



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 380 OF 2017

IN THE MATTER OF THE ESTATE OF JNG (DECEASED)

AND

IN THE MATTER OF SUMMONS FOR REMOVAL OF AN EXECUTOR

EMG.....1ST APPLICANT

SW.....2ND APPLICANT

VERSUS

NJOROGE REGERU MWAI MATHENGE

HON. GODFREY RIGATHI GACHAGUA.....1ST RESPONDENT/EXECUTORS

MUSYIMI & CO. ADVOCATES.....2ND RESPONDENT

RULING

1. Before me for determination is a summons application dated 14th June, 2021 as amended on 14th July, 2021 and brought under **section 76** of the **Law of Succession Act** (CAP 160) and **rules 44** and **73** of the **Probate and Administration Rules**. The application is centered on the issue of provision of school fees for two minors, who are beneficiaries of the estate of the deceased. The 1st Applicant is the mother and next friend of the minor AGN (name redacted on account of his being a minor) whereas the 2nd Applicant is the mother and next friend of the minor KGN (name redacted on account of his being a minor). The application is premised on the grounds on the face of it and upon the affidavits of EMG and SW, the 1st and 2nd Applicant respectively. Both affidavits were sworn on 14th July, 2021.

2. According to the Applicants, the subject minors are at risk of being removed from their respective schools owing to huge outstanding fee balances unless the court intervenes. That the Executors/Respondents have failed, refused and neglected to cater for the school fees of the minors since May, 2020.

3. On her part, the 1st Applicant stated that she had so far spent more than Kshs. 500,000/= on setting up the minor AGN for virtual classes which were incorporated at the onset of the Covid-19 pandemic. She gave a breakdown of the amount as follows:

- a. School fees: May 2020 to date at Kshs. 271,000/=
- b. Laptop at Kshs. 30,000/=
- c. Printer at Kshs. 40,000/=
- d. Internet Connectivity per month: May 2020 to date at Kshs. 65,000/=
- e. Other related costs at Kshs. 20,000/=
- f. Transport at Kshs. 80,000/=

4. The 1st Applicant asserted that due to the failure by the Executors to provide for her and the minor, she had taken up loans from both

friends and financial institutions in order to cater for the minor's education and other basic needs. She annexed copies of Statements of the Loan Accounts. She urged that vide a letter dated 31st March, 2020, the 2nd Respondent had indicated that the deceased's estate would continue to make payments to wit: housing approximated at Kshs. 45,000/= monthly, School fees of Kshs. 92,000/= per term and monthly upkeep of Kshs. 90,000/=. That she had however not received any sums of money since March 2020 thereby occasioning her financial agony. She further took issue with the proposed monthly upkeep stating that it was not enough to cater for the minor's needs. Therefore, that it was in the best interest of the minor that the court revises the monthly keep upwards to a sum of Kshs. 200,000/=.

5. The 1st Applicant averred that due to the failure of the Respondents to avail the funds as agreed, the minor AGN was at risk of being removed from school for failure to clear his school fees balance. This she said was despite the fact that **Article 53(1)(b)** of the **Constitution** states that every child has a right to basic education. She accused the Executors of neglecting the needs of the deceased's children contrary to their fiduciary duty to the estate. Further that the Executors had in certain instances favored the deceased's adult children who reside abroad whilst neglecting the deceased's school going children.

6. On her part, the 2nd Applicant also stated that the Executors had failed, refused and/or neglected to cater for the school fees of the minor known as KGN. She asserted that when the deceased was alive, he would cater for the minor's school fees in full urging that the minor was still in the same school as he was before the deceased's demise. She deposed that she had so far spent more than Kshs. 7,000,000/= towards the minor's school fees since the Executors had only undertaken to pay a sum of Kshs. 100,000/= when the total amount due was in fact Kshs. 640,000/= per term. That as of 31st March, 2021 the balance owed to [Particulars Withheld] School, which the minor attends, amounted to Kshs. 1,081,175.00/=.

7. The 2nd Applicant further stated that on 15th April, 2021, the [Particulars Withheld] School wrote to her informing her that the minor's report cards had been withheld as a result of non-payment of school fees. She urged that unless the school fees balance is settled, the minor was at risk of being removed from school, contrary to **Article 53(1)(b)** of the **Constitution** which provides that every child has a right to basic education.

