



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

SUCCESSION CAUSE NO. 78 OF 2003

NIRANJAN SINGH CHAGGAH DECEASED.

VERSUS

SATWANT SINGH CHAGGAH APPLICANT.

RULING

This is the Ruling in respect of the application dated 30/9/2002. The same is brought to court under section 3A Civil Procedure Act, section 45 and 79 of the Law of Succession Act and Rules 49 and 73 of the P & A Rules. A P/O was raised to the effect that the application was not properly before the court and that the applicant needed to move the court by way of plaint. This could deal with that preliminary objection and dismissed the same holding that the application was properly before the court. The ruling on that preliminary objection was delivered on 21/10/2004. The same is self-explanatory and I need not repeat those reasons in this ruling. I have perused the whole of this file since some issues had been raised “off the record” by counsel for the respondent particularly to the effect that there is no valid Grant in this file. In dealing with this matter, I choose to be guided only by the contents of the file before me. I have noted that the deceased one Narajan Singh Thaker Hira Chaggar died on 1/12/1991 at Eldoret Nursing Home. He died leaving a Will, which he duly executed on 25th day of September, 1973. The applicant herein namely Sitwant Singh Chaggar and three others were named as executors of the deceased’s estate. They were also named among the beneficiaries with their inheritance clearly indicated in the said will.

Pursuant to the Law of Succession Act, cap 160 of the Laws of Kenya, the applicant herein petitioned the Eldoret High Court for Probate or Letters of administration with written will annexed. His petition proceeded in the usual manner and complied with all the procedures laid out in the Law of Succession Act.

Eventually, the Grant was issued to him on 31/3/1993. He was appointed by the court as the executor of the estate of the deceased. It is worth noting that he did so with the consent of the 3 other named executors – as per the records in the court file. He then went ahead and filed an application for confirmation of the said Grant of Probate. His application is dated 27/5/93. It is not clear what happened to that application but a similar one was filed on 4/8/1995 through M. Gikonyo & Co. Advocates. The same was heard and allowed and subsequently, the applicant was issued with a certificate of confirmation of Grant dated 22/12/95. This is the only Grant we have in this file. There is no evidence in this file to show that the same is invalid or that the same was even revoked or annulled. As far as these proceedings are concerned therefore, there is a valid Grant on record. Learned counsel for the respondent feels very strongly that this Grant is not valid. Unfortunately, he has not availed us any iota or

shred of evidence to show that this Grant was ever revoked. His feelings therefore are not supported by any evidence and the court has no option than to ignore them. I will therefore proceed on the premise that the "Grant in this file is the only valid Grant in respect of the Estate of the deceased herein.

This now brings me to the application dated 30/0/2002. The applicant is seeking the following prayers.

1. That this honourable court be pleased to order the respondents to vacate the saw mill known as Kitale timber company limited leaving all machineries and any other property and premises allocated on plot No. 293/Railway Plot and Plot No. 2116/50/XXVII Milimani situated in Kitale town with all the developments thereon.

2. That the OCS Kitale police station to oversee the aforesaid vacation and to take inventory of all the properties on the said plots.

3. That the costs of the application be provided for.

The same is supported by the grounds on the face of the application and by the affidavit of the applicant dated 30/9/2002. Counsel for the Respondents filed Grounds of opposition dated 5/12/2002. According to the applicant, he needs to bring together – or gather the properties of the deceased to enable him to properly administer the same. He wants to do so in his capacity as the administrator. The said properties are and have been in the hands of the respondents herein since 1991. It is important at this stage to mention how the said properties landed into the hands of the Respondents. Only 17 days after the death of the deceased in this matter, the petitioner herein and 3 others who were named as the executors of the estate in the Will of the deceased entered into an agreement of sale with the Respondents herein. They appear to have disposed of the entire estate of the deceased. That was long before the deceased's Will was deposited in court and before a certificate of Probate was granted to the petitioner/applicant. Following that agreement, the Respondent took possession of the properties in question. The petitioner herein appears to have had a change of heart and it is that property that he now asks the court to return to him so that he can distribute it in accordance to the deceased Will. The Crux or gist of this application therefore -, to cut a very long story short -, is whether the petitioner/applicant and the other executors/beneficiaries had legal capacity to dispose of the property of the deceased before the Will was proved in court as required by our succession Act and before probate was granted counsel for the petitioner submits that the petitioner and the others lacked capacity to dispose the estate of the deceased. His contention is that the purported sales was unlawful and the respondents are therefore unlawfully in possession of the same.

