REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL CASE NO. 37 OF 2013 (O.S)

IN THE MATTER OF: CHADRAKANT DEVCHAND MEGHJI SHAH (deceased)

IN THE MATTER OF: THE WILL OF THE LATE CHADRAKANT DEVCHAND MEGHJI SHAH (deceased) DATED 25.7.11 and its VALIDITY

***EX PARTE APPLICANTS:* PRIYAT SHAH AND MONA SHAH**

RULING

1. Before me is an Originating Summons dated 19.9.13 in which Priyat Shah and Monah Shah the Applicants herein who claim to be the only beneficiaries of **Chadrakant Devchand Meghji Shah ("the Deceased"),** seek a determination of the following questions:

i) Whether the Deceased's Will dated 25.7.11 is valid;

ii) If found to be so, whether the heirs to the deceased can be ascertained from the Will;

iii) Whether the subject of the trust created under the Will can be ascertained;

iv) Whether the apportioned bequests of the remainder of the estate to the respective heirs to the deceased/beneficiaries can be ascertained.

v) Whether the Trust created under the Will is in breach of the rules against perpetuity;

vi) Whether as adults and only beneficiaries to the Trust, the beneficiaries can by mutual consent dissolve the trust created in their favour;

vii) The appointment of Mona Shah and Priyat Shah as administrator of the estate of the late **Chadrakant Devchand Meghji Shah (the Deceased).**

2. The Applicants go on to state that:

i) The Will dated 25.7.11 is uncertain as to the object of the gift;

ii) The Will dated 25.7.11 is uncertain as to the identity of the gift being vested;

iii) The said purported gift infringes the rule against perpetuities;

iv) The beneficiaries in any event, seek to dissolve the Trust, if at all valid;

v) The Applicants are the persons entitled in equal priority to apply for letters of administration on intestacy.

3. The background of this matter as can be gleaned from the record is that the Deceased died on 7.8.13 at the Nairobi Hospital and left a vast estate. The deceased was a widower and was survived by two children Priyat Shah and Mona Shah, the Applicants herein. Prior to his death, the deceased made a Will dated 25.7.11 in which he appointed Mukesh Manchand Shah and Harish Raichand Shah ("the Executors"), as executors thereof. He also had another Will (UK Will) relating to his estate in the United Kingdom that is identical to the Kenyan Will. Both the Applicants and the Executors acknowledge that the Will of the Deceased is poorly drafted, ambiguous and the true intention of the Deceased thereunder remains unclear.

4. In their supporting affidavit, the Applicants aver that the Will is ambiguous and riddled with uncertainty and therefore incapable of being properly interpreted or implemented. That the Will provided inter alia for a gift of the residue of the estate to Mona at 40% and Priyat at 60%. The Will required the Trustees in their discretion to pay the income of the Trust Fund (undefined) to Mona and Priyat. The Will further provided that should Mona and Priyat fail to obtain a vested interest leaving issue who survive him and reach the age of 21 years then such issue shall take by substitution and if there shall be more than one of such issue they shall take in equal shares per stirpes but so that no one takes a share if their parent is alive and takes a share. That neither of the Applicants had children during the life of the deceased or now. The Applicants further state that the Will did not provide for succession of the Trustees. The Will did not set out the duration of the Trust thus offending the rule against perpetuities.

5. The Applicants further claim that they are the sole beneficiaries of the estate of the Deceased; that the Will did not provide a gift over the residue nor appoint a residuary legatee over the residue. The Applicants aver that they have decided to dissolve the trust if it is valid, which they deny.

6. The Applicants aver that both the Kenyan and UK Wills have presented the same difficulties of ambiguity save for the discernible intention that the estate be shared by the Applicants on a 60/40 basis. Both the Kenyan and UK executors advocate for similar interpretation and administration of the estate. That the UK executors obtained the opinion of Queens Counsel in the interpretation of the UK Will who advised that the Will being uncertain, the estate should be distributed to the Applicants on a 60/40 basis. That this opinion was adopted as an order of the Court in the UK. The Applicants urge this Court to adopt a similar position and order the immediate distribution of the estate to the Applicants on a 60/40 ratio.

7. In a Replying affidavit sworn on 5.9.16 by Harish Raichand Shah, the Executors aver that the deceased had substantial business and property interests; That the relationship between the Deceased and his children was not good particularly with his son Priyat. That there were several reported incidences of violence inflicted by Priyat upon the Deceased. The Executors further aver that the drafting of the Will was questionable and conflicting and it was unclear as to what the Deceased wished to do with his residuary estate. That they were advised by their counsel that as executors they had a fiduciary duty to ensure the proper and lawful disposal of the estate. That the construction of the Will and the consequential effect of its terms could only be achieved by a determination by the Court. The executors of the UK Will are collaborating with the Executors herein through their respective counsel with a view to ensuring uniformity in interpretation and administration of the 2 virtually identical Wills. The Executors claim that the Applicants and their advocates have accused both sets of executors of conspiracy and blackmail.

