



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CASE NO. 283 OF 2013

EUNICE JEPKORIR KANDA 1ST PETITIONER/1ST APPLICANT

MUSA KOMEN CHEBII 2ND PETITIONER/2ND PPLICANT

FRANCIS KIMAIYO MUTWOL 3RD PETITIONER/3RD PPLICANT

VERSUS

MARY JACINTA MUMBUA OBJECTOR/RESPONDENT

RULING

1. The three applicants *Eunice Jepkorir Kanda*, *Musa Komen Chebii* and *Francis Kimaiyo Mutwol* are administrators of the deceased's estate. In their summons dated 24th February, 2015, the applicants moved this court seeking an order that a sum of Ksh.280,291 be paid to the 1st applicant out of monies held on behalf of the deceased's Estate by the Public Trustee Eldoret to cover educational expenses for four of the deceased's children at the [particulars withheld] Academy. The four children were named as *KWK*, *KGK*, *RSK* and *TBK*.

The application is supported by an affidavit sworn by the 1st applicant on 24th February, 2015 and the annexures thereto.

2. The application is opposed by the objector *Jacinta Mary Mumbua* (the respondent) through grounds of opposition filed on 29th October, 2015.

The respondent became a party to these proceedings when she filed a summons dated 29th April, 2014 seeking revocation of the grant of representation to the deceased's Estate issued to the three applicants on grounds that the same was obtained through concealment or non-disclosure of material facts. She contended that she was also the deceased's widow; that their marriage was blessed with one child but that these facts were concealed by the administrators when they petitioned for grant of letters of administration to the deceased's Estate. The summons is still pending hearing.

3. In her opposition to the instant application, the respondent listed seven grounds in her grounds of opposition the main ones being that the application was misconceived, bad in law, frivolous and devoid of merit; that the application contravened the court order issued on 14th May 2014 and therefore amounted to an abuse of the court process and that if the application was allowed, it would defeat the respondent's application dated 29th April, 2014 and the course of justice.
4. When the application came up for hearing on 2nd November, 2015, learned counsel *Mr. Cheptarus* appeared for the applicants while learned counsel *Mr. Omusundi* represented the

- respondent. In support of the application, *Mr. Cheptarus* submitted that the education of the four minors who were children of the deceased and hence beneficiaries to his Estate was important and that taking into account their best interest which was paramount, the court should order release of the aforesaid money to meet their educational expenses.
5. Learned counsel *Mr. Omusundi* on his part argued that the application had been made in bad faith to defeat the just ends of distribution of the assets of the Estate between the two wives of the deceased and their households; that the 1st applicant should not be allowed to access assets of the Estate before the objection proceedings were determined and that no evidence had been availed to the court to prove that school fees for the four minors were actually owing as alleged.
 6. I have carefully considered the application, the supporting affidavit, the respondent's grounds of opposition and the rival submissions made by the learned counsel's on record for the parties. I find that although it is true that there is a pending application challenging the grant of representation to the deceased's Estate, it is not disputed that the four minors for whose benefit provision for school fees is being sought are children of the deceased and that the 1st applicant, their mother is also one of the deceased's widows if it eventually turns out that the objector was also his wife as alleged.
 7. In my view, the pendency of objection proceedings cannot be a bar in appropriate cases to issuance of an order to have money released from a deceased person's Estate for payment of the deceased's children's school fees and related expenses if there was evidence to prove that their school fees was actually due and owing and that the Estate's administrator had no other means of raising money to meet the cost of their education. This so because as correctly submitted by *Mr. Cheptarus*, the education of children including the children of the deceased in this case is of paramount importance. Since this application concerns the welfare of the deceased's children in terms of facilitating their to access education, in determining the application, the court ought to be guided by the best interests of the children more than any other consideration.
 8. That said, i wish to state that in applications such as the instant one, it is important for the applicant not only to prove how much money needs to be paid as school fees or other expenses but also to prove by cogent evidence how much money was being held either by the Public Trustee or a financial institution on behalf of the Estate of a deceased person. Such evidence is critical because the court cannot be expected to issue orders in respect of monies which it is not sure is available because as a general rule, courts do not issue orders in vain.
 9. In this case, it has been alleged that there is money being held on behalf of the Estate by the Public Trustee Eldoret. However, the Public Trustee is not a party to these proceedings and there is no evidence availed to the court from the office of the Public Trustee to confirm that the office is holding money on behalf of the deceased's estate and if so the amount so held.
 10. In the absence of such evidence and in view of the foregoing, it is my opinion that the applicants have failed to lay a good basis upon which this court can grant the orders sought. I therefore find that the application is not merited and i consequently decline to grant the orders sought.
 11. Lastly as I conclude, i wish to observe that in order to obviate the filing of similar applications in future, parties should expedite the hearing of the summons for annulment of the grant because it is only after its determination one way or the other that the process of distribution of the Estate to its rightful beneficiaries can begin and ultimately end. I have noted from the court record not without some concern that directions on hearing of the summons were given by the court on 3rd November, 2014 and to date the respondent has not fixed the summons for hearing. In order to fast track the determination of the summons, i hereby direct the respondent do take a hearing date for the summons in the registry early next term on a priority basis.
 12. Costs of the application will be costs in the cause.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of November 2015

In the presence of :-

Mr. Omusundi for the Respondent

Mr. Okara holding brief for Mr. Cheptarus for the Petitioner/Applicants

Ann Court clerk