



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 961 OF 2006

IN THE MATTER OF THE ESTATE OF DEVCHAND LAGDHIR SHAH (DECEASED)

MAHENDRA DEVCHAND SHAH.....APPLICANT

VERSUS

DHIRAJLAL DEVCHAND SHAH.....1ST RESPONDENT

KIRAN DEVCHAND SHAH.....2ND RESPONDENT

RULING

The deceased Devchand Lagdhir Shah died on 23rd May 2003. He was survived by the following:

- a) Shanta Devchand Shah – widow (deceased);
- b) Mahendra Devchand Shah – son (applicant);
- c) Dhirajlal Devchand Shah – son (1st respondent);
- d) Kiran Devchand Shah – son (2nd respondent);
- e) Anjna Devchand Shah - daughter; and
- f) Bindu Devchand Shah - daughter.

2. On 4th May 2006 the respondents filed a petition dated 3rd May 2006 for grant of probate of written Will. The petition was based on the fact that the deceased died having made and duly executed his last written Will dated 26th March 2002 in which he appointed them as executors. The grant of probate was jointly made to the respondents on 26th July 2006 and confirmed on 4th July 2007.

3. The applicant filed an application dated 7th May 2015 seeking the revocation of grant of made on 26th day of July 2006. He further sought orders declaring all acts, deeds, transfers, assent to bequest and all other acts and deeds to dispose of assets of the said deceased by the said alleged executors null and void for all intent and purposes; that the said executors do disclose all the assets of the deceased within such time as this court may deem fit; and that this court do declare that the deceased died intestate and his estate be divided amongst the beneficiaries according to law. The application was based on the grounds that the alleged Will dated 26th March 2002 was not duly executed by the deceased in accordance with the law in force at the material date; that on 26th March 2002 the deceased was suffering from acute Alzheimer disease and was incapable of making any decision; that the deceased was of unsound mind hence incapable of making the Will, issuing any instructions, understanding anything or signing any document and particularly the alleged Will dated 26th March 2002; and that the applicant together with two other beneficiaries Anjna Ashok Shah and Bindu Umesh Shah did not sign the consent to confirmation of grant dated 6th March 2007 and filed in court on 28th March 2007 and have never appeared before the said Advocate Paras V. Shah who allegedly witnessed their signature.

4. The application was opposed by the respondents through the replying affidavit of Dhirajlal Devchand Shah dated 25th September 2015. It

was their case that the deceased died leaving behind a Will dated 26th March 2002 in which he appointed the respondents as the executors and trustees of the said Will; that at the time of making the Will the deceased was of sound mind and did not suffer from Alzheimer disease or receive any treatment for any mental condition; that the said Will was brought to the applicant's attention soon after the death of the deceased and it was odd that he waited for 12 years to contest it; that they petitioned for grant probate on 3rd May 2006 and were issued with the grant on 26th July 2006; that prior to the petition they had notified all the beneficiaries of the estate of the deceased of the contents of the Will and their intention to petition for the grant; that all the other beneficiaries freely consented to the confirmation of the grant; that the two beneficiaries Ajna Ashok Shah and Bindu Umesh Shah did not deny signing the consent for confirmation of grant; that the Applicant signed the consent forms forwarded to him and did not have to appear before Paras V. Shah for his signature to be attested; and that the executors followed due process in the petition for grant of probate.

5. The respondents also filed the preliminary objection dated 25th September 2015 on the grounds that:

- a) the application is statute barred under the provisions of the **Limitation of Actions Act, Chapter 22 of the Laws of Kenya**; and
- b) the supporting affidavit was not commissioned as required under the **Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**.

6. Parties dispensed of the preliminary objection by way of written submissions. They each filed their written submissions which I have considered.

7. On the first point raised by the preliminary objection regarding limitation of time, it was the respondent's submission that the issue of limitation goes to the jurisdiction and once a matter is statute barred, the court has no jurisdiction to entertain it; that the prayer for revocation of grant was statute barred by the provisions of **section 4 (1)(e)** of the **Limitation of Actions Act, Cap 22**; that exemptions to the application of the provisions of the **Law of Limitations Act** are enumerated under **Section 42** of the said **Act** and include criminal proceedings, matrimonial proceedings and actions to recover possessions of trust land; that an action for revocation of grant under the **Law of Succession Act** is not exempt from the limitation under **section 4 (1)(e)**; that the application for revocation of grant was filed on 18th May 2015, seven years and 10 months after the grant of probate which is well outside the six years limitation period; and that the **Law of Succession Act** is silent with regards to the period of limitation applicable for the filing of applications for revocation of grant and where an **Act** is silent on the period of limitation, the period of limitation applicable is six years as prescribed by **Section 4 (1)(e)** of the **Law of Limitations Act**. They relied on the case of **the Estate of the late Suleiman Kusundwa [1965] EA 247**. It was however the submission of the applicant that **Section 4(2)(e)** of the said **Act** was not applicable to this matter and that the applicable and relevant section was **section 20** of the **Act**. He further submitted that the parties had sworn affidavits alluding to different timelines and that the issue was not a true preliminary objection since it required the taking of evidence to determine the issues in dispute.

8. I note that the objection as to the application being statute barred under the provisions of the **Limitations Act, Chapter 22 of the Law of Kenya** is a pure point of law which if determined in favour of the respondent, would conclude the matter. It was therefore well taken by the respondent as preliminary objection. In determining the point of law the court is perfectly entitled to look at the pleadings and all the relevant matters on record (**Omondi –v- National Bank of Kenya Ltd & Others [201] KLR 579**).

9. The **Limitation of Actions Act** prescribes periods for limitations of actions and arbitrations. The actions to which that statute applies do not include succession causes, or, at any rate, causes or actions governed by the **Law of Succession Act**. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the **Civil Procedure Act and Rules**. It does not envisage the special proceedings governed by such statutes as the **Law of Succession Act (In re Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR)**.

10. Regarding the ground that the applicant's supporting affidavit was not commissioned as required under the **Oaths and Statutory Declaration Act**, the respondent relying on **section 4(1)** and **section 5** of the **Oaths and Statutory Declaration Act** submitted that although the affidavit was commissioned in Nairobi, the applicant is a resident of Middlesex, England, and that there was no evidence to show that he was in the Kenya at the time the supporting affidavit dated 7th May 2015 was purportedly commissioned. He submitted that the applicant did not take oath before one P. Okundi Ogonji, the Commissioner of Oaths whose stamp appears on the supporting affidavit dated 7th May 2015, and as such, the said affidavit ought to be struck off the record consequently leading to the collapse of the notice of motion application. They relied on the case of **C.M.C. Motors Group Limited v Bengeria Arap Korir Trading as Marben School & Another [2013] eKLR**. The applicant submitted that the respondents had not produced any evidence to establish that he did not sign the alleged affidavit, was not present in Nairobi on 7th May 2015 to swear the affidavit and that the Advocate Mr. P. Okundi Ogonji did not sign and witness the affidavit at Nairobi. He further submitted that the court cannot expunge an affidavit based on assumptions and speculations, but that there ought to be actual evidence produced by these respondents to support their allegations.

11. According to **Section 5** of the **Oaths and Declarations Act**, it is required that every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. The affidavit dated 7th May 2015 sworn by the applicant is commissioned as required by the Act. The same is validly before this court. This is because no material was placed before the court to show that the applicant did not appear before the advocate for the commissioning of the affidavit.

12. The preliminary objection dated 25th September 2015 is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 14TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE