



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO.80 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPSIELE ARAP CHUMO ALIAS KIPSIELE (DECEASED)**

**WESONGA, MUTEMBEI & KIGEN ADVOCATES.....APPLICANTS**

**AND**

**PRISCILA CHEBET CHUMO.....PETITIONER/ADMINISTRATOR/RESPONDENT**

**RULING**

1. Before me is an application brought by way of Summons dated 22<sup>nd</sup> March 2018 under section 47 of the Law of Succession Act (Cap. 160) and rule 49 and 73 of the Probate and Administrations rules, and section 45 and 52 of the Advocates Act (Cap.16) It was brought by Wesonga, Mutembei & Kigen Advocates and seeks several orders, some of which have been spent as follows-

**1. (Spent)**

**2. (Spent)**

**3. An order that legal fees in the sum of Kshs.4,000,000/- (four million) due to the firm of Wesonga, Mutembei and Kigen Advocates contained in an agreement dated 22<sup>nd</sup> June 2016 be included as a liability of the estate of the deceased.**

**4. An order be and is hereby issued authorizing the administrator to dispose of a portion of property of the deceased namely; Kericho/Kipchimchim/107 or Kericho/Kipchimchim/14 to satisfy the advocates legal fees due to the law firm of Wesonga, Mutembei & Kigen Advocates in the sum of kshs.4,000,000/- only.**

**5. (Spent)**

**6. Such further order as the Honourable court deems fit in the interests of justice.**

**7. An order that the costs of this application be provided for.**

2. The application has grounds on the face of the Summons and is supported by the affidavit of Robinson Kigen advocate sworn on 22<sup>nd</sup> March 2018. The main ground being that the applicant and the protesting beneficiaries voluntarily executed an agreement dated 22<sup>nd</sup> June 2016 agreeing on the advocate/client costs of kshs.4,000,000/- to be paid to the advocate, and that the advocate had diligently acted for the daughters of the deceased without any payment. Another ground is that the advocates used their own funds to do their work, and that later the administrator/surviving widow accepted the terms of agreement between the clients and the advocates and that some daughters later chose to fire the advocates though there was a valid agreement which meant that the costs were not subject to taxation. The affidavit amplified the grounds of the application.

3. The application was opposed through a replying affidavit sworn by Priscila Chebet Chumo (the administrator/petitioner) on 18<sup>th</sup> April 2018 in which she denied executing the agreement of 22<sup>nd</sup> June 2016 and stated that the applicant (advocate) was just instructed by her grandson Gilbert Kibet and that since any party to proceedings had a right to instruct an advocate of his or her choice, if the protesters had now chosen to act in person they should agree on how much was due to the applicant if he rendered services to them. It was also deponed that if legal fees was due then the applicant should apply for taxation and thereafter pursue the instructing clients for payment.

4. After the above affidavit was filed, the application was supported by an affidavit sworn on 23<sup>rd</sup> April 2018 by Ann Cherotich Juma (a protester) but filed on 7<sup>th</sup> June 2018. It was deponed therein that they (daughters) discussed with their mother (administrator) and signed the

agreement on fees at Sotik because they did not have money at hand. It was further deponed that she was misled by her sisters to fire the firm of Advocates and that she had no objection to the law firm being paid, and also the fees of Kshs.4,000,000/- being included as a liability of the estate and that land be sold for payment of the fees. She thus did not object to the application filed by the advocates.

5. A further affidavit sworn by Robinson Kigen Advocate on 31<sup>st</sup> October 2018 was also filed, in which it was deponed that what was stated in the affidavit of Priscila Chebet Chumo dated 18<sup>th</sup> April 2018 that the estate was worth only Kshs.2,000,000/- was not true. It was the contention of the deponent that the estate had two land assets worth Kshs.29,400,000/- as at July 2018. It was also deponed that the said Priscila officially endorsed the advocates instructions and that Anne Cherono who signed the agreement on the advocate's fees payable had confirmed in her affidavit sworn on 22/6/2018 that the agreement on fees was duly signed and that such fees was agreed.

6. By consent of all parties'counsel, the application proceeded by way of filing written submissions. A number of court case authorities were relied upon by the applicant firm of advocates. On the other hand J. K. Kirui for the respondent (not named) filed submissions, and Ms Koech Kipkirui & Associate's Advocates filed submissions on behalf of the petitioner. The submissions were not highlighted.

