



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 258 OF 2018

IN THE MATTER OF THE ESTATE OF AMRITLAL VIRA SHAH (also known as AMRITLAL VIRA NATHOO SHAH-DECEASED)

MAYURKUMAR AMRITLAL SHAH.....APPLICANT

VERSUS

BHARATKUMAR AMRITLAL VIRA SHAH.....RESPONDENT

RULING

1. By an application brought by way of a Notice of Motion dated 8th April, 2019 and filed on 9th April, 2019 the Applicant is seeking for orders that:

(1) Monies and/or balances thereof held in the Bank Accounts both in Kenya and India initially in the joint names of the deceased and his widow NIRMALABEN MANGALBHAI PATEL emanating from the proceeds of shares in ACME Textiles Limited be deemed to be part of the assets of the deceased's estate.

(2) NIRMALABEN MANGALBHAI PATEL holds the said proceeds or balances thereof as a Trustee for the benefits of the remainder of the beneficiaries who had not been given their bequests namely:

a) Kunal MayurKumar Shah

(4 shares out of the 52 shares).....8,000,000/-

b) Reema MayurKumar Shah

(4 shares out of the 52 shares).....8,000,000/-

c) Chirag BharatKumar Shah

(4 shares out of the 52 shares).....8,000,000/-

d) Neha BharatKumar Shah

(4 shares out of the 52 shares).....8,000,000/-

e) Nishi BharatKumar Shah

(4 shares out of the 52 shares).....8,000,000/-

f) The two sons and one daughter to receive balance of 3 shares to be distributed equally per paragraph (h) of the Will are:

i) MayurKumar Amritlal Shah

(one share of the 52 shares).....2,000,000/-

ii) BharatKumar Amritlal Shah

(one share of the 52 shares).....2,000,000/-

iii) Rupal Amritlal Shah

(one share of the 52 shares).....2,000,000/-

(3) The monies held in the joint account being the proceeds of the sale of the shares do not form part of the monies the deceased referred to as “monies in my Bank Accounts in Kenya and India” in paragraph 5 of the will.

(4) Costs of the administration of the estate should be paid out of the then joint account now in the name of NIRMALABEN MANGALBHAI PATEL.

(5) The balance in the said account in the name of NIRMALABEN MANGALBHAI PATEL after paying the Beneficiaries and costs, to be given to the said NIRMALABEN MANGALBHAI PATEL.

(6) If there is any balance in what is deemed to have been a joint account after distributing to the Beneficiaries and payment of the costs of Administration, the same be handed over/ retained by NIRMALABEN MANGALBHAI PATEL.

(7) The costs of this application be in the cause.

2. The application is supported by an undated affidavit sworn by the Applicant and filed on 9th April, 2019 in which he deposes that he is the Executor of the last will of Amritlal Vira Shah alias Amritlal Vira Nathoo Shah, the deceased herein. A grant of probate with written will was made to the Applicant by the High Court of Kenya at Nairobi on 9th November, 2018.

3. The Applicant states that in dividing, transferring and vesting the properties in accordance with the wishes of the deceased, he has encountered an ambiguity which has affected the subsequent vesting of certain properties. He referred the court to paragraphs 4 and 5 of the will which deals with the distribution of the shares of the deceased in ACME TEXTILES LIMITED. He asserted that during the deceased's lifetime, share proceeds representing 52% of shareholding and valued at shillings One Hundred Nine Million Four Hundred Thousand (Kshs. 109,400,000/=) in ACME TEXTILES LIMITED were realized.

4. The Applicant urged that out of the sum realized from the sale of the shares, Kenya Shillings fifty six million eight hundred forty two thousand seven hundred sixty six (Kshs. 56,842, 766/=) was paid directly to the beneficiaries known as Nirmalaben Mangalbhaj Patel and Sangeeta Bhailalbhaj Rai alias Sangeeta Samir Mehta as specified under paragraph 4 of the will. The balance after payment of incidental costs in the sum of Kenya Shillings Fifty Two Million Four Hundred Forty Seven Thousand Three Hundred Seventy (Kshs. 52,447,370/=) was transferred to the joint account of the deceased and Nirmalaben Mangalbhaj Patel. Further that a sum of Kenya Shillings Thirty million (Kshs. 30,000,000/-) was transferred from the local branch of the Bank of India.

