



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 1271 OF 2009

IN THE MATTER OF SHANTA JAYANDRALAL CHANDRARIA NATHALAL (DECEASED)

PRADIP JAYANDRALAL CHANDARIAOBJECTOR/APPLICANT

AND

ROHIN JAYANDRALAL CHANDARIA.....PETITIONER/RESPONDENT

RULING

PRELIMINARY OBJECTION

INTRODUCTION

The deceased died on **4th February, 2009**.

The deceased was wife of Jayandralal Chandaria Nathalal (deceased) as per the deceased's certificate of death attached to the petition. They had two sons namely:

Pradip Jayandralal Chandaria

Rohin Jayandralal Chandaria

The Grant of Probate of Written Will was obtained by the deceased's widow in **P&A Cause No. 2904 of 2006**. Subsequently upon the widow's death, The Petitioner Rohin Jayandralal Chandaria filed petition for grant of probate with proof of oral will which was filed on 4th June 2009 and he attached document of written oral Will dated 14th January 2009 and affidavits by witnesses of the Oral Will. Rohin Jayandralal Chandaria (hereafter 'the Petitioner/ Respondent') on 16th September 2009 was issued with Grant of Probate of Written Will. Summons for confirmation of grant were filed on 3rd November 2009 by the Petitioner and the Certificate of Confirmation of Grant was issued on 27th July 2010 in **P & A Cause No. 1271 of 2009 (in the instant case)** of his late mother's Estate.

On 26th October 2015, Pradip Jayandralal Chandaria (hereafter 'the Protestor /Applicant') filed Summons for Revocation or Annulment of Grants and sought orders as follows;

1) That status quo as it was since the demise of SHANTA JAYANDRALAL CHANDARIA and prior to the filing of the petition herein and more particularly; all those properties in the Schedule of the Certificate of Confirmation issued on 25th July 2011, be maintained pending

the hearing and final determination of the application for nullification and/or revocation of the grant filed therein.

2) That the cause herein namely; P&A Cause 1271 of 2009 be consolidated with P&A Cause 2904 of 2006 IN THE MATTER OF THE ESTATE OF JAYANDRALAL NATHALAL CHANDARIA ALIAS JAYANDRA CHANDARIA ALIAS JAYENDRALAL NATHALAL CHANDARIA (DECEASED)

3) That the Grant of Probate in P&A cause 2904 of 2004 issued on 13th February 2007 and confirmed on 29th October 2012 be revoked and/or nullified.

4) That the grant of Probate issued herein on 16th September 2009 and certification of confirmation issued on 16th July 2011 be revoked and or nullified.

5) That the Respondent herein ROHIN JAYANDRALAL CHANDARIA be ordered to immediately give a detailed account of his administration of the estates herein and particularly the proceeds of sale of parcel of land L.R. 209/5482 and any other property belonging to the estates herein that he may have purported to sell.

6) That the transfer and registration of the said parcel of land namely LR 209/5482, to Thika Wax Works Limited effected on 21st March 2014 be nullified and or revoked.

7) That all other assets belonging to the deceased herein and forming part of her estate be included in the Schedule of the assets herein and the same be distributed to the rightful beneficiaries accordingly.

8) That the Honorable Court be pleased to make any other order as it may deem fit to grant in the circumstances of this case.

9) That the costs of this application be borne by the Respondent in any event.

The Petitioner/Respondent Rohin Jayandralal Chandaria filed Replying Affidavit on 11th February 2016, among other issues, he objected to prayer to revoke and/or nullify the grant of probate in **Succession Cause 2904 of 2004** on the ground that the Court lacks jurisdiction to grant such orders.

On 6th May 2016, the Applicant filed Further Supplementary Supporting Affidavit.

On 1st July 2016 the Petitioner/Respondent filed notice of Preliminary Objection and stated as follows;

1) That the Court has no jurisdiction to issue orders for revocation of grant of the grant of Probate issued in Succession Cause 2904 of 2004, the application does not lie in law as the application should have been filed in the said Cause.

2) That the prayer for accounts of the estate of Jayandralal Nathalal Chandaria alias Nathalal Chandaria alias Jayendralal Nathalal Chandaria (deceased) is statute barred by the provisions of Section 4(3) of the Limitation of Actions Act cap 22 as the Grant of Probate of Written will was issued on 13th February 2007

3) That prayer for accounts of the estate of Shanta Jayandralal Chandaria Nathalal(deceased) is statute barred by provisions of Section 4(3) of the Limitation Actions Act Cap 2009

4) That consequently, the Court does not have jurisdiction to hear the Application dated 26th October 2015.

HEARING

The hearing of the Preliminary Objection commenced on 31st January 2017.

The Petitioner through Learned Counsel Mr. Mansur informed the Court that;

The revocation of grant for the estate of Jayandralal Nathalal Chandaria alias Nathalal Chandaria ought to be filed and pursued under **Succession Cause 2904 of 2006** and not in the instant file for the estate of Shanta Jayandralal Chandaria. They are separate estates and grants were obtained in different files.

Counsel stated that the Law of **Succession Act Cap 160** is silent on limitation of actions except an application under section 30 in Part III on provision of dependents. **Section 76 of the Law of Succession Act** does not prescribe a limitation period.

Therefore; we have to go back to Limitations of Actions Act. **Sections 4 (1) (e) Section 20 (1) & (2) & (3) & Section 21 of Limitation of Actions Act** are applicable to the instant case and this case is not excluded by **Section 42 of Limitation of Actions Act**.

Proceedings under the Succession Act are not excluded by the Limitation of Actions Act. The proceedings have been in Court since 2006 and the Applicant was aware of these proceedings and filed for revocation of grant in 2015. The applications for rendering accounts and revocation are statute barred.

The Applicant Respondent through Learned Counsel Mr. Ngugi stated; the Applicant filed a similar application in **Succession Cause 2904 of 2006** and therefore the prayer for consolidation of suits is abandoned.

With regard to the issue of Limitation of Actions of both confirmed grants of Probate; the Applicant/respondent seeks revocation of grant and under **Section 76 of Law of Succession Act** which was enacted in 1981 then the Limitation of Actions Act was not applicable, it cannot apply. Parliament did not intend that revocation of grant be limited in anyway.

The Applicant /Respondent stated through Counsel that the case-law relied on 1961 case would not be applicable as Law of Succession Act was passed in 1981.

WRITTEN SUBMISSIONS

In Respondent's Submissions dated 22nd November, 2016 he submitted in support of the Preliminary Objection as hereunder; the Court lacked jurisdiction to issue orders for revocation and/or nullification of the Grant of Probate issued in **Succession Cause No. 2904 of 2004** – the Estate of the Late Jayandralal Nathalal Chandaria.

The Respondent averred that the Applicant is seeking orders for the revocation and/or nullification of the Grant of Probate issued in **Succession Cause No. 2904 of 2004**, in the matter of the Estate of Jayandralal Nathalal Chandaria Alias Jayendra Nathalal Chandaria Alias Jayendralal Nathalal Chandaria (Deceased). It was Respondent's further view that the said succession cause has not yet been consolidated with the instant succession cause therefore the application is defective and cannot be granted.

The Respondent's relied on the following authority;

Owners of the Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd [1989] KLR at page 30 of the Respondent's List of Authorities where Nyarangi J held as follows;

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similar sentiments were expressed in **KARAURI vs NCHECHE [1995-1998] 1E.A. page 52 &**

BOSIRE OGERO vs. ROYAL MEDIA SERVICES [2015] eKLR

The Respondent also relied with the provisions of **Sections 4(1) (e) and 4(3) of the Limitation of Actions Act Cap 22** where he submitted that the prayers for and Revocation and/or revocation of Grant of Probate and accounts of the Estates of Jayandralal Nathalal Chandaria and Shanta Jayandralal Chandaria Nathalal respectively are statute barred where the Act **Section 4(1) (e)** provides that:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued...actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

Accordingly, it was the Respondent’s contention that Revocation and/or annulment of Grant of Probate for the Estates of Jayandralal Nathalal Chandaria and Shanta Jayandralal Chandaria Nathalal under **Section 4(1) (e) of the Limitation of Actions Act** should be statute barred and ought not to be entertained by this Honourable Court.