8. According to the Executors, contrary to what the Applicants claim, the Will does not make clear provisions to vest the residuary estate on Priyat (60%) and Mona(40%). That the Will provides that the shares be held in trust for them and contemplates failure of both of them to attain a vested interest.

9. The Executors aver that they have been prevented from seeking confirmation of the grant issued to them on 14.7.14 in Succession Cause No. 101 of 2014 by status quo orders granted in the cause herein. That the UK executors have also raised the concerns of potential exposure to future claims by the children of the Applicants in the event that they proceeded to distribute the estate absolutely to the applicants as

demanded. That unless the Court finds the entire will invalid, the Executors should not be removed as executors on the basis of unsubstantiated allegations of a conspiracy. They claim that the Deceased trusted them and appointed them to safeguard his interests while excluding the Applicants, specifically Priyat in whom he had no confidence.

10. The Executors claim that it will be necessary for them to be given a clear discharge upon distribution taking place after the estate accounts have been prepared and all liabilities paid. They further claim that the estate has tax liabilities which are yet to be settled by reason of court orders in these proceedings.

11. Abdulhamid Mohamed Haji Aboo, in his affidavit sworn on 5.9.16 averred that the Deceased instructed him to draw the Will. That the Will was to be identical to the UK Will, a copy of which was given to him. That the Deceased appointed the Executors as he had no faith in his children with whom they were not on talking terms. That the Deceased was apprehensive about Priyat's interference with Kabani Limited and directed that he be barred from the same and entrusted his brother Myendra Devchand Shah to run the same. Khalida Abdulrasul Bayan, a secretary in the firm of Aboo and Company Advocates swore an affidavit on 5.9.16 confirming that she witnessed the Deceased's will together with Abdulhamid Mohamed Haji Aboo.

12. In their submissions, the Applicants argue that though the will reflected the intention of the Deceased for the Executors to hold the estate for the benefit of the Applicants in the proportion of 60% for Priyat Shah and 40% for Mona Shah, some parts of the Will remain uncertain in the creation of Trusts. The Applicants submit that there is uncertainty as to the capital of the estate and that the trust created is also uncertain.

13. The Applicants contend that the Will at paragraphs 2 and 3 on page 4 is in breach of the law in that it seeks to restrict the powers of the executors by appointing Mayendra Shah as the Deceased's representative in Kabani Limited and effectively locks out the Executors. That allowing a third party to administer the Deceased's share and at the same time oust the Executors is tantamount to upholding the powers of an intermeddler over that of the legal representatives recognised by law. The Applicants further contend that the claim by the Executors that the Deceased reposed his trust in them to safeguard his interest is also contrary to law. That the Executors hold the estate for the benefit of the beneficiaries and not for his benefit.

14. It was submitted for the Applicants that the Deceased attempted to create a Trust. Citing the case of Knight v Knight (1840) Vol 49 ER 58, it was argued that for a trust to be valid, 3 certainties must exist. Certainty of intention, subject matter and object. The intention to give benefit absolutely to heirs was clear. However, there is uncertainty through ambiguous use of words as to what and how much was intended to be held in trust and what was intended to be distributed. There was thus failure to segregate the intended trust property from the other property. As such the trust was void. Further it not clear what the residue was that was intended to be held in trust for the Applicants in the stated proportions. It was argued further that there was no certainty of objects. That the trustees should at any time be able to make a full list of beneficiaries and if the class was unascertainable at any time the trust will fail for uncertainty. The Applicants have further submitted that the Will is uncertain as to the succession of the trustees and makes no provision in case of unwillingness to act or the demise of a trustee. It is the Applicants' case that the trust created for them does not stand the test of the 3 certainties and is therefore void.

15. The Applicants argue that the Trust created by the Will of the Deceased breaches the rule against perpetuity in that it is unclear when the same will come to an end. It provides for no other beneficiaries other than the Applicants. There is also provision for children of the Applicants who survive the deceased and upon attaining the age of 21 taking their parent's share by substitution in the event that that parent fails to obtain a vested interest. The Applicants did not have children at the demise of the deceased and still do not have children. No time limit has been set for the trust as such the Trust must fail for breach of the rule against perpetuities.

