



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

SUCCESSION CAUSE NO. 53 OF 2014.

IN THE MATTER OF THE ESTATE OF JOSEPH SIMIYU KHISA (DECEASED)

ZUWEINA SALIM.....1ST OBJECTOR

BEATRICE SIJENY.....2ND OBJECTOR

VERSUS.

JOSEPHINE KAPUKHA KHISA.....1ST PETITIONER

CLIVE NANDASABA KHISA.....2ND PETITIONER

ESTHER MULEKYO KITHOME.....3RD PETITIONER

RULING.

This Petition for distribution of the Estate of the deceased Joseph Simiyu Khisa filed by Josephine Kapukha Khisa, Clive Nandasaba Khisa and Esther Mulekyo Kithome in 2014 was objected to by Zuweina Salim Khisa and Beatrice Sijenyi. After full hearing of the objection Mabeya - J by Judgment dated 16.12.2014 distributed the estate to the beneficiaries and dependants. Dissatisfied with the mode of distribution Beatrice Adhiambo Sijenyi appealed to the court of Appeal in Kisumu Civil Appeal No. 2/2015. The court of appeal by Judgment dated 26/4/2018 set aside the distribution by Mabeya-J and redistributed this estate as per Paragraph 85 of the Judgment. The court in paragraph 84 of the Judgment directed;

It is appreciated that the matter may have been complicated and time consuming, but the costs ought to have been either agreed or taxed by the Deputy Registrar. All the advocates who have participated in these proceedings have contributed to the resolution of the succession dispute. We therefore set aside the order made by the trial Judge in regard to costs and direct that the sum of Kshs.3 million from APA Insurance Group Life be set aside to cater equally for all the advocate's costs, and that the costs of all the parties advocates in this court and in the High Court be either agreed or taxed.

During the proceedings in the High Court Caroline Khaosa represented the Petitioner Josephine Kapukha Khisa and Esther Mulekyo Kithome. Mr. Kanyangi appeared for Zuweina Salim (1st Objector) and Ochieng for Beatrice Sijenyi (2nd Objector).

After the conclusion of the matter in the Court of appeal *Patrick Teddy and Partners* filed a Notice of change of Advocate to come on record and represent Josephine Kapukha Khisa and Clive Nandasaba Khisa. The firm also filed application dated 20th August 2018 for confirmation of grant. The application to come on record by Notice of Change of Advocate was done without complying with the Civil Procedure rules, and was rightly in my view withdrawn by Teddy Odingo Okello. With the withdrawal of the application for change of advocate, and application for confirmation of grant, the issues that remained for determination was;

- 1) *The representation of the 1st and 2nd petitioners by the firm of Patrick Teddy & Partners, and*
- 2) *The division of the 3 petitioners among the advocates on record.*

On the issue of representation of the 1st and 2nd Petitioners in this proceedings, it is not in dispute that the 1st and 2nd petitioner have all along been represented by Gazemba Wekesa & Company. The same firm represented the Petitioners in the Court of appeal and Judgment was entered on 26.4.2018 Order 9, Rule 9 of the Civil Procedure Rules, 2010, which Rules are applicable to all proceedings at the High Court where there is a change advocate after judgment has been passed, such change **shall** not be effected without an order of the court – upon an application with notice to all the parties in the proceedings or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

Upon perusal of the proceedings, there is no evidence that this court has made any order on representation or consent filed between the outgoing advocate and the proposed incoming advocate firm of Patrick Teddy & Partners. The provisions of Order 9 Rule 9 having not been complied with, the Petitioners are still legally represented by the firm of Gazemba Wekesa & Co. Advocates and are the one advocates on record for the 1st and 2nd Petitioners herein.

The 2nd issue is on the division form APA Insurance division of the sum of Kshs.3 million directed by the court of appeal to set aside to cater equally for all the advocates costs.

The advocates on record have failed to agree on the distribution. I have looked at the submission on the same. It is my considered finding that the distribution of the Kshs.3 million among the advocates should not hold hostage these proceedings. I therefore direct that the sum of Kshs.3 million from APA Insurance Ground Life be deposited in this court pending the agreement on distribution by Counsels on record as at 26.4.2018 or by order of this Court. In the result, the petitioners are at liberty to properly file application for confirmation of grant.

Dated at Bungoma this 15th day of January, 2019.

S.N. RIECHI

JUDGE