REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 78 OF 2010

IN THE MATTER OF THE ESTATE OF GIOVANNI GREMMO (DECEASED)

DAVIDE GRAEMMO.....1ST APPLICANT

DANIELE GRAEMMO.....2ND APPLICANT

VERSUS

LIANA TAMBURELLI.....PETITIONER/RESPONDENT

AND

MILENA BORA.....OBJECTOR/RESPONDENT

RULING

(NOTICE OF MOTION DATED 23RD MARCH, 2018

AND

NOTICE OF MOTION DATED 12TH APRIL, 2018]

1. Davide Graemmo, the 1st Applicant and Daniele Graemmo, the 2nd Applicant have filed two applications before this court. The first application is dated 23rd March, 2018 and was filed on 4th April, 2018. The second application is dated 12th April, 2018 and was filed on 13th April, 2018. The two applications are supported by grounds on their faces and supporting affidavits sworn by the applicants.

2. In the 1st application, the applicants who identify themselves as the dependants of the estate of the deceased Giovanni Graemmo seek to be allowed to testify in this cause. Through the 2nd application they seek to be enjoined in this cause as interested parties.

3. Liana Tamburelli, the Petitioner/Respondent is not opposed to the applications. Milena Bora, the Objector/Resondent is strongly opposed to the applications.

4. Briefly, the applicants are the children of Liana Tamburelli and the deceased. Upon the demise of the deceased Liana Tamburelli petitioned this court through this cause and was granted letters of administration in respect of the estate of the deceased. The grant was subsequently confirmed. Thereafter Milena Bora filed an objection and the objection proceedings have been proceeding to date.

5. The reasons given in support of the applicants' prayer to be allowed to testify in this matter are that the applicants are the sons of the Petitioner and the deceased; that the deceased and the Petitioner were married in Italy on 6th April, 1961 and they were never divorced; that Milena Bora was never married to the deceased and never depended on him; that the applicants' testimony is pertinent to the determination of the matter; that it is in the interest of justice to allow the applicants to testify; and that no prejudice shall be occasioned to any of the parties if the orders sought are granted.

6. In his supporting affidavit, Davide Graemmo averred that they strongly felt that it was necessary for them to testify on their relationship with their late father and Milena Bora. He stated that their advocate had informed him that the testimony of their mother ought to be corroborated and that they should also be allowed to ventilate themselves.

7. It was further the 1st Applicant's averment that he had been advised by his advocate that his testimony was necessary in bringing out the issues in this matter and in assisting the court to arrive at a just and fair determination. Also, that it would be in the interest of justice to testify and that no prejudice would be occasioned to any of the parties if they are allowed to testify.

8. Daniele Graemmo's supporting affidavit is a replica of the supporting affidavit of Davide Graemmo. It is thus not necessary to restate the contents of the 2nd Applicant's supporting affidavit.

9. The 1st application was opposed through grounds of opposition dated 30th May, 2018 being that the application is frivolous, vexatious, an abuse of the law and made in bad faith; that the applicants have no locus standi; that the principal parties have already testified and closed their cases; that the court lacks jurisdiction as it has been wrongly moved by the applicants; and that Milena Bora's right to a fair trial will be greatly prejudiced if the application is allowed.

10. The 2nd application is supported by similar grounds to those of the 1st application. The applicants also swore supporting affidavits whose contents are similar with the affidavits they swore in support of the 1st application.

11. Milena Bora also filed grounds dated 30th May, 2018 in opposition to the 2nd application. In addition to the grounds stated in objection to the 1st application, she adds that the 2nd application should fail as the applicants have not disclosed the evidence they wish to tender to the court. Further, that the applicants are already named as beneficiaries of the estate and having given consent to their mother to petition for grant of letters of administration they have no right to participate in the proceedings.

12. The advocates filed and exchanged submissions on the applications and when the matter came up for highlighting of the submissions they informed the court that they would be relying on the filed submissions. I will advert to the submissions as I proceed to determine the applications.

13. The question to be answered in this ruling is whether the applicants have met the threshold for admission to these proceedings as interested parties. Of course if they are allowed into the proceedings then they are entitled to adduce evidence.

14. As correctly submitted by counsel for the applicants, the test for determining whether a person should be admitted to a suit as an interested party is the one set by the Supreme Court in **Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR** wherein it was stated that:

> **"[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:**
>
> > **One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:**
> >
> > > **i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**
> > >
> > > **ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**
> > >
> > > **iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."**

15. For a person to be admitted to a suit as an interested party, there must be demonstrated an identifiable stake that the person has in the outcome of the suit. Once a proposed interested party has demonstrated sufficient interest in a matter there is no reason why such a party should be denied an opportunity of having his voice heard in the matter.

16. However, an applicant, who through an application for enjoinment, seeks to delay the trial or frustrate the principal parties in the matter should not be entertained. As was pointed out by the Supreme Court in **Francis Karioki Muruatetu & another** (supra) the role of an interested party in the litigation to which he has been admitted is peripheral. The Court stated that:

> **"[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court."**

17. In the case before me, there is a dispute as to whether Milena Bora was a dependant of the deceased and thus entitled to a share of his estate.

18. The applicants who are the sons of the administratix (Liana Tamburelli) hold the opinion that the adminstratix has not produced sufficient

evidence in support of her case. They say that they want to corroborate the evidence of their mother. Apart from that motivation, they have not identified any prejudice they will suffer if they do not testify.

19. As pointed out by counsel for Milena Bora, the applicants have not exhibited the evidence they intend to adduce in order to assist the court in determining whether they should be admitted to the matter. It has also been correctly pointed out by counsel for Milena Bora that the applicants have already been disclosed as dependants of the deceased and their interest in the estate of the deceased is thus protected.

20. The administratix has adduced her evidence and closed her case. She could have called the applicants as her witnesses if she wanted to do so. She could have applied for leave to adduce further evidence. She did not do so. How and why do the applicants think that she needs their assistance? In my view, the applications by the applicants are only meant to further delay this old matter. They have not provided any plausible reason as to why they should be enjoined in this matter. Both of their applications are without merit. They are dismissed.

21. Ideally costs should not be awarded in a dispute like the one before this court. However, I find the applicants' applications were not necessary. They must pay costs to Milena Bora and that is my order. As the two applications were argued together, the applicants will only pay costs for the 1st application.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT