REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 30 OF 2013

BETWEEN

RAJESH PRANJIVAN CHUDASAMA ……...……APPELLANT

AND

SAILESH PRANJIVAN CHUDASAMA ……..RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Mombasa

(Nzioka, J.) dated 11th June, 2012

in

H.C. Probate & Admin. Cause No. 189 of 2011

****

JUDGMENT OF THE COURT

This is an appeal arising out of a ruling and order made by ***Nzioka, J***. delivered on 11th June, 2012 overruling the appellant's preliminary objection dated 8th February, 2012. The background to this matter is that the appellant and the respondent are the biological sons of the late ***Pranjivan Jesang Devji Chudasama*** (*the deceased*) who died on 24th February, 2011.

The cause giving rise to the Notice of Preliminary Objection was a petition filed by the respondent on 4th May, 2011 being ***Nairobi High Court Probate & Administration Cause No. 816 of 2011*** in which he sought to be appointed as the administrator *ad colligenda bona* of the estate of the deceased. Contemporaneously with the petition, the respondent filed a summons dated 4th May, 2011 and sought the following orders:

> ***"1. This application be certified urgent and be heard ex parte in the 1st instance.***
>
> ***2. Pending inter partes hearing of this application orders so*** *(sic)* ***issue that:-***

a. Rajesh Pranjivan Chudasama be restrained form in any way whatsoever interfering with the assets of The Estate of PRANJIVAN JESANG DEVJI CHUDASAMA (Deceased)

b. All and any bank account in the name of PRANJIVAN JESANG DEVJI CHUDASAMA or in his name with any other person in Fidelity Bank Limited, Imperial Bank Limited, Habib Bank Limited and Guardian Bank Limited be frozen.

3. Pending final determination of representation and distribution of The Estate of PRANJIVAN JESANG DEVHI CHUDASAMA (Deceased) Rejesh Pranjivan Chudasama be restrained form *(sic)* ***in any way whatsoever interfering with the assets of the estate.***

4. Pending final determination of representation and distribution of the Estate of PRANJIVAN JESANG DEVHI CHUDASAMA (Deceased) All and any bank account in the name of PRANJIVAN JESANG DEVHI CHUDASAMA or in his name with any other person in Fidelity Bank Limited, Imperial Bank Limited, Habibi Bank Limited and Guardian Bank Limited be frozen.

5. An order do issue compelling Rajesh Pranjivan Chudasama to furnish the applicant with a document he is holding purporting to be the final will and testament of PRANJIVAN JESANG DEVHI CHUDASAMA.

6. The Court do grant such further and other relief as may be in the interest of Justice.

7. Costs of the application be in the cause."

The application was heard ex-parte on 5th May, 2011 and ***Maraga, J***. (*as he then was*) ordered as follows:

*"**1. <u>THAT</u> the matter be and is hereby certified as urgent.***

2. <u>THAT</u> the matter be and is hereby transferred to Mombasa High Court for hearing and final disposal.

3. <u>THAT</u> all and any bank account in the name of PRANJIVAN JESANG DEVJI CHUDASAMA or his name with any other person in Fidelity Bank Limited, Imperial Bank Limited, Habib Bank Limited and Guardian Bank Limited be and are hereby frozen for a period of 7 days.

4. <u>THAT</u> mention be in Mombasa on 12/5/2011 for directions and further orders."

The appellant on the other hand together with his wife filed a petition on 9th May, 2011 seeking grant of Probate vide ***<u>Mombasa High Court Succession Cause No. 175 of 2011.</u>***

Upon service of the respondent's petition on the appellant and as would be expected, the appellant opposed the respondent's summons dated 4th May, 2011. The appellant further filed a Preliminary Objection dated 8th February, 2012 and sought the following orders that:

1. ***This Honourable Court has no jurisdiction to hear or continue to entertain the Applicant's application dated 3rd May 2011 ("the said application") or these proceedings on the ground that the Applicant has no*** *locus standi* ***to bring this application or these proceedings since he is not either an appointed executor under any will or an appointed administrator*** *ad colligenda bona.*

2. This Honourable Court has no jurisdiction to hear or continue to entertain the said application on the ground that neither Rule 49 of the Probate and Administration Rules nor the inherent power of the Court (under which provisions the said application has been brought) have any application to the relief sought in these proceedings.

