



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION

**IN THE MATTER OF THE ESTATE OF KESHAVLAL KANJI CHANDARIA ALIAS
KASHAVLAL KANJI SAMJI CHANDARIA (DECEASED)**

SUCCESSION CAUSE 580 OF 2012

RULING

INTRODUCTION

KESHAVLAL KANJI CHANDARIA died on 25th December 2012. The beneficiaries of the deceased's estate are the widow Sushila Keshavlal Chandaria and his son Bakul Keshavlal Chandaria. On 23rd March 2013, the deceased's family filed petition for grant of probate with Will annexed on and was granted on 5th September 2012.

The Will of the deceased dated 8th May 2008 appointed both widow and son as executors of his estate. On 10th April 2013 they filed summons for confirmation of grant and outlined assets that comprise of the deceased's estate as follows;

- (a) 1/3 share in L.R. Number 209/1992/2
- (b) Shares in M.R. Shah Construction (K) Limited
- (c) Shares in Park Road Nursing Home (K) Limited in the Account Books of M.R. Shah Construction
- (d) 16,879 Equity Shares in respect of Calcutta electric Supply Corporation

On 8th May 2013, the grant was confirmed in terms of deceased's Will.

APPLICANT'S CASE

On 18th August 2016, SudhirKumar Muljibhai Rajpal Shah Objector/Applicant filed application brought under Section 47 of Law of Succession Act and Rule 73 of Probate and Administration Rules and sought stay of distribution of the estate of the deceased pursuant to confirmation of grant pending hearing and determination of the instant application and **Commercial Suit No 333 of 2016 in the Commercial Division of the High Court.**

The Objector relied on grounds that the deceased herein is his maternal Uncle and jointly with his father in 1970 jointly purchased shares from London Stock Exchange of Calcutta Electric Supply Corporation (CESC) When his father passed in 1970, the deceased herein assisted his mother to transfer shares from their father's name to them. Apparently, according to the Objector, the deceased herein did not facilitate

transfer of shares to their family instead he transferred the shares to himself. This was informed by UK Registrars and CESC response upon enquiry by the Objector. The Objector pursued his father's shares and successfully had the shares registered in his name and his brother Ashok Kumar Mulji Shah. However, the Objector alleged that the deceased conceded that he did not remit half profits from the said Company to the Objectors and he agreed to pay back 50% dividends and interest earned on shares at 12% cumulative interest since 1980 as per Agreement attached to the Objector's application.

The Objector asserted that terms of the Agreement bind the deceased and successors and the deceased's estate is encumbered with the debt. The purpose of the Objector pursuing his claim against the executor of the deceased's estate in **Commercial Suit No 333 of 2016** will be futile if distribution of the deceased's estate would go on unabated as property sold and/or distributed ceases to be estate property.

The Executor has a matter filed in the Tribunal in India contesting whether his late father's shares in CESC shall be transferred to his name. therefore there is justified cause to warrant halting distribution of the deceased's estate until the current issues are canvassed and determined. The Objector filed written submissions through Counsel and in a nutshell stated as follows; the Court lacks jurisdiction to hear and determine the instant matter as it would usurp the jurisdiction of the Commercial and Admiralty of the High Court and the ongoing case before the Tribunal in India.

He relied on the case of; **FREDRICK KIMUTAI KIPRONO vs JOHN KANGOGO CHEBIATOR P.A. CAUSE NO 96 OF 2014**

It was held that a creditor to the estate ought to be notified of the succession cause in which his interests are involved and should participate therein.

The Objector conceded that the Family Court under Law of Succession Act cannot set aside the confirmation of grant. Therefore he Objector sought stay of distribution of the estate of the deceased until the debt is settled.

RESPONDENT'S CASE

The Respondent /Executor of the deceased's estate filed Replying Affidavit on 29th August 2016 opposing the Objector's claim on the basis that the confirmation of grant is not subjected to review or appeal. the claim of stay of distribution is not plausible as the Objector is not contesting distribution of the deceased's estate.

The Objector's claim is speculative as he did not furnish the court with the share certificate from Calcutta Electric Supply Corporation (CESC) and evidence of the objector's father's shareholding of the said company and the shareholding of the deceased.

The Objector contests ownership of shares of the said Company Calcutta Electric Supply Corporation (CESC) that were held by the deceased herein and the same dispute is the subject matter of the case in the Tribunal in India and Kenyan courts lack jurisdiction to determine the same. Therefore this Court cannot legally grant stay of certificate of confirmation of grant.

The Objector claims proceeds of the funds in the joint accounts held by his father and the Executors father in Bank of Baroda. By a letter dated 13th June 1980 from Bank of Baroda in London and confirms the accounts were held jointly on survivorship. Hence, the deceased who survived the Objector's father took over the accounts absolutely.

If the Objector's claim in **HCCC 333/2016 in Commercial & Admiralty Division of High Court**; the claim if any can be recoverable from the asset that jointly owned by both families and is currently valued at Ksh 400 million.

