REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCALLENEOUS SUCCESSION CAUSE NO. 23 OF 2018

NAZIM JIWA MITHA.....APPLICANT

VERSUS

SHAMSHUDIN JEFFERALI BOGHANI.....RESPONDENT

RULING

Before this court is an application for summons for revocation/annulment of grant for letters of administration of the estate of Laila Chhagan Sidi(deceased). According to the death certificate produced before this court, and whose authenticity hasn't been challenged by either party, the deceased died of cardiopulmonary arrest due to septic shock on 8th July 2017 at the Aga Khan Hospital in Kisumu East District aged 76 years. The deceased was a business lady and a resided in Kapsabet Town, Nandi County.

The respondent herein, Shamshudin Jefferrali Boghani petitioned for grant of letters of administration intestate. The respondent made the petition as the grandson of the deceased and was filed on 30th January 2018 at the Kapsabet Law courts.

The respondent swore an affidavit in support of the petition in which he stated that he is the only heir surviving the deceased.

In the petition, the respondent was guaranteed by Akber Abdul Jamal and Almunir G. Bhanji as personal sureties.

A letter from the chief, Kapngetuny Location in Kapsabet was also procured and in it, the chief stated that the respondent herein was a nephew to the deceased and the deceased was only survived by the respondent.

A publication was made in the Kenyan Gazette on 23rd march 2018 for the confirmation of grant of letters of administration intestate.

The applicant herein, Nazim Jiwa Mitha made an application under a certificate of urgency for summons for revocation/annulment of grant. The application is dated 9th august 2018 and was filed the same day.

The applicant sought the following orders;

1. That the application be certified urgent and heard exparte at the first instance.

2. That the grant of letters of administration issued to Shamshudin Jefferali Boghani on the 5th June 2018 in PMCC No. 9 of 2018 be revoked.

3. That costs of this application be provided for.

The application was accompanied with a supporting affidavit similarly dated and filed on the 9th August 2018.

The applicant claims that the grant taken out by the respondent was obtained by means of untrue allegation of fact that the deceased died intestate. The applicant contends that the deceased, Chhagan Sidi died testate having left behind a valid will. The applicant annexed copies of the deceased's death certificate and the will, both marked as NJM1.

The applicant also claims that as the executor of the will, he instructed his advocate to petition for the grant of probate at the Kapsabet Law Courts.

The applicant also claims that he was not aware of the filing and gazettement of the respondent's petition and grant of letters of administration till his advocate brought it to his attention when he had gone to petition for the grant at the Kapsabet Law Courts Registry.

The Same is marked as NJM1.

The applicant, in his supplementary affidavit dated 4th December 2018 and filed on the 14th of December 2018, further claims that the deceased, as per her will, bequeathed her properties for charitable purposes in health and education for the benefit of the children of Kenya. The applicant further contends that the deceased wished that a foundation in the name of Chagan Sidi Foundation be incorporated and consequently used as a vehicle to carry out and achieve her wishes. The applicant annexed the foundation's constitution to the supplementary affidavit and is marked as NJM1.

The respondent filed his written submissions on the 13th of December 2018 in which he raised a number of grounds in objection to this application.

The respondent claims that this court lacks the jurisdiction to hear and determine this suit as the applicant had filed another suit in Kapsabet Principal Magistrate Succession Cause No. 124 of 2018. The respondent contends that it is only the court that granted the letters of administration that has the powers to revoke and/or annul the same.

The respondent claims that the applicant hasn't proven that he concealed material facts in the lead up to the confirmation of the said grant. He claims that he is the true heir to the estate of the deceased as he falls in the 3rd degree of consanguinity pursuant to *Rule 7(1)* of the *Probate and Administration Rules* and *Section 39* of the *Law of Succession Act.*

The respondent also challenges the validity of the purported will of the deceased. The respondent avers that the will is invalid as it bequeaths property to a non-existent entity. The respondent also claims that the will is ambiguous especially its Paragraphs 1-6. The respondent further contends that the deceased may have been unduly influenced by the applicant and that the will was made under suspicious circumstances. The respondent further claims that the applicant drove the deceased to a certain position and in the end her mind was influenced to a level where it cannot be said she acted on her own volition. On this, the respondent relied on the Case of ***In the Estate of G.K.K(Deceased) (2013) eKLR.*** The respondent therefore prayed that this application be disallowed.

Having gone through the pleadings and the respective written submissions by both parties, this court has deduced a number of issues that it ought to determine. I will delve into them individually and wholesomely.

