



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 81 OF 2009

IN THE ESTATE OF PRISCILLAH CHERONO CHEPKWONY – DECEASED

JOHN CHEPKWONY KEMEI.....PETITIONER/APPLICANT

VERSUS

EDNA JEPLETING KORIR..... OBJECTOR/RESPONDENT

AND

LILIAN CHEPTANUI KEMEI & 2 OTHERS.....INTERESTED PARTIES/APPLICANTS

RULING

On 24th September 2019, Counsel for the parties before this court (i.e. the Petitioner and the Respondent) appear before Chemitei J.

The court recorded the following:-

“Court: The application dated 18/2/2019 is allowed.”

In that application, the Objector sought several orders including the prayer that the costs of the proceedings be borne by the Petitioner and interested parties jointly and severally. The Objector has interpreted the order issued by the court above to mean that she was entitled to the costs of the application, which was essentially in the nature of objection proceedings. What transpired subsequently thereafter is that the parties were able to agree on the distribution of the properties that comprise the estate of the deceased and indeed the Objector is a beneficiary.

However, soon after the objection proceedings were concluded, the Objector (who is the Respondent in this case), filed a party to Party bill of costs on the basis that the court had awarded her costs as per the above cited order. The respondent filed a bill of Kshs 651,495/- which upon taxation was reduced to the sum of Kshs 468,745/-. It is this amount that the Respondent executed for as against the Applicant.

The execution provoked the present application in which the Applicant seeks to have the court interpret the order issued by the court on 24th September 2019 regarding , whether indeed costs are payable in respect of the application which for all intents and purpose appears to have been settled pursuant to the agreement of the parties. The Applicant further prayed for the order of taxation to be set aside and the Objector be ordered to pay the Auctioneer his execution costs . The application was opposed. The Respondent filed grounds in opposition to the application. In it, the Respondent contends that the costs were due and owing from the Applicant pursuant to the order issued by the court. The Respondent maintained that the costs were properly taxed after the Applicant had participated in the proceedings. The Respondent was of the view that the application lacked merit and should be dismissed with costs.

During the hearing of the application, this court heard oral rival submissions by Mr. Bungei for the Applicant and by Ms Rutto for the Respondent. This court has carefully considered the said submission. It has also had the benefit of reading the pleading filed by the parties herein in support of their respective opposing positions. The issue for determination is whether the order issued by the court on 24th September 2019 indeed granted the Respondent costs. This court agrees with the Respondent that in ordinary civil cases and in ordinary circumstances costs always follows the event i.e a successful party is entitled to be paid his costs. **Section 27 of the Civil Procedure Act** provides so. However, it is a practice that has developed (to the extent that it has now received judicial seal of approval) that in family disputes costs as not usually awardable. The reasoning behind this position is simple; the court is mandated to assist families’ resolves their disputes without imposing further burden on them to pay costs. It also ensures that harmony is promoted within the family. The normal order that ensures upon such disputes being resolved is that each party to bear his/her/their costs. There is however an exception to this general rule; costs may be awarded by the court where the conduct of the losing Party is such that the award of costs will meet the ends of justice. In that case where such costs are awarded, the court specifically makes an order to that effect and gives reasons for making such as order.

In the present application, no such specific order was made by the court. The Objector could not assume that costs were awarded in her favour by mere procedural implication without an order being issued specifically by the court to that effect. It is for this reason that this court finds favour with Applicant's application as a result of which the application is allowed on the following terms;

- i) The certificate of taxation and the entire taxation pursuant to the Party and Party bill of cost filed by the Respondent is hereby set aside and declared to have been filed when no order of costs had been specifically issued by the court.
- ii) The court hereby directs that this being a family dispute no costs are payable to either of the parties unless a specific order to that effect is issued by the court.
- iii) The Objector shall pay Auctioneer's costs attendant to the execution process that she put in motion.

It is so ordered.

DATED at KITALE this 12th day of July 2021.

L. KIMARU

JUDGE