The Objector through counsel filed written submissions and stated that the instant application is incompetent and misconceived and abuse of Court process. The grant of Probate was granted and was

confirmed as per the deceased's Will. Under **Section 71 of Law of Succession Act**, The Court before confirming grant was satisfied as to identification of beneficiaries of the estate and their respective shares of the deceased's estate. No objection has been raised on the said distribution. The Objector is not contesting the Will of deceased or distribution of his estate except to the extent of recovery of an alleged debt. After confirmation of grant , the deceased's estate has been distributed or rather mode of distribution is settled and all that is remaining is execution of the Court order.

The Objector is not entitled to orders sought; the prayers for stay of distribution on alleged claim of debt to the deceased's case has not crystallized as it is pending hearing and determination in the Commercial court. The alleged agreement of 12th November 2010 validity and enforceability is still pending in the Commercial Court. There is no basis to stay distribution of the deceased's estate as preservation of the properties maybe sought in Commercial case and there is a jointly held asset that would be held pending outcome of the Commercial Court and the one in the Tribunal in India.

ISSUE

Is the Applicant Objector entitled to orders of stay of distribution of the deceased's estate pending establishing his claim and recovering the debt?

DETERMINATION

The Family Division of the High Court is donated jurisdiction from **Article 165 (3) COK 2010** and **Section 47 of Law of Succession Act** to hear and determine any application under the Act. The instant application sought stay of distribution of the deceased's estate over an alleged subsisting debt to the deceased estate.

The pending matter in Tribunal in India cannot ouster the jurisdiction of this Court . **Section 6 of Civil Procedure Act Cap 21 provides;**

the pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit or suit in such foreign Court.

Secondly the pending matter in Commercial and Admiralty Division of the High Court **HCCC 333/2016** has no relation or bearing to the matter in this Court because, this Court has issued grant of probate and confirmed it. No person has contested the deceased's Will, contested the list of beneficiaries or dependents, the list of assets that comprise of the deceased's estate and/or distribution of the estate. The Objector's claim is of an alleged debt due and owing by the deceased and thus from his estate now held by the Respondent. It is pending determination in Commercial Court and Tribunal in India. Therefore until determination is not a creditor to the deceased 's estate as he has not confirmed the claim against the deceased's estate.

The Objector's prayer to stay distribution of the deceased's estate is unfounded in law because to stay distribution with a valid regular and lawful confirmed grant would be to revoke and annul the confirmed grant under **Section 76 of Law of succession Act Cap 160** through the back door. Such process would be irregular as the Objector has not presented evidence of any of the grounds for revocation of grant; that the proceedings to obtain grant were defective; that there were concealment of material facts from the Court or that there was fraud and/or the grant has become useless.

Firstly; revocation of grant application can only be pursued by beneficiary or dependant of the estate. The Creditor ought to lodge their claim during the succession proceedings. After certificate of confirmation of grant he ought to lodge a Civil or commercial of land claim in respective divisions of The High Court against the executor, administrator of the deceased's estate as provided by **Section 79 and 82(a) LSA.**

In the case of FREDRICK KIMUTAI KIPRONO VS JOHN KANGOGO CHEBIATOR P& A CAUSE 96 of 2014 where the Court stated;

The burden of proof of the latter sale fell squarely upon the shoulders of the Objector. See Sections 107 & 109 of the Evidence Act.

The Court further held citing *IRERI NYAGA vs KARANI NGARI & ANOTHER EMBU HIGH COURT 68 OF 2007*;

.....a buyer or purchaser cannot cause an otherwise valid grant to be revoked for only the reason that he was not recognized in the proceedings. as stated earlier, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate.

The upshot of the matter is that the Objector is entitled to pursue his claim in the Commercial and Admiralty Court now that the Respondent is Executor of the deceased's estate. The Objector shall in the said Court prove on balance of probabilities the debt that ought to be settled from the deceased's estate. The family Court discharged its duty to facilitate transmission of beneficial interest to beneficiaries of the deceased's estate.

With regard to assets that comprise of the deceased's estate outside this Court's jurisdiction; namely shares in Calcutta Electric Supply Corporation (CESC), the Executor may pursue resealing of the confirmed grant in India High Court and the Objector may object to the transfer of shares of the Company in India to the Executor and after hearing and determination the issue shall be settled.

In a nutshell, this Court is *functus officio* after certificate of confirmation of grant is issued and there is no application for revocation of grant. There is no legal basis to grant stay of distribution as it would amount to revoking and annulling the confirmed grant. This Court is satisfied that there is sufficient security from the assets of the deceased's properties to cater for payment of the debt if the Objector obtains judgment on the same.

DISPOSITION

The application filed on 18th August 2016 for stay of distribution of the deceased's estate is dismissed.

Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT IN NAIROBI ON 13TH JULY 2017

M.W.MUIGAI