



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
SUCCESSION CAUSE NO. 361 of 2014
IN THE MATTER OF THE ESTATE OF JKN

BETWEEN

DK (suing on behalf of GMK and AMK).....APPLICANT

VERSUS

MITCHELL COTTS FREIGHT KENYA LIMITED

ITSL COMPANY LIMITED.....DEFENDANTS/RESPONDENTS

RULING

1. The deceased herein died intestate on 6th June, 2014 at Pandya Memorial Hospital Mombasa. According to form P & A of the petition for grant of letters administration intestate lodged on 27th August, 2014 by DK and MWN wife and brother to the deceased respectively, the deceased was survived by the following;

(1) DK, 31 years (widow)

(2) AMK 12 years (son)

(3) GMK 6 years (son)

2. The following assets valued at kshs11 million were listed as comprising the estate;

(a) Land in Malindi –[Particulars Withheld] area measuring 108 acres

(b)Motor vehicle Registration No. KAQ xxx

(c)Motor vehicle Registration No KBN xxx

(d)Developed plot at [Particulars Withheld] area measuring 70X100 ft

(e)Undeveloped [Particulars Withheld] area (adjoining the other [Particulars Withheld] plot)

(f) [Particulars Withheld] Bank A/C No. kshs 2,200,300

(g)Motor vehicle Registration No. KBA xxx

(h) 29 herds of cattle

(i) 13 goats

(j) Ancestral land in [Particulars Withheld] (to be allocated)

(k) Shares at [Particulars Withheld] Sacco.

3. A grant of letters of administration intestate was made on 30th September, 2015 and issued on 12th October, 2015 jointly to the applicants. Subsequently, on 18th November, 2015 the petitioners moved to this court under a notice of motion dated 17th November, 2020 seeking orders against [Particulars Withheld] Kenya Ltd and [Particulars Withheld] company limited as follows;

(1) Spent;

(2) Pending the hearing and determination of this application, a temporary injunction do issue to restrain the 2nd defendant, their servants, /workmen, agents, heirs, personal representative, or otherwise Whosoever from dealing with the shares which were put in trust for the benefit of the beneficiaries herein.

(3) Pending the hearing and determination of this suit, an injunction do issue to restrain the 1st defendant, its servants, workers agents, heirs, personal representative or otherwise whosoever from dealing with or issuing any directions whosoever either directly or indirectly as to the engagement of the funds and the purposes for which the funds are to be used for.

(4) An order be issued directing the 2nd defendant to release the funds which were put in trust for the beneficiaries to the plaintiff herein forthwith for purposes of enabling the plaintiff to put the funds into use in accordance with the wishes of the deceased to whom the funds were to accrue as being death benefits and for purposes of ensuring that there is compliance with the wishes of the deceased.

(5) That costs of this application to be borne by the defendant herein.

4. The application is based on grounds that the respondents have defrauded beneficiaries herein sums to the tune of Ksh 5,208,804 which monies were due to the beneficiaries as death benefits according to the deceased for the benefit of his children namely; MK and GMK. That unless the said money is released to the applicants (beneficiaries), the same will be squandered to the disadvantage of the intended beneficiaries.

5. When the court considered the ex parte application, a temporary order of injunction was issued on 19th November, 2020 pending hearing and determination of the application.

6. In response, the respondents filed a notice of Preliminary Objection dated 3rd December, 2020 and filed on 7th December, 2020 stating that;

(1) The notice of motion application is fatally and incurably defective in law and as such cannot stand or be ventilated before this Honourable court.

(2) The Honourable court lacks jurisdiction to hear or entertain the Notice of Motion application dated 17th November, 2020 in its entirety for the reasons that;

(a) the retirement benefits subject of the application herein do not form part of the estate of the deceased member hence the filing of the application herein in this honorable court and the orders sought therein offends the provisions of Section 36A of the Retirement Benefits Act.

(b) the procedure and fora for determination of complaints and/or disputes relating to decisions of trustees on Retirement Benefits are provided under Section 46 and 48 of the Retirement Benefits Act.

