

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
IN THE MATTER OF THE ESTATE OF THE LATE JUSTIN DAVID
KIRUNDA
MISCELLANEOUS APPLICATION NO. 252 OF 2014
ARISING FROM CIVIL SUIT NO.147 OF 2014
ARISING FROM PROBATE ADMINISTRATION CAUSE NO. 631 OF 2014
BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE
RULING ON A PRELIMINARY OBJECTION

When this matter came up for hearing, learned counsel Sumaya Kasule for the respondent raised a preliminary objection based on Section 255 of the Succession Act. She contended that under the said section no proceeding can be taken on a petition for probate or letters of administration after a caveat against the grant has been entered until notice has been given to the caveator. She maintained that no such notice was served on the respondent. She argued that this invalidated the main suit, which means there is no *prima facie* case, and that consequently, the main application should be struck off as well. She cited **Margret Kabahunguli V Eliazali Tibekinga & Another HCAC 08/95** and submitted that such notice is mandatory. She prayed that the main suit be struck off for lack of statutory notice under section 255 of the Succession Act.

Learned counsel Bitebekezi submitted in reply that the respondent's counsel had misinterpreted Section 255 of the Succession Act. He argued that the section was about no action being taken on any application for probate or letters of administration without notice to the caveator as the Court may consider appropriate, not the suit that seeks removal of a caveat. He contended that under the basic rules of statutory interpretation it is not logical that if someone lodges a caveat, it means there is something under contention. He wondered why someone would notify a caveator that someone wants to remove his/her caveat.

He submitted that a caveator being served with proceedings for removal of caveat is notice to the person that the caveat is challenged; that section 255 arises from section 254 to strengthen the said section 254; that section 255 is to bind the Court because section 254 gives a format for a caveat. He also submitted that the case cited by the respondent's counsel was made by court of concurrent jurisdiction and can be departed from by this court, and that even if it was convincing, the circumstances in that case were different. He contended that in the said case, which followed an earlier decision of **Namungo V Kilyankusa [1980] HCB 66**, the matter at stake was that a caveat was challenged by a Notice of Motion under section 254 (now 255) of the Succession Act, which varies from the facts in the instant case. He further submitted that section 265 of the Succession Act states that when a caveat is lodged, the caveator immediately becomes defendant and proceedings are supposed to be filed along those proceedings.

I have looked at the application, perused the court record and addressed the submissions of both counsel, including the law applicable.

Section 255 of the Succession Act, cap 162, provides as follows:-

*“no proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant of the petition has been entered with the Judge or officer to whom the application has been made, or notice has been given of its entry with some other delegate, **until after such notice to the person by whom the same has been entered as the court shall think reasonable.**”* (emphasis mine).

It was held in **Margret Kabahunguli V Eliazali Tibekinga & Another HCAC 08/95, Karokora J, as he then was**, that the notice in section 254 (now 255) of the Succession Act is a mandatory statutory notice which must be effected on the caveator notifying him of an intended suit should he fail or refuse to remove the caveat. In reaching the decision, court followed **Namungo V Kiryankusa [1980] HCB 66** where it was held that after service of the notice of intention to sue, and after the caveator has been served, the caveator would be served with the normal papers in a regular civil suit provided under section 265 of the Succession Act. The applicant in the administration cause would become the plaintiff while the caveator would become the defendant.

The circumstances of the instant PO are similar, on all fours, to those in **Margret Kabahunguli V Eliazali Tibekinga & Another** cited above. It is clear from the said case decision, and section 255 of the Succession Act, that before the suit is filed, the caveator must be served with notice of the intended suit to compel him/her to remove the caveat if he/she does not lift it on his/her own. The notice is served on the caveator/intended defendant, stating the matter in dispute and referring to the caveat. When the notice expires before the caveator has removed the caveat, the applicant would then file the suit becoming the plaintiff against the caveator who would become the defendant. The suit would then proceed as a normal suit as envisaged by section 265 of the Succession Act. I find no reason to depart from this decision.

I do not agree with the applicants/plaintiffs' counsel's arguments, with respect, that the section was about no action being taken on any application for probate or letters of administration without notice to the caveator and not the suit that seeks removal of a caveat. This very submission was made by the respondent's counsel in the cited case of **Margret Kabahunguli** and was rejected by the Judge. The essence of section 255 is that once a caveat is lodged on a petition for probate or letters of administration, no action in whatever form or manner can be commenced on the matter without prior notice having been given to the caveator. In my opinion, this renders the matter contentious. Thus, there can be no identification of the applicants by the Registrar of the court (preliminary proceedings to the grant), the file would accordingly not be forwarded to a Judge to make a grant, and no suit would be instituted, since both would be based on the petition that has been caveated. In my opinion, considering the statutory provisions and case law on the matter, these are the proceedings that are prohibited by section 255 after the caveat has been lodged and before the intended plaintiff has given notice to the intended defendant. As correctly submitted by the respondent's counsel, the instant suit would be premature without notice first being given to the caveator under section 255 of the Succession Act.

For the same foregoing reasons, I do not agree with the respondent's counsel's submissions that a caveator being served with proceedings for removal of caveat is notice to the person that the caveat is challenged. I also find no reason to depart from the decision in **Kabahunguli** as requested by the applicants' counsel. As stated above, the situation within which the PO was raised in the instant case is

similar, on all fours, to that the **Kabahunguli** case. I do not agree with the respondent's counsel that circumstances in the **Kabahunguli** and the **Namungo** cases were different from the instant case. Though it is correct, as submitted by the respondent's counsel that in **Namungo V Kilyankusa [1980] HCB 66** the matter at stake was that a caveat was challenged by a Notice of Motion unlike in the instant case, the fact remains that court reiterated the preliminary procedure to be followed by the applicant before instituting a suit to remove a caveat as including the usual notice of an intended suit (as opposed to the notice of motion filed by the applicant in that case). The same court stated that after the notice to the caveator, the applicant would then institute a regular suit against the caveator under section 265 of the Succession Act where the applicant would become the plaintiff and the caveator the defendant.

I would, in the foregoing circumstances uphold the preliminary objection and grant the respondent's counsel's prayers. The main suit is accordingly struck off the record for having been prematurely filed, in that there was no notice to the caveator as required under section 255 of the Succession Act. Miscellaneous Application No. 252 of 2014 cannot accordingly stand without the main suit. It is also struck off the record.

Dated at Kampala this 23rd day of March 2015.

Percy Night Tuhaise

Judge.