



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1506 OF 2017

IN THE MATTER OF THE ESTATE OF NICHOLAS KIPPYATOR KIPRONO BIWOT (DECEASED)

BARNABAS ARAP KIPRONO.....1ST PROTESTOR/APPLICANT

ROSEMARY KAMENE NZEKI.....2ND PROTESTOR/APPLICANT

VERSUS

DESTERIO ANDANDI OYATSI

KENNETH HAMISHI WOOLER KEITH

ELISABETH KLEM.....PETITIONERS/RESPONDENTS

RULING

1. The Deceased in this Succession Cause NICHOLAS KIPPYATOR KIPRONO died on 11.7.2017 leaving a Written Will dated 19.1.2017 in which he appointed three executors as follows

- (i) DESTERIO ANDANDI OYATSI**
- (ii) ELIZABETH KLEM**
- (iii) KENNETH HAMISHI WOOLER KEITH**

2. The Executors filed a Petition for grant of Probate in this Succession Cause and it was published in the Kenya Gazette on 5.1.2018 and in the Sunday Standard Edition of 24.12.2017. They filed a Summons for Confirmation dated 30.11.2018.

3. The two Protestors herein filed Summons dated 5.3.2019 and 15.7.2019 together with Supporting Affidavits against confirmation of grant of Probate with Written Will against the three Executors who are the Respondents.

4. The 1st Protestor BARNABAS ARAP KIPRONO in the Affidavit of Protest dated 5.3.2019 stated that the deceased sought and obtained from him loans between 5.11.2015 and 2.9.2016 amounting to Ksh.382,000,000 plus interest.

5. He is seeking Stay of the Summons for Confirmation of grant dated 30.11.2018 until his entitlement as a creditor is determined in ELDORET CIVIL SUIT NO. 7 OF 2019 which he filed against the three Respondents.

6. The 2nd Protestor ROSEMARY KAMENE NZEKI in her Affidavit dated 15.7.2019 also stated that she was the personal banker of the deceased managing the deceased's Barclays bank of Kenya Limited Account Portfolio and that she had no formal contract of Employment with the deceased.

7. The 2nd Protestor said in her Affidavit that at the time of the deceased death on 11.7.2017, the deceased was justly indebted to her in the sum of Ksh.1, 662,600 in respect of services rendered and Salary arrears from January 2017 to June 2017.

8. The 2nd protestor further stated in her affidavit that she also advanced the deceased Cash Ksh.762, 600 and she annexed two undated cheques of Ksh.312, 600 and 450,000 respectively.

9. The Respondents filed Replying Affidavits dated 12.6.2019 and 30/9/2019 respectively in response to the two protestors.

10. The parties filed written submissions in the two protests which I have duly considered and I find that it is not in dispute that the Respondents are the Executors of the deceased's will.

11. The issues for determination in the two protests are as follows:

(i) Whether the Estate of the deceased is indebted to the two protestors.

(ii) Whether the Summons for confirmation dated 30.11.2018 should be stayed

(iii) Who pays the costs of the objections?

12. On the issue as to whether the estate of the deceased is indebted to the two protestors, I find that the two protestors are not dependents or beneficiaries of the deceased.

13. The 1st Protestor has a suit pending in Eldoret High Court being Eldoret Civil Suit No. 7 of 2019 which has not yet been determined.

14. The 2nd Protestor ROSEMARY KAMENE NZEKI has not filed any suit and she stated in her own affidavit that there was no contract of employment between her and the deceased.

15. It is not the duty of the Family Court to ascertain unproved claims against the estate of the deceased. I agree with the holding of Mabeya J in the decision in the **estate of Zakaria Nthiga Matumo (Deceased)** that the probate court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate(emphasis mine).

16. The 1st Protestor should wait for the determination of the Civil Suit pending at Eldoret High Court and it is only after the Executors fail to honor the decree that he has a right to approach the Probate Court.

17. The 2nd Protestor has to follow a similar channel. I therefore find that this Court has no basis for making a finding that the Estate is indebted to the Protestors.

18. I accordingly find that there is no basis for staying the Summons for Confirmation dated 30.11.2018.

19. The Principles for granting an injunction or a stay are stipulated in the case of **Giella Vs Cassman Brown** as follows:-

a) Has the Applicant established a prima facie case with high chance of success?

b) Will the Applicant suffer irreparable damages unless an injunction is issued?

c) Where does the balance of convenience lie?

20. In the case of **Suleiman – v- Amboseli Resort Ltd (2004) KLR 589**, Ojwang Ag. J (as he then was) stated thus:

*“Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in **Giella – v- Cassman Brown**, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella –v- Cassman Brown*, the court has to consider the following questions before granting injunctive relief:*

i) Is there a prima facie case.....

ii) Does the applicant stand to suffer irreparable harm....

iii) On which side does the balance of convenience lie.....

21. In the current case, I find that the two protestors have not proved their claims at the right forum.

22. The estate of the deceased is worth millions of shillings and it cannot be said that the Protestors will suffer irreparably should the stay not be granted. There is still a continuing trust that will handle all issues arising and therefore it is not in the interest of justice to stay the succession process because of the two claimants.

23. I find that the balance of convenience in the current case tilts in favour of the Respondents.

24. Finally on the issue as to who pays the costs of the objections, it is trite law that the costs follow the event.

25. I accordingly dismiss the two Objections dated 5.3.201 and 15/7/2019 with costs to the Respondents.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 24TH DAY OF JANUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.