



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 123 OF 2017

IN THE MATTER OF THE ESTATE OF JOHN KEEN (DECEASED)

ZOLA SINET KEEN.....1ST APPLICANT

EDWARD MEITAMEI KEEN.....2ND APPLICANT

VERSUS

ANTONY SIMEL KEEN.....1ST RESPONDENT

PAMELA SOILA KEEN.....2ND RESPONDENT

BERNARD OLONANA KEEN.....3RD RESPONDENT

SOMOIRE KEEN.....4TH RESPONDENT

ROSEMARY SANAU KEEN.....5TH RESPONDENT

AND

MAINA WACHIRA.....INTERESTED PARTY

RULING

1. The deceased John Keen died on 25th December 2016. He left a written Will dated 2nd December 2015. He appointed Justice Isaac Lenaola, Counsel Maina Wachira, and his children Rosemary Sanau Keen (5th respondent) and Pamela Soila Keen (2nd respondent) as the executors of the Will. The executors petitioned the court on 1st February 2017 for the grant of probate of written Will. The grant was issued on 4th April 2017. The grant has not been confirmed.

2. The deceased left a large polygamous family, and a substantial estate.

3. Justice Isaac Lenaola resigned and an executor, and Maina Wachira has since passed on.

4. There are three applications that are the subject of this ruling. Two of the applications were dated 14th December 2020. The first one was by the 1st applicant Zola Sinet Keen who is a granddaughter of the deceased. The chamber application sought that the respondents be directed to pay her school fees of Kshs.4,818,126/= and accommodation of Australian Dollars 26,400. She is a student at the University of Sidney in Australia in the Faculty of Arts and Social Sciences. She asked that the money be directed to come from J. Keen Investments Limited Account No. xxxx at Standard Chartered Bank, Karen Branch, or from any other accounts of the deceased's estate. Her case was that the respondents were the executors of the estate of the deceased who were also signatories to the account, but that they had failed and/or refused to pay her fees and accommodation as had been directed in the Will. She stood to be discontinued by the University owing to this failure and/or refusal to pay. She annexed documents to show that the sought amounts were due. There is no dispute that the 1st applicant

was one of the deceased beneficiaries. She swore that in 2020 she was almost being discontinued from school for non-payment of fees and she was forced to come to court which ordered the payment of 4,717,088/= towards fees and Kshs.1,852,320/= towards accommodation. The order was on 13th March 2020. She stated that what she was seeking was for the January 2021 semester.

5. The 2nd respondent swore a replying affidavit to oppose the application. She swore that the 1st applicant's application filed on 2nd March 2020 that led to the orders above had a supporting affidavit sworn on 2nd March 2020 in which the applicant indicated that she was -

“now in her last year of studies.”

The 2nd respondent made reference to the affidavit that had been sworn by Edward Maitamei Keen (2nd applicant) on 2nd March 2020 to support the request by the 1st applicant. At paragraph 30 of the affidavit the applicant had deponed as follows: -

“30. THAT Zola is now in her last year of studies at the University of Sidney and failure to make the payments immediately will see her released from school and all her past years of high academic achievements will go to waste to her great loss and prejudice.....”

According to the executors, the 2nd respondent continued, they were surprised that the 1st applicant had not completed school as promised. According to them, the 1st applicant had completed her undergraduate studies, and therefore they had no obligation to pay the fees or accommodation as sought.

6. The applicants did not swear any further affidavit.

7. The second application (dated 14th December 2020) was by the 2nd applicant on behalf of his minor son Z.K. who was a Grade II pupil at Nairobi Academy, and also for the 1st applicant who is his daughter. For the 1st applicant he repeated what she had sought in her application. For Z.K., he sought the payment of his fees and related expenses amounting to Kshs.1,819,913/=. He asked that the money be directed to come from the J. Keen Investments Limited account above, or from any other account of the deceased's estate. The 2nd applicant is the brother of the 2nd and 5th respondents. His case was that it was the deceased who used to pay the fees and related expenses for the minor. He deponed that, according to the Will, the respondents were obligated to pay the fees and the related expenses of the 17-year-old boy. He made reference to his application dated 2nd March 2020 that was compromised on 13th March 2020 when the court made an order for the payment of the boy's fees and related expenses. He annexed the fees schedule from the school.

