



**Britam Asset Managers (Kenya) Limited v Estate of the Late Vivian  
Talash Ntimama (Deceased) & another (Civil Case E111 of 2020)  
[2021] KEHC 114 (KLR) (Commercial and Tax) (7 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 114 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E111 OF 2020  
F TUIYOTT, J  
OCTOBER 7, 2021**

**BETWEEN**

**BRITAM ASSET MANAGERS (KENYA) LIMITED ..... APPLICANT**

**AND**

**ESTATE OF THE LATE VIVIAN TALASH NTIMAMA  
(DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**DORCAS PEDELAIN NTIMAMA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. These Originating Summons commenced by an interpleader, Britam Asset Managers (Kenya) Limited (Britam), asks this Court to determine, whom between the Estate of the Late Vivian Talash Ntimama (the 1<sup>st</sup> Respondent or Estate of Vivian) and Dorcas Pedelain Ntimama (the 2<sup>nd</sup> Respondent or Mama Dorcas) is entitled to the funds in account Code WMF xxxx held by Britam.
2. In his lifetime Hon. William Rongora Ole Ntimama was the owner of a vast estate. In a will dated 24<sup>th</sup> June 2015 he appears to have carefully considered to whom and how that Estate would devolve upon his demise. To his credit the Deceased made considerable bequests to his wife, Mama Dorcas. Two of which were 50% proceeds in an account under Code xxxx and the entire proceeds in account xxxx both at Britam.
3. Upon the death of the Deceased, and in implementation of the terms of the will, there was a switch out of the accounts of the Deceased and monies therein distributed in deference to the will. Account No. WMF xxxx was created in the name of Mama Dorcas and was credited with Kshs.100,000,000/=.



4. In that will, as well, was provision made for Vivian, the last daughter to the Deceased. She, in relations to her siblings, stood in some special place. Under clauses 6.4 of the will, the deceased bequeathed 100% of his Lavington estate being LR Number xxxx and L.R xxxx to his wife Dorcas and which was subsequently to revert to Vivian. There was a similar bequest in respect to 100% of his CIS MARA/OLOPITO/xxxx Ha Estate. In consideration, the Deceased instructed Vivian to make provision for the upkeep, comfort and maintenance of Mama Dorcas and to generally take care of her in the course of her life.
5. Account No. WMF xxxx was opened sometime in 24<sup>th</sup> January 2018. In the account opening form, Mama Dorcas was named as the subscriber and Vivian as the joint subscriber. The signing and operations mandate was to either/or Mama Dorcas and Vivian. At the heart of the controversy herein is whether the manner in which the account was opened and to be operated granted to Vivian joint ownership of the funds in the account.
6. The family of the Deceased was to suffer misfortune. At the age of 42 years, Vivian died on 31<sup>st</sup> January 2020. In the meantime, her mother Dorcas was struggling with dementia and memory loss and eventually her children Amos, Timothy, Sanau, Lydia and Sanaipei were appointed her legal guardians and managers of her affairs.
7. Upon her death, the estate of Vivian has taken a position that Vivian was not just a signatory to account No. WMF xxxx but also a joint subscriber and owner. Further that Mama Dorcas decided to invest part of her inheritance with her daughter Vivian, a decision that was allegedly informed by the intentions of the late Hon. Ntimama that whatever he had bequeathed to his wife would eventually pass over to Vivian.
8. That position is at odds with the position taken by the legal guardians of Mama Dorcas. They hold the position that Vivian was not a joint investor or owner of the funds in account No. WMF xxxx but was merely a signatory for purposes of assisting Mama Dorcas manage her accounts as her health had started deteriorating sometime back in 2017.
9. The Court received evidence from two witnesses. Erick Kariuki Kimani (Kariuki) and Sanau Koillapa Ntimama (Sanau) for the estate of Vivian. Lydia Naneu Masikante (Naneu) and Debra Sanaipei Ntimama (Sanaipei) for Mama Dorcas. Their evidence is discussed where it helps to resolve the only two issues that present themselves for the Court's resolution.
  - i. Whether the Estate of Vivian is part owner of the funds in WMF xxxx?
  - ii. What are the appropriate order of costs in regard to these Originating Summons?
10. It is common ground that all the money invested in the controversial account was money bequeathed to Mama Dorcas through the will of the Deceased. In this regard, Mama Dorcas, under her written hand on 23<sup>rd</sup> January 2018, instructed Britam to invest Kshs.97.5 Million for a period of 3 months at a rate of 11% p.a.
11. It is nevertheless also true that at the point of opening the account Mama Dorcas included Vivian not just as a co-signatory but also a second subscriber. In general, the law presumes that, unless expressly stated to the contrary, full ownership of a joint bank account passes to the surviving joint owner upon the death of joint owner. The survivor becomes the sole owner of any funds in the bank account