5. It is the Applicant's prayer that the monies held in the Bank Accounts both in Kenya and India be deemed to be part of the proceeds of the sale of shares and any other monies the deceased may have deposited therein from other sources altogether, be deemed to be part of the deceased's estate. Further that NIRMALABEN MANGALBHAI PATEL the joint holder of the said Bank Accounts be deemed to hold the said amounts plus interest thereon as a Trustee for the remainder of the beneficiaries who had not been given their bequests in terms of paragraphs 4 a-e and h of the deceased's last will.

6. The Applicant asserted that to complete the distribution of the assets in accordance with the wishes of the deceased in a fair, smooth and uncomplicated fashion, to cover other costs and to ensure that there is enough money for these purposes, the monies transferred to India together with any other monies forming part of the deceased's estate with interest thereon be transferred to an account in Kenya preferably the Bank of India. This he says will ensure there are enough funds to distribute amongst the deceased's named beneficiaries and to pay the necessary costs. The deceased had in paragraph 4 of his last will directed that the cost of the administration of the estate be realized from the estate.

7. The Applicant urged that the balance in the joint account, if any, after distribution of the sums in the specified shares to the beneficiaries and payment of the costs of Administration, should be retained by Nirmalaben Mangalbhaj Patel.

8. The application came up for hearing on 17th June, 2019 during which time Mr. Masese learned counsel for the Applicant told the court that the Executor is seeking a clarification by way of declaration in paragraph 4 of the will in which the deceased bequeaths 52 percent of the will. Counsel stated that before the Testator's death, the shares in Acme Textiles Limited were sold and they realized Kenya Shillings One Hundred and Nine million (Kshs. 109,000,000/=). That it is the Applicant's understanding that this sum represented 52 percent of the shares.

9. Mr. Masese stated that the shares of two of the beneficiaries were paid out of the sale proceeds and the balance deposited in an account held jointly by the deceased Testator and Nirmalaben Mangalbhaj Patel, a wife to the Testator and mother to the executor. Counsel urged that the money is therefore part of the bequest and should go to those who did not receive a share out of the sale. That this is in spite of the fact that paragraph 5 of the will directs that the money in the deceased's bank account in Kenya and India be given to his wife Nirmalaben Mangalbhaj Patel.

10. Mr. Masese contended that because there is a possibility that Nirmalaben Mangalbhaj Patel could have had her own monies in the joint account, the court should only consider the monies that came from the sale. Counsel suggested that any other monies in the account other than from the sale should go to the deceased's wife Nirmalaben Mangalbhaj Patel.

11. I have considered the pleadings and the evidence tendered. The pleadings filed hereto indicate that the sole issue that emerges for

determination revolves around construction of the will.

12. The law on construction of wills is found under **section 22** of the **Law of Succession Act CAP 160 Laws of Kenya** which provides that wills shall be construed in accordance with the provisions of the First Schedule to the Act. In determining this application therefore I will be guided by the provisions of the **First Schedule** to the **Law of Succession Act**.

13. Paragraph 4 of the deceased's last will, to which the Applicant referred, indicates the respective shares the deceased devised and bequeathed to his named beneficiaries from his 52 percent shareholding in Acme Textiles Limited. From the pleadings and the oral submissions of Mr. Masese, the court gathers that the deceased's 52 percent shareholding was sold before his demise and some of the proceeds were paid directly to two (2) of the named beneficiaries. The balance thereof was deposited in a joint account in the names of the deceased and his wife Nirmalaben Manghalbhai Patel. The deceased, as Testator, also directed under the said paragraph that the cost of the administration be realized from the estate.

14. Whereas under paragraph 5 of the will the deceased directed that the monies in his bank accounts in Kenya and India be given to Nirmalaben Manghalbhai Patel, a wholesome reading of the will reveals that this does not include the proceeds from the sale of the deceased's shares in Acme Textiles Limited. This is because from paragraph 4 of the will, the intention of the testator was to bequeath the shares or the proceeds realized from their sale to his beneficiaries as specified under paragraph 4 of the will.

