



Shah v Shah (Civil Appeal 137 of 2019) [2024] KECA 1502 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1502 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 137 OF 2019
SG KAIRU, S OLE KANTAI & JM MATIVO, JJA
OCTOBER 25, 2024**

BETWEEN

SHAMIT SHANTILAL SHAH APPELLANT

AND

KANCHANBEN RANMIKLAL SHAH RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Achode J.) delivered on 7th February, 2017 in High Court Succession Cause No. 1214 of 2007)

JUDGMENT

JUDGMENT OF MATIVO, JA.

1. The factual background to this appeal as I gather it from the record is straight forward, uncontroverted or common ground. Premchand Kanji Shah-deceased died testate on 19th March 2006. He was unmarried and left no children. He had properties both in Kenya and overseas. In respect of his Kenyan estate, he made a Will dated 23rd May 2003. In his Will, the deceased appointed the Shamit Shantilal Shah (the appellant herein), Dr. Ramniklal Khimji Shah (his brother-in-Law) and Kanchanben Ramniklal Shah, his sister (the respondent) to be executors and trustees to his will for the purposes of dealing with all his properties in the Republic of Kenya.
2. In his Will, the deceased bequeathed all his Kenyan estate to his sister (the respondent) save for his house number L.R. 7158/47 which he gave the respondent and her late husband Dr. Ramniklal Khimji Shah life interest to use it and after their respective deaths, the property would be transferred to the appellant herein. In this regard, Clause 2 of the Will provided as follows:

“I give to my sister Kanchanben Ramniklal Shah and my brother in-law Dr. Ramniklal Khimji Shah the right to occupy use and enjoy for their life all my residential property being Land Reference Number 7158/47, Nairobi or if I sell that property then any other house in which I shall be residing at the date of my death so that the survivor of the said Kanchanben Ramniklal Shah and Dr. Ramniklal Khimji Shah shall occupy- rent free my



aforesaid residential property until such time as he or she dies. After the death both the said Kanchanben Ramniklal Shah Dr. Ramniklal Khimji Shah my trustees shall give my aforesaid residential property to Shamit Shantilal Shah absolutely.”

3. On 27th August 2007, a Grant of Probate of Written Will was issued to the appellant and the respondent herein. The said Grant was confirmed on 1st July 2008.
4. By an application dated 3rd October 2014, the appellant moved the High Court seeking an order that the respondent be ordered to execute all the necessary documents and instruments to transfer L.R. No. 7158/47, Nairobi to him, subject to the respondent’s life interest under the Will in order to finalize administration of the deceased’s estate. The application was anchored on section 45, 47, 76 and 83 (f) of the Law of Succession Act and Rules 44, 49 and 73 of the Probate and Administration Rules.
5. The grounds in support of the application were that the respondent had refused to transfer the said property to the appellant, subject to the respondent’s life interest in the property as per the deceased’s Will, and that he had failed to finalize the administration of the estate contrary to the deceased’s wishes.
6. In opposition to the application, the respondent filed a replying affidavit sworn on 13th November 2014, basically contending that the application was premature because she had a life interest in the property which could only be extinguished upon her demise, therefore the transfer would be contrary to the deceased’s testamentary wishes. She maintained that the late Majanja J. on 28th February 2012 found that the appellant had not diligently administered the estate. Further, she was apprehensive about the appellant’s intentions.
7. After considering the application and the parties’ submissions, vide the impugned ruling dated 7th February 2017, Achode, J. (as she then was) dismissed the appellant’s application on grounds that it was devoid of merit and premature.
8. Aggrieved by the ruling, the appellant appealed to this Court, citing four grounds principally contending that the learned judge erred by :- (a) failing to appreciate that the property having been bequeathed to her absolutely she was entitled to have her name registered in the register of titles subject to the respondent’s life interest, (b) failing to appreciate that under section 83 (g) of the Law of Succession Act, the administration of the deceased’s estate ought to be completed within 6 months from the date of the confirmation of the grant, (c) failing to appreciate that the only way to conclude the administration of the estate was to transfer the said property to her subject to the respondent’s life interest, and, (d) failing to properly consider and apply the law. The appellant prays that the appeal be allowed with costs and the impugned ruling be substituted with an order allowing her application dated 3rd October 2014.
9. During the hearing of this appeal on 5th June 2024, the appellant argued two issues. One, whether the learned judge erred in law in failing to hold that the distribution of the estate ought to be closed within 6 months from the date of the confirmation of the grant. Two, whether the property should be registered in her name.
10. Addressing the first issue, the appellant argued that they have concluded most of the distribution and what remains is the distribution of the suit property. The appellant cited section 83 (g) of the Law of Succession Act which requires executors of a deceased’s estate to complete the administration of an estate in respect of all matters other than continuing trusts within 6 months, and to produce to the court a full and accurate account of the complete administration. The appellant argued that the grant was confirmed on 1st July 2008, therefore, the statutory deadline for distribution was 1st January 2009 and there being no application for extension of time made by the executors, the application dated 3rd



