



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), J. MOHAMMED & KANTAL, J.J.A)

CIVIL APPEAL NO. 362 OF 2017

BETWEEN

JITENDRAKUMAR LALJIBHAI THANKIAPPELLANT

AND

MUKESH LALJIBHAI THANKY..... 1ST RESPONDENT

HIRABEN LALJIBHAI THANKY 2ND RESPONDENT

AJAY LALJIBHAI THANKY..... 3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ougo, J.) dated 12th July, 2017

in

Succession Cause No. 119 of 1978)

JUDGMENT OF THE COURT

Background

1. The dispute that pitted the parties herein against each other revolved around the administration and distribution of the Estate of **Lalji Ladharam Thanki** (Deceased) who died on 28th June, 1977. The deceased was survived by thirteen (13) beneficiaries who included the parties herein. All the property which belonged to the Deceased was to be shared equally amongst all the beneficiaries of the Estate of the Deceased.
2. The Grant of letters of Administration Intestate of the Estate of the Deceased was issued to **Jitendrakumar Laljibhai Thanki** (the appellant), the deceased's son, on 11th May, 1978. The Estate comprised three (3) properties amongst other assets; **LR. No. 209/1220/3** situated on **Batu Batu Road Parklands** (hereinafter referred to as Batu Batu property); **LR No. 1870/IV/89** situated on **Terrace Close Westlands** (hereinafter referred to as Westlands property); and **LR. No. 3734/352** situated on **Othaya Road off Argwings Kodhek Road** (herein after referred to as Othaya Road property) (the suit properties). The suit properties were jointly owned by the deceased and his two sons namely, **Jitendrakumar Laljibhai Thanki** (the appellant) and **Devkrishan Lalji Ladharam Thanki (Devkrishan)** who subsequently died on 22nd March, 2004. **Mukesh Laljibhai Thanky** (a son of the Deceased), **Hiraben Laljibhai Thanky** (the widow of the Deceased) and **Ajay Laljibhai Thanky** (a son of the Deceased) are the 1st, 2nd and 3rd respondents herein.
3. Thereafter, the appellant vide an application for confirmation of the letters of administration proposed to sell the assets of the Deceased's Estate and distribute the net proceeds, which he approximated at about Kshs. 34 million, equally amongst the beneficiaries. It would appear that only 10 out of the 13 beneficiaries gave their consent to the confirmation. The 1st respondent, also the Deceased's son, was one of the beneficiaries who did not give his consent.
4. Nonetheless, the letters of administration were confirmed on 29th July, 2008; thereafter, vide sale agreements dated 13th March, 2013 between the appellant and **Devkrishan's** daughters, who were the administrators of his Estate, the appellant purchased **Devkrishan's** share, 1/3 of the suit properties at Kshs.40,333,332.00 and the same was transferred to him. Further, the appellant through transfers by assent conveyed the Deceased's share in the suit properties to himself. Accordingly, all the three suit properties were registered in the appellant's

name as the sole proprietor. The appellant then sold the **Westlands property** and **Othaya property** to third parties at Kshs. 130,000,000 and Kshs.128,000,000 respectively.

5. According to the appellant, he distributed the net proceeds of the Deceased's share, being the equivalent of the amount he had purchased **Devkrishan's** share, amongst his beneficiaries; and that each beneficiary was paid a total of Kshs. 3,102,564.00 with the exception of the 1st respondent who refused to accept the same.

6. Subsequently, the appellant issued a notice to the 1st respondent to give vacant possession of the **Batu Batu property** where the 1st respondent resided with his family. According to the 1st respondent, the said property was a family home from the time the deceased was alive; that in any event, the appellant had not distributed to the beneficiaries their rightful shares; that what should have been distributed is the Deceased's share in the proceeds obtained following the sale of the two suit properties by the appellant; that what was more, the appellant had failed to account and/or distribute the rental income derived from the **Westlands** and **Othaya properties** prior to their sale; and that as such, he was not prepared to vacate the **Batu Batu property** until he was paid his rightful entitlement in the Deceased's Estate.

7. Based on the foregoing and the looming eviction, the 1st respondent filed summons dated 29th July, 2015 in the High Court seeking *inter alia*:-

“... ”

2) Pending the hearing and the determination of the application Jitendra Lalji Ladharam Thanki be restrained from threatening to evict or evicting the applicant from the family residence, erected on L.R. No. 209/1220/3.

3) That the administrator of the estate Jitendra kumar Lalji Ladharam Thanki be compelled to give a full account of the rent received on behalf of the estate properties to wit. L.R. no. 1870/IV/89 and L.R.

3734/352 from the time of the deceased's death and to avail the applicant's share of the one-third (1/3) that is to be available for distribution to the beneficiaries.

4) That the administrators be compelled to furnish all the relevant documents relating to the disposal of the other estate properties and to avail the applicant's share of the one-third (1/3) share of the actual sale price of L.R. No. 1870/IV/ 89 and L.R. No. 3734/352 available for distribution to the beneficiaries.

5) That the administrator of the estate Jitendrakumar Lalji Ladharam Thanki be ordered to pay to the applicant herein Mukesh Laljibhai Thanki his lawful share...”

8. Further, the 2nd and 3rd respondents, the widow and son of the Deceased respectively, filed summons dated 26th August, 2016 praying for the following orders:-

“... ”

2) That Jitendra Lalji Ladharam Thanki and or his agents be restrained from disposing of by sale or otherwise interfering whatsoever or dealing with the interest of the deceased and or beneficiaries of the deceased's estate in L.R. No. 209/1220/3 pending the hearing and determination of this application.

3) That Jitendrakumar Lalji Ladharam Thanki being the administrator of the estate of the deceased herein be compelled to render to the court and the beneficiaries/applicants a full and accurate account of all rental and any other income received on behalf of the estate properties namely L.R. 1870/IV/89 and L.R. 3734/352 from the time of the deceased's death to-date and to make the same available for proper and equitable distribution among the beneficiaries.

4) That the said administrator be compelled to furnish all the relevant documents (including agreements for sale, transfer and payment remittance receipts /advices) relating to the sale and transfer of properties namely L.R. 1870/IV/89 and L.R. No. 3734/352 and to make the same less the monies that may have been paid to any beneficiary) available for proper equitable distribution among the beneficiaries.

5) That the transfer of the one third (1/3) share of L.R. No. 209/1220/3 by the said administrator to himself be annulled/cancelled and the said share of the property be distributed equitably among the beneficiaries ...”

9. Likewise, the 2nd and 3rd respondents' application was based on the grounds that they were of the view that the appellant had not distributed their rightful shares in the Deceased's estate; that the appellant had failed to give accounts of the rental income collected from the Estate; and that the **Batu Batu property** was the family home.

10. In response, to the above applications, the appellant in his affidavit dated 29th July, 2015 maintained that each beneficiary had been given his/her rightful share; that the 2nd and 3rd respondents were precluded from stating otherwise having consented to the confirmation which was the basis of the distribution and received their shares; that the **Batu Batu property** was registered in his name and had never been the family home; that he had given the necessary accounts of the rental income; and that the 2nd respondent, who was the Deceased's widow, had been receiving the Deceased's share of the rental income.

11. Upon hearing the parties' respective positions, the High Court (**Ougo, J.**) by a ruling dated 12th July, 2017 issued the following orders:-

i. The respondent is restrained from evicting the applicant from L.R. No. 209/1220/3;

ii. the administrator of the estate Jitendrakumar Lalji Ladharam Thanki is hereby ordered to give a full account of the rent received on behalf of the estate properties to wit. L.R. No. 1870/IV/89 and L.R. 3734/352 from the time of the deceased's death the same to be done within 60 days from the date of this ruling. The same to be served on the counsel for the applicant within the said 60 days;

iii. the administrators is hereby ordered to furnish all the relevant documents relating to the disposal of the other estate properties and the actual sale price of L.R. No. 1870/IV/ 89 and L.R. No. 3734/352 within 60 days from the date of this ruling; and

iv. the court has partially granted orders sought by the applicants. The issue of equal distribution of any amounts to the beneficiaries and annulment of their share of their property shall be dealt with once the respondent has complied with the orders of this court. Matter to be mentioned after the 60 days on the 25/9/2017 at 2.30 pm. This being a family matter cost shall be in the cause.

12. The appellant was aggrieved by that decision hence this appeal which is premised on the grounds that the learned Judge erred in fact and law by-

a) Holding that the appellant had failed to demonstrate how he acquired the deceased's share of the properties;

b) holding that sale of the properties ought to have been preceded by valuation to ascertain their market value;

c) directing the appellant to render accounts of the estate of the deceased from the time of his death to 2006;

d) directing the appellant to avail rental and/or any other income from the properties for distribution among the beneficiaries;

e) finding that L.R No. 209/1220/3 is a family residence;

f) restraining the eviction of the 1st respondent from L.R No. 209/1220/3;

g) pursuing redistribution of the estate without the request by the beneficiaries; and

h) granting orders which had not been sought. Submissions by Counsel

13. The appeal was heard virtually due to the COVID-19 pandemic. At the hearing, learned counsel, **Mr. Havi** appeared for the appellant, learned counsel **Ms. Wangari Kamau** appeared for the 1st respondent, while the 2nd and 3rd respondents were represented by learned counsel **Mr. Isindu**. The appeal was disposed of by way of both written submissions and oral highlights.

14. According to **Mr. Havi**, the learned Judge restrained the appellant from taking vacant possession of the **Batu Batu property** based on an erroneous perception that it was the family home despite the undisputed evidence to the contrary. Citing **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR**, counsel argued that the learned Judge should not have restrained the appellant from evicting the 1st respondent since the appellant was the registered owner of the said property while the 1st respondent had no legal right over it. Counsel added that the Deceased was only entitled to a 1/3 of the suit properties and the sales proceeds thereto were shared among the beneficiaries with the exception of the 1st respondent who refused to accept his share.

15. In counsel's view, the beneficiaries' consent to the confirmation of the grant and the proposed distribution thereunder was sufficient; and that the appellant as the administrator of the estate did not require a separate consent to convey the estate properties to himself or sell them. In that regard, the appellant relied on **Re the Estate of Thiongó Nginyayu Muthiora (deceased) [2013] eKLR**. Besides, the properties having been vested in the appellant as an administrator meant that he had the requisite authority to sell and transfer the same.

16. Counsel went on to argue that the learned Judge's finding that the consent of the beneficiaries was required contradicted her holding that the respondents had not established their allegations of fraud and illegality on the appellant's part.

17. It was contended further that the suit properties which were commonly owned by three people, two of whom were deceased, could not be sold unless the title was in one person's name. Therefore, that was what led the appellant to purchase his late brother's share and transfer the deceased's share to himself. As far as the appellant was concerned, there was no impropriety or contravention of the law.

18. Counsel for the appellant took issue with the learned Judge for directing that the appellant avails accounts from the time of the deceased's death to the date of the ruling. This is because, according to the appellant, the accounts for the period from 1978 to 2007 were on record. In any event, counsel argued that the respondents were neither entitled nor could they demand for the accounts of the rental income relating to the deceased's share in light of the uncontroverted evidence that the said rent had been collected by the 2nd respondent over the years.

19. Maintaining that the respondents were not entitled to more than what the other beneficiaries were paid, counsel submitted that the said payments were based on the amount the appellant had acquired the suit properties from the other joint owners.

Furthermore, the grant having been confirmed and the Estate distributed, the issue of distribution was *res-judicata* and should not have been entertained by the learned Judge.

20. **Ms. Kamau** submitted that the confirmed grant transferred the deceased's share in the 3 properties to his 13 beneficiaries. It followed therefore, that the appellant required the beneficiaries' consent, as the legal owners of the properties, before he could sell or transfer the same to himself or to third parties. Counsel urged that contrary to the appellant's assertion, an administrator does not become a proprietor of the estate property. Rather he/she is a trustee and stands in a fiduciary position which requires him/her to act in the best interests of the beneficiaries.

21. Counsel opined that the fact that the appellant paid the beneficiaries what he alleged were their rightful shares after the sale of the **Westlands and Othaya Road properties**, evinced that he undertook the sale on behalf of the deceased's Estate; and that by claiming otherwise revealed his intention to defraud the beneficiaries of the true value of the Estate. Moreover, there was no evidence to demonstrate that the deceased's share was transferred to the appellant for valuable consideration.

22. Counsel urged that the appellant was under a statutory duty to render accounts within 6 months of confirmation of the grant or whenever required to do so by the court either on its own motion or upon application. Counsel submitted that the learned Judge did not direct redistribution of the Deceased's Estate; that it was clear that not all the proceeds of the Estate had been fairly and equally distributed in accordance with the Confirmed Grant; and that the issue of equal distribution of the beneficiaries' share in the Estate would be dealt with once the appellant complied with the orders of the Court.

23. Counsel further contended that the appellant could not purport to evict the 1st respondent from the **Batu Batu property** taking into account that his share of the Estate was neither transferred to him nor was he paid the actual value for the same. Counsel argued that the injunction was therefore rightly issued and the appeal, therefore lacked merit.

24. Equally, opposing the appeal, **Mr. Isindu** submitted that the appeal stems from an interim decision of the High Court, in that, the learned Judge only directed the appellant to render accounts of the Estate which he has failed to do.. Counsel contended that the basis of the order was that a total of Kshs. 258 million had been received by the appellant as sales proceeds but only about 40 million had been distributed; that the High Court had the power under the terms of the Grant and **Sections 82,83,94 & 95** of the **Law of Succession Act** to require the appellant to render accounts of the deceased's Estate; that in issuing the order, the learned Judge acted in line with her obligation under **Article 159 (2)** of the **Constitution** by dispensing substantial justice without undue regard to technicalities and that notwithstanding that, the assets of a Deceased's Estate vests in his/her personal representative who is required to act diligently and for the benefit of the Estate and beneficiaries. In counsel's view, the evidence adduced indicated that the appellant had failed to do so.

Determination

25. We have considered the grounds of appeal, submissions by the parties, the authorities cited and the law. For starters having perused the impugned ruling, we concur with **Mr. Isindu** that the same was on purely interim orders, that is, rendering of accounts, and there was no definite finding on the distribution of the Estate. Our position is informed by the following portion of the said ruling:

“However, it is important to point out that the issue of transfer of their share to the respondent is not an issue that can be ignored. The respondent has not adduced any evidence to show how he acquired the 1/3 share belonging to the applicants. No sale agreement or transfer documents in regards to the same has been adduced. No evidence has been adduced to indicate that the two had consented to a transfer of their share to the respondent. How then did the respondent deal with the 1/3 share belonging to the applicants without their consent? This is an issue that needs to be interrogated further.”

26. In our view, the learned Judge in the above extract merely expressed her concern on the lack of clarity of the manner under which the deceased's share was transferred to the appellant and did not in any way make a final finding on the merits of the case. It was a finding based on *prima facie* evidence. It is clear too that the learned Judge reserved the determination of the same as well as the question of whether the Estate was equally distributed until the appellant provided the accounts of the Estate, as clearly set out in the orders issued by the High Court.

27. It follows therefore, that since the aforesaid issues were reserved to be determined on merit at a later date by the High Court, they cannot properly be the basis of the appeal before us. In accordance with our jurisdiction as set out under **Article 164(3)**

(a) of the **Constitution**, we cannot entertain an appeal concerning issues which are yet to be determined by the High Court. To do so would be to usurp the jurisdiction of the trial court. . See **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

28. The only issues that we can delve into are with regard to the orders requiring the appellant to render accounts and the interim injunction restraining the eviction of the 1st respondent from the **Batu Batu property**. **Section 83 (h)** of the **Law of Succession Act** places an obligation on the legal representative of a Deceased's Estate to render accounts at any time when required to do so by the Court. More specifically, the provision reads as follows:

“Personal representatives shall have the following duties-

...

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 up to the date of the account;...”

Consequently, we see no fault on the part of the learned Judge in directing the appellant to render accounts of the Deceased's Estate.

29. It is trite that injunctions being equitable remedies are discretionary in nature. Therefore, whether or not we should interfere with the learned Judge's discretion in this case will depend on whether we are satisfied that she misdirected herself in some matter and as a result has arrived at a wrong decision, or that it is manifest from the case as a whole that she was clearly wrong in the exercise of her discretion and that as a result there has been injustice. We cannot see any misdirection. See Mbogo &

Another vs. Shah [1968] EA 93.

30. From the circumstances of this case, it is common ground that the learned Judge directed the appellant as the administrator to render accounts prior to the determination of the other issues raised by the parties. It is precisely for that reason that we find that the learned Judge restrained the impending eviction of the 1st respondent from the **Batu Batu property**. As such, we see no reason to interfere with the learned Judge's discretion of issuing the said injunction.

31. The totality of the foregoing is that we find that the appeal lacks merit and is hereby dismissed. Since the matter concerns a dispute between family members, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

J. MOHAMMED

.....

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