



REPUBLIC OF KENYA



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In re Estate of the Late Justice Daniel Kennedy Sultani Aganyanya (Deceased) (Succession Cause E002 of 2021) [2024] KEHC 11380 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE E002 OF 2021**

JN KAMAU, J

SEPTEMBER 25, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE JUSTICE
DANIEL KENNEDY SULTANI AGANYANYA (DECEASED)**

RULING

Introduction

1. In their Summons dated and filed 28th July 2023, Caroline Aganyanya and Lloyd Aganyanya, the 2nd and 3rd Petitioners herein sought for orders compelling Rtd Justice Roselyne Nambuye, the 1st Petitioner herein, to release the Pension proceeds of Justice Daniel Kennedy Aganyanya (hereinafter referred to as the “deceased”) to the natural children of the deceased as per the rectified Grant dated 27th October 2022 and that in the alternative, the said Grant be rectified further expunging and/or deleting Schedule C that prevented them from inheriting from her estate upon her own demise and the same be further rectified to reflect receipt of the pension proceeds.
2. They also prayed for an order directing the 1st Petitioner to appear before this court for cross-examination based on her Affidavit dated 11th July 2023 and another order to issue barring her whether directly by herself or her agents from utilising the proceeds of the Pension.
3. On 25th July 2023, the 2nd and 3rd Petitioners swore an Affidavit in support of the said Summons. They averred that the dispute was about the Pension proceeds and Schedule C that appeared in the rectified Grant dated 22nd October 2022.
4. They stated that the deceased passed away in February, 2020 leaving behind dependant children and grandchildren who relied on him for crucial necessities such as school fees, shelter and living expenses. They pointed out that it was axiomatic that the pension proceeds would accrue to the wife, the 1st Petitioner herein but nonetheless, she had offered to forgo her entitlement to the pension even before P. J. Otieno J, explicitly stating that it would be used for the benefit of the deceased’s children and grandchildren.
5. They contended that she was also advised by the Bukusu elders that since she did not have any children with the deceased, she would not be entitled to anything from his estate. They averred that during



- the funeral and all through the confirmation of the Grant, she declared her disinterest in the Pension emphasising that they had not made any joint investments.
6. They were categorical that the 1st Petitioner's waiver and/or disinterest in the Pension proceeds were duly noted and recorded in the Certificate of Confirmation of Grant. They asserted that when one of the properties in Kitale attracted a buyer, the 1st Petitioner demanded that she would only execute the sale documents if a clause were included in the Grant, preventing the natural children of the deceased from inheriting from her upon her demise. They added that they reluctantly agreed to rectify the Grant and include the said clause.
 7. They pointed out that as they were waiting for the pension proceeds for administration, the 1st Petitioner devised a plan to convert the said funds thus violating the rectified Grant. They stated that her claim that it would be illegal for a wife to forfeit and transfer her pension rights to the deceased's children was an afterthought conceived in bad faith which showed her pretentious nature driven by malice and fraud.
 8. They were categorical that the pension proceeds were contested as they were of a substantial value in the sum of Kshs 19,000,000/=. They asserted that it was only fair and just for the 1st Petitioner to honour her initial position and release the pension proceeds to them as stipulated in the rectified Grant as failure to do so would maintain the clause that disinherits them which amounted to legal fraud. They pointed out that if the court found it unjust to compel the release of the Pension proceeds then it should rectify the grant and remove the clause that disinherited them as that will allow them inherit from her after her demise. They asserted that inclusion of the entire clause was not only foreign to the Law of Succession Act but also unconstitutional.
 9. On 30th August 2023, the 1st Petitioner swore a Replying Affidavit in opposition to the 2nd and 3rd Petitioner's Summons. The same was filed on 1st September 2023.
 10. She averred that the 2nd and 3rd Petitioners' Summons were misconceived and unmerited and ought to be dismissed. She stated that no basis had been laid as regards the prayer seeking to cross-examine her as the same had not met the established criteria for cross-examination of a deponent and was only meant to intimidate her to refrain from opposing the application herein and given that the affidavit on which the cross-examination was being sought had not been controverted.
 11. She further stated that after issuance of the Grant, she authorized the 2nd and 3rd Petitioners to assemble all assets of the deceased and identify the respective beneficiaries for purposes of distribution and confirmation, but that to her surprise, the 2nd and 3rd Petitioners and other children of the deceased excluded her from the list of distribution by not listing her as a beneficiary of the deceased's estate. She asserted that thereafter, one of the deceased's children one Marjorie Aganyanya sent her abusive messages claiming that she had failed to process the Widow's Pension Benefits.
 12. She was categorical that after several consultations, she acceded to the deceased's children's proposed mode of distribution but on condition that an item be included in the Grant barring them from laying any claim on her property and/or estate. She stated that as the same had not been included in the first Certificate of Confirmation of Grant, they had to apply for rectification of the same and the said Grant was rectified to include the same clause as Schedule "C".
 13. She further stated that vide letter dated 7th November 2022, she wrote to the Director Pensions expressing her desire to cede the deceased's pension and that instead of the same being paid on a monthly basis to her, a consolidated five (5) year lumpsum be paid with a view to distributing the same to the deceased's natural children. She denied the 2nd and 3rd Petitioners' averments that she had tasked them with following up on the Widow's Pension Benefits with the Director, Pension.



