



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

SUCCESSION CAUSE NO.106 OF 2014

IN THE MATTER OF THE ESTATE OF AYUB KIPRONO CHEPKWONY (DECEASED)

PAULINE CHEPCHIRCHIR.....APPLICANT

VERSUS

STELLA CHEPKWONY.....1ST RESPONDENT

IRENE CHEPKWONY.....2ND RESPONDENT

RULING

1. Before me is an application by way of Chamber Summons dated 19th December 2018 brought under Rule 49 of the Probate and Administration Rules seeking that pending the hearing and determination of this Succession Cause an order do issue restraining the respondents whether by themselves, their agents or servants from collecting rent from those rental premises comprised in LR No.631/394 and known as Chekan Estate.

2. The application has grounds on the face of the Chamber Summons that the applicant was still in the process of identifying other assets of the deceased whose particulars had not been previously known, and that the respondents had taken over collecting rent from all the rental properties of the deceased to the exclusion of the applicant who needed money to buy medication.

3. The application was filed with a supporting affidavit sworn by the applicant on the 19th December 2018 in which it was deponed that the applicant was on 9th October 2014 issued with letters of administration with Josephine Chemutai Chepkwony, that because of incessant wrangles among her step children, Stella Chepkwony and Irene Chepkwony were joined as administrators (and a certificate of grant issued with the name of four administrators).

4. It was further deponed that the deceased left two assets. First unsurveyed commercial plot No.3 Kericho Municipality known as Chepkwony market, and secondly LR No.631/394 known as Chekam estate on both of which the deceased had constructed commercial and residential buildings which earned income for upkeep and that in July 2018 the two co-administrators Stella Chepkwony and Irene Chepkwony forcefully took over the rent collection to the exclusion of the applicant who was aged and needed finances for medication, and that she be allowed to collect rent from Chekan estate of Kshs.35,000/= a month until completion of the succession cause, since the monthly income from tenants of Chepkwony market was not less than Kshs.100,000/= per month.

5. The applicant also filed a further affidavit she swore on 10th May 2019 in which she deponed that it was not true that she picked tea leaves from parcel LR No. Kericho/Kapsuser/952 without showing the proceeds thereto. She also deponed that she took a loan in 2016 from Kenya Highlands Sacco Society Ltd to preserve the estate herein, and stated that it was not true that she earned Kshs.70,000/= monthly from tea proceeds. She further stated that she was aware that a step daughter namely Winny Chepkwony had always been taken care of by Josephine Chemutai Chepkwony, and that the respondents had continuously collected Kshs.100,000/= from the Chepkwony market without showing the proceeds. She denied having sold any property as alleged, and stated that what she was seeking was a paltry Kshs.35,000/= per month as compared to Kshs.100,000/= per month receivable by the respondents.

6. In response to the application, the respondents filed a replying affidavit sworn on 20th February 2019 by Irene Chepkwony as well as further affidavit. It was deponed that the applicant had a 10 acres parcel of land No. Kericho/Kapsuser/952 where she picked tea with a monthly income of Kshs.70,000/=: that the rent collected from the houses only realized between Kshs.16,000/= to Kshs.36,000/= a month and that the money was also used for medical treatment for a sister Winny Chepkwony who suffered severe depression, that the respondents were willing to offer the applicant Kshs.5,000/= per month from April 2019, and that they proposed opening of a joint interest earning account of the administrators so that all moneys from the estate was paid thereto, and asked that the court gives necessary orders, and maintained that the applicant had not produced any accounts for rent she collected as ordered by the court on 23rd November 2018.

7. By consent of counsel for the parties, the application proceeded by way of filing written submissions. The applicant's counsel M/s Bett & Company filed written submissions on 30th May 2019 in which counsel highlighted the background of the application, and contended that as the applicant was a widow, the children of the deceased could not have a claim on the estate until her death, and that the application was properly grounded on the Constitution and the law and should thus be allowed.

8. The respondent's counsel M/s Obondo Koko & Company filed their written submissions on 25th September 2019 and maintained that this being a polygamous estate, the respondents had a right of claim together with the widow.

9. This is an application for restraining orders, which is a kin to interlocutory injunction pending determination of the succession proceedings herein. In my view therefore, the parameters taken into consideration in the case of **Giella – vs – Cassman Brown [1973]** though a civil case are relevant in this succession matter. The said parameters are whether the applicant has a prima facie case with probability of success. The second consideration is whether the applicant will suffer substantial loss if the restraining orders sought are not granted. Thirdly, if the court is in doubt, then the court will determine the application on the balance of convenience.

10. Does the applicant have a prima facie case with probability of success? Both the applicant and the respondents are administrators in this case. The applicant is a widow of the deceased, while the respondents are children of his co-wife. Though it has been argued that the respondents being children have no basis of making a claim against the widow, that in my view is not right. Firstly, since they are administrators they have a right to protect the estate and the interests of all beneficiaries. Secondly, under section 40 of the Law of Succession Act (Cap.160) where there is a polygamous family and there are surviving children, the children take a higher prominence to the widows in the distribution of the assets of the estate.

11. On the other hand the applicant as administrator and widow also has a right of claim both for herself and other beneficiaries. In my view therefore the applicant has a prima facie case with probability of success.

12. Will the applicant suffer substantial loss if the orders sought are not granted? It is apparent from the facts that she is elderly and sick. It is also a fact that there is a sickly step daughter who has to be taken care of. It is not disputed that the respondents are currently receiving rent from all the assets. Figures of rent received and receivable have been given on both sides which cannot be verified by this court. Though this court has powers to make orders that serve the greater interests of justice, I am not particularly clear if the applicant will suffer substantial loss if the orders sought are not granted, I so find.

13. What is the order that can be given on the balance of convenience? The respondent's have proposed the opening of a joint interest earning account for banking all the income from the estate. At this stage, I do not know what purpose opening such joint account will serve as in fact all the administrators can open such a joint bank account in order to protect the assets of the estate without the necessity of a court order. To balance the convenience in both sides, and the interest of justice and fairness in this matter, where the applicant needs money for medical attention, and a step daughter also needs money for medical attention, I order that the respondents will pay the applicant Pauline monthly the sum of Kshs.25,000/= from the date of this ruling and also to keep a record of all moneys they receive from the estate, which accounts should be filed at confirmation of grant stage.

14. I thus order that the respondents do pay the applicant Kshs.25,000/= every calendar month from date of this ruling until the confirmation of grant herein. Costs in the cause.

Dated this 28th day of April 2020.

GEORGE DULU

JUDGE

Delivered by video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Orina and Mr. Mwita.