



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 6 OF 2001

IN THE MATTER OF THE ESTATE OF THE LATE GUYA ROBERT OTIENO

BETHA AWUOR GUYA.....BENEFICIARY/APPLICANT

VERSUS

SILAS OTIENO OYARO.....PETITIONER/1ST RESPONDENT

MARREN ATIENO GUYA...BENEFICIARY/2ND RESPONDENT

RULING

The application dated 5th May 2021 was brought by **BETHA AWUOR GUYA** pursuant to the provisions of **Rule 73** of the **Probate and Administration Rules**.

1. The Applicant asked the Court to direct the **HUMAN RESOURCE MANAGEMENT & DEVELOPMENT OFFICER** of the Judiciary of Kenya to release to her, some money from the **GRATUITY** of the deceased, **ROBERT OTIENO GUYA**.
2. Specifically, the Applicant requested that some money be released to her for the purposes of payment of school fees and related expenses, being School Transport, School Catering and Hostel.
3. It is common ground that Robert Otiemo Guya used to be an employee of the Judiciary. He died on 25th December 2020, whilst still in service.
4. It is further common ground that the deceased was survived by two families, whose particulars are as follows;

1ST HOUSE

1. Wife – Marren Atieno Guya
2. Ruphine Auma Guya – Daughter
3. Wycliffe Omondi Guya – Son
4. Cynthia Awino Guya – Daughter
5. Faith Lilian Guya - Daughter

2ND HOUSE

1. Wife – Betha Awuor
2. Leila Dorin Anyango - Daughter

3. Bob Koffi Annan – Son

4. Queen Esther Christine – Daughter

5. Chloe Blessings – Daughter

5. All the children of the 1st house are adults, whose ages range between 34 and 26. On the other hand, the ages of the children of the 2nd house ranges from 18 to 1.

6. The Applicant sought payment from the gratuity, in order to enable her pay school fees for her children. The Applicant moved to Court after she was informed that the Human Resource Management & Development Officer of the Judiciary had made a decision to withhold the benefits due to the Estate of Mr. Guya, until the Succession proceedings were finalized.

7. The Judiciary indicated that the decision to withhold the gratuity was informed by the fact that the 1st wife had requested that it be so.

8. If the gratuity was withheld until the finalization of the proceedings on succession, that would be construed as a tacit acknowledgement that gratuity was a part of the free estate of the deceased.

9. Wycliffe Omondi Guya filed a Replying Affidavit on 31st May 2021. As he stated on oath, he is not only the eldest son of Mama Marren Atieno, but he also had her authority to swear the affidavit on her behalf.

10. At paragraph 24 of his affidavit, Wycliffe said;

“THAT the money the applicant wants to access is the subject matter of a nomination and hence should be dealt with by the rules of the scheme, which have not been presented.”

11. It would therefore follow that because the gratuity was the subject matter of nomination, under the rules governing the applicable scheme, the same ought to be dealt with in compliance with the relevant rules.

12. To the extent that the gratuity is to be dealt with in accordance with rules prescribed by the applicable scheme, I hold the considered view, albeit on a prima facie basis, that the gratuity would not form part of the free estate of the deceased.

13. In this case there is a Nomination Form, in which the Applicant has been nominated as the Next of Kin.

14. However, the Respondents have vigorously disputed the authenticity of the said Nomination Form. They pointed out that the said Form was allegedly signed 5 days prior to the demise of Robert.

15. The Respondents were of the view that the alleged nomination was done under undue influence.

16. In any event, as the Respondents said, the Rules of the Scheme were not before the Court.

17. Ms Muhalia, the learned advocate for the Respondents, submitted that before it can be decided how much each child should receive for his or her maintenance, inquiries must be conducted.

18. In support of their submissions, the Respondents placed reliance on the case of **MW Vs PNM & ANOTHER, HIGH COURT**

SUCCESSION CAUSE NO. 580 OF 2014.

19. It is to be noted that in that case the learned Judge made the following observations in her ruling, which was on an application for, inter alia, payment of school fees;

“It is not entirely correct to say that the Respondents have disinherited the minor and the applicant. Although the grant is up for revocation, it shows that the respondents did provide for the minor, in their own way, by allocating her a plot in Mavoko, and half of the proceeds of the deceased’s gratuity from her employer.”