8. It was the 2nd Applicant's averment that the Executors had also neglected to cater for the minor's accommodation to the standard the deceased did when he was alive. Therefore, that the monthly upkeep should be revised to a sum of Kshs. 200,000/= as the deceased provided in his lifetime, which sum would also cater for the minor's extracurricular activities.

9. The 2nd Applicant echoed the 1st Applicant's sentiments that the Executors had failed to honour their fiduciary duty owed to the estate and were giving preferential treatment to some beneficiaries to the detriment of others. Further that the Executors were not acting in the best interest of the estate as they had prioritized payment of their fees and neglected the needs of the beneficiaries. She singled out the Executor Njoroge Regeru as having paid himself fees in excess of Kshs. 16,000,000/=. On this basis, she urged the court to strip him of his executorial duties and appoint her as Executor in his place.

10. In opposition thereto, the 1st Executor Mwai Mathenge filed a replying affidavit sworn by himself on 28th July, 2021 in which he deposed that the summons application dated 14th June, 2021 was made in bad faith and premised on non-disclosure. Therefore, that it should be dismissed in its entirety with costs to the Respondents.

11. According to Mwai Mathenge, the Applicants had misled the court by failing to disclose the colossal benefits that had been conferred to the minors prior to March 2020. He delineated them as follows:

Benefits to minor AGN

- a. Prior to March 2020, a total sum of Kshs. 3,658,450/= in the form of school fees and monthly allowance of Kshs. 100,000/=.
- b. From September 2017 – March 2020: Kshs. 45,000/= monthly towards accommodation, with a total value of Kshs. 2,115,000/=.
- c. In March 2020, Kshs. 2,882,494/= being payment of gratuity proceeds from the County Government of Nyeri.

Benefits to minor KGN

- a. Prior to March, 2020 a total sum of Kshs. 3,550,000/= in the form of school fees.
- b. In March 2020, Kshs. 2,882,494/= being payment of gratuity proceeds from the County Government of Nyeri.

12. He urged that from September 2017 to date, the 1st Applicant had received a total of Kshs. 8,655,944/= in the form of monthly allowances, lump sum payments, school fees and accommodation. Further that the 2nd Applicant had on her part received a total of Kshs. 6,432,494/= in the form of monthly allowances, lump sum payments, school fees and accommodation. It was his view that the sum of Kshs. 2,882,494/= paid to each of the Applicants in March 2020 was therefore sufficient to cater for the needs of the minors, including their education, urging that it was the equivalent of a monthly payment of Kshs. 140,000/= over a duration of two (2) years.

13. The Executor asserted that the Applicants had been continuously appraised of developments in the estate including the contents of the Report of Executors which highlights not only the benefits paid out but also the challenges faced by the Estate. For instance, that one of the Estate companies owed a sum of about Kshs. 700,000,000/= to Co-operative Bank. Further that the Covid-19 pandemic had triggered the closure of Olive Gardens Hotel, one of the Estate's key sources of income. He urged that in spite of these challenges, the Executors had prioritized the minors AGN and KGN over the other beneficiaries, some of whom were yet to receive any amount from the estate.

14. He conceded that he and his co-executors had by a letter dated 31st March, 2020 informed the Advocates of the 1st Applicant that the estate would continue to cater for full housing and school fees. He asserted that the Estate had continued to provide full housing valued at Kshs. 45,000/=, but that it had not been possible to pay the minor's school fees owing to the closure of Olive Gardens Hotel in April 2020 coupled with other difficulties faced by the Estate. He denied the averment by the 1st Applicant that the letter had made a commitment for further provision of Kshs. 90,000/= in respect of monthly upkeep, terming it a deliberate misreading of the letter.

15. He noted that in any event, the Applicants had not demonstrated how they were supporting the subject minors on their part, urging that **Article 53(e)** of the **Constitution** entitles children to parental care and protection including equal responsibility of the mother and father to provide for the child. Therefore, that the Applicants ought not to look to the Estate as the sole source of income for the upkeep and maintenance of the minors.

16. It was urged that the Executors had diligently administered the estate of the deceased as required by law, as elaborated in the report prepared by the Executors a copy of which is on record. That the principle role of Executors is to administer the Will in accordance with the provisions of the Law of Succession Act. Further that in the present case, the Will did not make provision for maintenance of dependants, only that the Executors would liquidate the assets, settle liabilities and distribute the net estate to the beneficiaries provided for in Article Six of the Will. Therefore, that it was only upon taking appropriate counsel that the Executors resolved to make certain advances to beneficiaries of the Estate. In so doing, they took into consideration whether the beneficiary was dependent on the deceased at the time of his death and thereafter, the needs of the beneficiary, and the school level where appropriate. He urged that contrary to the averments by the Applicants, there was no favoritism extended to any beneficiaries and the alleged discrimination was therefore nonexistent.

