



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 34 of 2007

IN THE MATTER OF THE ESTATE OF JAMES SAMUEL KIHUGA CHEGE (DECEASED)

PETER MUCHERU KIHUGA 1ST PETITIONER/APPLICANT

VINCENT NJOGU KIHUGA 2ND PETITIONER/APPLICANT

ANTHONY KIMANI KIHUGA 3RD PETITIONER/APPLICANT

STEPHEN GITAU KIHUGA 4TH PETITIONER/APPLICANT

VERSUS

ELIUD NJOGU KIHUGA 1ST OBJECTOR/RESPONDENT

MORRIS GITAU KIHUGA 2ND OBJECTOR/RESPONDENT

RULING

The application dated 11th September 2012 is filed by the Petitioners as an Amended Summons. It is brought pursuant to a Court Order made on 27th September 2012, and under Rule 73 of the Probate and Administration Rules and Sections 70, 79, 82 (b) and 92 of the Law of Succession Act, Cap 160 Laws of Kenya. They pray that:-

1. The proceedings of 27th September 2011 be reviewed.
2. The Grant of Letters of Administration made to the Petitioners on 2nd November 2007, and subsequently substituted on 10th February, 2011 be partially confirmed with respect to the shares held and controlled by the deceased **JAMES SAMUEL KIHUGA CHEGE** at East African Breweries Limited to wit Account No. 89500.
3. Upon such confirmation, the Petitioners be granted leave of Court to liquidate/sell/dispose of the said shares in the open market.
4. The personal representatives be at liberty to offset the liabilities of the deceased to wit, land rates, land rents and other stand premiums that have accrued against the free property of the deceased.
5. The balance if any, be applied towards the administration of the estate, that is rehabilitate the capital assets of the estate which are in need of repair.

6. Costs of the summons be provided for.

It is premised on grounds that:-

- (a) There is on record an order declining partial confirmation which ought to be reviewed, varied and or set aside.
- (b) The Honourable Court granted the Applicant leave to file an amended application on 5th September, 2012.
- (c) The capital assets of the estate are in danger of being sold/disposed of on account of long standing arrears of rates, rent and stand premiums.
- (d) The administrators are in agreement as to how the estate assets can be made profitable and beneficial to the heirs.
- (e) It's in the best interest of the estate that the orders sought are obtained.

It is further supported by the affidavit of Vincent Njogu Kihuga, one of the administrators of the estate of the deceased sworn on 11th September 2012. He depones that it is necessary that deceased's shares held by East Africa Kenya Breweries Account number *{particulars withheld}* be sold so as to pay rates to the Municipal Council of Eldoret and also do repairs and renovation to them so that they can attract premium clientèle. He says that it is important that the sale be conducted as soon as possible as the waiver of penalties in rates could lapse before rates are paid. That further any surplus amount after payment of rates and repairs and renovations are done shall be distributed as per agreement made by the parties on 8th July 2011.

During the hearing the following other parties were represented as follows:-

- Mr. Ng'eno held brief for Mr. Gicheru for Objector, Mr. Ngaruiya Kamau.
- Mr. Chemoyai was for the 3rd Interested Party, Mr. Jan C. Esselink.
- Mr. Kimani was for the 2nd Interested party, Morris Gitau Kihuga.
- Mr. Kigamwa was for the 1st Interested party, Eliud Njogu Kihuga.

When I peruse the file, there are only two replying affidavits to the amended motion; one sworn by Eliud Njogu Kihuga sworn on 13th September, 2012 and another sworn by Morris Gitau Kihuga sworn on 14th September. It is noted that the motion was amended pursuant to leave granted to the Applicants to amend the application of 3rd August 2012. The leave was granted after Court declined to partially confirm the Grant, hence the prayer to review, vary or set aside those orders. Other parties named above had however filed replies to this application and it is on this ground that parties present were allowed to submit in response to the amended motion.

Mr. Kigamwa advocate submitted the law does not provide for partial confirmation of grant and in any event the grant is subject to an application for revocation.

Mr. Kimani Advocate submitted that, in principle his client does not oppose the sale of shares save that his client should be involved as he has challenged the Grant that was issued. He further stated that, pursuant to a suit by the Municipal Council of Eldoret against the Administrators, parties recorded a consent to the effect that the rates payable shall Ksh. 6.5 million and shall be paid after confirmation of the Grant.

Mr. Chemoyai submitted that his client's interest is only in the application for revocation of grant and so he did not wish to oppose the application.

Mr. Ngeno too submitted that he did not wish to oppose the application.