16. The Applicants argue that if the trust fund is found to be valid, then the principle in Saunders v Vautier entitles them as sole beneficiaries who are of suitable age and competence to call for the trust

fund to be transferred to them absolutely.

17. For the Executors, it was submitted that both Wills appear to create a discretionary trust intended in the first instance to potentially benefit the children of the Applicants and not the Applicants themselves. That the residuary provisions at Clause 5 of the Will appear to contemplate the Applicants not receiving any benefit whatsoever under the Will. That the Applicants can only obtain a vested interest if the Executors exercise the wide discretionary powers given to them under the Will. The Executors contend that the Applicants cannot receive anything or exercise any right as beneficiaries until their status under the Will is resolved. That rights and powers to distribute to the Applicants can only be established once a court determines the question as to whether the Deceased intended to give the residuary estate absolutely to his children and if so, in what proportions.

18. It was submitted that the Executors "broadly agree with the opinion interpretation of UK Counsel Thomas Dumont of the Will that the Deceased intended to make an absolute gift of the residuary estate to Priyat Shah (60%) and Monah Shah (40%). Citing the provisions in the Law of Succession Act relating to construction of wills, the Executors submit that the uncertainty of the Will regarding the residuary provisions should lead to a finding of a partial intestacy.

19. On failure of the Trustees, the Executors submit that in the event of the demise of a trustee or refusal to act the law allows for the beneficiaries to apply for letters of administration with will annexed or for a grant *de bonis non* if the last surviving executor died before completion of administration of the estate. The Executors submit that there is no basis for the Will to be declared void for not providing for substitution of executors.

20. The Applicants urge the Court to find the trust created under the Will of the Deceased void for uncertainty and order the immediate distribution of the estate to the Applicants in the proportions of 60%:40% as intended by the Deceased.

21. I have carefully considered the Originating Summons, the rival affidavits and submissions by counsel for the Applicants. I have considered the questions raised by the Applicants as hereunder:

22. Whether the Deceased's Will dated 25.7.11 is valid;

Section 11 of the Law of Succession Act ("the Act") provides:

"No written will 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…"

23. The Will was duly signed by the Deceased. There is no doubt that the signature of the Deceased on the Will was intended to give effect to the writing as a will. Further the Will was attested by two competent witnesses namely, Abdulhamid Mohamed Haji Aboo the Deceased's advocate and a Khalida Abdulrasul Bayan a secretary in the said advocate's firm. They have both sworn affidavits to confirm that they indeed attested the Will of the Deceased. The Will has therefore met the validity requirements stipulated in Section 11 of the Act.

24. Whether the heirs to the deceased can be ascertained from the Will;

Having found the will to be valid, the next issue for determination is whether the heirs of the

Deceased can be ascertained from the Will. Clause 5 of the Will states:

> ***"5. <u>Gifts of Residue</u>***
>
> ***Subject as above, my Trustees shall hold the residue of my estate as follows:***
>
> ***01. As to a 40% share of the residue to my daughter <u>MONA SHAH</u> to be held in trust for the benefit of <u>Mona</u>. The Trustees shall pay or apply the income of the Trust Fund to <u>Mona</u> in such shares and in such manner as the Trustees shall in their discretion from time to time think fit. If Mona Shah shall fail to obtain a vested interest leaving issue who survive me and reach the age of 21 years then such issue shall take by substitution and if there shall be more than one of such issue they shall take in equal shares per stripes but so that no one takes a share if their parent is alive and takes a share.***
>
> ***02. As to a 60% share of the residue to my Son <u>PRIYAT SHAH</u> to be held in trust for the benefit of <u>Priyat</u>. The Trustees shall pay or apply the income of the Trust Fund to <u>Priyat</u> in such shares and in such manner as the Trustees shall in their discretion from time to time think fit. If <u>Priyat</u> Shah shall fail to obtain a vested interest leaving issue who survive me and reach the age of 21 years then such issue shall take by substitution and if there shall be more than one of such issue they shall take in equal shares per stripes but so that no one takes a share if their parent is alive and takes a share."***

It is common ground that the Deceased was survived by his 2 children Mona and Priyat and that they have no children. From the above provisions of the Will, it is evident that the Deceased intended to give the bequest to his two children, the Applicants. In the event of Monah and Priyat not attaining a vested interest, their respective shares were to go to their respective child or children upon attaining the age of 21 years. Given that Monah and Priyat did not predecease the Deceased, they both attained a vested interest in their father's estate. The contention by the Executors that the Will appears to create a discretionary trust intended in the first instance to potentially benefit the children of the Applicants and not the Applicants themselves holds no water. The benefit to the children of the Applicants was contingent on the Applicants not attaining a vested interest. There is therefore absolutely no uncertainty that Monah and Priyat are the heirs or legatees under the Will.