and is similarly solely responsible for any overdrawn sums. This is the doctrine of the joint account survivorship. Of this doctrine Starke J in *Russel v Scott* (1936) 55 CLR 440 held:

“A person who deposits money in a bank on a joint account vests the right to the debt or chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship...”

12. An account opening form to a joint account is not just a contract between the account holders and the Bank, but also between the account holders in se. The account opening form in this matter is silent as to how the interest of a deceased joint owner should be treated upon death. Further, there was no evidence that Vivian and Mama Dorcas had an agreement in this regard. The Court therefore takes it that, without more, the place to start is that Mama Dorcas is the sole owner of the monies in the Bank account. This is because Vivian predeceased Mama Dorcas.

13. This Court is however urged by the Estate of Vivian to find that there was a presumption of advancement of the funds in the said account to Vivian. In this regard this Court is referred to the decision in *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR in which the Court of Appeal, in respect to presumption of advancement, stated :-

“However, where a gift can be shown either to have been intended by the donor, or where the donor was under an equitable obligation to pay, then a presumption of advancement is readily made. (see. Snell’s Equity, 29th Edn, Sweet & Maxwell p.178). As a result, the presumption of advancement is made in cases where the circumstances unequivocally point to the intention of the donor to make it so, or where the donor has an obligation to pay the gift (for example in her capacity as a wife or mother to the donee)”

14. The Estate of Vivan asks this Court to look and examine the intentions of the late Ntimama whose will is the source of the funds. I interrogate this proposition.

15. It is true as noted by the Estate of Vivian that in respect to the devises under Clause 6.4 and 6.5 for the Lavington Estate and the CIS Mara Estate, these were bequeathed to Mama Dorcas for her life but were to subsequently revert to Vivian in entirety. But in respect to the funds which have given rise to this dispute would be clause 6.14 (and perhaps 6.15). These read:-

“[6.14] I give, devise and bequeath 50% of my benefits held under Britam Portfolio Code UM0722 to my wife in her lifetime, the remaining 50% should be shared equally between my daughters Lydia, Sanau, Sanaipei, Vivian, my sons Amos, Timothy and my grandchildren Terry Anne and Semerian.

[6.15] I give, devise and bequeath the proceeds of my account under Britam BA034972M to my wife in her lifetime.”

16. Although counsel for the Estate of Vivian submits that the will of Hon. Ole Ntimama depicted that his intentions were that everything he had bequeathed his wife was supposed to pass to the late Vivian upon the death of his wife, a more keen examination reveals that in respect to the funds at Britam there were no instructions that those or a remainder would pass to Vivian. This must be contrasted with the bequests under clause 6.4 and 6.5.



17. It needs to be added that even clause 6.16 does not demonstrate an intention that the funds which were bequeathed to Mama Dorcas were supposed to revert to Vivian upon the death of Mama. Clause 6.16 reads:-

[6.16] In the event that my wife proceeds before myself; the 50% in terms of clause 6.14 above and 100% in respect of clause 6.15 above shall be absolutely bequeathed to Vivian Talash Ntimama.”

I understand this simply to be an intention by Testator that should his wife, Mama Dorcas, pre-decease him then those funds were to be bequeathed absolutely to Vivian. That cannot be construed to mean that if the bequest of the funds to Mama Dorcas had come to fruition, as it did, then those funds or any remainder would pass to Vivian. Had that been the intention of the Testator, then he would have expressly said so as he did in respect to the gifts given by clauses 6.4 and 6.5.

