



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO 22 OF 2018

ESTATE OF CHRISTOPHER KIPNGETICH BIWOTT alias CHRISTOPHER BIWOTT

IN THE MATTER OF AN APPLICATION FOR REVOCATION OF

GRANT ISSUED ON 12TH SEPTEMBER 2018

GRACE CHELIMO BIWOTT (Suing on her behalf and as next friend of

LEON BIWOTT AND LENNY BIWOTT).....APPLICANT

VERSUS

PRISCILLAH JEPKOECH BUSIENEI.....1ST RESPONDENT

LAURA CHEMITAI BIWOTT.....2ND RESPONDENT

RULING

1. By a summons for revocation dated 27th February 2020, the applicant (**GRACE CHELIMO BIWOTT** (Suing on her behalf and as next friend of **LEON BIWOTT AND LENNY BIWOTT**)) seeks that:

a) the grant of letters of administration made on 12th September 2018 to **PRISCILLAH JEPKOECH BUSIENEI** (1st respondent) and **LAURA CHEMITAI BIWOTT** (2nd respondent) be revoked and/or annulled. In the alternative and on a without prejudice basis, the grant of letters of administration be amended and re-issued to **PRISCILLAH JEPKOECH BUSIENEI** and **GRACE BIWOTT**

b) An order be issued to **KCB Group River Road Branch Nairobi** to furnish the court with certified bank statements for the **account No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

c) An order be given to **CFC Stanbic Bank Limited, Ruaraka Branch Nairobi** to furnish the court with certified bank statements for the accounts for the **account No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

d) An order be given to **Barclays Bank of Kenya Bank Limited (Now trading as Absa Bank of Kenya PLC), Moi Avenue Branch, Nairobi** to furnish the court with certified bank statements for the accounts for the account **No 11302053** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

e) An order be given to **Spire Kenya Bank Limited Nyali Branch Mombasa** to furnish the court with certified bank statements for the accounts for the account **No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

f) An order be given to **Sidian Bank Limited, Kenyatta Avenue Nairobi Branch** to furnish the court with certified bank statements for the accounts for the account **No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

g) An order be given to **Co-operative Bank of Kenya Limited, Nairobi Business Centre** to furnish the court with certified bank statements for the accounts for the **account No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

h) An order be given to **Kenya Post Office Savings Bank, Cannon House Branch** to furnish the court with certified bank statements for the accounts for the **account No [...]** for the period between **1st November 2016 and 4th March 2020** pending hearing and determination of this application

The Deceased (**CHRISTOPHER KIPNGETICH BIWOTT alias CHRISTOPHER BIWOTT**) died intestate on 30th November, 2016 and grant of Letters of Administration Intestate were subsequently issued to **PRISCILLA JEPKOECH BUSIENEI** and **LAURA CHEMTAI BIWOTT** who had petitioned in their capacity as the wife and daughter respectively. According to the applicant, she is also a widow of the deceased and is suing on behalf of herself and the children of the deceased who are minors yet they were left out as beneficiaries. It is her contention that the deceased was survived by the following people at the time of his death

a) Priscilla Chepkoech Biwott - Widow

b) Grace Chelimo Biwott - Widow

c) Lizley Chepkorir Biwott - Daughter

d) Laura Chemtai Biwott - Daughter

e) Leila Chepchirchir Biwott - Daughter

f) Babra Cherotich Biwott - Daughter

g) Leon Biwott - Son

h) Lenny Biwott - Son

The applicant laments that the Respondents have failed to include her and her children among the beneficiaries of the estate of the deceased, or even obtain consent from her. Further, they have been collecting proceeds from the estate of properties known as **PLOT NO. 31/3/130 on LR NO. 31/1 RUARAKA NAIROBI and PLOT NO. 31/6/0165 on LR NO. 31/1 RUARAKA NAIROBI**, and sharing the proceeds thereof selectively, and in a manner maliciously calculated to cause loss and damage to the applicants as beneficiaries to the estate.

On 14/07/2020 this court directed that the matter be canvassed through written submissions but when it was mentioned on 28/07/2020, the respondents had neither filed response nor any written submissions. Upon a plea for indulgence by the respondent's counsel, this court enlarged time by another three (3) days but two months later, there has been no compliance by the respondents.

The applicant through her counsel filed written submissions where it is pointed out that the proceedings to obtain the Grant of Letters of Administration Intestate made on 12th September 2018 were defective in substance as:

a. Form P&A No.5 paragraph 4 does not disclose the names of all the beneficiaries;

b. There was failure to procure the applicant's consent in FORM 38 as per Rule 26 Sub rule 2 of the Probate and Administration Rules

The applicant cited the decision in **Joseph Muhoro Nyaga & 4 others vs Peterson Githu Gathingu (2016) eKLR** the Court quoted with approval the Supreme Court of India in **Anil Behari Ghosh vs SMT Latika Bla Dassi & Others** interpreting their equivalent of **Section 76 (a)**:

"the expression "defective in substance" means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings"

It is submitted that in the present case, the Respondents were aware of the existence of the applicants as dependants of the deceased under **Section 29 of the Law of Succession Act CAP 160** yet they failed to include them in the list of beneficiaries (Form 5) or obtain the consent of the applicant thus rendering the proceedings defective in substance. Further, that the Grant of Letters of Administration Intestate made on 12th September 2018 was obtained fraudulently by the making of false statements that:

a. Only the Petitioners and the 2nd petitioner's sisters are the SOLE beneficiaries to the estate herein knowing this statement to be false;

b. Procuring a chief letter dated 6TH March 2017(annexture GBC-7) to support their false and misleading narrative

c. Giving the Area Chief Matunda Location false information which led to him crafting the letter dated 6th March 2017 contrary to Section 3, Section 10 as read together with Section 11 of the leadership and Integrity Act No. 19 of 2012.