20. The determination made in that case was at a totally different stage of the process of succession, as compared to the case before me.

21. Secondly, and in any event, the minor had been provided with half of the proceeds of the deceased’s gratuity from her employer.

22. Even if it were assumed that the Nomination Form was invalid, and that the gratuity was part of the estate of the deceased, there is no doubt that the Applicant and her children would be entitled to about on-half of the gratuity, at worst.

23. Therefore, if the Judiciary was to pay out a portion of the gratuity, while the succession cause was still ongoing, the Respondents would

not be prejudiced at all.

24. Of course, if the gratuity was a part of the estate of the deceased, the most ideal time when it ought to have been distributed would be at the stage when the Court was granting confirmation of the grant.

25. However, the Court is enjoined, by law, to always give priority to the best interests of children whenever making a determination that impacts any such children.

26. **Article 53 (2) of the Constitution** states that a child's best interests are of paramount importance in every matter concerning the child.

27. I hold the considered view that the best interests of the children who are attending school can only be realized if their fees and other school-related expenses are paid.

28. It would be completely against the interests of any such children, to block the source from which their fees could be payable, just because the court had not yet reached the stage where the grant could be confirmed.

29. It is not lost on the Court that when concluding her submissions, the learned advocate for the Respondents submitted thus;

“If money is released, each house should be given the same.”

30. I understand that to mean that the Respondents had changed their position, which initially was that the gratuity could only be paid out upon finalization of the process of succession.

31. It strikes me that the Respondents' position was not anchored on a firm legal position, but more probably upon the view that if the 2nd House were to be given anything now, the 1st House should also be given an equivalent sum.

32. However, the Respondents have not demonstrated to the Court that any of them was in need of financial support to pay for school fees and incidentals thereto. The Court cannot therefore simply order that if some payments were being made out of the gratuity, for use in paying fees to the children of the 2nd house, some payments should therefore also be made to the 1st house.

33. In my considered view, the Applicant has demonstrated that the deceased used to meet the costs of education for the Applicant's children.

34. Although parental responsibility is supposed to be shared between the parents, the Applicant's income is completely insufficient for purposes of paying school fees and related expenses.

35. Therefore, I find that justice demands that the fees payable for the Applicant's children be paid out of the Gratuity, so as to sustain the children in school.

36. It would be a negation of the children's fundamental rights, and a disregard of the constitutional mandate, to let the children drop out of school for non-payment of fees, just because the process of succession had not yet been finalized.

37. Nonetheless, the Applicant and her children must bear in mind the possibility that the Court might ultimately hold that gratuity was to be shared between the two households. If that were to happen, the Court would, (in determining the manner in which the estate was to be distributed), have to take into account any payments which will already have been made out.

38. In order to ensure utmost transparency, I direct that any payments in respect of the children's fees and related expenses shall be paid directly to the schools or institutions which provide the relevant services.

39. I further order that the Applicant shall get the service providers to give to the Judiciary's Human Resource Management & Development Officer, the relevant Fee Structures or invoices.

40. In order to ensure that the assets of the estate are safeguarded, so that the same may benefit all the beneficiaries, I direct that the parties herein do expedite the process of succession. In order to give effect to this direction, the Court will give further directions shortly after delivering this ruling. However, before such further directions are given, the parties will be accorded an opportunity to provide their proposals on how best to fast track the finalization of the process.

41. In allowing money to be paid out of the gratuity when the process of succession was still ongoing, I am confident that none of the beneficiaries will be prejudiced. My said view is informed by the affidavit sworn by the Objector, Wycliffe Omondi Guya, on 21st April 2021. At **paragraph 6** of the said affidavit he depones that the estimated value of the assets comprising the estate of the deceased is Kshs 21 Million. Therefore, provided that the substantive process of succession was finalized expeditiously, every beneficiary should be able to get an appropriate share, even in the event that the court were to find the Will to be invalid.

42. I now allow the application dated 5th May 2021, save only that the money will be paid directly, by the Human Resource Management & Development Officer of the Judiciary of Kenya to the specified service providers: the only exception being the sum of Kshs 100,000/=

which is for the welfare and upkeep of Chloe Blessings Guya, which will be paid to the Applicant.

43. Although the application is successful, I order each party to bear his or her own costs. I so order because the matter before me is about a family that is trying to find a reasonable resolution to issues which have arisen following the demise of their loved one.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE