



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 346 OF 2013

IN THE MATTER OF THE ESTATE OF ABDULKARIM CHATUR POPAT

also known as ABDUL KARIM CHATURBHAI

ADIL ABDULKARIM CHATUR POPAT.....1ST APPLICANT

GULZAR ABDULKARIM CHATUR POPAT.....2ND APPLICANT

KARIM SAIFUDDIN ANJARWALLA.....3RD APPLICANT

VERSUS

AZIM ABDULKARIM CHATUR POPAT.....RESPONDENT

RULING

1. The parties in the 2 Applications before me dated 31.7.18 and 21.9.18, Adil Abdulkarim Chatur Popat, (Adil) Gulzar Abdulkarim Chatur Popat (Gulzar), Karim Anjarwalla (Karim) and Azim Abdulkarim Chatur Popat (Azim) are all executors of the will of Abdulkarim Chatur Popat also known as Abdul Karim Chaturbhai (the Deceased). The Deceased died on 2.3.13 at the Aga Khan Hospital in Nairobi at the age of 87. He was survived by his widow Gulzar and his sons Azim, Adil and Alnashir Abdulkarim Chatur Popat (Alnashir). Grant of Probate of Written Will was issued to the executors on 29.1.14 and confirmed on 20.11.14.

2. In the Application is dated 31.7.18, Azim seeks that the consent (the Consent) executed by Mbugwa Atudo and Macharia Advocates and Oloo & Chatur Advocates and filed in Court on 25.9.17 be set aside. He also seeks the reinstatement of the applications dated 28.7.15 and 1.11.15 for hearing at the earliest date available. In the application dated 1.11.15 Azim sought the revocation of grant of probate of the will of the Deceased. In the Application dated 28.7.15, Adil, Gulzar and Karim sought orders that Azim who resided in Canada be compelled to execute various documents in respect of the distribution of the estate of the Deceased.

3. The grounds of the Application are that the Consent was procured through undue influence, coercion duress and an agreement (the Agreement) that was contrary to the policy of the court and to law. Azim controls Plaza 500 Hotels Limited (Plaza 500) and KBK No. 85 Ventures Limited (KBK) that own a hotel and rental apartments in Canada. He claims that his brother Adil wields great power over the Deceased's estate and in particular over Millgate Limited (Millgate) and Penrose Properties Limited (Penrose) both offshore entities which are creditors to Plaza 500 and KBK.

4. Azim further claims that Adil abused his influence over the Millgate and Penrose to coerce Azim to sign documents of confirmation of Grant in September 2014, against his will. Azim claims that their late father sanctioned the conversion of Plaza 500 Hotel into apartments. However upon his demise, Adil unilaterally prevented the estate from finance the project forcing Azim to seek funding from third parties at high interest rates. Azim was offered a facility by Realtech Capital Group Inc. which required Millgate and Penrose to execute subordination consents and priority agreements in favour of the third party lender. Azim states that 3 priority agreements were signed without any issue. However on 7.4.16 Plaza 500 informed Millgate that a fourth priority agreement would be required to secure critically anticipated or negotiated credit facilities. Because Azim had filed the application for revocation of grant, Adil instructed Millgate and Penrose not to sign the priority agreement. This resulted in Plaza 500 and KBK being in immense and critical financial pressure from the third party lenders who on 3.8.17 obtained an order to foreclose and sell Plaza 500's property.

5. The foregoing circumstances forced Azim to sign the Agreement dated 4.9.17. In the Agreement, it was agreed *inter alia* that he would withdraw his application for revocation of grant. Adil would support his co-executors' their preliminary objection to defeat Alnashir's application. He would instruct his advocates to execute a consent withdrawing his application the filing of which would be at the absolute discretion of his co-executors. Azim would execute the necessary papers to pave way for the distribution of the Deceased's estate. In return Miullgate and Penrose would execute the priority agreements. Azim was to further sell his shares in Simba Corporation Limited and Simba Motors Limited to purchasers approved by Adil. Azim would have no further claim against the estate. Azim claims that he would never have signed the Agreement or instructed his advocates to sign the consent had his livelihood not been threatened. He further states that upon

signing the Agreement, the priority agreements were signed on Adil's instructions. He is now under pressure to sign the transfers necessary to distribute the estate.

6. Azim avers that his advocates have advised him that the Agreement is contrary to law as it was procured through undue influence, coercion and duress. The Agreement is repugnant to justice, unconscionable and offends ordinary standards of morality in a family succession dispute. It violates Azim's rights under Article 50(1) of the Constitution of Kenya 2010. Azim urged the Court to grant the orders sought in the Application.

7. In the second Application dated 21.9.17 Adil, Gulzar and Karim seek in the main the striking out of Azim's Application. They claim that the prayers raised in the Azim's Application are the subject of arbitration between the parties instituted by Azim before the London Court of International Arbitration (LCIA) to which all the parties have submitted and by which they are bound. The Consent was filed pursuant to Clause 1.3 of the Agreement. The Agreement contains an arbitration clause requiring all disputes related thereto to be referred to arbitration under the LCIA rules and that the governing law of the Agreement shall be the law of England and Wales. On 2.3.18, Azim instituted LCIA arbitration proceedings in London and the primary issue in dispute is whether the Agreement is void or voidable. Azim seeks the setting aside of the Consent on the basis that the Agreement from which the consent was derived is void for having been entered into under duress.

