



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 354 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE PETER GILBERT

NJOROGE NG'ANG'A a.k.a. FAI OMAR AMARIO (Deceased)

MARSHA DEE AMARIO.....APPLICANT

MIKI NG'ANG'A NJOROGE.....1ST RESPONDENT

SHEENA EUSTON AMARIO.....2ND RESPONDENT

YURI GILBERT AMARIO.....3RD RESPONDENT

RULING

1. There are two issues for determination here;

i) *Whether the 1st administrator Miki Ng'ang'a Njoroge has any legal obligation to provide maintenance to the 2nd administrator/beneficiary applicant Marsha Dee Amario.*

ii) *Whether the firm of Robson Harris & Co. Advocates LLP appearing for Miki Ng'ang'a Njoroge ought to be disqualified from this matter on account of conflict of interest.*

2. The issues arise from two (2) applications filed by Marsha Dee Amario, one dated 7th June 2021 and the other dated 14th June 2021 respectively.

3. The application of 7th June 2021 seeking maintenance of the said Marsha Dee Amario was served on the other beneficiaries to the estate of the deceased. The same was not opposed by these other beneficiaries.

4. The grounds for the application dated 7th June 2021, are that she is a beneficiary of the estate, and a person living with disability due to “debilitating seizures she suffers from because of a brain condition which led to her undergoing major brain surgery in 2016, the medical costs of which were settled pursuant to orders of this court.”

5. That before his death, the deceased who is her father provided for all her upkeep and education. Due to her condition the applicant and the respondent settled on an agreement where he would provide her with Kshs. 134,000/= per month for her maintenance based on the reason that he solely runs Fai Amarello Limited, where he owns 10% of the company and the deceased's estate owns 90% of the company.

6. It is the applicant's position that the respondent has engaged in delay tactics in the distribution of the estate because for the last eleven (11) years he has been the sole beneficiary of the income from Fai Amarello Limited, and has never given any account of the what belongs to the estate of the deceased. That the respondent stopped her allowance when the applicant refused to cooperate towards a skewed distribution of the estate. That the respondent earns Kshs. 2 million per month from the company, yet he has stopped her allowance which is necessary to enable her pay rent, buy food, buy vital medicines to manage her seizures and fragile mental condition which requires both psychiatric and psychologist support.

7. It is not denied by the respondent Miki Ng'ang'a that he has been providing this allowance. He deposes in his Replying Affidavit sworn on 15th June 2021 that there has never been any arrangement for him to provide the Kshs. 134,000/= to the applicant. At the same time he deposes that he has “consistently provided to the maintenance provision and other primary requirements including and not limited to education needs, medical and rent” but due to the prevailing economic circumstances brought by the Covid pandemic he cannot sustain the

said provisions. He concedes to having made an allowance of Kshs. 28,000/= on 29th May 2021. He goes on to depone that the applicant is inviting the distribution of the estate without the participation of the other beneficiaries.

8. Parties filed written submissions, together with authorities in support of their rival positions which I have considered.

9. The applicant and the respondent are among the beneficiaries of the estate of Fai Omar Amario a.k.a. Peter Njoroge Ng'ang'a who died on 23rd May 2010.

10. It is also evident that the respondent is managing the only going concern of the estate with an income. It is apparent from his own papers is this income is not accounted for.

11. It is also evident from his own admission that he has been providing for the applicant with maintenance, paying for her education, medication and upkeep.

12. In the submissions filed on 19th August 2021, it is submitted for the applicant that **Sections 26, 27, 28 and 29 of the Law of Succession Act** support her provision, and she relied on the case of **JNK (deceased) [2017] EKLR** where the court upheld the position that the widow therein could be paid a monthly sum for maintenance *pendete lite*. The only issue was whether the sum was reasonable.

13. For the respondent it is argued that as a brother, and co beneficiary of the estate, he has no legal obligation to pay maintenance to the applicant and that there is no existing agreement that obligate him to provide maintenance for the applicant. That any maintenance provisions made to the applicant for the last ten (10) years was based solely on humanitarian, social family grounds and not any legal compulsion and could not form the basis for legal compulsion.

14. On this issue, it is not in dispute that the applicant and the respondent are children of the deceased, beneficiaries of his estate and co administrators. It is also not in dispute that the respondent is currently running Fai Amarillo Limited, in which he owns 10%, and the deceased 90%, and this is a going concern. He has not disputed the fact that he earns a salary of up to Kshs. 2 million per month from the company. He has not laid before the court any evidence of what he is doing with the 90% part of the deceased's estate's share of the income from that company. He has been providing for the applicant for the last ten (10) years, why is he stopping now?

