



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO.23 OF 2019

ELIZABETH CHELIMO SIELEY.....1ST PLAINTIFF/RESPONDENT

ANDREW KIPKORIR SIELEY.....2ND PLAINTIFF/RESPONDENT

JONATHAN KIBIWOTT SIELEY.....3RD PLAINTIFF/RESPONDENT

PETER KIPROP SIELEY.....4TH PLAINTIFF/RESPONDENT

(Suing as the administrators of the estate of the late Nathaniel Kibitok Sieley)

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT/APPLICANT

THE BRANCH MANAGER, K.C.B NANDI HILLS BRANCH...2ND DEFENDANT/APPLICANT

RULING

1. The respondents sued the applicants in their capacity as the administrators' of the estate of the late Nathaniel Kibitok Sieley (deceased) who died on 19.3.2013. The letters of grant were issued on 28.9.2018. The applicant (**Kenya Commercial Bank**) is a financial institution where the deceased held an account no. 096-271770881/1106788699 at **Nandi Hills Branch**. The respondents claimed that there was a sum of Kshs 23,591,986.25 at the time of the deceased death and further credits until the 14.2.2019 when the amount was reached the sum of Kshs. 24,069,373.60/=. That this amount was paid out to undisclosed people, was only discovered when they requested for a bank statement from the 2nd defendant (**The branch Manager, K.C.B Nandi Hills Branch**).
2. The applicants filed a statement of defence dated 18.6.2019 denying the plaintiffs allegation that the amount was withdrawn. The defendants had been informed of the same and they denied the same. They averred that they had been put on notice by the administrator of the estate **one Luke Kimutai** who had obtained letters of grant of administration in **Nku. High Court Succession no. 3 of 2013**, the same had been authenticated by the court. Therefore, they acted on the strength of the grant presented to them.
3. The plaintiff's filed a reply to defence and averred that they were the legal administrators of the estate of the deceased and had no knowledge of Luke Kimutai. Further the payment of the sum of Ksh.24,069,373.60 was fraudulent and illegal and that the defendants were solely responsible for the said payment.
4. The defendants/applicants then filed a notice of motion application to be granted leave to issue a third party notice to Luke Kimutai, saying if such leave is not granted, it will suffer great prejudice which is what is for determination.
5. The defendants/ applicants averred that it was in the interest of justice that Luke Kimutai was joined as a party to this suit and there shall be no prejudice suffered by the plaintiff's if the same was allowed. The application was supported by an affidavit sworn by their counsel on record **Mr. Bernard O. Manani**. The counsel averred that the defendants stand to suffer irreparable damage if this application is not allowed for the reason that the available records indicate the transactions were carried out by the said person.
6. In response to the application Andrew Kipkorir Bitok Sieley swore an affidavit and averred that by his own knowledge and advise from their advocate, the said application was made in bad faith, was fatally defective, lacked merit and that counsel was not conversant with the controversial facts.
7. In addition, the grant relied upon by the defendants had not been annexed, they had established that the grant issued in regard to the estate of the late **Nathaniel Kibitok Sieley vide Nku. High Court Succession number 3 of 2013** was fake. That the genuine grant having the said case number was in regard to the late **Ayub Wandundo Kimani**. The letters from the Deputy registrar Nakuru and **Ashitiva & Co.**

Advocates were annexed, so there was no need for the third party in this suit.

8. The issue that arises here for determination is whether the defendants have reason enough to seek leave to issue third party notice. The court has discretion to either grant or decline the said application. The purpose of third party is provided for under Order 1 rule 15 of the Civil Procedure Rules 2010 as follows:

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)

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(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in sub rule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under sub rule (4) makes such a claim as is mentioned in sub rule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

9. The defendants aver that since the amount was paid out to the intended party, it would be prudent for them to enjoin him. The amount of money in question is Ksh.24,069,373.60/=. In *Yafesi Walusimbi v. Attorney General of Uganda (1959) EA 223*, the Court held as follows;

“In order to join a third party the subject between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.”

The money is alleged to be withdrawn by the intended party, which money belonged to **Nathaniel Kibitok Sieley** deceased who is the husband and father to the plaintiff’s respectively. Therefore, the subject matter is the same in issue between the plaintiffs and the defendants.

10. The court needs to look at the allegations by the plaintiffs as against the defendants and also the allegation of the defendants as against the intended party. If the issues are the same and similar reliefs being sought, then the court shall exercise its discretion. **Section 1A** of the overriding objective of the Civil Procedure Act is to facilitate expeditious disposal of suits. It provides as follows: ***the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

11. The plaintiffs have opposed the said application stating that the defendants had failed to exercise due diligence prior to issuing the said amount. Of importance to note is that third party proceedings are usually between the defendant and third party,

and in this case the applicants have demonstrated the nexus between the issue at hand. The defence they wish to raise, which is pegged to the Third Party’s role in the matter and I find that the application has merit, and is allowed. Costs shall be in the cause

Delivered, Signed and dated this 10th day of February 2020 at Eldoret

H. A. OMONDI

JUDGE