15. **Rule 2** of the **First Schedule** is express on the meaning of clauses and provides thus:

“The meaning of any clause in a will is to be ascertained from the entire instrument, and all the provisions of the will are to be construed with reference to each other; but where two clauses or provisions are irreconcilable, so that they cannot possibly stand together, the last shall prevail.”

16. A reading of paragraph 4 of the will reveals that the bequests therein are express and positive and by reason of **rule 5** of the **First Schedule**, the bequests cannot therefore be controlled by inference and argument from other parts of the will.

17. I am persuaded by the decision in the **matter of the estate of Salome Mukami Kariuki (deceased) Succession Cause 2299 of 2012 [2013] eKLR**, in which Musyoka J while deliberating on the issue of construction of wills opined thus:

“One of the cardinal rules of construction of wills, and indeed all documents, is that it must speak for itself. The testator's intention should be ascertained as expressed in the will itself. In other words, the meaning of the will is to be gathered from the will itself...”

The modern approach to construction of wills is the intentional and purposive approach, which tends towards discovering the purpose or intention of the testator in expressing himself in the manner that he does in a will...Extrinsic evidence is permissible for the purpose of exposing the circumstances in which a testator was situated at the time he made the will. Evidence can be led to assist the court to ascertain the meaning he intended in the said circumstances to give to his chosen wording. *Re Smalley* (1929) 2 Ch. 112 demonstrates that extrinsic evidence is admissible to ascertain the property that the testator refers to in his will.”

18. From the evidence adduced hereto, and from a reading of the will, there is no doubt that the Testator, the deceased herein, intended to bequeath his 52 shares in Acme Textiles Limited in the terms specified under paragraph 4 of the will. Further that the Testator intended that the monies held in his bank accounts in Kenya and India go to his wife Nirmalaben Mangalbhahi Patel. At the time of preparing the will however, the shares had not been sold and reference to monies held in the deceased's bank accounts does not therefore cover the proceeds from the sale of the shares. The proceeds of the sale of the shares should therefore be shared in the terms specified under paragraph 4 of the will.

19. With regard to the cost of administration, the deceased directed under paragraph 4 of the will that the cost be realized from the estate which comprised of two land parcels, 52 percent shares in Acme Textiles Limited and monies held in his bank accounts in Kenya and India. The estate has since been distributed save for the monies held in the deceased's bank accounts which include part of the proceeds from the sale of the 52 percent shares. In the premise therefore, the cost of administration can only be realized from the monies held in the deceased's bank accounts.

20. After payment of the pending bequests specified under paragraph 4 of the will and the cost of the administration, the balance of monies held in the accounts shall devolve to Nirmalaben Mangalbhahi Patel in accordance with paragraph 5 of the will.

21. It is noteworthy that whereas the will names two executors, being the Applicant and the Respondent herein, the Respondent was reluctant to prove the will. This cause was therefore initiated solely by the Applicant who caused a Citation dated 17th April, 2018 to issue directed to the Respondent, who is his brother and co-executor. There is on record an affidavit of service sworn on 23rd May, 2018 and filed on 30th May, 2018 as proof of service of the citation upon the Respondent.

22. With regard to the present application, I note that there is no affidavit of service on record to show that the Respondent was served nor is there any response filed thereto. I will nonetheless proceed to determine the application. I note that all the Respondent has done since being served with a Citation in May 2018 is appoint Advocates to act on his behalf and file grounds of opposition to an application made by the Applicant for the preservation of the deceased's estate. He has however not accepted or renounced probate since.

23. Under **section 60** of the **Law of Succession Act**, where several executors are appointed, probate may be granted to all of them simultaneously or at different times. Further, under **rule 22(7)** of the **Probate and Administration Rules**, if the person cited fails to apply for a grant with reasonable diligence, the Citor may petition the court for a grant himself as in the present case. There is on record a Grant of Probate with written will issued solely to the Applicant on 9th November, 2018. In the instant case, I note that the Respondent's reluctance to

act is prejudicial to the estate of the deceased.

24. From the foregoing, it is my considered view that the application filed by way of notice of motion dated 8th April, 2019 aims to realize the deceased's wishes as expressed under his last will. The application therefore has merit and is allowed in the terms prayed. The orders shall be served upon the Respondent. It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **17th** day of **September, 2019**.

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.