8. The Applicants state that Azim had due to disagreements relating to the estate and other commercial disputes, failed to sign transfer forms for the distribution of the Deceased's estate resulting in a stalemate. The Agreement was the culmination of mediation and negotiations of the parties as directed by the Court over the dispute relating to the Deceased's estate. In the negotiations, the parties including Azim were fully represented by counsel.

9. The Applicants contend that Azim's Application is clear breach of the arbitration Agreement as well as the principle of *lis alibi pendens* and an abuse of the Court process. The issues raised in Azim's Application are the subject of the ongoing arbitration and there is the risk of conflicting decisions. The Court may therefore be embarrassed if it proceeds to hear and determine the Application. Azim did not disclose to the Court that he had commenced the arbitration proceedings in London which amounts to material non-disclosure and *mala fides* on his part and a breach of his duties as a litigant before this Court. Further the Agreement relates to commercial disputes which this Court as a Succession Court cannot determine. Azim's Application therefore ought to be dismissed with costs.

10. Azim filed Grounds of Opposition dated 15.10.18 and a Replying Affidavit sworn on 15.10.18. He claims that the Applicants Application seeks to divest him of his rights under Articles 25(c) and 50(1) of the Constitution of Kenya 2010 and is thus invalid by virtue of Article 2(4) of the Constitution. Section 6 of the Civil Procedure Act confers jurisdiction upon this Court to hear the matter. The Application also seeks to divest this Court of its jurisdiction as conferred by Sections 2(1), 4(1) and 47 of the Law of Succession Act. Azim contends that the Settlement Deed was procured by coercion, duress and undue influence and is thus invalid unconscionable and contrary to the policy of the Court and incapable of founding any lawful or legitimate arbitration proceedings. Azim further states that he has applied for stay of proceedings in the LCIA. The Settlement Deed is also incapable of maintaining public confidence in the administration of justice by this Court and is thus in violation of Article 159(2) (e) of the Constitution.

11. On his part, Alnashir in his Replying Affidavit sworn on 9.10.18 averred that upon this Court directing on 13.7.16 that parties explore mediation, he wrote to the Applicants on 28.7.16 seeking that litigation be placed in abeyance pending mediation. His request was however declined and the Applicants insisted that litigation precedes mediation. Alnashir further informed the Applicants vide his letter dated 14.9.16 that involvement of Azim in mediation efforts as well as disclosure of all information and documentation was necessary to facilitate an expeditious and conclusive resolution of all issues in dispute. Alnashir states that the Applicants are misleading the Court that they engaged in mediation as there could have been no mediation without his participation. During the time the Applicants allege to have engaged in protracted negotiations culminating in the settlement agreement dated 4.9.17, Alnashir had 2 applications pending in Court which ought to have been taken into account.

12. Alnashir further states that the settlement agreement was drafted contrary to the status quo order of 6.6.17. The settlement agreement is void as it seeks to carry out illegal distribution of the estate despite express prohibition by the Court. The distribution of the estate is a live issue before this Court. The arbitration agreement in the settlement agreement is void *ab initio* as the dispute is not arbitrable as the Deceased died domiciled in Kenya. For this reason and given that Alnashir is not a party to the arbitral proceedings, the succession proceedings are the only avenue in which he can challenge the settlement agreement. The final decision as to the substantive jurisdiction of an arbitral tribunal always rests with the Court.

13. The gist of the Applicants' submissions is that Azim is seeking a determination of whether the Agreement is void or voidable in 2 concurrent tribunals viz, the LCIA and this Court. The Applicants' in their submissions contend that Azim's failure to disclose to this Court that he had filed arbitration proceedings in LCIA to set aside the Agreement constitutes an abuse of the Court process as his Application also seeks to set aside the Agreement. Azim's request for arbitration is dated 2.3.18 while his Application before this Court is dated 31.7.18. Where a party seeks in 2 concurrent applications determination of the same or similar issues, the Courts have held that this is an abuse of the Court's process. Azim's averment in paragraph 8 of his replying affidavit that the legitimacy of the Agreement must be determined by this Court while in paragraph 12.22 of his Application for stay of arbitral proceedings he states the exact opposite that the Kenyan Court cannot determine whether the Agreement is void or voidable. The Applicants contend that Azim is forum shopping and should not be allowed to abuse the Court process. Azim's Application should be struck out to prevent the abuse of the Court process.