3. The injunctive orders granted by Maraga J ex parte on 5th May 2011 and which continue in force to date are wholly irregular and unlawful and ought to be set aside ex debito justitiae on the ground that such orders are not only incapable of being granted under the Law of Succession Act and the Probate and Administration Rules but, even assuming they were, the said orders were extended irregularly.

4. This Honourable Court has no jurisdiction or right to call for viva voce evidence at the inter partes hearing of the said application without a proper basis being laid by the Applicant."

The preliminary objection was disallowed by ***Nzioka, J***. thus precipitating this appeal. In the meantime, the respondent filed an application on 30th August, 2011 seeking *inter alia* an order to have his petition as well as the appellant's petition being ***Mombasa High Court Succession Cause No. 175 of 2011*** consolidated.

In his memorandum of appeal to this Court, the appellant raised 5 grounds of appeal:

"1. The Ruling delivered and decision made on 11th June 2012 does not answer the Preliminary Objection raised by the Appellant dated 8th February 2012 but rather goes into the earlier Ruling delivered by the court on 30th November 2011.

2. The learned Judge erred in law in disallowing the Appellant's Preliminary Objection and directing that the parties move with speed and prosecute all the pending applications in the matter when the court does not have jurisdiction to entertain and continue to hear the matter.

3. The Learned Judge wrongly exercised her discretion in failing to appreciate and find that the court lacked jurisdiction to deal with the matter for the reasons that:-

a) The Respondent did not have the locus standi to institute the Petition or the application both dated 3rd May 2011 since the Respondent was neither an appointed executor under a WILL or appointed as an administrator ad colligenda bona wherefore the whole proceedings in the superior court were a nullity ab initio.

b) The Law of Succession Act, and the Probate and Administration Rules do not provide or allow the grant of an injunction order. She thus misapprehended the provisions of the law relied upon by the Respondent in seeking the injunction orders which occasioned an injustice.

c) The exparte injunction order issued on 6th day of April 2011 was issued in a vacuum, in that, there was no suit in place.

d) The court's power to order for oral evidence to be adduced on interlocutory applications which are supported by affidavits should be sparingly invoked.

e) The Respondent had in its submissions admitted to instituting the proceedings irregularly on a flimsy reason that the Respondent did not know of the WILL and the estate was being wasted.

f) The issue of injunction orders was the subject of both the Respondent's application dated 3rd May 2011 and the Appellant's application dated 7th July 2011 and which issue went to the jurisdiction of the court wherefore wrongly holding that she could not descend into the arena by dealing with those issues under a Notice of Preliminary Objection;

g) An issue of consolidation of suits cannot confer jurisdiction where none exists. The consolidation of the Respondent's Petition dated 3rd May 2011 and the application dated

3rd May 2011 filed in MOMBASA HIGH COURT P & A CAUSE NO. 1898 OF 2011 with the Appellant's petition as per the court order dated 12th September, 2011 was made suo moto.

h) The Preliminary Objection raising an issue of jurisdiction is enough to dispose of a matter notwithstanding any consolidation.

i) The irregularity of the Respondent's petition and application dated 3rd May 2011 went into the jurisdiction of the court.

Whereby she reached a wrong decision in disallowing the Preliminary Objection raised by the Appellant.

4. The Learned Judge erred in law and in fact in failing to appreciate the facts and circumstances of the matter before court and the submissions made on behalf of the Appellant and therefore exercised her discretion on wrong principles whereby she reached a wrong decision.

5. The Learned Judge exercised her discretion wrongly when she failed to consider that striking out the Respondent's petition and application and or allowing the Preliminary Objection would not cause the Respondent any prejudice."

In his written submissions filed on 24th January, 2014, ***Mr. Inamdar***, learned counsel for the appellant dealt with all the grounds jointly. He faulted the ruling of Nzioka, J. for failing to deal with the preliminary objection in limine and deferring it until after a *viva voce* hearing. He contended that the respondent had no *locus standi* to file any proceedings as he was not an appointed executor under any Will nor any administrator *ad colligenda bona* appointed under any court order. He cited the authorities of ***Kothari v Quaresh [1967] EA 364***, ***Otieno v Ougo & Another [1986-1989] EALR 468*** and ***Alfred Njau & Others v City Council of Nairobi [1982-88] IKAR 229*** in support of his proposition.

A further issue raised by the appellant was that the learned Judge erred in failing to appreciate the import and gambit of a grant *ad colligenda bona* and submitted that such a grant is:

"limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made"

He relied on the case of ***Morjaria v Abdalla [1984] KLR 490*** to buttress his argument. The appellant further faulted the learned Judge in failing to appreciate the unavailability of injunctions in succession matters. He pointed out that Maraga, J. erred in issuing the freezing orders on 5th May, 2011 and that in any event the orders expired on 16th May, 2011 as they were to last for 7 days from 5th May, 2011 and hence there was no order capable of extension. He urged us to find that these orders ought to have been set aside *ex debito justitiae*.

The appellant further faulted the order of consolidation of the petitions made *suo moto* by ***Odero, J***. on 13th September, 2011 without the consent of the parties yet the appellant had opposed the application for consolidation in his grounds of opposition dated 7th September, 2011. He relied on the case of ***Evans v Esso Kenya Limited*** (*Civil Appeal No. 13 of 1995*) in which this Court disapproved of the practice adopted by Odero, J. describing it as "*repugnant to the administration of justice."*

Finally, the appellant concluded that the learned Judge's direction that the applications be heard by way of viva voce evidence when no such application had been made and in the absence of any consultation or consensus by the parties was erroneous.

The respondent opposed the appeal. In his written submissions dated 26th February, 2014, he pointed out

that the appeal herein was against the order of 11th June 2012 made by Nzioka, J. and not against the order of 30th November, 2011 made by Nzioka, J. He noted that the fundamental basis upon which the appeal was premised was that the respondent had no *locus standi* as he had not taken out letters of administration. He submitted that he instituted the proceedings in the High Court as a beneficiary of the estate of the deceased being the deceased's son; that at the time he moved the court he was unaware of any proceedings taken out by anyone seeking to be the legal representative of the estate of the deceased; that he did not ultimately seek to be the deceased's legal representative and that although he was shown a copy of the Will he was anxious as no step was being taken to take out the proceedings to administer the deceased's estate. He explained that the proceedings commenced by him were meant to preserve the estate upto the point where proper representation was taken out; and that when he became aware that the appellant had applied for probate, he sought a consolidation of the proceedings to enable him ventilate his claim under ***section 26*** of the Law of Succession Act.

The respondent further submitted that the jurisdictional stand taken by the appellant presupposed that a beneficiary of an estate or anyone claiming from the estate could not take measures to preserve the estate. That ultimately, what the respondent sought was a determination of whether he was entitled to benefit from the estate of the deceased and that before that question was determined it was important that the assets be preserved. He took issue with the proposition that an injunction cannot be granted in matters of succession.

The appellant filed a reply to the respondent's submissions. He maintained that the respondent's action of persisting in pursuing his petition after he became aware of the appellant's proceedings to probate the Will was a continuing abuse of the court process. The appellant relied on ***section 62*** of the Law of Succession Act that forbids the grant of letters of administration to another person where a Will appointing executors was in existence except in certain limited circumstances that he alleged were inapplicable in the present suit. He contended that the respondent should have cited the appellant to propound the Will or to renounce his executorship instead of applying for letters of administration *ad colligenda bona* as he was well aware that the deceased died testate. The appellant further contended that the bank accounts which he operated jointly with the deceased had passed to him by survivorship and could not therefore be treated as part of the deceased's estate. He relied on the Australian case of ***Russell v Scott [1936] HCA 34*** to show that money deposited in a joint account carries with it the legal right to title by survivorship and was not a testamentary disposition.

We have considered the facts of the case, the rival arguments of the parties, the authorities cited as well as the law.

We shall first deal with the issue of whether the respondent had *locus standi* to institute the summons application dated 3rd May, 2011 and filed in court on 4th May, 2011. It is common ground that at the time of institution of the said summons, the respondent was not in possession of a grant of letters of administration. The respondent acknowledges that he may have known of the existence of a Will, but according to him he doubted the validity of the Will. In his view therefore the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this Court differently constituted rendered itself thus:

> ***"… an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."***

Besides, the respondent seemed to have confused the issue of *locus standi* and a cause of action. In ***Alfred Njau & Others v City Council of Nairobi*** (*supra*) this Court had occasion to discuss the two. They stated:

> ***"Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to***

appear or be heard, in court or other proceedings; …"

The court proceeded to state:

"***To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no*** *locus standi* ***means he cannot be heard, even on whether or not he has a case worth listening to."***

It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite *locus standi* to seek relief from the Court without first obtaining letters of administration. In any case being aware that there was a purported Will alleged to be in existence, he ought to have moved the court to have the appellant propound the Will or renounce the executorship and if need be then proceed to challenge the *"Will"*.

The second issue is whether the Law of Succession Act and the Probate & Administration Rules made thereunder allow the granting of injunctive order such as the ex-parte orders granted by Maraga, J. on 5th May, 2011. The appellant cited the High Court decision in ***Re Estate of Ng'ang'a Njoroge Njuguna, Succession Cause No. 1016 of 1993 [2013] eKLR*** to support its position that injunctions are not contemplated and are unavailable under the Law of Succession Act and/or Probate & Administration Rules.

Counsel for the respondents however submitted that the respondent's summons application invoked ***rule 49*** and the inherent powers of the court as well as all other enabling provisions of the law and did not refer to the Civil Procedure Rules. He submitted that all enabling provisions included ***rule 73*** which enabled the court to make orders necessary for the ends of justice or to prevent an abuse of the process of the court.

We could not agree more with the respondent's position as regards injunctive reliefs in succession matters. In ***Floris Pierro v Giancario Falasconi, Civil Appeal No. 145 of 2012 (UR)*** this Court pronounced itself as follows:

> ***"The appellants took the position that the Court had no such jurisdiction whereas the respondent took the contrary position. However, the High Court was persuaded that rule 73 of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunction in deserving cases. We are in total agreement with this conclusion.***
>
> ***We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunctive orders. In other words, we are of the firm view that section 47 of the Act gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders."***

Accordingly, we reiterate the view that injunctive reliefs are available in succession causes.

The other issue raised by the appellant was that the learned Judge of the High Court erred in failing to address the merits and or demerits of the issues raised by the appellant in the preliminary objection by preferring to deal with them at a later stage. The learned Judge is on record as having stated:

> ***"The issue of the injunction orders is a subject of the application dated 3rd May 2011 and supported by the application dated 3rd May 2011. The respondent filed a replying affidavit to it***

dated 7th July 2011, and in addition, the respondent has filed a Chamber Summons dated 7th July 2011, supported by his affidavit sworn the same day. These applications are still to be fully heard and determined. Therefore, I shall not descend into that arena by dealing with those issues under a Notice of Preliminary Objection. Similarly the order issued by this court herein *(sic)* ***relating to viva voce evidence in my opinion cannot be set aside on a Notice*** *(sic)* ***Preliminary Objection."***

In refusing to deal with the preliminary objection, did the learned Judge act on wrong principles which led to a wrong decision or miscarriage of justice? The nature and basis of a preliminary objection was well laid down in the celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd. [1969] EA 696,***

"… 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."