Section 4(3) of Limitations of Actions Act provides;

An action for an account may not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

Section 42 of Law of limitations Act exempts;

- a) Criminal proceedings**
- b) Matrimonial proceedings**
- c) Actions to recover possession of trust land.**

The Applicant also filed a submissions on 5th September, 2016 opposing the Preliminary Objection filed by the Petitioner which was dated 29th June, 2016 stating that it is very clear from the record that the determination of the issues of law and fact are similar in the **Succession Causes of 2904 of 2006 Estate of Jayandralal Nathalal Chandaria and 1271 of 2009 Estate of Shanta Jayandrala Chandaria Nathalal** for the following reasons that;

- 1) The 1st deceased (JAYANDRALAL NATHALAL CHANDARIA) P & A Cause No. 2904 of 2006 was the father of the applicant and the objector herein.**
- 2) The second deceased (SHANTA JAYANDRALAL CHANDARIA) in P&A 1271 of 2009 was the mother of the Applicant and the objector herein.**
- 3) The second deceased obtained grant of probate over estate of the first deceased by non-disclosure and misrepresentation of material facts.**
- 4) Following the demise of the second deceased the Respondent herein then moved to Court and obtained grant of probate over her estate which she basically inherited from her deceased husband, who was the father of the parties herein, by non-disclosure and misrepresentation of material facts hence issues to be dealt with are common.**
- 5) The Applicant has prayed for revocation of both grants in the two Estates of the deceased persons herein hence prayers sought by the Applicant in the two estates are the same.**

Therefore the 2 cases ought to be consolidated and heard and determined as one.

The Applicant’s relied on the following authority;

RMG VS NG INTERESTED PARTY S.P. LIMITED [2013] where Hon. Justice Musyoka held;

The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matters be disposed of at the same time.....

ROSE FAITH MWAWASI & ANOTHER VS FATUMA ATHMAN ABUD FARAJ [2015] ECLR.

He also relied with **Article 159(2) (d) of the Constitution**, which advocates that ***justice shall be administered without undue regard to procedural technicalities in exercising judicial authority.***

With regard to limitation of actions and the lack of jurisdiction of the Court to hear and determine the matter as the application for revocation and accounts are statute barred, the Applicant/Respondent relied on

Section 76 of Law of Succession Cap 160 Laws of Kenya that provides ***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion.***

(a) that the proceedings to obtain a grant were defective in substance;

(b) that the grant was obtained fraudulently by making of a false statement or by concealment from the Court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

.....

The Applicant/ Respondent **relied on the case of RE ESTATE OF CHARLES NGOTHO GACHUNGA SUCCESSION CAUSE 687 OF 1984** where the Court was guided by the above provision and the Court set aside revoked and annulled the grant issued 24 years ago and ordered the administrator to render full and accurate account of his administration of the estate.

The Preliminary Objection cannot be raised if any fact has to be ascertained or if what is being sought is the exercise of judicial discretion.

The Applicant contended that in succession matters, the office of administrator is for life and he can be called to account for the Estate at any time so long as he is still alive. He further stated that Section 76 of the Law of Succession Act does not impose any time limitations within which an application for revocation of grant ought to be filed.

DETERMINATION

The Court considered pleadings oral and written submissions and the issue for analysis and determination is whether the application filed on 26th October 2015 and prayers sought therein are statute barred and therefore the Preliminary Objection of 1st July 2016 shall be up held or not.

The essence of a preliminary objection was set out in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD –VERSUS- WEST END DISTRIBUTERS LIMITED [1969] E.A 696**. In that case, it was held that a preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. A preliminary objection as per law J.A was stated to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or refer the dispute to arbitration.”

This Court has from the relevant legal provisions and case-law made following conclusions;

1. The Law of **Succession Act Cap160** commenced in 1981 whereas the **Limitation of Actions Act Cap 22** came into force in 1967. By implication of **Section 25 of Interpretation and General Provisions Act** which provides;

Where one written law amends another written law, the amending written law shall, in so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with amended written law.