7. I have considered the application, documents filed and the submissions of all counsel involved. In my view, the issues are four-

**a) Whether an agreement was entered into for payment of advocates fees and by whom?**

**b) Whether the fees, if any is payable by the estate?**

**c) Whether the court can grant the reliefs sought?**

**d) What are the orders as to costs?**

8. With regard to the first issue whether an agreement was entered into for payment of advocates' fees, I have seen a copy of the handwritten agreement dated 22/6/2016, headed "instructions and fees agreement". It was an agreement signed by Florence Chepkirui Ngeno, Emily Chelangat Ngeno, Ann Cherono Juma, and Gilbert Kibet for the estate of Sarah Chepngeno who appears to have died. Nobody signed for estate of Chepkoskei (wife) though a space was provided in the agreement for her signature. It was also signed by Chepngetich Edna. The agreement states as follows:

*"We undersigned instruct the firm of Wesonga Mutembei & Kigen Advocates to act for the excluded beneficiaries in Succession Cause No.80 of 2014, Kericho High Court, properties being Kericho/Kipchimchim/121 and 107. The agreed legal fees being a sum of Kenya shillings Four Million Only (Kshs.4,000,000/-) shall be paid to you. You earn your full fees upon entry of appearance and accepting instructions herein."*

9. The above is the entire agreement. Thereafter, a typed undated document headed "Witness" shows that Priscila Chebet Chumo the petitioner committed herself by thumb printing the said typed document which has the following terms-

*"I Priscila Chebet Chumo, petitioner, accepts to have the excluded beneficiaries included and accept the terms of agreement between the clients and the advocate."*

10. Though this typed document was witnessed by Robinson Kigen, who swore the affidavit in support of the Summons herein, no date appears anywhere on the document even at the witnessing stage. It is below the witnessing that the same Robinson Kigen as the authorized representative of the advocates signs and is witnessed by a person whose identity was not disclosed.

11. I note that one of the signatories of the handwritten instructions and fees agreement Ann Cherotich Juma later supported the application by filing an affidavit but the rest of the excluded beneficiaries have kept quiet, and I understand that they withdrew instructions from the advocates.

12. In my view, though the instructions and fees agreement appears to be very informal, especially for such a large amount of money, I find that it was an agreement signed between the firm of lawyers and Florence Chepkirui Ngeno, Emily Chelangat Ngeno, Anne Cherotich Juma, Gilbert Kibet and Chepngetich Edna who thought that they were excluded as beneficiaries of the estate, in an effort to get the lawyer represent them. The petitioner Priscila Chebet Chumo did not sign the agreement. She merely later agreed to include the excluded beneficiaries and acknowledged existence of the already executed agreement which did not refer to her as one of the intended signatories. Thus I find that the instructions and fees agreement was signed by the above named persons but not by the petitioner Priscila Chebet Chumo.

13. On whether the legal fees is payable from the estate, I have been referred to many court cases. In my view, after a deceased person dies, and in the course of succession proceedings, only the administrator to some extent and subject to the directions of the court can commit the estate of a deceased person to new debts. Other beneficiaries can consent only to the extent of their portion of property entitlement, or anticipated portion from the estate.

14. From the contents of the instructions and fees agreement above whose contents I have already reproduced, there was no intention or reference by the signatories to the agreement to commit the estate to the payment of legal fees. The signatories of the agreement who signed it with the law firm were aggrieved persons who wanted to be included in the estate as beneficiaries and had a right to seek legal representation. The legal costs for such representation was primarily theirs unless the court after hearing the matter, orders that they be paid costs and by whom. The excluded beneficiaries neither had capacity to commit the estate to payment of advocates costs, nor did they purport to do so.

15. Priscila Chebet Chumo on her part, as petitioner or administrator did not sign any document stating that she or the estate would take over payment of the legal costs. She merely referred to accepting “the terms of agreement between the clients and the advocates.” Since she was neither a client of the advocate firm, nor did that agreement talk of legal fees being paid by the estate or from the estate, it cannot be said that she committed the estate to pay the legal costs. I thus find that legal fees if any, arising from the agreement, is not payable by the estate. The court cases referred to are in my view cases where the administrators properly committed the estate to pay the fees. They are not applicable herein.

16. With regard to whether the court can grant any of the orders sought, in my view having found as above, I come to the conclusion that this court cannot grant any of the prayers sought.

17. To conclude, I find no merits in the application. I dismiss it with costs payable by the firm of lawyers to the petitioner Priscila Chebet Chumo.

Dated and delivered at Kericho this 19<sup>th</sup> day of November 2019.

**George Dulu**

**JUDGE**