



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1546 OF 2019

IN THE MATTER OF THE ESTATE OF TOB CHICHO COHEN (DECEASED)

BETWEEN

SARAH WAIRIMU KAMOTHO COHEN.....PETITIONER/APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

OFFICE OF

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE REGISTRAR OF BIRTHS AND DEATHS,

DEPARTMENT OF CIVIL REGISTRATION NAIROBI.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Petitioner/Applicant had on 17th December, 2019 through her Advocates on record filed an application under certificate of urgency by way of a Chamber Summons dated 16th December, 2019. The application is predicated on **Article 40** of the **Constitution of Kenya**, **section 45, 46** and **47** of the **Law of Succession Act CAP 160**, and **rule 59, 63** and **73** of the **Probate and Administration Rules**.

2. On 13th January, 2020 the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 10th January, 2020 seeking to have the application struck out as against each one of them.

3. At the hearing on 15th January, 2020 upon application by learned Counsel Mr. Omari for the beneficiaries Gabriele Hannah Van Straten Cohen, Sarah Cohen and Seth Van Straten the court directed that the firm of Musyoki Mogaka and Company Advocates file and serve a formal application on the joinder of the beneficiaries.

4. What is for determination at this stage therefore is which of the three (3) applications being the main application, the Preliminary Objection and the application for joinder should be heard first.

5. The Petitioner's position as stated by learned Counsel Mr. Murgor is that nothing sought in their application prejudices the interests of any person claiming to be a beneficiary of the deceased's estate. Further that time is of the essence since this application was filed under Certificate of Urgency and was certified as such. In his view, the Preliminary Objection and the main application should be heard together and the application for joinder can be heard when it is ready.

6. On their part, the 1st and 2nd Respondents through learned Counsel M/s Mwaniki argued that the Preliminary Objection should be heard before the main application stating that it will assist the court to make a finding on the issue of joinder. Further that should their Preliminary Objection succeed, the 1st and 2nd Respondents need not participate in these proceedings any further. She urged that the application should be heard first before the other two (2) applications.

7. According to learned Counsel Mr. Omari for the beneficiaries, the Preliminary Objection and the main application can only be canvassed after the joinder of the beneficiaries. Counsel contended that to determine the questions raised in the Preliminary Objection or main

application to the exclusion of his clients will occasion great injustice to them.

8. The beneficiaries' position was echoed by learned Counsel M/s Komu for the 3rd and 4th Respondents who alluded that a situation where the Preliminary Objection may be allowed and later the purported beneficiaries are enjoined to the proceedings would raise difficulties. Counsel urged that it is therefore in the best interest of all parties that the application for joinder be heard first. Counsel also joined her sentiments to those of M/s Mwaniki on the Preliminary Objection which in any case she is in support of.

9. Having carefully considered the arguments of the Counsels on record for the parties herein, it is my view that the formal application for joinder of the purported beneficiaries once filed, should be heard first. This is because the court has been called upon to make orders concerning an estate to which they have laid a claim. In so doing, the court will be able to hear all the parties, which is necessary to enable the court effectively adjudicate upon and determine the question as to whether the applicants belong to this matter or not.

10. Although the main application was certified urgent, I note that none of the parties hereto have demonstrated that they will suffer prejudice if the application for joinder is heard first. In any event, a determination on the question of joinder first will ensure that justice is not only done but seen to be done.

11. If the parties are found to have a legal interest or duty in the deceased's estate to warrant the grant of an order for their joinder to these proceedings, then to proceed to determine the questions raised herein in their absence, when the orders granted may curtail their legal rights, would be to occasion an injustice.

12. For purposes of clarity, I hereby direct that the application for joinder shall be heard first. Upon determination of the question of joinder, the court shall proceed to hear and determine the Preliminary Objection dated 10th January, 2020 raised by the 1st and 2nd Respondents to the main application. These two (2) applications may be heard on the same date. Thereafter directions shall be given on the hearing of the main application.

It is so ordered.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF JANUARY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioner/Applicant.

In the presence ofAdvocate for the 1st and 2nd Respondents.

In the presence ofAdvocate for the 3rd and 4th Respondents.

In the presence ofAdvocate for the Beneficiaries Gabriele Hannah Van Straten Cohen, Sarah Cohen and Seth Van Straten.