14. In oral submissions on behalf of Azim, it was argued that to strike out his Application will have the effect of ousting the jurisdiction of this Court in dealing with the estate of the Deceased. The Court has oversight power over all other tribunals. The settlement agreement seeks to oust the jurisdiction of this Court over the estate of the Deceased and this Court is the right forum. Azim signed the Agreement from a position of disadvantage and relied on ground of economic duress and coercion as special circumstances to warrant him to avoid the Agreement. To him not every non-disclosure amounts to bad faith. In seeking protection of the Court to correct an error, he cannot be said to have acted in bad faith to warrant his being locked out. Azim argues that the assets of the estate of the Deceased can only be dealt with in accordance with the Law of Succession Act. The Agreement which seeks to deal with the assets in any other way is void.

15. On his part, Alnashir submitted that the settlement agreement purportedly touching on the estate of the Deceased was not a result of the

mediation ordered by the Court as not all parties to the dispute herein were involved. The settlement agreement excluded him and was wrongful, *mala fide* malicious and solely meant to unlawfully disinherit him. Alnashir further submits that the arbitration agreement contained in the settlement agreement is void as it seeks to oust the jurisdiction of this Court in succession matters. He contends that the settlement agreement is void for seeking to illegally distribute the estate of the Deceased in spite of a status quo order of the Court prohibiting the distribution thereof.

16. It is trite that a party who seeks any relief from a Court has a duty to make full and frank disclosure of all material facts to enable the Court arrive at a just finding. Conversely, a party who is guilty of wilful material non-disclosure is not deserving of the remedies sought in the application.

17. In Sceneries Limited v National Land Commission [2017] eKLR Mativo, J had this to say about deliberate non-disclosure of material facts:

...it is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.

18. The record shows that Azim, his wife Yasmin Popat and son Jameel Popat filed arbitral proceedings in LCIA on 2.3.18 seeking *inter alia* a declaration that the settlement agreement is void and/or voidable and that the right to avoid the agreement has not been lost. On 8.8.18, Azim filed the present Application dated 31.7.18 seeking the setting aside of the consent filed on 25.9.17 on the basis that the settlement agreement forming the basis of the consent was procured through undue influence, coercion, duress, etc. In his Application, Azim did not disclose to the Court that the settlement agreement is subject to the arbitral proceedings in the LCIA which he himself requested. Azim is therefore guilty of concealment from the Court of material facts and I agree with Mativo, J that this Court has both the right and duty to deny Azim the relief sought. The material non-disclosure renders Azim undeserving of the orders sought.

19. It was further submitted for the Applicants that Azim's filing of concurrent proceedings in this Court and the LCIA over the same matter is an abuse of the Court process. The Court of Appeal set out instances that constitute abuse of the Court process in Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR. The Court stated:

“ In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds...”

20. My own view is that the circumstances of the case before me, falls squarely in the above illustrations. This Court of censures the filing of the Application herein by Azim 4 months after filing his request for arbitration with LCIA in respect of the settlement agreement. The Court is guided by the holding in Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR, where Bosire, JA observed:

The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved.

21. The filing of the present Application by Azim before this Court while the arbitration seeking similar orders is pending before the LCIA is clearly an abuse of the Court process. Initiating parallel proceedings is also tantamount to forum shopping and playing lottery with the Court which would render legal proceedings a circus. This is as was observed by and as Odunga, J in Republic v Sacco Societies Regulatory Authority Ex Parte Joseph Kiprono Maiyo & 3 others [2017] eKLR:

Accordingly, if what is sought to be achieved by the appeal is substantially the same as what is sought in the judicial review proceedings, a party ought not to be allowed to have a double-pronged attack on the same decision. In my view even without the provisions barring such a course, to proceed in that manner would amount to playing lottery with the Court and render legal proceedings a circus. That clearly is an abuse of the Court process.

22. Further, Azim made an election to have the dispute determined in London under the LCIA rules in terms of Clause 5.2 of the settlement agreement. Having so elected Azim is bound by that election and cannot thereafter while the arbitral proceedings are pending, file an application in this Court seeking similar orders. The Application dated 31.7.18 is in my view an abuse of the Court process and is for striking out.

23. It has been argued that failure to grant the orders sought by Azim would strip this Court of its jurisdiction to deal with the estate of the Deceased as conferred to it by the Law of Succession Act. I find no merit in such argument. The jurisdiction of this Court to deal with the

estate of the Deceased remains intact and cannot be vitiated or ousted by declining to grant the orders sought. Indeed my own view is that allowing Azim's Application would be tantamount to this Court abetting abuse of its process. In Heritage Insurance Company Limited v Patrick Kasina Kisilu [2015] eKLR, Muriithi, J had this to say and I concur:

To prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process.

24. Having found for the reasons stated that Azim's Application dated 31.7.18 is an abuse of the Court process, it is not necessary in my view to interrogate the validity of the Agreement. In any event the issue is live before the LCIA having been taken there by Azim himself. The LCIA in my view is the correct forum for determination of the validity of the settlement agreement.

25. In the result the Application by Azim Abdulkarim Chatur Popat dated 31.7.18 being an abuse of the Court process is hereby struck out. This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th December 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the 3 Co-Executors**

..... **for Azim**

..... **for Alnashir**

..... **Court Assistant**