25. <u>Whether the subject of the trust created under the Will can be ascertained and whether the apportioned bequests of the remainder of the estate to the respective heirs to the deceased/beneficiaries can be ascertained.</u>

The above 2 questions will be dealt with together due to their conceptual similarities. Clause 5 of the Will quoted above provides in relation to the Trust thus:

> ***As to a 40% share of the residue to my daughter <u>MONA SHAH</u> to be held IN TRUST for the benefit of <u>Mona</u>. The Trustees shall pay or apply the income of the TRUST FUND to <u>Mona</u> in such shares and in such manner as the Trustees shall in their discretion from time to time think fit.***

The above provisions are replicated in respect of Priyat also. Black's Law Dictionary 2nd Edition defines residue as:

> ***"The surplus of a testator's estate remaining after all the debts and particular legacies have been discharged"***.

26. From a perusal of the Will, one is unable to tell what the residue of the Deceased's estate is. Clause 4 thereof provides:

> ***"My Trustees shall hold the residue of my Estate upon trust to retain postpone or self (sic) it and will:***

01 Pay any debts funeral and testamentary expenses

02 Deal with the residue of my Estate as I now direct"

The Will directs that the residue of the estate is to be held by the Trustees upon trust to *inter alia* pay any debts funeral and testamentary expenses and deal with the residue of the estate as further directed in the succeeding clauses. It is not however stated what other debts and legacies were to be discharged before arriving at the residue. The Will further gives the Executors complete discretion in determining the share of the income of the Trust Fund to pay to both Mona and Priyat. However, the Will does not state what the Trust Fund is and what property of the estate will make up the trust. The Will only refers to the income from the Trust Fund. There is uncertainty as to what the capital will be from which this income is to be derived.

27. As submitted for the Applicants, for a trust to be valid, it requires the coincidence of three conditions which are known as "the three certainties". If any of these conditions are absent then the trust will be void ab initio. The proposition of the three certainties is taken from the dictum of Lord Langdale in the leading case Knight v Knight (1840) Vol 49 ER 58 where he held that the words of the testator's will were not sufficiently certain:

> ***"As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommend, or entreated or wished, to dispose of that property in favour of another, the recommendation, entreaty or wish shall be held to create a trust. First if the words were so used, that upon the whole, they ought to be construed as an imperative; secondly, if the subject of the recommendation or wish is certain; and thirdly, if the objects or persons intended to have benefit of the recommendation or wish also be certain."***

28. According to Lord Langdale, for a valid trust, first, there must be certainty of intention to create a trust. Second, there must be certainty of the subject matter i.e. the assets constituting the trust fund must be readily determinable. Third, there must be certainty of objects i.e. the people to whom the trustees are to owe a duty must be readily determinable.

29. From the material before me, it would appear that the Deceased had no confidence in the Applicants in administering and managing his estate. He specifically excludes his son Priyat. He therefore proposed to establish a trust to be managed by the Executors herein for the benefit of the Applicants. Indeed Clause 6 of the Will is dedicated to the powers of the trustees. I am satisfied that there is certainty of intention.

30. As regards certainty of objects, the Deceased directed the Executors to hold the residue of his estate in trust for his children Mona and Priyat. The Will stated that in the event these two children failed to obtain a vested then their share would be taken by their respective children. But no grandchildren of the Deceased would take their parent's interest if such parent were alive. Contrary to the Executors' submission that both Wills appear to create a discretionary trust intended in the first instance to potentially benefit the children of the Applicants and not the Applicants themselves, the Will is clear that none of the grandchildren would take their parents' share during the lifetime of the parents. Both Mona and Priyat survived the Deceased and neither had children at the time of the demise of the Deceased.

31. I further disagree with the suggestion by the Executors that the residuary provisions at Clause 5 of the Will appear to contemplate the Applicants not receiving any benefit whatsoever under the Will. That the Applicants can only obtain a vested interest if the Executors exercise the wide discretionary powers given to them under the Will. While it may be true that the Deceased did not have much faith in the capability of the Applicants to manage his estate, it is inconceivable that his intention was that the Applicants receive nothing at all under the Will and that if the Applicants were to receive anything at all it would be at the discretion of the Executors! It is clear from the Will that the objects of the trust are readily determinable as Mona and Priyat.