Counsel for the Respondent on the other hand maintains that the sale was legal/lawful and that an executor appointed under a written Will has capacity to dispose of the moveable and immovable properties of a deceased person. They both extensively referred to the law of Succession Act. Some legal authorities were also furnished to the court. Counsel for the petitioner/applicant also contended that the sale was riddled with fraud and that the proceeds from the sale did not benefit the estate. He said that that alone should initiate the said sale. He produced an authority "The Law of Succession" by Sir David Hughes Parony – to support that contention. In my considered view however, it is not my place in this ruling to decide on whether the sale was fraudulent or not. My only concern, and the only issue for decision here in my view is whether the petitioner and the other executors had the legal capacity to dispose of the said property before the certificate of Probate was Granted by the court. In my view the

Law of Succession Act has sufficient provisions on this issue and I need not therefore refer to the excerpts of the 2 English textbooks, which I have been referred to.

The authority of SIMIYU VS WATAMBAMALA – Civil Appeal No. 34 of 1984 though relating to disposition of land upon intestacy is in my view quiet relevant and applicable to our case. In this case, the court of Appeal held that

“The mere anticipation that the land would devolve on the respondents did not confer on them any rights onto the land.”

If this authority were to be followed then the petitioner and the others did not have capacity to confer any rights over any property belonging to the deceased before the same was passed on to them. Counsel for the respondent nonetheless submitted that there is a difference between a Grant of Probate and letters of administration intestate. In my view however, under the law of succession, even where a deceased leaves a Will, the same must be proved in court and Probate granted to the executors before the same can take effect under section 3 of the law of Succession Act “Probate” means the certificate of a court of competent jurisdiction that a Will, of which a certified copy is attached in the case of a written Will, has been proved a valid will with a grant of representation to the executor in respect of the estate.”

A Grant of representation in the Law of Succession Act therefore refers to both Probate – where there is a Will and to Estates under intestacy.

This definition therefore brings all estates where there are Wills, under the direct ambit of section 55 of the Law of Succession Act, which provides.

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net Estate, or to make any division of property, unless and until the grant has been confirmed under section 71.”

An executor just like an administrator of a deceased’s estate is not empowered to dispose of or even distribute any capital assets of a deceased’s estate before Probate or Letters of Administration is confirmed. According to counsel for the Respondent, an executor can dispose of capital assets and his actions will be validated once the Grant is confirmed – unlike an administrator. He cited section 80 (1) of the law of Succession Act which provides.“

"A grant of probate shall establish the Will as from the date of death, and shall render valid all intermediate acts of the Executor or Executors to whom the Grant is made consistent with his duties as such."

This section however talks about the duties of the executor. The said section therefore has to be read together with section 83 of the Act, which lays down the duties of the personal representatives. Section 83 (f) says that those duties and responsibilities are subject to section 55 which I quoted earlier and which forbids the disposal of capital assets. Section 80 does not therefore support the respondent’s stand in this matter. It should be noted that ‘personal representative’ also includes ‘Executors’ as per

section 79 of the Succession Act.

In my considered view therefore and after considering the submissions of both counsel in this matter and the authorities cited, and the law of Succession Act, our law does not allow an executor or an administrator of an estate to dispose of any capital assets forming part of the deceased's estate. The petitioner in this case and the other executors had no authority or legal status to sell the property of the deceased. The purported sale was not sanctioned by the law. It was not validated when the Probate was granted. I may however mention that the petitioner's conduct in the whole transaction smurks of dishonesty and should attract the wrath of this court. I say so because he was one of those who purported to sell the property yet he comes back to court to argue that the sale was unlawful. He that as it may however, the law is on his side and the same cannot be breached or flouted so as to punish him for his dishonesty and misbehaviour.

For all the foregoing reasons, I find that the applicant/petitioner has the force of law on his side. The Notice of motion dated 30/9/2002 carries the day. The same is hereby allowed. The only way the court can punish the petitioner for his misconduct as aforementioned, is to deny him the award of costs in this case.

I consequently order that the application in question is allowed with each party being ordered to pay its own costs. Orders accordingly.

WANJIRU KARANJA.

AG. JUDGE.

Dated, delivered and signed at Kitale this 13 day of April, 2005 in presence of:-



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