In the judgment of ***Sir Charles Newbold*** in the same case he states as follows:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion ***(****emphasis added****)"***

In our view issues of *locus standi* and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues. Thus in our view, the learned Judge erred when she refused to determine the issues raised in the Preliminary Objection on the basis that there were other pending applications on the same issues. The Judge should have determined the preliminary objection on its merits. We agree with the appellant's position that a Preliminary Objection, if upheld, serves the interest of justice by saving time and costs by expeditiously disposing off matters in their entirety. In this case the preliminary objection dated 8th February, 2012 questioned the respondent's *locus standi* and the Court's jurisdiction. The issues for determination before the learned Judge should have been whether the Preliminary Objection was purely on a point(s) of law? If the answer to that question was in the affirmative, were the points properly raised or merited so as to dispose off the suit and any other pending applications? If she then upheld the objection it would have saved the parties herein both time, costs and served the interest of justice by disposing off all other pending applications raising the same issues. It was not in order for the Judge to order that the parties move with speed and prosecute all the pending applications.

The learned Judge also stated that the main complication in not striking out the respondent's petition and application was because the said petition had been consolidated with that of the appellant as per the court ruling of 13th September, 2011, which had not been set aside or reviewed. Our perusal of the record and the appellant's in his submissions reveal that by an application dated 17th August, 2011 and filed on 30th August, 2011, the respondent had prayed for consolidation of the petitions, to which application the appellant filed grounds of opposition dated 7th September, 2011. However, before this application was heard, ***Odero, J***. made an order for consolidation, *suo moto* during a mention and in the absence of any consent or submission by either party. Again on 7th November, 2011, the appellant through counsel objected to the said consolidation on the ground that the respondent's petition was a nullity and could not be consolidated with the appellant's petition. In her ruling dated 30th November, 2011 the learned Judge acknowledged that there was a dispute as to whether consolidation had been made. She however chose to rule on the petitions independently as they related to the same subject matter. Having appreciated the existence of a dispute as to consolidation, the learned Judge could not thereafter refuse striking out of the appellant's petition on the basis that it had been consolidated. Furthermore, the said order consolidating the two petitions cannot be said to have been valid and legal. In ***Evans v Esso Kenya Ltd. C.A. No. 13 of 1995***, this Court held as follows:

"We have no doubt that where a matter is fixed for mention as it was in this case, the learned Judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to justice."

Applying the above test to this case, we have come to the conclusion that the order consolidating the two petitions was illegal as the respondent's petition having been filed without *locus standi* was a nullity *ab initio* and the refusal by Nzioka, J. to strike out the respondent's petition on the basis that they had been consolidated cannot stand. In any case, the learned Judge would still have come to the conclusion that the respondent did not have the *locus standi* to institute the proceedings dated 4th May, 2011 if she determined the respondent's petition on its own merits. In his pleadings, the respondent has alluded to knowing that there was a Will in regard to the deceased's estate and what he ultimately sought by his proceedings was a determination of whether he was entitled to benefit from the estate of the deceased as a dependent under the estate. Therefore, his recourse in law lay in filing a formal application under ***section 26*** of the Law of Succession Act and ***rule 45*** of the Probate & Administration Rules.

There is still one more issue raised by the appellant and that is that the bank accounts which he operated jointly with the deceased had passed to him by survivorship. On our part we see no reason to delve into this having come to the conclusion that the respondent had no *locus standi* to institute the petition he purportedly did. It therefore follows that all orders including the one freezing the deceased's bank accounts jointly held with the appellant obtained by the respondent were a nullity.

In view of the above, we allow the appeal and direct that the ruling and order of Nzioka, J. delivered on 11th June, 2012 be set aside and the appellant's Preliminary Objection dated 8th February, 2012 be allowed with costs to the appellant. The costs of this appeal shall be borne by the respondent.

Dated and delivered at Mombasa this 13th day of November 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR