



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1214 OF 2007

IN THE MATTER OF THE ESTATE OF PREMCHAND KANJI SHAH (DECEASED)

SHAMIT SHANTILAL SHAH.....APPLICANT

VERSUS

KANCHANBEN RAMNIKLAL SHAH.....RESPONDENT

R U L I N G

1. In the Chamber Summons dated 3rd October, 2014 brought under **Section 45, 47, 76 and 83 (f)** of the **Law of Succession Act** and **Rules 44 (1), 49 and 73** of the **Probate and Administration Rules, 2011** Shamit Shantilal Shah (hereinafter the Applicant) seeks two orders. The first is that the court do direct Kanchanben Ramniklal Shah (hereinafter the Respondent), to execute all documents and instruments to transfer Land Reference Number 7158/47 Nairobi (hereinafter the suit property), devolving to the Applicant subject to the life interest of the Respondent pursuant to the Deceased's said Will. The second is that the court do direct the Respondent to bear the costs of the Application.
2. The grounds of the application as contained on the face thereof are that the Respondent has deliberately failed, refused and/or declined to transfer the suit property devolving to the Applicant subject to the life interest of the Respondent pursuant to the Will of the Deceased. In the Last Will and Testament of the Deceased, dated 23rd May, 2003 the Testator bequeathed to the Respondent and her husband, the right to occupy use and enjoy the suit property for their lifetime. Upon the death of the two, the Trustees of the Deceased are to give the suit property to the Applicant absolutely.
3. It is the Applicant's contention that the Respondent has failed, refused and declined, after due notice and reasonable cause, to proceed diligently to finalize the administration of the Estate of the Deceased by refusing to execute the wishes of the Deceased as stated above in his Will.
4. The Applicant has sworn an Affidavit dated 3rd October, 2014 in which he reiterated the grounds in the Application. He further argued that he was made to believe that the Respondent would sign transfer documents with regard to the suit property as provided in the will of the Deceased, thus devolving the said property to him absolutely.
5. This belief was premised on an agreement made between him and the Respondent by which he transferred shares held by the Deceased in three companies namely; Freight-in-Time, Swani Coffee Estates Limited and Sunripe Limited to the Respondent, upon signing of the requisite share transfer forms by the Applicant. He contended that the Respondent has declined to sign the transfer despite numerous

efforts. He thus prays that the court do grant the application.

6. Counsels made Oral submissions before the court on 24th October, 2016. Learned Counsel Mr. Muchiri held brief for learned Counsel Mr. Chacha for the Applicant. Mr. Muchiri argued that the Respondent had been reluctant to execute the requisite instruments out of fear that she may be evicted from the suit property.

7. This, Counsel contends would be impossible as there would be an endorsement that the Respondent has a life interest in the property thus hindering her eviction from, or sale of the suit property. Counsel urged the Court to grant the first prayer of the application so as to obviate the need for the Applicant to be ever enjoined as a beneficiary in the Estate of the Respondent should she pass on.

7. Mr. Ayisi learned Counsel for the Respondent argued that the Application was premature as the property they seek to transfer has in it the life interest of the Respondent, which can only be extinguished upon her demise. He contended that the Application seeks to interfere with the testamentary wishes of the Deceased. Further that if the Deceased had wished for the Applicant to have an interest in the suit property while the Respondent was alive, he would have stated so.

8. Counsel urged the Court to uphold the testamentary wishes of the Deceased. He pointed out that on 28th February, 2012 Maraga J, (as he then was), found that the Applicant herein had not diligently administered the estate. That therefore, the Respondent is wary of the intention of the application given the historical conduct of the Applicant.

9. Counsel opined that the Application is unnecessary as the suit property would devolve to the Applicant absolutely upon the death of the Respondent. He urged the Court to dismiss the Application because to grant it would interfere with the testamentary wishes of the Deceased and would occasion prejudice to the Respondent.

10. Under Clause 2 of his Last Will and Testament, the Deceased granted the Respondent and her husband the right to occupy, use and enjoy the suit property for their lifetime. The deceased stated clearly that if he were to sell it, this provision would attach to any other house in which he would have been residing at the date of his death.

11. The survivor of the aforementioned couple was to occupy the suit property rent free, until death. (The Respondent's husband has since passed away). The Trustees of the Estate were therefore to grant the suit property to the Applicant upon the death of the Respondent, not before. It is noteworthy that the Will has not been contested.

12. Life interest is not defined in the Law of Succession Act. Black's Law Dictionary, ninth edition, West, 2009, defines it as an interest in real or personal property measured by the duration of the holder's or another person's life. In the context of **Section 35 Law of succession**, it is an interest held by the surviving spouse during their life in the whole of the residue of the net intestate estate.

13. The effect of **Section 35** is therefore that the surviving spouse first enjoys rights over the property and at her death the property passes to other persons, see the decision of Hon. Musyoka J. in **TAU KATUNGI VS MARGRETHE THORNING KATUNGI AND ANOTHER, SUCCESSION CAUSE NO. 1040 OF 1991.**

14. Having perused the grounds of the application, the supporting affidavits and the rival submissions, I am of the considered opinion that the Application dated 3rd October, 2014 is premature. It is therefore found to lack merit and is accordingly dismissed with costs to the Respondent.

SIGNED DATED and DELIVERED in open court this 7th day of February 2017.

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L. A. ACHODE

JUDGE