



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 44 of 2005

JOSEPH CHESANG CHEPKWONY APPLICANT

VERSUS

ELIZABETH CHEPKOECH SALAT RESPONDENT

RULING

Two widows of the deceased Isaac Kipkorir Arap Salat are co-executrices of his estate.

Vide an Originating Summons dated 10th January, 2005 Josephine Chesang Chepkwony Salat, one of the widows (hereinafter referred to as ‘the Applicant’) sought for orders inter alia against Elizabeth Chepkoech (another widow and hereinafter referred to as the Respondent) for accounts of assets held by her and in possession and control and for declaration, that any monies appropriated by the Respondent be apportioned and taken into consideration and be deemed as an advance to her from the Estate from her share.

The application also prayed for other orders but they are not for determination presently as per order of this court dated 25th May, 2005 and issued on 30th May, 2005.

Period within which the Respondent was to furnish the accounts of nine properties specified in the said order was extended. I am also made aware that there is pending before the court an application for confirmation of grant of representation but it was also clear that I was to determine the issue of accounts and appropriation, if any, by the Respondent as per the order of 25th May, 2005.

The hearing of the application initially commenced by the respondent giving her evidence but, before completion of her examination in chief, it was agreed by both counsel that the court shall determine the issues by way of submissions based on affidavits filed by respective party.

Eventually submissions were made on 13th September, 2006 during court vacation after firm resolute by the court.

I have five affidavits, namely:

- 1. Affidavit sworn by the Respondent on 1st August, 2005**
- 2. Applicant’s replying affidavit sworn on 16th September, 2005**
- 3. Applicant’s affidavit of Account sworn on 14th July, 2005.**

4. Respondent's affidavit on Account sworn on 10th July, 2006.

5. Applicant's affidavit in reply sworn on 5th August, 2006.

Written submissions were filed although that from the Respondent was not filed and served as per my order of 11th September 2006. Mr. Wandabwa the learned counsel for the Respondent, however was allowed to make oral submissions based thereon.

Both counsel made their submissions fully before the court.

At the outset, I may observe that the Applicant has given her accounts on the properties of the estate held by her under her affidavit sworn on 14th July, 2005. The Respondent has not raised many issues on its contents except by way of submissions made. There is arrears of rates in the sum of Shs.91,301/-.

I shall come back to the response of the Respondent to the application after I have dealt with submissions made by Mr. Karanja, the learned counsel for the Applicant.

Mr. Karanja made his submissions with articulation taking the court through the respective averments made in respect of each contentious head of income received by the Respondent as per the Applicant. The Applicant withdrew her claim in respect of a tractor bearing Registration No. KXX 497 and thus out of the nine properties listed, the submissions were made as regards eight properties.

1. Milk products from Sotik Farm being L.R.No.6055/9 as from 3rd June, 1992.

At paragraph 20 of her affidavit of 1st August, 2005, the Respondent has averred that there was '**no commercial exploitation**' as regards milk products.

The Applicant received, on her request, the details of milk income from Kenya Co-operative Creameries Union Ltd in the name of the Respondent. According to the information the Respondent had received Shs.370,744.70 for an intermittent period from December, 1995 to July, 2005. It was also stated that proceeds during 1997 to 1999 were by cash from the old KCC Ltd and from August, 1999 to April 2002 as the old KCC Ltd was under receivership, and from August, 1995 to April, 2002, the records were not available. From the accounts shown on page 34 of the annexure '**JS8A**' the Respondent received between Shs.2,735 and Shs.13,129.80 per month. I may put Shs.7,000 as an average income per month.

In response to the aforesaid account the Respondent in her affidavit of 10th July, 2006 has shown milk sales of Shs.30,000 per month from 1987-1990, Shs.10,000 per month during 1991 – 1992 and Shs.5,000 per month from 1993 – 2005 and Shs.3,000 per month in the year 2006. She has also shown expenses of Shs.4,930,900 against an income of Shs.2,595,000. It is thus more than 200 p.c. expense shown and yet without any supporting documents. She has also not shown the decrease of income from Shs.30,000 per month in 1987 – 1990 to Shs.3,000 per month in 2006.

In my opinion, the Respondent is not honest in placing proper accounts before the court. I cannot accept, without any proof, such heavy loss in the business of milk products.