d. Lying with malicious intent to disinherit the applicant and her sons from the estate herein in spite of them being aware that we are the children of the deceased. (Annexure GBC-9 is a copy of the Newspaper of Daily Nation dated 7th December 2016 containing death and funeral announcement, and mentioning the applicant as a wife of the deceased);

e. Unlawfully omitting the applicant's names and the names of Leon and Lenny Biwott from paragraph 4 of form P&A No.5 (Supra Annexure GBC-5)

f. Failing to disclose all the beneficiaries of the estate to the Court yet annexure GBC-8 is a copy of the Funeral Programme of the deceased acknowledging that the deceased was married to the applicant and the two minors were listed as among his off-springs

The applicant relies on the case of **Ibrahim vs Hassan & Charles Kimani Macharia Interested party (2019) eKLR** where the petitioner had obtained the grant by listing two beneficiaries instead of five, the court held:

"It must be noted that the object of the court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that the beneficiaries who were left out when the proceeds of the suit property were shared are given their share of the Estate in question. It is for that reason, that I invoke the inherent powers of this court granted under Article 159 of the Constitution, Section 76 of the Law of Succession Act and Section 73 of the Probate and Administration Rules ... "

29. It is also pointed out that the Petitioners/Respondents are collecting rental income of over KShs 400,000/- per month from the estate properties for their personal use and gain to the detriment of the applicant and the minors, Leon and Lenny Biwott, who are legal beneficiaries of the estate of the deceased.

WHETHER THE COURT SHOULD ORDER THE BANKS TO RENDER ACCOUNTS

The applicant submits that the deceased had erected several apartments on properties known as PLOT NO.31/3/130 on L.R. NO.31/1 RUARAKA NAIROBI and PLOT NO. 31/6/0165 on L.R. NO. 31/1 RUARAKA NAIROBI which by the time of his death was generating rental income of KShs. 400,000 per month Further, that the Respondents/Petitioners are currently collecting rental income generated out of the estate properties known as PLOT NO.31/3/130 on L.R. NO.31/1 RUARAKA NAIROBI and PLOT NO. 31/6/0165 on L.R. NO. 31/1 RUARAKA NAIROBI and they have declined to share the same with applicants

The lament is that applicant is currently unemployed, so her children are relying on the goodwill of strangers to survive and meet their basic needs while the estate is vast and income generated therefrom is being utilized solely by the Respondents/Petitioners. That they urgently require reasonable provisions to be made for our academic, food, clothing and medical use. With regard to the prayer for rendering of accounts, the applicant invokes Article 35 of the Constitution of Kenya, 2010 which provides:

(1) Every citizen has the right of access to

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

It is argued that the banks listed in the application are in possession of information required for the protection of the applicant's right for provision out of the estate of the deceased and for the proof of the applicant's case against the respondent.

That in any event this court is empowered by Section 47 Laws of Succession Act as follows:

Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

39. Further, Section 22 Civil Procedure Act, Cap 21 Laws of Kenya provides for the jurisdiction of this court in such instances, as follows:

"Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party-

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

Thus, this court is empowered by the above provisions to grant the prayers in the application regarding disclosure of bank statements relating to the listed statements

In addition, Section 83 Law of Succession Act Cap 160 provides that: Personal representatives shall have the following duties-

(h) 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;

This court is urged to be guided by the case of **Rafiki Microfinance Bank Ltd vs Zenith Pharmaceuticals Ltd (2016) eKLR**, the court pronounced itself as follows with regard to discovery:

"As illustrated by the learned authors in Halsbury's Laws of England, Volume 13 at para 38, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state: 'Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to "fish" for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed. From the above, it is clear that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.'"

It is argued that the bank statements requested for in the application are necessary to give full account of the dealings with the estate of the deceased for just and equitable distribution of the estate among the beneficiaries including the applicants herein.

As to whether the court should revoke the grant, this court is referred to the provisions of **Section 76 Law of Succession Act Cap 160**.

I have considered the nature of the prayers sought as well as the annexures thereto. Indeed, there is an acknowledgement in documents which were made public – namely the newspaper death announcement and the booklet containing funeral programme, which vindicates the applicant's contention regarding her status and that of the children. There has been no response filed and it is safe to infer that the lack of response is because the respondents realize there is nothing to challenge, and the application remains uncontested. Consequently, the prayers sought are granted to the effect that:

- a) The grant of letters of administration made on 12th September 2018 to PRISCILLAH JEPKOECH BUSIENEI (1st respondent) and LAURA CHEMITAI BIWOTT (2nd respondent) be revoked.**
- b) An order be issued to KCB Group River Road Branch Nairobi to furnish the court with certified bank statements for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- c) An order be given to CFC Stanbic Bank Limited, Ruaraka Branch Nairobi to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- d) An order be given to Barclays Bank of Kenya Bank Limited (Now trading as Absa Bank of Kenya PLC), Moi Avenue Branch, Nairobi to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- e) An order be given to Spire Kenya Bank Limited Nyali Branch Mombasa to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- f) An order be given to Sidian Bank Limited, Kenyatta Avenue Nairobi Branch to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- g) An order be given to Co-operative Bank of Kenya Limited, Nairobi Business Centre to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**
- h) An order be given to Kenya Post Office Savings Bank, Cannon House Branch to furnish the court with certified bank statements for the accounts for the account No [...] for the period between 1st November 2016 and 4th March 2020 within 14 (fourteen) days hereof**

Costs of this application shall be borne by the respondents.

Mention on 12th to confirm compliance by the various banks.

E-Delivered and dated this 23rd Day of September 2020 at Eldoret

H.A. OMONDI

JUDGE