I have considered all the submissions made on behalf of the respective parties. Court must address itself as to the legality of the orders sought. The application is brought under Rule 73 of Probate and Administration Rules and Sections 70, 79, 82 (b) and 92 of the Law of Succession Act. None of these provisions provides for partial confirmation of grant. But again, Court is bestowed with wide powers to make orders as are necessary to meet ends of justice. I will apply such discretionary powers judiciously as I have noted, first, the waiver to pay rates by the Municipal Council lapsed on 30th August, 2012 and second, parties agreed on the time-lines within which rates are payable. Those time lines extend as far as this Grant shall be confirmed or as Court deems fit to grant orders that mitigate ends of justice to be met.

Section 47 provides that:-

“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 Magistrate appointed by the Chief Justice.”

Under section 86, **“debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy”** whereas Rule 73 of the Probate and Administration Rules reads:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such Orders as may be necessary for the ends of justice or prevent abuse of the process of the Court.”

The Applicants have demonstrated that indeed rates are owing to the Municipal Council of Eldoret to the tune of Ksh. 16,376,934/= but Mr. Kimani Advocate for the 2nd Interested Party disclosed that a consent was entered between the Applicants and the Council to the effect that rates payable be Ksh. 6.5 million Annexed to the Replying Affidavit of Morris Gitau Kihuga (2nd Interested party) sworn on 14th September 2012, is a copy of consent order dated 11th January, 2012 in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 785 OF 2011 – MUNICIPAL COUNCIL OF ELDORET -VS- PETER MUCHERU & 3 OTHERS**. Terms of the consent are that:-

(a) The amounts of rates payable by the Defendants to the Plaintiff be and is hereby agreed at the sum of Sh. 6,500,000/= all inclusive but exclusive of the costs of this suit and that the said amount be paid upon the confirmation of the Grant in **ELDORET HIGH COURT SUCCESSION CAUSE NO. 34 OF 2007**.

(b) The costs of this suit be and are hereby agreed at the sum of Ksh. 650,000.00 to be paid on or before 31st January, 2012.

(c) Upon the payment of the sums set out in (a) and (b) above this suit be marked as settled.

The relevant part of this consent to this cause is Clause (a) only; which means that if Court finds in favour of the Applicants, the rates payable to the Municipal Council of Eldoret shall be in the sum of Ksh. 6,500,000/=. Mr. Ngigi for the Applicants conceded to this fact. It would find it indisputable that, apart from the accrued rates, the subject plots for which the rates are payable should also be renovated and/or repaired so as to remain marketable for business.

My considered view is that the estate should be distributed without liabilities as rightly submitted by Mr. Koros Advocate who appears jointly with Mr. Ngigi for the Applicants and as provided under S. 86 of the Law of Succession Act. In any case, it does only harm than good to allow the estate to go into waste when it can be salvaged by turning it around to become more profitable. I say this in view of the fact that, although the consent recorded in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO.**

788 OF 2011 allowed the rates to be paid upon confirmation of the Grant herein, there is the need to repair the premises that may be built on any of the subject plots so as to attract more rent. Moreover, Court notes that there is now an application dated 28th August, 2012 filed by the 1st Interested Party seeking to have the Grant nullified. No one can predict for how long the issues raised in this application will take to settle. Hence any orders made in the interest of preserving the estate for the benefit of all beneficiaries should be welcome.

I would therefore find it necessary to order that the shares be sold only for purposes limited to the payment of the rates in the sum of Ksh. 6,500,000/= and for any necessary repairs to any of the premises standing on the subject plots. This can be done without partially confirming the Grant, which I hold as unprocedural. In this regard I decline to review the Orders made by Court on 27th September, 2011. It is also possible that the shares held by Kenya Breweries can be sold in such number as can realize the amount sufficient to cater for the above purposes. In the premises I order as follows:-

1. That the Administrators herein do file a Bill of Quantities that shows and determines the cost of repairs/renovations required on the premises. Such costs shall be tabled in Court for adoption.
2. That once the repairs/renovation costs are adopted by the Court, they shall be added to the Ksh. 6.5 million payable as rates and the total sum shall be the amount for which the shares shall be sold.
3. That Court will thereafter direct that either Registrar of securities for Kenya Breweries Limited or, if the deceased held a Central Depository System (CDS) account, the brokers of the CDS account do sell such amount of shares as shall realize the actual amount to meet the payment of the rates, and costs of the repairs and renovations.
4. That the Applicant do take a mention date in the registry upon filing the bill of quantities.
5. That costs of this application be in the Cause.

DATED and **DELIVERED** at **ELDORET** this 20th day of December, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

.....for Applicants

Mr. Karani Advocate for Objector

Mr. Barasa Advocate for 1st Interested Party

Mr. Kimani Advocate for 2nd Interested Party

No appearance for 3rd Interested Party