18. Quite to the contrary the evidence that emerged is that, although Mama Dorcas invited Vivian as a co-signatory and second subscriber to the account, the funds in the account belonged solely to Mama Dorcas. In his testimony for the estate of Vivian, Kimani stated that he was not aware whether his late wife Vivian used part of the money in this account for her personal use. The Estate of Vivian then becomes more emphatic in this regard when its lawyer submits:-

“We wish to categorically state that the estate of the late Vivian Talash Ntimama does not have any intentions to access/withdraw the funds in the said account for its use.”

19. This is a concession that as long as Mama Dorcas was alive the money solely belonged to her. This Court is therefore unable to accept the following qualifier by the estate of Vivian:-

“However, based on the intention of the late Honourable Ntimama, the estate is entitled to any funds that will remain in the said account upon the demise of the 2<sup>nd</sup> Respondent who has lifetime access and enjoyment of the said funds.”

20. That submission must be rejected because, for one, the Court was unable to trace that alleged intention in respect to the funds (see the discussion above). Second, it is to turn logic on its head to accept that while Vivian was not the owner or co-owner of the funds when Mama was alive, the estate of Vivian and not Mama became the owner of those funds upon the death of Vivian.
21. The position does not change even in the face of evidence that Vivian, in her lifetime, was either reluctant or unwilling to accede to a request made at a family meeting of 16<sup>th</sup> November 2018 that changes should be made to the signing mandate of the account to incorporate two sons of Dorcas, namely Sipoi and Timothy.
22. This Court comes to the conclusion that given how the account was managed and operated, that is to the sole benefit of Mama Dorcas, Vivian, though a joint subscriber or signatory to the account, was not a part or joint owner of the funds therein. Therefore the general rule alluded to earlier should not be disturbed. Having survived Vivian, Mama Dorcas as the sole survivor remains the exclusive owner of the funds in Account No. WMF xxxx.
23. Having come to the above conclusion, what are the appropriate orders on costs in respect to these proceedings? The convention is that costs follow the event. At the same time, it is at the discretion of the Court, a discretion to be exercised judiciously. So that there must be good reason to depart from the general rule.



24. Here, the interpleader seeks costs of the summons as it argues that these proceedings were necessary and it had incurred expenses and costs in bringing them.
25. On the other hand, the 2<sup>nd</sup> Respondent submits that interpleader suits are not ordinary events and by analogy asserts that parties to interpleader proceedings do not have a horse in the race but merely hold the purse to the outcome of the derby. Second, that because the position of Britam was neutral and passive, it cannot claim success any one way.
26. The purpose of an award of costs is to compensate a party for expenses it has been put in prosecuting or defending a claim. It is not in the nature of a punishment to the losing side. Neither is it a reward or token to the winning side. It cannot be gainsaid that Britam had to pay Court fees for commencing and sustaining these proceedings as it has had to meet legal costs. Whether or not it is just for Britam to be compensated for these costs and expenses depends on whether these proceedings were necessary.
27. I think they were. Britam holds funds in account No. WMF xxxx. Rival claims to those funds were made by the Respondents. They were unable to agree on the operation and management of the funds. Britam was put at a dilemma as to whose instructions to follow. Who was entitled to the funds may not have been obvious to Britam. These proceedings were not only a sensible way of Britam seeking the answer but also necessary. Had the party who is not the owner of the funds not insisted on them, then Britam would not have been put in difficulty. It is that party that caused Britam to incur expenses and costs. It is that party that must meet Britam's costs on these proceedings.
28. As to costs between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, I am inclined to order that each side meets its own costs. I make these order bearing in mind that these parties are members of one family and, as demonstrated by this dispute, there is already a wedge between them. An order of costs may not help in healing the differences.
29. The final orders are:-
- i. The Court finds that 2<sup>nd</sup> Respondent, Dorcas Pedelain Ntimama is the sole owner of the funds held in account under Code No. WMF xxxx.
  - ii. The 1<sup>st</sup> Respondent shall meet the costs of Britam in presenting these proceedings.
  - iii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall each bear their own costs.

**DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2021**

**F. TUIYOTT**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2021**

**A. MABEYA, FCI Arb**

**JUDGE**

**PRESENT:**

