



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 78 OF 2016**

**ROBERT MAX MULIE.....APPLICANT**

**(Executor of the Estate of Bernhard Martens)**

**-VERSUS -**

**ISMAIL M.H. MAWJI T/A MANOHAR LALL & RAI (MLR)**

**ASSOCIATES.....RESPONDENT**

**RULING**

1. **ROBERT MAX MULIE** is the Executor of the Estate of **BERNHARD MARTENS**.
2. He has brought an application against **ISMAIL M.H. MAWJI** Trading As **MANOHAR LALL & RAI (MLR) ASSOCIATES**, in his capacity as the Company Secretary of the following four (4) companies;
  - a) *Dreamcoat Automotive Refinishing Products Limited;*
  - b) *Puratos East Africa Limited;*
  - c) *Lulumizi Limited; and*
  - d) *Papyrus (Africa) Limited.*
3. It is common ground that the late Bernhard Martens owned shares in each of the 4 companies.
4. The applicant has asked the court to issue orders to compel the defendant to register the applicant as a member of each of the 4 companies.
5. The nature of the orders sought by the applicant are described as Temporary Mandatory Injunctions.
6. The applicant also sought temporary injunctions to restrain the defendant from intermeddling with the Estate of the late Bernhard Martens, until the suit herein is heard and determined.
7. The application is premised on the Grant of Probate issued on 2<sup>nd</sup> December 2015, pursuant to which the applicant was appointed at the Executor of the Estate of Bernhard Martens.

8. Following his appointment as the Executor, the applicant requested the defendant to register him as a member of the 4 companies, or to issue him with share certificates in respect to the said companies.

9. The defendant had declined to either register the executor as a member of the companies or to issue him with share certificates.

10. The applicant deems the respondent's actions as being unlawful and unjustifiable, as they amount to a breach of the Memorandum & Article of Association of the companies in issue.

11. Therefore, the applicant views the actions of the respondent as being tantamount to intermeddling with the Estate of the deceased.

12. The respondent confirmed that he had declined to transfer the shares in the 4 companies from the name of the deceased, to the name of the applicant.

13. However, the respondent insists that the law does not stipulate that shares should be transferred from the name of the deceased to the name of the executor.

14. It is the understanding of the executor that Clause 12 (b) of the Articles of Association of **DREAMCOAT AUTOMOTIVE REFINISHING PRODUCTS LIMITED**, presumes that shares belonging to a deceased shareholder should be in the name of the executor, so that the executors or the administrators of the Estate of the deceased may be in a position to transfer them to any member or members who had been nominated by the Directors, as having the first option to purchase the shares.

15. The advocates for the executor did assert, in their letter addressed to the respondent, that Article 29 of Table A of the Companies Act vested the shares of a deceased in his Executors.

16. The defendant acknowledged that the applicant had, through the grant of probate issued by the Court on 2<sup>nd</sup> December, 2015, been given;

*“...administrative powers of The Estate of the Late Bernhard Marten (deceased).*

**In view of the above his appointment is as an executor and not as a shareholder and therefore this doesn't warrant any procedures to transfer the shares held by the Late Bernhard Martens to his name and issue a share certificate as stated in your letter.**

17. The respondent was categorical, that the shares of the deceased could only be transferred from the Estate of the deceased, directly to the beneficiaries, as specified in the Will.

18. The applicant quoted the following words from clause 12 (b) of the Articles of Association of Dream Coat Automotive Refinishing Products Limited;

*“On the death of any of the shareholders the surviving members of the Company or any member nominated by the directors shall have the option to purchase the shares... in which case he or they shall have first option to have the shares transferred to him or them jointly and the executors or the administrators of the deceased may transfer the same accordingly?.*

19. It is the applicant's understanding that this clause presumes that the shares would have to be in the name of the executors first, before they can be transferred.

20. In answer, the respondent says that clause 12 (b) does not provide for the transfer of the shares to the name of the executor.

21. Of course, clause 12 (b) does not specifically provide for the transfer of shares into the name of the executor, and the applicant appreciates that fact, hence his contention that a presumption arises from that clause.

22. The applicant also quoted clause 9 of the Articles of Association of **Puratos E.A. Limited**, to back his submissions. The said clause provides as follows;

***“Any share may be transferred by a member to any child... and any share of a deceased member may be transferred by his executor or administrator to any child... and shares standing in the name of the trustees of the Will of any deceased member may be transferred upon any change of trustees to the trustees for the time being of such Will?.***

23. The third quotation given by the applicant was from clause 9 of the Articles of Association of **Papyrus (Africa) Ltd**, which is in the following words;

***“Any share may be transferred by a member to any child... and any share of a deceased member may be transferred by his executor or administrator to any child... and shares standing in the name of the trustees of the Will of any deceased may be transferred upon any change of trustees to the trustees for the time being of such Will?.***

24. A reading of those clauses makes it clear that the executor or the administrator was mandated to transfer the shares. The clauses state that any share may be transferred by his executor or administrator.

25. None of the Articles of Association state that the shares may be transferred to the executor or the administrator.

26. In my considered view, there is a world of difference between the power to affect the transfer of shares by the executor and the power to effect the transfer shares to the executor.

27. In this case, the Will stipulates that the Estate shall be shared in equal share between **Ms SABINE HENRIETE MARTENS**, who is a daughter of the deceased, and **Ms MARGARET VAN UNEN**, a partner of the deceased.

28. In effect, there is no portion of the Estate which could remain, so that the executor can acquire ownership of it.

29. The daughter of the deceased has sworn an affidavit, indicating that she was his only child. She also says that she is an adult. Therefore, when the executor makes reference to clauses in the companies Articles of Association, which empower an executor or an administrator to transfer shares to a child, I am unable to appreciate the relevance of the said clauses to this case, as none of the named beneficiaries are children.

30. It is also not clear why the applicant made reference to situations in which shares can be transferred upon the change of trustees. In this case, the deceased cannot be described as a Trustee, so that upon his demise, there was a change of trustees.

31. The applicant has asserted that the daughter of the deceased had taken over the running of the companies. That assertion was made in the applicant’s submissions.

32. Of course, if the applicant were to prove that Sabine Martens was actually running the companies, that would constitute intermeddling, and the issue would need to be addressed appropriately, before the Probate & Administration Court.

33. The applicant submitted that all the property of the deceased vested in the executor, as the personal representative of the deceased.

34. The question that then arises is why the applicant should insist that although the property vested in him as the personal representative of the deceased, he wanted the shares to be transferred to his personal name.

35. When the courts have said that the executor's title dates from the date of the death of the deceased, that means that even if the Will was opened weeks or months after the deceased passed on, as soon as it became clear who the Will had designated as the executor, the said executor's authority qua executor, was deemed to have become effective from the moment when the deceased passed on.

36. The word "*title*" in that respect does not refer to right of ownership of the property constituting the Estate of the deceased.

37. In conclusion, I find that the circumstances prevailing in this case cannot be described as disclosing a case so clear that the court could grant an interlocutory mandatory injunction. Therefore, the application is rejected.

38. But before concluding this Ruling, I feel obliged to state that if the parties were mindful of the Will of the deceased, as they both assert, they should find no hindrance in giving effect to the said Will.

39. The costs of the application dated 16<sup>th</sup> March 2016 shall be borne by the Estate of the deceased.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> day of October 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Muthee for Shaw for the Applicant

Goswami for the Respondent

Collins Odhiambo – Court clerk.