October 2014 was not premature contrary to the trial court's holding. The appellant maintained that she filed her application after the lapse of the six months.

11. Regarding the second issue, the appellant maintained that it is only prudent that the suit property be registered in her name as per clause 2 of the Will. She added that she will never interfere with the respondent's enjoyment of the property and cited *Kingdom Kenya 01 Limited vs. The District Land Registrar, Narok & 15 Others*, [2018] KLR where this Court held that nothing can stop a beneficiary whose proprietary rights had crystallized in terms of section 83 (i) of the *Law of Succession Act* from moving a court to protect his proprietary rights.
12. In opposition to the appeal, the respondent maintained that this is not a contract claim, which is enforceable by way of specific performance. She submitted that the court finalized its task after by confirming the grant as per the Will and cited the High Court in re Estate of Solomon Mwangi Waweru (Deceased) [2018] eKLR where Musyoka, J. held that the duty of a probate court is to oversee the transmission of the estate to his beneficiaries.
13. Regarding the applicability of section 83 (g) of the *Law of Succession Act*, the respondent maintained that this suit involves a continuing trust, which is an exception under the said section. She cited *re Estate of Atibu Oronje Asioma (Deceased)* (Succession Cause 312 of 2008) [2022] KEHC 11046 where Musyoka J. stated that a continuing trust in the context of the *Law of Succession Act* is the life interest enjoyed by a surviving spouse and the trust held on behalf of a minor.
14. It was the respondent's case that her life interest in the suit property can only be terminated upon her death and it is only after her death that the trustees shall transfer the property to the appellant. She maintained that the 6 months' timeline does not apply where there is a continuing trust and cited the holding in *Elizabeth Nkirote vs. Kithinji Murugu & Another* [2007] eKLR that although ownership of a life estate is technically temporary because it ends upon a person's death, it is treated as complete ownership of fee simple so long as the holder lives. Therefore, upon the death of the life tenant, ownership of the estate reverts to the original grantor.
15. The respondent also submitted that under the common law, a life tenant's equitable interest can only be challenged on grounds of breach of fiduciary duty, mismanagement or waste, failure to pay obligations and endangering the remainder interest. Therefore, in absence of evidence that the respondent has committed any of the above misdeeds, the orders sought in the application cannot be allowed. Further, the appellant is apprehensive that that she will be evicted from the property or the property will be sold.
16. I have carefully considered the record of appeal and the law. Before addressing this appeal on merits, I will first address a pertinent jurisdictional question. Regrettably, none of the parties addressed this pertinent legal issue. However, this is an issue of law, therefore this Court can suo moto raise and determine it. (See this Court's decision in *Sinopec International Petroleum Service Corporation vs. Public Procurement Administrative Review Board & 3 others* (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment).
17. This Court in *John Mwita Murimi & 2 Others vs. Mwikabe Chacha Mwita & Another* [2019] eKLR held as follows:

“It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in *Makhangu vs. Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* [2014] eKLR. In analyzing the *Makhangu* decision (supra), this Court held that under the *Law of Succession*



Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court.”