Section 76 of Law of Succession Act was enacted much later after the Limitation of Actions Act. Contrary to submissions that the said Section is silent on limitation; with respect this Court differs with the said statement.

The Law of Succession contains limitation of action in **Section 30 of the Act**. If Parliament intended limitation of filing the revocation of grants and rendering of accounts by personal representatives; the spirit and letter of the legislation would have expressly stated so. Instead Section 76 is categorical and not silent that there shall be no limitation period for application to annul or revoke a grant it shall be at anytime and by anyone including the Court on its own motion. Therefore, revocation of grant is not subject to the Limitation of Actions Act as the Law of **Succession Act Cap 160** came into force later and is clear that if the intention to limit the application was in Parliament's mind, then it ought to have been spelt out as was stipulated in **Section 30**. The intention was to allow operation of the Law of Succession Act without the limitation except as envisaged in the Act.

2. The requirement to render accounts is provided under **Section 83 (h) of Law of Succession Act Cap 160 and provides;**

Personal Representatives shall have the following duties;

.....

h) to produce to the Court , if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of account.

The Law of Succession Act Cap 160 bestows on personal representatives (defined in Section 3 as executor or administrator of a deceased person) of deceased's estate statutory duties and mandates that crystallize upon appointment by issuance of a grant. Since the office and role of personal representative is not limited or time capped and/or prescribed in the Act; it is subject to revocation of grant, death or final distribution of the deceased's estate to the satisfaction of all beneficiaries and interested parties to the estate. Therefore the Limitation of Actions Act cannot and does not oust the statutory duties of personal representatives of deceased's estate by effluxion of time.

3. This Court takes into account situations where a beneficiary or interested party may not be aware or informed of proceedings regarding a deceased's estate and not by being indolent, but by circumstances beyond their control, are deprived of contesting and or establishing one's proprietary or beneficial interest or right merely due to limitation of actions. **Articles 22, 27, 48, 50 (1) & 159 2 (d)** Constitution empower each person, party's to lodge and ventilate their cause in Court and upon being heard, determined on its merits. In the instant cause it is on record that the Applicant/Respondent resides out of the country and he

left in 1999. He was not indolent, he may not have known or been informed or did not agree to what transpired. All these can only be determined by hearing of the application and determination on merit.

4. This Court concedes jurisdiction by extension limitation of actions is a matter of law that goes to the root of this case. Both counsel eloquently put to the Court the 2 schools of thought; one, litigation must come to an end by strictly applying limitation of actions. On the other hand, each party is entitled to access to justice, however, inconvenient, based on genuine grounds a litigant should not be shut out. The Court relies on the case of **RE ESTATE OF CHARLES NGOTHO GACHUNGA SUCCESSION CAUSE 687 OF 1984** where Hon. Justice Musyoka stated and this Court is persuaded;

It is argued that the application has come in too late. In other words the same was filed after an inordinate delay which has had the effect of rendering it time barred due to efflux ion of time. The answer to this submission is that the office of administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say that Section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed.

IN RE ESTATE OF JOSEPHINE MAGDALENA MOTION (DECEASED) SUCCESSION CAUSE 1679 OF 2008; Hon Musyoka stated which this Court is persuaded;

Even if the Limitation of Actions were to apply to the proceedings prescribed by the Law of Succession Act; which I hereby submit it does not, a summons such as the one herein cannot be an action to which Limitation of Actions Act applies. For it is an interlocutory application filed within a Cause. An action in context of Limitation of Actions can only possibly refer to a Cause or suit, not interlocutory applications within the Cause or suit.

Therefore **Sections 4(1) (e) 20 & 21 & 42 of the Limitation of Actions Act** are not applicable in the instant case/matter.

DISPOSITION

- 1. From the above issues this Court finds that the Preliminary Objection of 1st July, 2016 is not upheld.**
- 2. The application for revocation of grant of 26th October, 2015 to be set down for hearing inter partes and a date to be obtained from the registry.**
- 3. Each party to bear its own costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY MARCH, 2017.

M. W. MUIGAI

JUDGE

In presence of:-

Mr. Ngugi for the Respondent.