



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1341 OF 2014**

**IN THE MATTER OF THE ESTATE OF KANYOIKE KIBOO (DECEASED)**

**JOHN KIBOO.....ADMINISTRATOR**

**VERSUS**

**PETER KIRURI MUMBWA.....PROTESTOR**

**RULING**

1. The deceased herein Kanyoike Kiboo died on 15<sup>th</sup> August 2011 intestate. He was survived by one wife (now deceased) and his son John Kiboo the Administrator herein. He left behind two assets namely; Kiganjo/Kiamwangi/599 and Kiganjo/Kiamwangi/1403.
2. On 14<sup>th</sup> September 2017 letters of administration were issued to the administrator and on 1<sup>st</sup> November, 2017 he filed summons for confirmation of grant and proposed that all the property of the estate of the deceased be distributed to him on his own behalf as the only remaining beneficiary of the deceased.
3. On 13<sup>th</sup> December, 2017 Peter Kiruri Mumbwa filed an affidavit of protest, and averred that he is a creditor of the estate of the deceased. He stated that he was entitled to compensation pursuant to a judgement of Kiambu PMCC 20 of 1990. It was his case that the deceased owed him a refund of Ksh.1,696/= as the purchase price plus interest for 27 years and another Ksh.15,000/= as demolition costs. Further, that it was a term of the decree that the interests of the amount was payable until full settlement was made. In his evidence he urged the court to include him as a beneficiary in the extent of the Court judgement and prayed that the grant not be confirmed as proposed by the Administrator.
4. On his part, the Applicant did not dispute the existence of a judgement against the deceased but, denied knowledge of any interests accruing thereto. During the hearing of the protest, the Applicant made a proposal to settle the debt owed by the deceased in instalments if given time.
5. Subsequently, the court referred the matter to Court annexed Mediation. However, the Administrator did not comply with the mediation and a certificate of non-compliance was filed by the Mediator. The court directed that the parties file written submissions in support of their respective positions.
6. In his submissions, the Protestor relied on the case of; **Barrack Deya Okul (deceased) 2018 eKLR** where the court found that where a decree arises against a case involving a deceased person, the deceased's estate can be listed as having a liability in the petition of succession and provision of its payment is made at the confirmation of the petition. He also submitted that **section 86** of the **Law of Succession Act**, provides for debts of every description enforceable at law and ordered by or out of the estate, shall be paid before any legacy.
7. In his submissions, the Administrator submitted that the protestor ought to have pursued compensation using the recommended legal channels. Further, he asserted that being an Administrator of the estate of the deceased, he needed more time to establish the assets and liabilities of the estate of the deceased before any orders of refund can be made. He asserted that the protestor had not made any effort to pursue a refund and his protest should thus be dismissed.
8. I have considered the pleadings, the oral evidence and the submissions of the parties. The issues that arise for determination are;
  - i. Whether the Protestor is entitled to a refund from the Estate of the Deceased.
  - ii. Whether the grant should be confirmed as proposed by the Administrator.

9. The law provides for persons beneficially interested, a phrase that would encompass creditors. The dispute herein was filed as a protest before confirmation of the grant. It falls upon the court to deal with the questions raised within **rule 41(3)** of the **Probate and Administration Rules** which provides that:

**“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”**

10. The Administrator acknowledged the existence of a judgement debt pursuant to Kiambu PMCC 20 of 1990. On his part, the Protestor is asking to be included as a beneficiary of the estate owing to the debt for purposes of distribution. **Section 37(1)** of the **Civil Procedure Act** provides as follows:

**“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”**

11. From the provisions of the Act, once a petitioner is notified of the existence of a liability by a creditor owed by the estate, it is mandatory to include such a liability in the petition. In the absence of a variation or the setting aside of a decree against a deceased person, it is in my view a proven liability against the estate of the deceased and must be included in the list of liabilities. As provided by **section 86** of the **Law of Succession Act**, the debt should be paid before any legacy is passed on. This position was reiterated in the case of **Re Estate of Barrack Deya Okul (deceased) 2018 supra**.

12. In this case, the decree being relied upon to establish a claim in these proceedings was issued in 1990 at Kiambu Court. By the time the deceased died, he had not paid the judgement debt. Ever since the administrator was appointed in 2017 to determine the assets and liabilities of the estate, no action has been taken towards the payment of the debt. The proposal on the mode of distribution in the application for confirmation of grant by the administrator neither acknowledged nor provided for the liabilities.

13. The upshot of the foregoing is that the Administrator of the estate of the deceased is granted 30 days within which to file fresh summons for confirmation of grant and to include the Protestor as a creditor to the estate.

**DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8<sup>TH</sup> DAY OF APRIL, 2020.**

**L. A. ACHODE**

**HIGH COURT JUDGE**