With best I can do under the circumstances, I find that the Respondent has misappropriated the income as an administratrix in the tune of Shs.3,000 per month since the year 1995 and she be held liable for such loss to the estate. The said sum thus be deemed as an advance to her from the estate.

2. Coffee Products: Income from Sotik Farm (L.R.6055/9).

The Respondent has similarly averred in paragraph 21 of her affidavit of 1st August, 2005 that the said products have not been "**commercially exploited**".

Once again the Applicant took upon herself to find some proof on the said products. She has produced

the Account from Kenya Planters' Co-operative Union in the name of the Respondent (Annexure JS 9) to the affidavit sworn on 16th September, 2005). The Respondent has not even tried to explain the said Accounts which I agree are a bit confusing. However, there are specific entries showing payments to the Respondent in her Bank Account held at Barclays Bank Queensway Branch, Nairobi. I would presume that the said Accounts are to be read as any Bank Account wherein Debit entries show the payments to the Account holders, which as shown on page 53 of the Annexures in the Applicant's affidavit of 16th September 2005, amount to Shs.8,083,467.65 and it also shows an amount of Shs.586,807.20 as credit.

Mr. Wandabwa submitted that the Respondent only accepts the payments shown on credit column.

That cannot be accepted even as per the Affidavit of the Respondent sworn on 10th July, 2006. She herself, in her abrupt manner of showing Accounts, has accepted the income of Shs.1,125,000 from 1991 – 2006. She has shown on top of it Nil Balance in the years 1987 -1990, 1993 -1996 and 1998 – 2006. I do see payments in her Accounts in 1990 as well as from 1998 – 2000. Her own annexures also show deliveries made during those years (pages 13 to 19)

In her Accounts once again she has not shown the details of the expense, has not demonstrated integrity towards her duties as an administratrix.

Mr. Wandabwa persuaded me to accept that she is not an entrepreneur due to her illiteracy and her mismanagement of the estate cannot be imputed as misappropriation.

I cannot agree to the said contention in view of stark contradictions in her affidavits which in my opinion, tantamount to either sheer recklessness or dishonesty and either of that, cannot be expected from an administratrix of an estate.

However, as I am unable to figure out the method of accounting from the Kenya Planters' Co-operative Union, I shall like to have a clear understanding thereof by way of an affidavit from its official giving clear picture of accounts of Respondent's Accounts specifically showing how much amount she withdrew during the period shown therein.

3. Trees from the Sotik Farm:

The Respondent in her affidavit sworn on 1st August, 2006 (Paragraph 22) specifically averred that she has not felled or sold any trees from that farm.

The Applicant produced photographs to show the remains (trunks) of the felled trees and general view of the farm with felled trees. They are shown as Annexure "JS 11" in her affidavit sworn on 16th July, 2005.

The Respondent thereafter responded in paragraphs 25 to 27 of her affidavit of 10th July, 2006. She now made an about-turn and has stated that the trees were felled for fencing purposes on all the farm plots and that it was necessary to clear the forest to create grazing grounds and to eliminate the danger of disease and that the trees were too old and they fell down themselves.

I do note again that she has not taken any issues on the authenticity of those photographs and that she once again fell short of giving details and also even trying to explain her earlier averments which are absolutely contradicting her averments made in the aforesaid affidavit.

I must stress that the Respondent first makes blank denials by her initial averments, then after confronted with facts, tries to give unsubstantiated averments which, in any event, do not help her at all. On the contrary by these averments she has come out as an uncreditworthy person.

In absence of proper estimate of the number of felled trees, and accepting the estimate of Shs.5,000 per tree given by the Applicant as well as the photographs shown, I do find that the Respondent has

appropriated an income of Shs.700,000, which shall be deemed as an advance to the Applicant from the estate. While arriving at this figure, I also took into account the area of farm which I am told and not disputed is around 125 acres.

4. Tenancy on Kericho Plot being No.631/1036.

Respondent adopted similar trend also in respect of this heading. She stated in her affidavit of 1st August, 2005 that she had only one tenant at a rent of Shs.4,000 per month but presently the plot is vacant, (paras 5 and 8 thereof).