32. On certainty regarding the subject of the trust, the Will does not indicate what part of the estate will

form the capital of the trust. In Palmer v Simmonds (1854) 2 Drew 221, Henrietta Rosco, the settlor, said she wanted to create a trust for various people over her property, and then to *'leave the bulk of my said residuary estate unto the said William Fountain Simmonds, James Simmonds, Thomas Elrington Simmonds and Henrietta Rosco Markham equally*.' Sir RT Kindersley held that because the court could not be sure which parts of the residue were meant to be held on trust, the trust failed. The term "bulk" was too uncertain for the court to determine what was meant. The Deceased herein directed that out of the residue of his estate, the Executors were to pay any debts funeral and testamentary expenses. Given that by definition, residue is after all debts and particular legacies have been settled, it is not clear what this residue is and how this residue from which the Executors were to pay debts, funeral and testamentary expenses is to be arrived at. The Executors were further directed to hold the residue in trust for his daughter (40%) and his son (60%). Again, it is not known what portion of the estate of the deceased is to be held in trust for the children of the Deceased or to be invested as the "Trust Fund" from which income would be paid to Mona and Priyat. Like in the Palmer case, the term "residue" in the Deceased's Will is too uncertain for the court to determine what was meant.

33. The Deceased further directed the Executors to pay or apply the income of the trust fund to his children in such shares and in such manner as the Trustees shall in their discretion from time to time think fit. It is not known what the trust fund is. It cannot also be determined what the capital of the trust fund from which the income derived would be paid or applied to the beneficiaries as directed. To be able to exercise their discretion in applying the income of the trust fund as directed, the Executors must first know what the property or capital of the trust fund is. There is no certainty as to what property is to be held upon trust. Due to this uncertainty, the Executors cannot possibly know exactly what is and what is not intended to be included within the trust. Any attempt by the Executors to implement the Will would fail as they would not know what portion of the estate is to be invested as capital of the trust fund.

34. Because trusts involve imposition obligations in respect of holding of property, the trust property must be sufficiently certain as an imperative. If there is no certainty of the capital or subject matter of the trust then by extension, there can be no certainty of the income of the trust fund which is to be given to Mona and Priyat as directed by the Deceased in his Will. If there is uncertainty on the subject matter then no trust arises. The trust and gifts to the children of the Deceased therefore fail for uncertainty.

35. It is my view that it is on these two issues that this Originating Summons turns. Having found that the trust and gifts thereunder fail for uncertainty, the remaining questions are now moot.

36. Much has been said about following the opinion of English counsel, Thomas Dumont regarding the UK Will which the High Court of Justice, Chancery Division adopted as an order of the Court under the Administration of Justice Act, 1985. I agree with the submissions for the Executors that the said Act has no application in our jurisdiction. We also do not have an equivalent procedure.

37. The Will is drawn in general terms. The estate is described as vast but what it is comprised of has not been disclosed in the pleadings. The only asset we gather from the Will is Kabani Limited in which the Deceased and his brother Myendra Devchand Meghji Shah are shareholders and directors. The Deceased states in the Will that this company is their "primary business and bread earner". The Deceased excluded the Executors from the running of the company stating that he had full confidence in his brother to manage the same and urged the Executors to accord him full cooperation. A testator cannot dictate by will how a limited liability company is to be run upon his demise. The management of a company is governed by the provisions of the Companies Act. The only directions the Deceased may by Will give in relation to the said company is limited to the shares he holds in the company and no more.

38. Rule 17 of the First Schedule of the Law of Succession Act provides that a testator shall be presumed to calculate against intestacy and that a construction avoiding intestacy shall be preferred. Although the rule makes a presumption against intestacy, the function of this Court is to construe the testator's Will, not to make a new will for him. Consequently this Court finds that the uncertainty in the **bequests to the Applicants has resulted in their failure.**

39. Having found that the trust and gifts under the Will have failed what then should happen? Rule 31 of

the said Schedule provides:

> ***"The failure of any gift of a share in a residuary bequest, whether general, limited or particular, shall not result in that share accruing to the other shares therein, but, subject only to any subsequent residuary bequest, shall create an intestacy in respect of that share"***

40. Having considered the matter in its entirety, I do find that the trust and the gifts to Mona and Priyat have failed for uncertainty. This failure of the said trust and gifts has created an intestacy in respect of the entire estate of the Deceased given that there are no other beneficiaries of the estate and therefore no other gifts other than the failed gifts.

DATED, SIGNED and DELIVERED in MOMBASA this 20th February 2017

M. THANDE

JUDGE

In the presence of: -

……for the Applicants

……for the Executors

……Court Assistant