18. The Court has been consistent in re-echoing the above position. In *Francis Macharia Karanja & 6 Others vs. Virginia Muthoni Karanja* [2020] eKLR, Kiage, J.A, in a lead ruling expressed himself as follows:

“As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The same relates to the procedure to be invoked by an intended appellant before this Court can assume jurisdiction to hear succession matters. The issue goes to the heart of this Court’s jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in *The Owners of The Motor Vessel "Lillian S" Vs. Caltex Oil Kenya Ltd* [1989] KLR 1.

I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in *Hafswa Omar Abdalla Taib & 2 others vs. Swaleh Abdalla Taib* [2015] eKLR;

“Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters unless with leave. This was echoed in *Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another* [2014] eKLR;

“We reiterate that section 50 of the Law of Succession Act is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. But section 47 of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction.”

19. It is my conclusion that leave to appeal was a pre-requisite in the present appeal. I note that the same was not obtained prior to filing of this appeal. Consequently, on this ground alone, this appeal is incompetent and falls for striking out.
20. Despite my above finding, I will nevertheless address the merits of the case. This appeal will stand or fall on question whether the trial judge erred in finding that the application dated 3rd October 2014 was premature. Premchand Kanji Shah, the deceased whose estate is the subject of these proceedings predeceased his sister and his brother-in-law. This appeal turns on the interpretation of clause 2 of the deceased's will dated 23rd May 2003 reproduced at paragraph 2 of this judgment. The question narrows



itself to whether the appellant's assertion that L.R. No. 7158/47, Nairobi be transferred into his name during the respondent's lifetime is in conformity with the said clause. I wish to clarify that the issue of life interest as provided under section 35 of the Law of Succession Act is not applicable in this case since the said section only applies where the intestate has left one surviving spouse and child or children.

21. A reading of clause 2 leaves no doubt that the deceased Premchand Kanji Shah intended that Kanchanben Ramniklal Shah and Dr. Ramniklal Khimji Shah (deceased) reside in L.R. No. 7158/47 Nairobi during their life time and upon their respective deaths, the said property would be given to the appellant absolutely. Put simply, as per the said clause, both Kanchanben Ramniklal Shah and Dr. Ramniklal Khimji Shah, were gifted to use the property during their lifetime, but on their respective deaths, the property would pass to the appellant. Dr. Ramniklal Khimji Shah is already dead, but Kanchanben Ramniklal Shah (the respondent) is still alive. As per the said clause, her death is a pre-condition for the said property to pass to the appellant. A contrary argument is an affront to the clear language of clause 2 of the deceased's will.
22. Much as the appellant heavily relied on section 83 (g) of the Law of Succession Act which inter alia requires an administrator to within six months from the date of confirmation of the grant to complete the administration of the estate, the appellant ignored the fact that the said provision expressly excludes continuing trusts. In any event, the deceased's intention is clearly manifested by clause 2 which conferred a life interest on the subject property to the respondent and her husband the late Dr. Ramniklal Khimji Shah. The said clause creates a life interest in favour of the respondent and her late husband conferring to them the right to use the property up to their respective deaths after which the property will pass to the appellant. It is therefore manifest that the respondent's interest will only terminate after her death. The appellant is impermissibly inviting this Court to re-write the will, which we decline to do.
23. Arising from my finding both on the jurisdictional question discussed above and on the merits of the appeal, it is my finding that this appeal is devoid of merit. Consequently, I hereby uphold the findings by Achode J. (as she then was) that the appellant's application seeking the transfer of L.R. No. 7158/47, Nairobi into his name is premature. Accordingly, I would dismiss this appeal with costs to the respondent.

JUDGMENT OF GATEMBU, JA

1. I have had the benefit of reading in draft the judgment of my brother Mativo, JA. and agree that the appeal should be dismissed. However, considering that there are varying decisions of the Court on the question of leave to appeal in succession matters and not having heard the parties on the competence of the appeal in that regard, I would refrain from addressing that issue.
2. That said, the final orders are that the appeal is dismissed with costs to the respondent.

JUDGMENT OF KANTAI, JA.

1. I have seen in draft the judgment of my learned brother, Mativo, JA. I agree with the reasoning and conclusion made and I have nothing useful to add. The appeal should be dismissed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

J. MATIVO

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JUDGE OF APPEAL



S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