Applicant, in her affidavit of 16th September, 2005, produced documents showing the facts that there are several tenants who have confirmed that they are tenants of the Respondent (Annexure JS 1 pages 1 to 21). She has also produced photographs showing businesses which are carried out on the plot as well as showing vehicles (vans) of a company called Tiroto parked on the plot.

The Respondent in her own peculiar way insisted on veracity of her averments of the existence of tenant but went on annexing on page 21 of her affidavits of 10th July, 2006 three receipts of payments of rates to the Town Council which are paid by the said Tiroto Company, one Victor Odhiambo and one David Matara. These are some of the tenants who are mentioned by the Applicant in her affidavit and annexure of 16th September, 2005.

I shall not deal with the Applicant's efforts and failure to give notice to all the tenants on the plot to deposit their rents direct to the Kericho Town Council, so as to reduce the arrears of rates which is approximately Shs.2 million. But it is clear that the receipts produced by both parties do indicate that the same Town Council did accept payments directly from those three tenants in respect of payment of the rates for the said plot.

The Applicant estimates 17 to 20 tenants of a rental income of Shs.500,000/- per year. She wants the said appropriation to be in the sum of Shs.6,500,000/- for 13 years.

However, this court has to be aware that the tenancy also has its expense at least for the payment of rates which unfortunately is not up-to-date from both the parties.

Considering the fact before me, I shall be very conservative in arriving at the figure under this head and find that the Respondent has appropriated Shs.2,150,000/- inclusive of non-payment of rates and shall be deemed to be an advance to her by the estate.

5. Sotik Club 181 L.R.No.7288/272.

Similar is the situation as regards this property.

In paragraph 12 to 15 of her affidavit of 1st August, 2005, the Respondent has stated that the Hotel is run down and has been closed for a period of over two years and that now she has a tenant who pays her Shs.10,000/- per month. She said that the tenant paid Shs.130,150/- to renovate the thatched roof replacing it with mabati and that he applied the rent towards rates and renovation.

The Respondent has shown photographs of the Hotel and Discotheque. Once again being confronted with those averments and photographs, the Respondent in her affidavit of 10th July, 2006 has averred that no profit was made in the year 1987 – 89 and was vacant up to 1995. Then her son Mike Salat re-opened the place with his funds but was unable to run in profit, during 1996 and 1997. In 1999 her two children re-opened the same but closed again in the same year. The same then was rented in the year 2000. In her own account submitted she has shown an income of Shs.851,000/- against the expenses of Shs.908,828/- making a loss of Shs.57,828/-. Once again these figures are not substantiated.

I am forced to note that the Accounts are not audited and are alleged to have been made by a person

whom Mr. Wandabwa described as an illiterate person.

I also note that the Respondent Administratrix allowed her own children to run the Hotel in exclusion of other beneficiaries and that since the year 2000 the Hotel is run by a tenant which earlier was a tenant for two years.

In view of these facts, this court is totally unable to accept the credibility of the Respondent who seems to twist the facts as per her own convenience.

The Respondent has raised issues over the plot bearing L.R.No.13287/35 Ngata Farm. The Applicant in another affidavit sworn on 16th September, 2005 in P. & A. 299/92 has stated that it is owned by her. In any event this issue was not the one of the properties directed by court order dated 25th May, 2005. I shall at present thus cannot deal with the said issue which has to be considered after proper facts placed before the court.

Considering the evidence before me I do find that the Respondent has appropriated Shs.890,000 considering payment towards the rates (Shs.30,000) and the same shall be deemed to be an advance to her from the estate.

I shall take two vehicles together namely.

7. Range Rover – Registration No. KTR 060 and

8. Trooper Registration No. KWK 861

It is not in doubt that they are old vehicles and after considering the circumstances behind the two vehicle, I am not inclined to make any order as to the compensation to the estate.

9. Livestocks

Lastly, it is on record that during the family meeting 16 cows and 19 goats and sheep were recorded as the property of the estate. I am sure, the said figures must have been different at present since 1994.

In absence of proper numbers on record, I do find that this issue be taken during the confirmation of the grant and/or distribution of the estate.

As I have still to receive the actual sum received in respect of coffee products. I shall not give my final figure and order in this ruling.

Orders accordingly.

Dated and signed at Nairobi this 13th October, 2006.

K.H. RAWAL

JUDGE

13.10.06