1. Whether this court has the jurisdiction to hear and determine this application.

The respondent herein claims that this court lacks the jurisdiction to hear and determine this suit. The court of appeal asserted itself on this matter in the case of ***Owners of the Motor Vessel"Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** and stated as follows: -

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"**

Section 47 of the *Law of Succession Act* provides 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'***

The respondent claims that the applicant has filed another suit in Kapsabet Principal Magistrate Succession cause No. 124 of 2018 and that this court would therefore lack the jurisdiction to hear and determine this application.

A perusal of the same indicates that Kapsabet Principal Magistrate Succession cause No. 124 of 2018 is a petition for grant of letters of administration by the applicant herein, Nazim Jiwa Mitha. It is dated 29th may 2018 and filed before the Kapsabet Law Courts Registry on the 2nd of august 2018. The petition was made long after the respondent herein petitioned for the grant of letters of administration intestate.

It is therefore my view that it is the court hearing petition Kapsabet Principal Magistrate's Succession cause No. 124 of 2018 that lacks the jurisdiction. I am satisfied that this court has the jurisdiction to hear and determine this suit.

2. Whether the grant of letters of Administration intestate, by the respondent were obtained fraudulently.

The respondent herein, Shamshudin Jefferrali Boghani petioned and was granted the letters of administration intestate from Kapsabet Principal Magistrate's Succession cause No. 9 of 2018.

The respondent petitioned for the grant in his capacity as the grandson to the deceased. However, the letter from the chief, in support of the petition dated 29th January 2018 contradicts this information, the letter indicates that the respondent was a nephew to the deceased.

Further, the respondent, in his written submissions dated 11th of December 2018 and filed on the 13th of December 2018 avers that he is the nephew to the deceased.

It is therefore unclear to this court the relationship that existed between the deceased and the respondent.

Evidence on record also shows that the respondent was a tenant in the premise owned by the deceased and indeed the respondent admitted this in the 5th Paragraph of his further affidavit filed in this court on the 16th of October 2018.

The respondent claims that the property that was owned by the deceased is family property and that the deceased couldn't bequeath them as she pleased. The question I would then ask myself is, how could the respondent be a tenant in the premises he quasi-owned since he alleges it belonged to the family.

Section 39 (1) of the Law of Succession Act states,

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

As per the grant, the respondent claims to be the only heir surviving the deceased. The presumption that the respondent wants this court to make is that the deceased was survived by no one within the 1st, 2nd and 3rd degrees of consanguinity save for himself. That is to say, the respondent has no siblings, parents, uncles nor aunties for if he had, he ought to have sought their consents in petitioning for grant of letters of administration pursuant to Rule 26 of the Probate and Administration Rules which states that,

1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

The respondent, in Paragraph 7 of his further affidavit claims that the deceased had siblings namely; Hashen Chhagan Sidi and Malek Chagan Sidi. If at all they are still alive, the respondent ought to have sought their consents or that of their children in petitioning for the grant since, together with the respondent, they all fall under the same degree of consanguinity.

Section 51 (g) of the *Law of Succession Act* states that every application for grant shall, in cases of total or partial intestacy, include information as to, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.

Section 76 of the *Law of Succession Act* as to obtaining grants fraudulently states as follows: -

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.

This court therefore holds the view that there is a high likelihood that the respondent concealed material facts in petitioning for the grant. If at all there exists other beneficiaries of equal degree of consanguinity, and my assessment indicates a high likelihood of their existence, their consents were not procured in petitioning for the grant and as such, the procedure for obtaining the grant may have been flawed.

In view of the above, coupled with the contradiction as to the relationship that existed between the deceased and the respondent, it is the finding of this court that the grant was obtained improperly as it fell short of the statutory and procedural stipulations required in obtaining the grant of letters of administration intestate.

3. <u>Whether the deceased left behind a valid written will.</u>

The applicant herein, Nazim Jiwa Mitha, claims that the deceased died testate having left behind a Will. The alleged will, dated 25th June 2015 was produced in evidence and marked as NJM1.

The alleged will was witnessed and attested to by Imtiazzally Nurani and Mubina Hanif Bhatia but who have neither sworn an affidavit nor testified before this court in person as to the authenticity of the alleged will.

The alleged will was drawn and filed by P.K.K.A Birech of Birech, Ruto and Co. Advocates. The said advocate swore an affidavit dated 18th August 2018 in which he claimed to have drafted the said will and oversaw its witnessing and attestation by the aforesaid two witnesses.

Before delving into the validity or otherwise of the alleged will, let me first get into the contents of the alleged will.

I have gone through the alleged will and much as I may not go into its finer details, I will go into the fundamental substance, crucial in the determination of the above question.