(3) The Notice of Motion application dated 17th November, 2020 is bad in law, frivolous, vexatious and otherwise an abuse of the court process and should be dismissed and or struck out with costs.

7. As a response to the Preliminary Objection, the applicant filed eight grounds of objection dated 10th February, 2021 stating that;

(1) The Preliminary Objection is misconceived and bad in law as a Preliminary Objection cannot be raised where both facts and law have to be ascertained.

(2) That the allegations made therein do not solve the dispute once and for all as there are factual issues involved on the validity of the trustee relationship between the parties.

(3) That the high court has unlimited jurisdiction both in civil and criminal cases under Article 165 (3) and (4) of the Constitution and equally under Section 47 of the Law of Succession Act which donates the high court unlimited jurisdiction to deal with succession matters.

(4) That the trustees Act confers jurisdiction to the high court over determination and or disputes involving trustee related actions.

(5) That by telling the court that the defendant's scheme has its own rules does not preclude the jurisdiction of the court to

call upon the defendants to find out how much is due to the plaintiff.

(6) That if the defendants' position is that it does not hold any money, then the matter can proceed to hearing and determination can be made.

(7) That Section 26 of the Law of Succession Act entitles dependants to reasonable provision to which the high court has jurisdiction to determine.

(8) That the defendant's Preliminary Objection is frivolous, vexatious and an abuse of the process of the court and the same ought to be dismissed.

8. On 10th March, 2021, the court with the consent of both parties directed for the preliminary Objection be canvassed first before the application. During the hearing, parties' respective counsel orally submitted. Both counsel literally adopted their grounds of opposition/objection. Mr Ngaine for the respondents/objectors submitted that the money being sought by the plaintiff /applicant does not belong to the estate. That the money is a benefit under Section 35 of the Retirement Benefits Act hence the court has no power to arbitrate over the matter. Mr. Onduso reiterated his grounds of objection contending that the preliminary objection does not raise pure points of law.

9. I have considered the application herein, objection thereof and the response thereto. I have also considered counsel's oral submissions. The only issue that emerge from their respective counter objections cum arguments is whether the respondents have met the threshold to uphold the preliminary objection. There is no dispute that the money the subject of the application for injunction is being held by the respondents being the deceased's employer (1st respondents) as the settlor and the second respondent as the trustee for the benefit of the deceased's son Gillians Munene Kiilu

10. What then entails a valid Preliminary Objection? In the celebrated case of **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Limited (1969) E A 696** the court held that;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

11. In the instant case, the respondents are claiming that the court has no jurisdiction to determine benefits accruing under the Retirement Benefits Act and in particular Section 36 A of the Retirement Benefits Act. Indeed, this is a pure point of law which if upheld will fully dispose the application for injunction.

12. Having held as above, this court is left with the critical question whether it has jurisdiction to determine benefits accruing under the Retirement Benefits Act. In the case of **Owners of the Motor Vessel “Lillians “S” Vs Caltex Oil (Kenya) Limited (1989)eKLR** the court held that jurisdiction is everything and without it a court will down its tools and move no further step.

13. Indeed, jurisdiction is a creature of the Constitution or written law hence a court must derive jurisdiction from either. While addressing the issue of jurisdiction, the Supreme Court in the case of **Samuel Kamau Macharia and another Vs KCB and 2 others (2012) e KLR** had this to say;

“A Court's jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law”

14. I am alive to the fact that a high court has unlimited jurisdiction under Article 165 of the Constitution. However, this wide jurisdiction should not be used to the detriment of other written laws which confers jurisdiction to other bodies or institutions so as not to limit the right of appeal as one mode of access to justice by exhausting all levels of judicial process. To buttress this point, I am guided by the holding in the case of the **Speaker of the National Assembly Vs Karume Civil application No. 91/1992(1992) eKLR** where the court stated that where there is a clear procedure provided in dispute resolution or redress of any particular grievance, such procedure must be strictly followed.