15. What I note from his own pleadings, his affidavits and submissions by his counsel is that the respondent is conflicted; in one breath he denies ever having any arrangement with the applicant for maintenance and the next breath he says he has been providing for her for the last ten (10) years, and in the next breath, that there is no legal or any obligation on his part to provide for the applicant. What is clear though is that the respondent has not been providing for the applicant as a brother. The applicant is a dependant of the deceased, and the respondent, as one of the administrators holding the part of the estate that has an income, has been providing for the applicant not from his own pockets but from the pockets of the estate of the deceased. It is mischievous for him to begin to submit, as he has done, that as a brother to the applicant he has no legal obligation to provide, because nobody is asking him to do so as a brother, his obligation emanates from his running of 90% of the deceased's state in Fai Amarillo Limited and keeping the income to himself.

16. Pursuant to **Section 26, 27 of the Law of Succession Act**, the respondent has a legal duty to provide for the applicant. It is noteworthy that the rest of the beneficiaries, clearly aware of the applicant's situation have not raised any objections to her application, an indication that the prevailing situation where the respondent has been providing for the applicant does not prejudice the eventual distribution of the estate. In any event, at the point of distribution of the estate, all these will be brought to book to ensure that each beneficiary gets an equitable share.

17. On the 2nd issue, Mr. Wilberforce Akello denies vehemently in his affidavit sworn on 23rd August 2021 that the applicant has never been a client of the firm of Robson Harris & Company Advocates.

18. It is also submitted that it is not the place of courts to choose counsel for litigants. Counsel relied on **Dorothy Seyanoi Moschoni vs Andrew Stuart and Another [2014] eKLR** among other authorities.

19. For the applicant it is argued that where this is conflict of interest with respect to the representation of a former client, an advocate cannot continue to act in that matter. Reference is made to **SOPPEC 6 (Conflict of Interest) code off Standards of Professional Practice & Ethical Conduct 2017, Delphis Bank Limited vs Chatt & 6 Others [2005] IKLR**.

20. I did however find an in the annexures to the application, an email from the counsel for the respondent, Mr. Akello to Ms. Omamo counsel for the applicant which email was not disputed, where he clearly states that the applicant was their client (meaning Robson & Harris Advocates) before she became Ms. Omamo's client. The email is dated 19th May 2021 from wilberforceakello@robsonharris.com. It is addressed to Pearlyne Omamo and copied to Sheena Amario, Marsha Elior, Miki Njoroge, info@mirugi.co.ke Greg Karugo, Margaret Wamaitha. The subject of the email is, **Amario Family Resolution**. It makes reference to an earlier email, same date from Ms. Omamo. It states in part;

“3. The allegation of unpaid maintenance contained in your letter are baseless and lacks legal backing.

4. The matter cannot be resolved expeditiously through the aggressive litigation approach that you appear to fashion. Please trace the history of the matter and the court journey and be apprised (sic) accordingly. In any event you note that your present client was once our client as such primary family mediation should be the primary approach in this probate issue.” (emphasis is mine)

21. It is not in doubt that Mr. Akello is not being forthright in his affidavit and submission that the applicant is a stranger to the firm of

Robson Harris Advocates, yet he knew that that is not true. He cannot approbate and reprobate the same fact. He cannot in one setting say that the applicant was their former client and in the same breath that she has never provided instructions to the firm of Robson Harris.

22. The fact is he concedes that for over ten (10) years his client, Miki Njoroge has been providing for the applicant, until March 2021 when the provision stopped. He is privy to the agreement whether formal or informal, whether based on social humanitarian grounds, he is privy to the circumstances under which Miki Njoroge began to provide for the applicant, and he must be aware and privy to the circumstances that led to Miki Njoroge stopping the maintenance allowances for the applicant, and seeking legal counsel elsewhere. It is from these facts that I am led to the conclusion that Counsel is clearly conflicted with respect to this application. He ought not to have filed pleadings in opposition to his former client's application as it is evident he is clearly conflicted.

23. Should the firm of Robson Harris be removed from this matter? I have carefully considered that the firm appears for several other members of the family including Miki Njoroge, the respondent herein. Having the firm removed at this stage would prejudice other family members who are not parties to this particular application and who have not opposed the application. It may also slow down the progress made so far in the matter. Hence the tenable thing to do is to bar the firm from acting in matters that are in conflict with the applicant's issues.

24. In the upshot, I find that the respondent Miki Njoroge Ng'ang'a, as an administrator of the estate of the deceased running the going concern that is the Fai Amarillo Limited is obligated to provide maintenance for the applicant at Kshs. 134,000/= per month to continue with immediate effect. He is also hereby ordered to clear the arrears of the maintenance within three months hereof.

25. Considering the nature of the matter there are no orders as to costs.

Dated, Signed and Delivered via ZOOM this 25th Day of October 2021.

Mumbua T. Matheka

Judge

In the presence of:

Edna Court Assistant

Ms. Muisyo holding Brief for Mr. Ndegwa for 1st Admin

Ms. Kinuthia for Bernice Njeri

N/A for Ms. Omamo, Mr. Akello