Paragraph 4 of the alleged will appoints the applicant herein and one Maurice Obwaya Owi of Id. No. 1051992 as the trustees of the Chagan Sidi Foundation. Paragraph 5 of the same will directs the two trustees herein to collect income from the properties of the deceased for, and I quote, 'Charitable purposes of Health and/or education'. Further, the applicant herein, in his supplementary affidavit dated 4th December 2018 and filed on the 14th December 2018, at paragraph 5 states that the foundation was to be used as a vehicle for charitable purposes in health and education for the benefit of the children of Kenya.

At paragraph 6 of the alleged will, the deceased appointed the applicant herein and the other trustee, Mr. Maurice Obwaya Owi as the executors of her will and directed them to incorporate the Chagan Sidi Foundation.

My understanding of the above connotations with regards to the alleged will is that the deceased intended that her estate be used for the benefit of the public, and as at the time of the making of the alleged will should have been governed under the Non-Government Coordination Act of 1992, which has since been repealed through the enactment of the Public Benefit Act that came into force on the 9th of September 2016. The Act was enacted to,

> ***'…provide for the establishment and operation of public benefit organisations; to provide for their registration; to establish an administrative and regulatory framework within which public benefit organisations can conduct their affairs and for connected purposes.'***

Section 2 of the same *Act* defines *'Public Benefit Activity'* as; -

> ***'An activity that supports or promotes public benefit by enhancing or promoting the economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organizations'***

However, the applicant herein claims that he is in the process of incorporating the said Foundation. The applicant evidenced this with a copy of the Foundation's Constitution, marked as NJM1 as well as Application Forms under the Societies' Act.

A perusal of the said Foundation's Constitution shows that its objects contradicts what the alleged will envisioned. As per the Foundation's constitution, specifically in Paragraph 12, the society would source its funds from monthly contributions from the members as well as from a financial institution.

Furthermore, the purpose of the foundation would be to improve the welfare of its members. It is therefore clear to this court that the foundation will be a club of a few people out to benefit themselves from the foundation. This would be a significant deviation from the intents of the alleged will.

The fact that the alleged foundation hasn't been registered four years after the intention for its registration was made further compounds the incredibility of the alleged will. The alleged will claims to bequeath the property to an inexistent organization.

Even with the above crystallization of information about the alleged charitable organization, I will still look into the validity of the said Will. The respondent claims that the deceased lacked the free will to dispose the estate. Section 5(1) of the *Law of Succession Act* embodies the principle of testamentary freedom by providing that any person is capable of disposing off his property by Will so long as he is of sound mind. Testamentary capacity has been described as the testator's ability to understand the nature of Will making. This test was set in the case of ***Cockburn CJ in Banks v Goodfellow*** where the court stated as follows;

> ***"he must have a sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them."***

On this, I take note that the deceased had written a letter to the Branch Manager, National Bank of Kenya, Kapsabet Branch seeking that she be furnished with withdrawal slips on her account since the year 2005. She claimed that someone was taking advantage of her age to withdraw money from her bank account. It is possible therefore that the deceased may not have been able to recount all her properties, more so the balance at the bank.

The respondent further claims that the deceased may have been unduly influenced into making the will. In ***Mwathi vs Mwathi (1995-1998) 1 EA 229***, the Court held that;

> ***"Undue influence occurs when a testator is coerced into making a Will or some part of it that he does not want to make. Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make"***

On the issue of whether the will was properly witnessed and attested to, I will seek guidance from the wordings of *Section 11* of the *Law of Succession Act* which provides that;

"No witness shall be valid unless-

> ***(a) the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator,***
>
> ***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;***
>
> ***(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."***

It is unclear to this court the circumstances under which the alleged witnesses attested to the alleged Will. The attestation of a Will validates the testator's signature and in this case, this court cannot be certain that the will was properly attested to. The unavailability of the said witnesses to corroborate the assertions by the applicant, either in person or by swearing an affidavit, only serves to abrase the statutory requirements under Section 11 of the Law of Succession Act.

Determination.

In light of the above, this court makes its determination as follows: -

1. That the grant of letters of administration were taken out premised on the wrong account of facts and the grant is hereby revoked.

2. That the alleged Will is entirely invalid. The deceased died intestate as the alleged Will fell short of the statutory requirements mandatory of any valid Will.

3. That the respondent herein, or any beneficiary under the intestacy rules can petition for and take out fresh grant of letters of administration intestate as the flaw in taking out the first one cannot be cured.

4. That the applicant herein is estopped from meddling, in any way, with the estate of the deceased.

Each party to bear its own costs.

This court so orders.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of July, 2019.

In the absence of;

Mr. Ndege for applicant

And in presence Mr. Babu for respondent

Ms Sarah – Court clerk