8. The 2nd respondent's response was that, according to Clause 7 of the deceased's Will, the respondents were to pay fees and medical expenses for the grandchildren whose parents (the children of the deceased) were not able to provide for the same. This was because, as per Clause 7 of the Will, the deceased had adequately provided for his children. Clauses 6 and 7 of the Will provided as follows: -

“6. I GIVE and BEQUEATH to the trustees the monies and funds or the balances thereof in my account or accounts at THE STANDARD CHARTERED BANK KENYA LIMITED and whether held in cash or by way of deposits (fixed or otherwise) to hold in trust.

i. Firstly, for the benefit of my child and grand-children named in clause 4 above and the Trustees at their discretion shall apply the same or the income therefrom firstly for education of my said child and grandchildren as provided in clause 4 above and secondly in payment of medical expenses and other necessities or necessities of life for my said child and those of my grand-children needing such assistance and whose parents are not able to provide for such needs.

ii. In case of those of any grandchildren who are over twenty-one (21) years at the time of my death and who are not attending or enrolled in an educational institution and Trustees may value the funds available under this clause and if they deem it necessary and in their absolute discretion apportion and pay out the said funds such an amount to a specific grandchild that would enable that grandchild advance or improve his or her status in life by the undertaking and execution of a business project or venture which in the view of the trustees appear or offer an attainable opportunity to improve and advance the life of that grandchild

7. The provision in this Will for my grandchildren is entirely my decision and is informed by the fact that I have sufficiently provided for my children in terms of upbringing, education, health, investments and other needs and by direct gifts of various properties that I have granted as deemed fit and at my discretion. The gifts made inter vivos by me are sufficient and no child shall claim what is not specifically granted to hi, or her I having considered the nature of behavior and conduct of each child towards me and generally the love and respect each child has shown and has accorded to me during my lifetime.”

9. According to the respondents, the 2nd applicant had failed to demonstrate that he was not able to pay fees and related expenses for the minor at the school. The respondents then made reference to Clause 4 of the Will which provided that fees for the grandchildren would be payable to those who had attained either 'O' level or 'A' level, which Z.K. had not yet attained. Clause 4 provided as follows: -

“I HEREBY GIVE DEVISE and BEQUEATH the shares owned and held by me in J. KEEN INVESTMENTS LIMITED (24,500 shares), and RESSON GARDENS LIMITED (998 shares) to the Trustees to hold in trust and to apply the income therefrom from those of my grandchildren THAT IS the children of Antony Simel, Pamela Soila Keen, Hilda Soila Keen, Edward Neitamei Keen, Somoire Sam Keen and Bernard Olonana Keen who are known to me at the time of my demise and who are born in marriages and who shall attain O-Level and A level education and who shall advance to and be admitted in

the universities and institutions of higher learning as undergraduates and also for my daughter Silole Wangui Keen already enrolled at Keele University, Manchester in the United Kingdom in such amounts and in such proportions as the Trustees shall consider and deem fit and necessary mainly for the purpose of advancing and improving their education and general status in life and upon completion of the highest attainable level or position of achievement in education by the said child and the attainment of the age of Twenty One(21) years by the youngest grandchild to distribute the shares as follow: -

a) In J. Keen Investments Limited: -

(i) Anthony Simel Keen – One Thousand (1,000)

(ii) Bernard Olonana Keen – One Thousand (1,000)

(iii) Pamela Soila Keen – Three Thousand Nine Hundred (3,900)

(iv) Sindy Somoya Keen – Three Thousand Nine Hundred (3,900)

(v) Silole Wangui Keen - One Thousand

(vi) Hilda Resson Keen – Three Thousand Nine Hundred (3, 900)

(vii) Clifford Lemita Keen – One Thousand (1,000)

(viii) Somoire Keen – Three Thousand Nine Hundred (3,900)

(ix) Edward Neitamei Keen - Three Thousand Nine Hundred (3,900)

(x) Nicholas s. Keen – One Thousand (1,000).

b) In RESSON GARDENS LIMITED:-

The trustees to distribute the shares in such percentage holding same or as near as possible to that of J. Keen Investments Limited.”