14. She was categorical that in response to her said letter, she received two (2) letters from the Ministry of Finance, Pension Department, one dated 22nd May 2023 and the other dated 29th May 2023 stating the basis upon which the deceased's pension would be payable upon her as the deceased's widow. She invoked Section 13 and 17 of the [Pensions Act](#) which provided that the deceased's pension was not assignable and did not form part of the deceased's estate respectively.
15. She pointed out that it was for the said reasons that she deponed Affidavit dated 11th July 2023 and filed on 14th July 2023 alluding to the revelations made to her by the Director, Pension and that which had not been controverted by the 2nd and 3rd Petitioners. It was her contention that her disclosure to court was what spurred the filing of the Summons herein.
16. It was her case that the deceased's estate had fully been distributed according to the rectified Certificate of Confirmation of Grant and that there was nothing left in the estate and the matter ought to have been closed and she be discharged as an Administrator of the estate. She denied the allegations of fraud on her part and stated that it was the deceased's children who were dishonest in coming back to claim from her after they had fully distributed the deceased's assets within themselves and renounced their interests in her estate.
17. She denied all the other averments made by the 2nd and 3rd Petitioners and urged the court to dismiss the Summons herein and allow her cross application to the same.
18. On 25th March 2024, the 2nd and 3rd Petitioners swore a Further Affidavit in opposition to the 1st Petitioner's Replying Affidavit. The same was filed on 29th May 2024. They reiterated their averments in their supporting affidavit to the Summons and denied the 1st Petitioner's averments.
19. The 2nd and 3rd Petitioners' Written Submissions were dated 25th March 2024 and filed on 28th March 2024. The 1st Petitioner filed two (2) sets of Written Submissions. Her first Written Submissions were dated 12th February 2024 and filed on 14th February 2024 while her Supplementary Submissions were dated 11th April and filed on 12th April 2024.
20. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

21. Right from the onset, this court noted that this being a family cause, the parties herein were emotive in expressing their grievances thus the affidavits were lengthy and broad but in the interest of justice the court considered them as they were but only sieved that which was important in addressing the issues before it.
22. The 2nd and 3rd Petitioners submitted despite being aware that she was entitled to the deceased's pension as the widow, she waived her right and surrendered the same to the deceased's children.
23. They placed reliance on the cases of [Serah Njeri Mwobi vs John Kimani Njoroge](#) [2013]eKLR and [Penina Wothaya Wachira vs Kenya Methodist University](#)[2018]eKLR where the common thread was that the doctrine of estoppel operated as a principle of law which precluded a person from asserting something contrary to what was implied by a previous action or statement of that person.
24. They were emphatic that in this case, estoppel by record and estoppel by conduct applied since the beneficiaries were not aware of the provisions of Section 13 and 17 of the [Pensions Act](#) Cap 189 (Laws of Kenya) and as such they had believed the 1st Petitioner's averments in her affidavits, her affirmations in court in August 2023 and her general conduct. In this regard, they relied on the case [Penina Wothaya Wachira vs Kenya Methodist University](#) (*Supra*) where it was held that a party seeking to raise estoppel



- had to make out a clear case and show that it would be unconscionable, unethical and/or unreasonable for the promisor to go back on their promise.
25. They were categorical that payment of said pension benefits to the 1st Petitioner would cut off the beneficiaries from her inheritance as step children. They contended that they would suffer detriment as they had also given up their right under Section 60 (sic) of the Law of Succession Act to inherit as step children which was their right in law given that the 1st Petitioner had no biological children of her own.
 26. They invoked Sections 13 and 17 of the Pensions Act and asserted that she was aware that she had to process the same which included receiving the monies on a monthly basis and remitting it to the beneficiaries and that nothing in law dictated how she would use the money once it was in her account. They argued therefore that that was not illegal as she had tried to lead the court to believe.
 27. They further cited the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR where it was held that a waiver could arise where a person had pursued such a course of conduct as to evince an intention to waive his right or where his conduct was inconsistent with any other intention than to waive it, thus, it may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other had waived his right.
 28. They urged this court to uphold the Grant as it was and compel the 1st Petitioner to remit the Pension benefits to the natural children of the deceased. , but that if the court would be inclined to grant the orders sought by the 1st Petitioner, then the natural children will have the right to inherit as step children of the 1st Petitioner. They further urged the court to allow their application and dismiss the 1st Petitioner's cross application with costs.
 29. On her part, the 1st Petitioner submitted that she was informed by the Director of the Pensions that pension benefits could not be paid in lumpsum and the only dependants eligible to benefit from the fund were the widow and children below the age of twenty one (21) years. She reiterated that Section 17(2)(b)(i) of the Pensions Act indicated that a dependant's pension would not be paid to any child above twenty one (21) years old unless they were still receiving full time education in a recognised institution.
 30. It was her case that the natural children of the deceased were all above the age of twenty-one (21) years and hence they did not qualify to be paid the dependant's pension. She asserted that since Section 13 of the Act was explicit that pension was not assignable, it, therefore followed that any of her averments purporting not to assign the widow's pension benefits and causing the same to be distributed in this succession proceedings would offend the said Section and Section 17 of the Pensions Act.
 31. She explained that the said information having been brought to light, was what informed her filing her application seeking to have the grant rectified to delete part xxii being widow's pension benefits erroneously described in the said rectified grant as widow's pension/gratuity did not form part of the free property of the deceased's estate and was therefore not capable of distribution amongst the beneficiaries in these proceedings as was held in the case of G.A.A.M & Another vs M.O.A.O[2016] eKLR.
 32. She invoked Section 5 and 13 of the Pensions Act and contended that Section 17(1) of the said Act provided that a dependant's pension was paid to the widow or the children of the deceased's officer for a period of five (5) years following his death but that Section 17(2)(a) of the said Pensions Act further stated that the dependant's pension would be paid to the widow for as long as she remained alive and did not marry. She was categorical that she was the legitimate/lawful beneficiary of the widow's pension benefits.