15. There is no dispute that the deceased died intestate and left some terminal benefits with the 1st respondent. Pensions and related retirement benefits are governed by the Retirement Benefits Act, Cap 197 laws of Kenya. Section 36 A of the said Act provides that;

“Upon the death of a member of a scheme the benefit of a scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules”

16. Regulation 23 of the Retirements Benefits (occupations Retirement Benefits Schemes) Regulations 2000 provides that;

“the scheme rule shall provide that upon the death of a member, the benefits payable from the scheme shall be paid to the nominated beneficiary and if the deceased member had not named the beneficiary then the trustee shall exercise their discretion in the distribution of the benefits to the dependants of the deceased member, provided that the trustee may refuse to pay the nominated beneficiary and the reasons for such refusal shall be recorded.”

17. In this case, the beneficiary is GMK (son-minor). Consequently, a trust was created between the deceased's employer and [Particulars

Withheld] trust (Trustee) on 9th June, 2015 in which DK (Widow), MN and MK signed, confirming that the accrued benefits were to be used to meet education, medical, school fees expenses and or any other activities that will contribute to the intellectual advancement of GMK the youngest son to the deceased until he attains the age of 25 years and incase of any balance the same be released to him (beneficiary) (See annexure JKN-2 in support of the injunction application)

18. It was a term of the grant letter (trust), that incase of any dispute, the same would be resolved amicably and if not through an arbitrator whose decision would be final. In her affidavit in support of injunction application, the applicant claimed that they were duped to sign the grant letter (Trust Deed)

19. It is trite that where the Retirement Benefits Act provides a procedure for payment of terminal benefits and the dispute resolution mechanism, parties must adhere to and exhaust that procedure or process before seeking court's intervention. See in **Re estate of Carolyn Acheng Wagah (deceased) 2015) e KLR** where the court held that;

“by virtue of Section 36 A of the Retirement Benefits scheme, the benefits accruing to the said children do not form part of the estate of the deceased, and should not be the subject to these proceedings. The probate court has no jurisdiction over such benefits and it cannot distribute it to them”.

20. See also **Jimmy R. Kavilu and 16 Others Vs Stanbic Bank Kenya Ltd and 7 Others (2019) e KLR** where the court held that it had no jurisdiction to determine matters concerning pension schemes and trustees thereof unless brought under judicial review court contesting the decision of the Retirement benefits Tribunal. Similar emphasis was held by **Muchelule J in Joseph Kimani Kamau Vs Sundeep K Raichura and 5 Others (sued as trustees of Alexander Forbes Retirement Fund (Provident Section 3) (2019) e KRL** in which the court held that any dispute between a party and the pensions fund should be dealt with under Section 46 (1) of the Act, by complaining to the executive officer of the authority and if not satisfied to the tribunal set under Section 47 of the Retirement benefits Act and thereafter to the high court for judicial review.

21. There is no doubt that the Retirement Benefits Act has elaborate provisions on how to deal with terminal benefits and management by trustees. The applicants are complaining that they had not understood what they were signing before the respondent. There is a legal mechanism provided in the grant letter (Trust Deed) which involves arbitration clause. Besides, the respondents are not parties to this succession hence orders to enjoin them as interested parties ought to have been sought first. Equally, this court is not seized of the jurisdiction to determine termination of a trustee relationship between parties in the first instance.

22. In a nut shell, and in view of the above legal analysis, I am inclined to agree with the respondents that this court is not properly seized of this matter as the applicants ought to exhaust the legal mechanism as provided under the Retirement Benefits Act before moving to the court. To that extent, the court does not need to hear the notice of motion dated 17th November, 2020 as it will arrive at the same conclusion. Accordingly, the Preliminary Objection herein is upheld and the Notice of Motion dated 17th November, 2020 struck out on the ground that it is bad in law. Technically therefore, the listing of the terminal benefits in the petition shall not form part of the estate.

23. Regarding costs, this is a family related issue hence each party shall bear own costs.

DATED, SIGNED DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF AUGUST, 2021

J. N. ONYIEGO

JUDGE