10. The respondents further swore that Z.K. had not attended school since 2017 and that while they had made payment in March 2020 for him to sit examinations, he had not sat the examinations and was no longer a student at the school.

11. The applicants did not swear any further affidavit.

12. The last application was dated 8th March 2021 by the 2nd applicant and sought the following orders: -

“1. THAT the 1st respondent, Anthony Simel Keen, the 2nd respondent, Pamela Ken Huijbers, the 3rd Respondent, Bernard Olonana Keen and the 4th respondent Somoire Keen, jointly and severally be and are hereby ordered to produce in court during the hearing of this matter and/or to the applicant documents in respect of J Keen Investments Limited including but limited to-

(a) An inventory of the assets and liabilities of the company as at 31st December 2020.

(b) Title deeds held in the name of the company

(c) Minutes of the Company’s general meetings for the years 2016, 2017, 2018, 2019 and 2020;

(d) Motor Vehicle certificates of registration held in the name of the company;

(e) All statements of bank accounts held in the name of the company since 25th December 2016 to date;

(f) Statement of income, expenses, acquisition and such related matters for the period from 25th December 2016 to date

(g) Annual returns filed with the Registrar of Companies for the period 25th December 2016 to date

(h) Tax returns filed with the Kenya Revenue Authority for the period 25th December 2016 to date.

2. THAT the 5th respondent Rosemary Sanau keen, be and is hereby ordered to produce in court during the hearing of this mater and/or to the applicant documents in respect of Resson Gardens Limited including but limited to: -

- (a) An inventory of the assets and liabilities of the company as at 31st December 2020.
- (b) Title deeds held in the name of the company
- (c) Minutes of the Company's general meetings for the years 2016, 2017, 2018, 2019 and 2020;
- (d) Motor Vehicle certificates of registration held in the name of the company;
- (e) All statements of bank accounts held in the name of the company since 25th December 2016 to date;
- (f) Statement of income, expenses, acquisition and such related matters for the period from 25th December 2016 to date
- (g) Annual returns filed with the Registrar of Companies for the period 25th December 2016 to date
- (h) Tax returns filed with the Kenya Revenue Authority for the period 25th December 2016 to date.

3. THAT the 2nd respondent Pamela Keen Huijbers, the 5th Respondent Rosemary Sanau Keen and the 1st interested party Maina Wachira Advocate jointly and severally, be and are hereby ordered to produce in Court during the hearing of this matter and/or to the applicant documents in respect of the late Hon. John Keen (Deceased) including but limited to:-

- (a) title deeds held in the name of the Deceased;
- (b) Motor Vehicle certificates of registration held in the name of the deceased;
- (c) All statements of bank accounts held in the name of the deceased since 1st September 2016 to date
- (d) An inventory of assets and liabilities of the late Hon. John Keen as at 25th December 2016 to date.”

13. In the 2nd applicant's supporting affidavit, he stated that the deceased was the majority shareholder of J. Keen Investments Limited by having 24,500 shares of the 50,000 issued shares. He was also the majority shareholder in Resson Gardens Limited in which he had 998 shares out of the 1000 issued shares. He stated that Anthony Simel Keen (1st respondent), 2nd respondent, Bernard Olonana Keen (3rd respondent) and Samoire Keen (4th respondent) were the directors of J. Keen Investments Limited while the 5th respondent was the only Director of Resson Gardens Limited. He deponed that as per Clause 4(a) of the Will, the deceased had distributed shares in J. Keen Investments Limited and given him 29000 shares and directed the trustees under Clause 4(b) to distribute the shares in Resson Gardens Limited in such a percentage holding same or as near as possible to that of J. Keen Investments Limited. In his capacity as a beneficiary of the estate of the deceased and a shareholder of J. Keen Investments Limited he had severally requested the respondents and the 1st interested party Maina Wachira to account for portions of the deceased's estate under their control but nothing had been done, he stated. He stated that he had a legitimate interest in the two companies and that was why the application had become necessary.