33. She also cited the case of *Serab Njeri Mwobi vs John Kimani Njoroge* (*Supra*) amongst other cases and argued that the doctrine of estoppel was not applicable to the proceedings herein and that inviting the court to apply the same would be tantamount to inviting it to override clear mandatory provisions of a statute. She further contended that said doctrine of estoppel was an equitable principle and as equity follows the law, the 2nd and 3rd Petitioners were precluded from the said doctrine to assert an illegality which was prohibited by clear provisions of the *Pensions Act*.
34. Notably, it was not in dispute that the 1st Petitioner was the deceased's wife. What was in dispute was whether she was entitled to the deceased's Pension proceeds to the exclusion of the 2nd and 3rd Petitioners and other beneficiaries and whether or not it was lawful to disinherit the deceased's children from inheriting from her.
35. Section 13 of the *Pensions Act* Cap 189 (Laws of Kenya) provides as follows:
- “A pension, gratuity or other allowance granted under this Act shall not be assignable or transferable except for the purposes of satisfying—
- a. a debt due to the Government; or
 - b. an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted, and shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the Government.”
36. Section 17 of the said *Pensions Act* further provides that:-
1. Subject to the other provisions of this Act—
 - a. where an officer who has had ten or more years' service dies after he has retired from the service of the Government having been granted a pension under this Act, there shall continue to be paid a dependants' pension, on the terms and subject to the conditions set out in subsection (2), to the widow or the children of the officer for a period of five years next following the date of the officer's death, at the rate of the officer's pension at the date of his death;
 - b. where a pensionable officer who has served the Government for ten or more years dies while in the service, the President may grant to the widow or the children of the officer, in addition to any grant made under Section 18, a dependants' pension, on the terms and subject to the conditions set out in subsection (2), for a period of five years next following the date of the officer's death at a rate not exceeding the amount of any pension that could have been granted to the officer if he had retired on medical grounds on the date of his death:

Provided that in the event of a widow to whom a dependants' pension has been granted under the provisions of this subsection dying or otherwise ceasing to be entitled to the pension, the child or children who are entitled, in accordance with the terms and conditions set out in subsection (2), to a dependants' pension shall be entitled in accordance with those terms and conditions to receive the dependants' pension for the remainder of the period of five years from the officer's death which is still outstanding at



the date on which the widow dies or otherwise ceases to be entitled to the dependants' pension.

For the purposes of subsection (1), a dependants' pension shall be paid on the following terms and subject to the following conditions-

- (a) if the deceased officer leaves a widow, whether or not he also leaves any children, the widow shall for so long as she is alive and remains unmarried be entitled to receive the whole of the dependants' allowance at the appropriate rate provided for under subsection (1);
- (b) if the deceased officer does not leave a widow or if within the period of five years during which the dependants' pension is payable under this section the deceased's widow dies or remarries, any child or children of the deceased who is or are entitled at the appropriate date to receive the dependants' pension shall be entitled to receive (and if more than one child, in equal shares) the dependants' pension at the appropriate rate provided for under subsection (1):

Provided that—

- (i) a dependants' pension or a share thereof shall not be payable under this subsection at any time to any child who has attained the age of twenty-one years unless, and only during the time that, the child is receiving full-time education at a university, college, school or other educational establishment which is approved by the President for the purposes of this section; (Emphasis court)

- 38. Based on the above Sections, Pensions, gratuity and death benefits are subject to legislation. Pensions, gratuity and death benefits for civil servants are governed by the *Pensions Act* Cap 189(Laws of Kenya) and not by the *Law of Succession Act* as such funds did not form part of the estate of the deceased as was also held in the case of *Re Estate of Stanley Paul Buliba (Deceased)*[2023] KEHC 2702 (KLR).
- 39. The widow had exclusive entitlement. The deceased's children could only access the pension in the event she died or remarried.
- 40. In the premises foregoing, this court found that the 1st Petitioner herein was entitled to inherit the deceased's pension proceeds as she was the lawful surviving wife of the deceased and the deceased's children were above twenty-one (21) years of age.
- 41. This court had due regard to the case of *Henry Muthee Kathurima vs Commissioner of Lands & Another* [2015] eKLR where it was held that estoppel could not override constitutional provisions and express statutory procedures.
- 42. Although, the 1st Petitioner had sworn affidavits surrendering her rights to inherit from the deceased's estate, her rights under the *Constitution* of Kenya, 2010, the *Law of Succession Act*, the *Pensions Act* and other statutory provisions were still intact. This court thus agreed with her that the doctrine of estoppel was not applicable in the circumstances of this case.
- 43. As the 2nd and 3rd Petitioners could not approbate and reprobate on the express waivers they both gave to renounce their interest in the deceased's estate, they were similarly not estopped from seeking intervention to restate their rights to inherit the deceased's estate in the unfortunate event of the 1st



Petitioner's demise. Indeed, Schedule C of the Certificate of Confirmation had disinherited them contrary to the provisions of the law.

