



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 769 OF 1988

IN THE MATTER OF THE ESTATE OF DES RAJ GANDHI (DECEASED)

RAJ KUMARI GANDHI.....APPLICANT

VERSUS

TRILOK NATH GANDHI.....RESPONDENT

RULING

1. This ruling is pursuant to a Notice of Motion Application dated 15th October, 2019 which is brought under Order 32 Rule 1 and 4, Order 32 Rule 15 and order 51 Rule 1 of the Civil procedure rules 2010. In the application the following orders have been sought:

i. That this honourable court be pleased to appoint Ms. Satya Bhama Gandhi to act as the Next friend of the applicant in this suit, to make statements and swear affidavits as may be necessary to protect the applicant's interest in this suit.

ii. That costs of this application be in the cause.

2. The application is premised upon the grounds in the supporting affidavit dated 15th October sworn by Satya Bhama Gandhi. She deponed that she was the daughter of the applicant who filed summons for revocation of grant dated 7th September 2017. She stated that her mother's physical and mental health had steadily deteriorated due to her advanced age being 86 years old. She averred that the duly qualified medical practitioner diagnosed her mother with communication problems due to poor short term memory as she was unable to follow conversations. She averred that due to the aforementioned mental affinity, her mother is unable to protect her interest in this suit. She asserted that no prejudice would be suffered by the respondent Administrator if this application is allowed. She added that she was willing and capable of protecting her mother's interest in the suit and she did not harbour any adverse interests against her.

3. No response to the application was filed by the respondent. On 18th November, 2019, the application proceeded by way of oral submissions. M/s Omamo learned counsel for the applicant made oral submissions reiterating the grounds raised in the application. Guided by Order 32 rule 15 of the civil procedure rules, she urged the court to make an inquiry whether the applicant was capable of protecting her interest in the suit. She relied on the decision of Justice M. Mativo in **MMM v AMK[2016] eKLR**

4. Mr. Ogada learned counsel for the respondent submitted on points of law and stated that the application was premature as the orders sought could not be obtained at this stage. He stated that the court has been invited to conduct an inquiry into the applicant's suitability to protect her interests yet no such prayer was sought in the application. He asserted that Order 32 rule 15 of the Civil Procedure Rules applies to persons of unsound mind, which can only be determined by medical practitioners. He challenged the medical report annexed as inadequate and without any conclusion of mental illness. He further stated that the document presented did not qualify as a medical report to guide the court on what the doctor had done. He quoted Section 125 of the Evidence Act which provides exceptions against the general presumption that everyone is considered sane and able to testify. He stated that the right procedure was for the appointment of a guardian to take over the affairs of the Applicant. He prayed for the application to be dismissed.

5. I have considered the application herein, the affidavit in support and oral submissions by both counsels. The issue for determination is whether the application dated 15th October, 2019 has merit.

6. This application was brought pursuant to Order 32 Rule 15 of the Civil Procedure rules 2010. The deponent argued that she was well suited to represent her mother's interest in the suit since her mother's physical and mental health had greatly deteriorated. Learned counsel M/s Omamo urged the court to make an inquiry as to whether the applicant was of sound mind to be able to protect her interest in the suit. On his part, learned counsel for the respondent Mr. Ogada argued that the issue of soundness of mind can only be determined by a medical practitioner and filed in court a report and that the application before court was premature.

7. I have perused the document presented in court dated 2nd October, 2019 identified as a medical report of Mrs. Raj Gandhi. It indicates that Raj Gandhi had developed communication problems with a short term memory and inability to follow conversation. It also states that she continues to be on medical care. A closer look into the application and the submissions by counsel for the applicant, shows that of concern is the physical and mental state of Raj Kumari Gandhi. It would appear as alleged by the deponent, that the mental state of Mrs. Raj Gandhi has become impaired so that she cannot follow conversations. With this in mind, the relevant statute which this application ought to encompass is the Mental Health Act which reads as follows in its preamble:

An Act of Parliament to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the custody of their persons and the management of their estates; for the management and control of mental hospitals; and for connected purposes.

8. The relevant Sections are 26 and 27 of the Mental Health Act. This application has not complied with the provisions of Section 26 and 27 of the Mental Health Act which provide as follows;

26 (1) The court may make orders—

(a) for the management of the estate of any person suffering from mental disorder; and

(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

Section 27 of the same act provides that where a manager is appointed under this part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper.

9. It is important to note that the relevant question for determination is whether Raj Kumari Gandhi is of sound mind and can be able to protect her interest in the instant suit. Section 125 of the Evidence Act provides as follows:

(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to the questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

10. This court is being called upon to determine the competency of the Applicant to testify. The presumption in law is that she is competent unless proven otherwise through a process established in statute. This question cannot be determined at this stage in the manner sought in the application before court.

11. The mental status of Raj Kumari Gandhi having been called into question has to be determined as provided under Section 26 and 27 of the Mental Health Act before the intended applicant can file the application to be substituted as the applicant in the summons for revocation of grant. Order 35 rule 15 of the Civil Procedure Rules provides that;

The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

12. In my view, these provisions are only applicable once an application is made under Section 26 and 27 of the Mental Health Act. Therefore the process of having one declared to be of sound mind must be followed. The medical report attached is not adequate to determine the mental status of Raj Kumari Gandhi.

13. Consequently, the application dated 15th October, 2019 is hereby dismissed. No orders as to costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF NOVEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant

In the presence ofAdvocate for the Respondent