14. The 5th respondent responded to the application on her behalf and on behalf of the 2nd respondent and Hilda Resson Keen (the 6th respondent). She clarified that the shareholders of Resson Gardens Limited were the deceased 998 shares, herself one share and the 6th respondent one share. According to her, what was available as part of the estate of the deceased were the 998 shares. The shares would be administered in accordance with the deceased's Will. The 2nd applicant's interest in the company related only to the 998 shares, she swore. This was because he was neither a shareholder nor a director in the company. He could not, she stated, seek to see accounts or of the other information relating to the company. As for J. Keen Investments Limited, the 5th respondent swore that the deceased's shares thereon would be dealt with in accordance with Clause 4 of the Will as follows:

“I HEREBY GIVE DEVISE and BEQUEATH the shares owned and held by me in J. KEEN INVESTMENTS LIMITED (24,500 shares), and RESSON GARDENS LIMITED (998 shares) to the Trustees to hold in trust and to apply the income therefrom from those of my grandchildren THAT IS the children of Antony Simel, Pamela Soila Keen, Hilda Soila Keen, Edward Neitamei Keen, Somoire Sam Keen and Bernard Olonana Keen who are known to me at the time of my demise and who are born in marriages and who shall attain O-Level and A level education and who shall advance to and be admitted in the universities and institutions of higher learning as undergraduates and also for my daughter Silole Wangui Keen already enrolled at Keele University, Manchester in the United Kingdom in such amounts and in such proportions as the Trustees shall consider and deem fit and necessary mainly for the purpose of advancing and improving their education and general status in life and upon completion of the highest attainable level or position of achievement in education by the said child and the attainment of the age of Twenty One(21) years by the youngest grandchild to distribute the shares as follow: -

c) In J. Keen Investments Limited: -

- (xi) Anthony Simel Keen – One Thousand (1,000)
- (xii) Bernard Olonana Keen – One Thousand (1,000)
- (xiii) Pamela Soila Keen – Three Thousand Nine Hundred (3,900)

(xiv) Sindy Somoya Keen – Three Thousand Nine Hundred (3,900)

(xv) Silole Wangui Keen - One Thousand

(xvi) Hilda Resson Keen – Three Thousand Nine Hundred (3, 900)

(xvii) Clifford Lemita Keen – One Thousand (1,000)

(xviii) Somoire Keen – Three Thousand Nine Hundred (3,900)

(xix) Edward Neitamei Keen - Three Thousand Nine Hundred (3,900)

(xx) Nicholas s. Keen – One Thousand (1,000).

d) In RESSON GARDENS LIMITED:-

The trustees to distribute the shares in such percentage holding same or as near as possible to that of J. Keen Investments Limited.”

The Will further directed that the shares in J. Keen Investments Limited would not be distributed until upon the youngest grandchild of the deceased known to him at the time of his death had turned 21 years of age. That had not happened. Secondly, the 2nd applicant was the deceased’s beneficiary but could only become a shareholder at that time, and therefore he was not entitled to the sought information.

15. The 1st, 3rd and 4th respondents are some of the children of the deceased and beneficiaries of his estate.

16. The 2nd and 5th respondents are the executors of the Will of the deceased. They have a fiduciary responsibility to act in the best interests of the estate, the beneficiaries and creditors (**In re Estate of Julius Mimano (Deceased) [2019] eKLR**). They have to make sure that the deceased’s wishes as expressed in the Will are respected and carried out. They are required to manage the estate of the deceased prudently and appropriately deal with the beneficiaries and creditors in good faith, ensuring that information keeps flowing and ultimately distribute the estate as commanded by the Will. In the management of the estate of the deceased, they should exercise the same degree of diligence and caution that a reasonably prudent person would exercise in the management of her/his own affairs.

17. On the question whether or not the 2nd and 5th respondents should pay to the 1st respondent the sought Kshs.4,717,088/= towards her university fees and Kshs.1,852,320/= towards her accommodation, one has to go back to the wishes of the deceased as expressed in the Will. One has to ask whether in remitting the said money the respondents will be acting cautiously and prudently in realizing the wishes of the deceased as expressed in the Will.