44. Section 29 of the [Law of Succession Act](#) defines who a dependant is. It reads as follows:

“For the purposes of this Part, “dependant” means:-

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

45. Having said so, this court had due regard to the case of [Gilbert Otieno Okute vs Moses Odera Onditi](#)[2013]eKLR the Court of Appeal considered the question, of whether the step son had the right to inherit held that as the respondent's son was the son of the husband (deceased) of the deceased therein, he had a right to inherit too as a step son as per Section 29 of the [Law of Succession Act](#).

46. In the circumstances, it was the court's considered view that the deceased's children herein were beneficiaries to the estate of the 1st Petitioner in the event of her demise and were entitled to inherit her estate bearing in mind the degree of consanguinity.

47. Rectification of grants is provided for in Section 74 of the [Law of Succession Act](#) and Rule 43(1) of the [Probate and Administration Rules](#).

48. Section 74 of the Law of Succession provides as follows:

“Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

49. Rule 43(1) of the [Probate and Administration Rules](#) provides that:-

“Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.”

50. From the language of Section 74 of the [Law of Succession Act](#) and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation was limited to errors in names and descriptions, or in setting forth the time and place of the deceased's death as was held in the case of [In the matter of the estate of Hasalon Mwangi Kabero](#) [2013] eKLR or the purpose in a limited grant. Such other minor errors in that genre could also be rectified.



51. As the entries the Petitioner wanted rectified did not fall under the provisions of Section 74 of the Law of Succession, to progress this matter, this court found and held that it could proceed to revoke the Grant of Letters of Administration Intestate under the provisions of 76 of the Law of Succession Act.
52. The said Section 76 of the Law of Succession states that:-
- “A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion (emphasis court) that the grant has become useless and inoperative through subsequent circumstances.”
53. Turning to the issue of cross-examination of the 1st Petitioner in respect of her Affidavit that she swore on 11th July 2023, the 1st Petitioner argued that the 2nd and 3rd Petitioner did not lay the basis for the order for cross examination.
54. This court noted that a party could seek an order for cross-examination of a deponent of an affidavit. The rule conferred on a trial court discretion to order attendance of a deponent of an affidavit for cross-examination as was provided in Order 19 of the Civil Procedure Rules, 2010.
55. Order 19 of the Civil Procedure Rules provides that:-
- “1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:
- Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.
- 2.
- (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent (emphasis court).
- (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”
56. However, just like any other discretion, the discretion to order cross-examination had to be exercised judicially, and only in cases where it would enhance the course of justice. It was not a matter of course and a party who applied for the same had to lay a basis for it as was held in several cases amongst them the case of GGR vs HPS [2012] eKLR.
57. Although, the 2nd and 3rd Petitioners had alleged fraud on the part of the 1st Petitioner, they did not demonstrate that to this court. Bearing all these in mind, it was this court’s view that there was no basis for cross-examining the 1st Petitioner herein.



Disposition

58. For the forgoing reasons, the upshot of this court's decision was that the 2nd and 3rd Petitioner's Summons application dated and filed on 28th July 2023 was partly merited as far as Prayer No (3) on the issue of inheriting from the 1st Petitioner only was concerned. The effect of this is that the substantive part of the Prayer No (3) be and is hereby allowed while Prayers Nos (2), (4) and (5) be and are hereby dismissed.
59. The Rectified Certificate of Grant dated 27th October 2022 be and is hereby revoked forthwith to delete and/or omit xxii Pension/ Gratuity from the assets to be distributed to the deceased's children and Schedule C in its entirety.
60. It is hereby directed that a fresh Certificate of Confirmation of Grant reflecting the changes be issued forthwith.
61. As this was an emotive family cause, this court deemed it fit not to award costs to any party so as to preserve the family ties. Each party will therefore bear its own costs.
62. Matter to be mentioned on 10th March 2025 to confirm compliance with Section 83(g) of the [Law of Succession](#) Cap 160 (Laws of Kenya) and/or for further orders and/or directions.
63. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

