within a succession cause or succession proceedings is for the High Court to isolate the same, stay the proceedings to the extent that they relate to that issue and refer the parties to the relevant court, the Environment and Land Court. Once the Environment and Land Court resolves the dispute, the resolution is then placed before the High Court so that the High Court can resolve the outstanding issues on distribution of an estate in the context of that resolution or determination by the Environment and Land Court.

21. What does that leave us so far as this matter is concerned? I am being invited here to make a determination on the status of LR No. 1870/V/67 Westlands as to whether it belonged to the deceased as at the date of her death or to the 1<sup>st</sup> defendant in view of the indenture that the deceased had executed prior to her death. I am conscious of the fact that the matter before me is not a succession cause, but a suit. This is not the cause where the plaintiff obtained representation to the estate of the deceased, and where he should eventually get orders on distribution of the said estate. Instead, this is a civil suit properly initiated by the estate for determination of rights over property as between the estate and third parties. If it were a succession cause, I, sitting as a Judge of the High Court would have to determine whether LR No. 1870/V/67 Westlands was estate property or not, and whether I should have it placed in the schedule of the assets available for distribution pending confirmation of grant where then the issue as to whether it had been conveyed to the 1<sup>st</sup> defendant would arise for determine and whereupon I would refer it to the Environment and Land Court. I would be poised to do so on the basis that as at the date of the deceased's death on 21<sup>st</sup> May 2000 LR No. 1870/V/67 Westlands was still in the name of the deceased. A person carrying a search on the title on the said date would have established that it was registered in the deceased's name. Technically, it was estate property. The indenture was lodged for stamp duty payment on 23<sup>rd</sup> May 2000 and for registration on 24<sup>th</sup> May 2000. Those events happened after the deceased had died on 21<sup>st</sup> May 2000, meaning that the 1<sup>st</sup> defendant was acting contrary to section 45 of the Law of Succession Act, and her conduct probably would be classified as intermeddling with the estate of a dead person.

22. Acting as a probate court I would have jurisdiction to rule that the property was technically estate property which ought to be listed in the schedule of assets of the estate, and direct any aggrieved party to wait for the administrator to apply for confirmation of the grant so that the issue could be raised at that stage, whereupon, should such issue be raised by way of a protest, I would direct the parties to file a formal suit, such as the instant one, this time before the Environment and Land Court, for determination of the authenticity of the transaction comprised in the indenture. As it is I am not sitting as a probate court. As mentioned elsewhere, what I have before me is not a succession cause, but a civil suit for determination of the authenticity of the land transaction comprised in the subject indenture. I have no jurisdiction over the issue that arises in this suit, and the plaintiff would be better off before the Environment and Land Court.

23. On the terminal dues, the twin issues are whether the estate is entitled to them, and whether they are recoverable or whether the High Court can order the 2<sup>nd</sup> defendant to pay them as a debt to the estate. The 2<sup>nd</sup> defendant appears to concede that the deceased was entitled to terminal dues given that she had been their employee for quite some time, but argues that the terminal dues were no available as the company had spent money on the deceased's hospitalization and medical bills, and that the money spent was what had accrued to the deceased as her terminal dues. The 2<sup>nd</sup> defendant asserts that whatever would have been due to her was exhausted by the medical bills settled by it. Whether terminal dues accrued and whether they were expended to settle the deceased person's bills is a dispute that arises from and revolves around employment and labour relations. It is an issue that is caught up under Article 162(2)(a) of the Constitution, and the High Court has no jurisdiction by virtue of Article 165(5) of the Constitution over that dispute. It could be argued that the same are civil issues properly brought in civil proceedings properly brought under the provisions of the Civil Procedure Act, Cap 21 Laws of Kenya. That may be so. But they revolve around issues in respect of which the High Court has no jurisdiction.

24. These issues arose in 2000, as I stated earlier, well before the new Constitution came into force. It could be argued that this court became seized of them under the old Constitution and should therefore proceed to determine them under the old dispensation. The answer to that is that the matter before turns on jurisdictional and constitutional parameters. The High Court is a creature of the Constitution and exercises such jurisdiction as the Constitution confers upon it. The old Constitution was retired by the new Constitution, and upon promulgation on 27<sup>th</sup> August 2010 the new Constitution became effective and ousted jurisdictions that had been conferred by the old Constitution and conferred fresh jurisdictions. This court had jurisdiction to pronounce on the issues arising in this suit before 27<sup>th</sup> August 2010, that jurisdiction is not there anymore. The coming into force of the new Constitution in 2010 took away the jurisdiction of the High Court over this matter, the parties ought to have changed tact then, and withdraw the instant suit and commence fresh suits before the courts that were conferred with jurisdiction under the new Constitution.

25. I need not say more. In view of everything that I have said so far, it should be clear that I, as a Judge sitting in the High Court, have no jurisdiction to grant the orders sought in the Originating Summons dated 13<sup>th</sup> October 2003. I shall accordingly dismiss the said suit. Costs shall abide the outcome. Any party aggrieved has thirty (30) days to challenge this decision at the Court of Appeal.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>st</sup> DAY OF January 2019**

**W MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15<sup>th</sup> DAY OF February 2019**

**ASENATH ONGERI**

**JUDGE**