18. When the 1st applicant was given money for fees and accommodation on 13th March 2020, both her and her father (2nd applicant) informed the court that she was completing her undergraduate studies. Now that she has asked for more money, the respondents have in the replying affidavit sought to know why the request when she was supposed to have completed her studies! One would have expected the 1st applicant to make an explanation. Has she repeated? Has she graduated? What happened to her evidence that she was completing her studies? Neither her nor her father responded by a further affidavit. The applicants may be beneficiaries to the estate of the deceased, but the same way they expect the respondents to account to them in the management of the estate of the deceased is the same way they have to account to the estate and to the other beneficiaries in relation to any money they have received. If they want money for fees, for instance, it must be clear that indeed they have gone to school. Given the facts, I am not able to authorize the 2nd and 5th respondents to release the sought payment. In reaching this decision, I bear in mind that the 2nd applicant, and the other children of the deceased, were, as shown by Clause 7 of the Will, given sufficient investments, gifts, and properties by the deceased while he was still alive. They should be able to draw from these investments and properties to educate their children.

19. Regarding the application by the applicant that provision of Kshs.1,819,963/= be made towards fees and related expenses of her son Z.K., the respondents swore, without demur, that the child is no longer in school at Nairobi Academy. They stated that he is in fact not in school, and that he did not take the examination that had made them release the money through the court order of 13th March 2020. The 2nd applicant failed to react to this sworn evidence by the respondents. Do the respondents have reasons to release the sought money? Does the court have sufficient information and reasons upon which it can compel the 2nd and 5th respondents, as executors of the Will of the deceased, to release the money? My answer is in the negative.

20. In reaching this decision, I have considered the provisions of the Will that provided that the grandchildren’s fees be paid to those who had attained ‘O’ level or ‘A’ level education, and whose parents were not able to provide such fees. The 2nd applicant made no reference to those conditions in the Will.

21. Lastly, there is the application dated 8th March 2021 by the 2nd applicant. In dealing with this application, I am mindful that **section 83** of the **Law of Succession Act** tasks the executors with the obligation to give a full and accurate account of all dealings with the estate of the deceased up to the date of account. Under **section 83(h)** of the **Act**, the court or any interested party can request for a full and accurate account of the assets and liabilities of the estate of the deceased. The 2nd and 5th respondents stand in a fiduciary position so far as the administration of the estate of the deceased is concerned. They owe the beneficiaries and creditors the duty to render an account to them of their administration of the estate of the deceased. This is because they are in the same position as trustees who are holding the estate in trust

for the beneficiaries and creditors.

22. It is, however, material to point out that J. Keen Investments Limited and Resson Gardens Limited are each a limited liability company, and the interest of the estate of the deceased in each company is ideally limited to the shares that the deceased held in each company. This is even as he was in each case a majority shareholder in either company. The 2nd applicant, although a beneficiary of the estate of the deceased, was not a shareholder or director in either company. The Will allocated a certain number of shares in J. Keen Investments Limited to him from the deceased's shares, but the grant is yet to be confirmed for the 2nd and 5th respondents to give him the shares. The 1st, 2nd, 3rd and 4th respondents are directors of J. Keen Investments Limited and the 5th and 6th respondents are shareholders in Resson Gardens Limited. In paragraph 5 of the 2nd applicant's supporting affidavit, he stated that, in his capacity as a shareholder in J. Keen Investments Limited, he has been seeking information regarding how the company was running. He is not yet a shareholder. But as a beneficiary of the estate of the deceased he would certainly be interested in how the companies are being run. This is because the deceased, it would appear, incorporated the companies to protect his wealth and empire. It is from the businesses run by the companies that the beneficiaries and their children will benefit for many years to come. If the companies are mismanaged then the deceased's wealth will dissipate, and the beneficiaries will lose irreparably.

23. Prayer 3 of the application is straightforward, as it seeks information on the assets and liabilities in the name of the deceased between the time of his death and the time of the application.

24. In the wider interests of justice, I allow the application.

25. In conclusion, I dismiss the request by the 1st applicant for fees and accommodation, and dismiss the application by the 2nd applicant for fees and related expenses for Z.K. I allow the 2nd applicant's application dated 8th March 2021 by making an order that a full and accurate inventory be filed and served by the respective respondents within 60 days from today. In respect of each of the three application, costs shall be borne by the estate.

DATED and DELIVERED at NAIROBI 19TH JULY 2021

A.O. MUCHELULE

JUDGE

COURT – Mention on 27th March 2021 before Judge Aroni.

A.O. MUCHELULE

JUDGE