



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE NO. 159 OF 1997**

**IN THE MATTER OF THE ESTATE OF CHARLES LEVITAN**

**(DECEASED)**

**LOISE NJERI MWAURA ..... PROTESTER**

**VERSUS**

**1. ANTONY LEVITAN**

**2. SIR PETER JOHN SMITHSON HEWETT ..... CO-EXECUORS**

**RULING**

This affidavit of Protest Against confirmation of Grant is dated 18th January 2002 and filed the same date the Protester being Loise Njeri Mwaura and the affidavit is said to have been brought under Rule 40 Sub rules (1), (5) and 6 of the Probate and Administration Rules and Section 72 of the Law of Succession Act.

The Protester, who claims to be a lawful wife of the deceased and that her son Antony Mwaura is a son of the deceased, has filed this affidavit to prevent confirmation, by this court, of the Grant of Probate made to Antony Levitan and Sir Peter John Smithson Hewett in this matter on 14th May 1997.

After the summons for confirmation of that grant had been filed in this matter on 5th February 1999, that summons has remained pending to date mainly because of the litigation started by the Protester to press on her claim aforesaid.

The Protester is represented by Mrs Alice Wahome while the Executors are represented by Miss Dar.

I have had the opportunity to look at the provisions of the law the Protester's counsel said she was relying upon. Rule 40 (1) of the Probate and Administration Rules provides for the making of an application for confirmation of grant. It states, among other things, that the Applicant for confirmation of grant shall satisfy the court that no application under Part III of the Law of Succession Act is pending. The summons for confirmation of grant in this matter was filed before an application under Part III of the Act was filed. The Protester filed her application under Part III later and therefore the summons for confirmation of grant is still pending to-date.

Sub rule (1) of Rule 40 does not say that once an application under Part III of the Act has been filed, a summons for confirmation of grant earlier on filed becomes invalid.

Moving to sub-rule (5) of Rule 40 of the Probate and Administration Rules, it talks about a situation where a caveat has been entered pursuant to rule 15 and is subsisting. That is when subrule (5) is applicable. In this matter I have no information about the existence of a caveat. In any case that sub rule is only about the procedure to be followed to handle the caveat, the caveator and the applicant for confirmation of a grant.

As to section 72 of the Law of Succession Act, the relevant part is paragraph (a) where it is stated that no grant of representation shall be confirmed until the court is satisfied that no application under Part III is pending. That paragraph does not talk of a pending appeal, as counsel for the Executors pointed out, and it would appear that the Legislature did not intend the word “application” to include the word “appeal”. Otherwise the Legislature could have specifically mentioned the word “appeal”.

Moreover, what the Protester has done is the filing of a Notice of Appeal in the Court of Appeal. That Notice was filed in April 2001. For the purpose of her protest against confirmation of grant the Protester asks the Court to take that Notice as an appeal. It is more than one year since that Notice was filed in the Court of Appeal on the ground that the Protester is appealing against the judgment of this court delivered by Visram J. dated 23rd March 2001. No substantive appeal has been filed and the Protester argues that it is because this court has not yet supplied her with copy of the proceedings.

If the notice is like an appeal under the Court of Appeal Rules, what I have said above about the absence of the word “appeal” in paragraph (a) of Section 72 of the Law of Succession Act covers the Notice of Appeal which is also not mentioned in that paragraph.

As for the reliance by the Protester on the claim that she has not filed the appeal, more than one year down the line, because this court has not supplied her with copy of the proceedings, I hope she is not including copy of Judge Visram’s judgment dated 23rd March 2001. There should be no dispute that she has copy of the judgment as the same is among the annexures the Protester has filed in support of her affidavits in her applications in this matter.

Otherwise I notice that the proceedings in question were in fact typed by this court some considerable time back as the copy left in the court case file looks old. If the Protester has not been given or has not collected a copy, it may be because she has been preoccupied with her continuing applications in this court which applications may also have made it impossible for the court to produce final or fair or more copies to be supplied – thereby suggesting that the Notice of Appeal filed in the Court of Appeal is only there as an excuse to frustrate further proceedings by the Executors in this court leading to delay of justice. Properly, the Protester should have been diligent in getting her appeal move forward in the Court of Appeal. I get the impression that she is not diligent in that respect.

Going back to sub rule (6) of rule 40 of the Probate and Administration Rules which seems to allow any person wishing to object to a proposed confirmation of a grant to file an affidavit of protest, such a person must have sound grounds.

In this matter the Protester made her claim under Part III section 26 of the Law of Succession Act. That claim failed, Visram J in his judgment dated 23rd March 2001 holding that the Protester and her son were not dependants of the Deceased within the meaning of the Law of Succession Act and that therefore they were not entitled to any part of the estate of the Deceased. The Protester filed a subsequent application to stay execution of that judgment. I dismissed that application on 19th October 2001 – holding that there was no execution to stay in that judgment. By then to-day’s protest had not been filed, although the summons for confirmation had been filed as far back as 3rd January 1999.

As far as this court is concerned therefore, there was nothing to prevent the Executors from going ahead to have the grant of Probate confirmed. But when the Executors started going ahead, the protest came up with this protest basing it on grounds which are not tenable. This court could have understood had the protest raised her present protest basing it upon a judgment of the Court of Appeal in her favour. But as things stand now, I do hold the opinion that she does not have good grounds to sustain the protest which I do hereby dismiss.

Accordingly the summons dated 3rd January 1999 for confirmation of the Grant of Probate made to the Executors of the Estate of the Deceased in this matter on 14th May 1997 be and is hereby confirmed as prayed.

Dated at Nairobi this 31st Day of October 2002.

**J.M. KHAMONI**

**JUDGE**