17. On the allegations that the 3rd Executor Njoroge Regeru had prioritized payment of his fees, the 1st Executor stated that what had been paid out was legal costs payable to Njoroge Regeru & Company Advocates for having represented the deceased in various matters, which payments were provided for under Article 10 of the deceased's will. He contended that while Njoroge Regeru is an Executor of the estate of the deceased, Njoroge Regeru & Company Advocates, in which Mr. Regeru is a partner, is not an Executor. Further that the legal fees were not owing to Njoroge Regeru the individual but rather to Njoroge Regeru & Company Advocates, a firm comprising several partners. He deposed that the law was that all debts of the estate should be paid to creditors before any legacies are disbursed. Therefore, that there was no breach of the fiduciary duty owed to the estate by the Executor Njoroge Regeru. He urged that the administration of the estate had been in accordance with the law and there had been no misconduct on the part of Njoroge Regeru to warrant his substitution as sought.

18. At the hearing date of 29th July, 2021 the Counsels on record elected to make oral submissions in respect of the application. Learned Counsel Mr. King'ara made oral submissions on behalf of the Applicants in which he reiterated the averments in their affidavits and submitted that there were no limitations in the deceased's will and the Executors were therefore to continue paying the minors' school fees from the Estate.

19. Counsel contended that the estate has not paid any monies towards the school fees of the minor KGN from July 2017 to date. That this was despite the fact that the minor was enrolled at [Particulars Withheld] school which is the school he attended even during the deceased's lifetime. He noted that the minor was not in school at the date of his oral submissions even though schools were open at that date. Counsel further submitted that the minor AGN who is enrolled to Musingi Bora School was also not in school due to a fee balance of Kshs. 270,000/=.

20. In opposition, learned Counsel Mr. Kimathi Kamenchu affirmed the sentiments made by the 1st Executor and urged that there was no requirement in the will for Executors to provide school fees and maintenance to the subject minors. Counsel conceded that the Executors had in good faith committed to paying the school fees of the minors but pointed out that this was before the estate got into financial distress. He noted that the Estate had to date paid a total sum of Kshs. 8,655,944/= towards the minor AGN and a total sum of Kshs. 6,432,494/= towards the minor KGN. Further that while it had been stated that the minor AGN was not in school on the material date, it had not been clarified that this was not owing to school fees arrears but rather because the minor was on summer holiday until 7th September, 2021, as per the calendar of the British Curriculum offered at [Particulars Withheld] School which the minor attends.

21. In his rejoinder, Mr. King'ara pointed out that the Applicants were not in employment and it was the deceased who catered for all their needs. Therefore, that the court should allow the application in the terms prayed.

22. I deem it fit to give a brief history of the proceedings leading up to the instant application. The Executors herein filed an application for Grant of Probate on 29th March, 2017. A Grant of Probate with Written Will was consequently issued on 10th July, 2017. Thereafter, in 2018, the Executors applied for confirmation of grant. On 21st March, 2018 this court confirmed the Grant of Probate of the deceased's estate to Mwai Mathenge, Geoffrey Rigathi Gachagua and Njoroge Regeru, being the Executors named under the deceased's will dated 17th February, 2017.

23. The minors the subject of this application are the children of the deceased and beneficiaries named under the deceased's last written will. Their bequests are provided under Article 6 of the will, which stipulates that the minor AGN is entitled to 5 per centum of the deceased's net estate whereas the minor KGN is entitled 2 per centum of the deceased's net estate. These bequests are however subject to the liquidation of all the assets comprising the deceased's estate and the settlement of liabilities, whereupon the net proceeds will be shared amongst the beneficiaries in percentages as specified.

24. An examination of the "Joint Will Executors Consolidated Report for the Period April 2017 to March 2021" reveals that the Executors appointed under the will have been diligent in managing the deceased's estate and paying out the liabilities of the estate. The report confirms that payments have been made to the Applicants since 2017 until March 2020 towards the school fees, accommodation and maintenance of the subject minors. Notably, as at July 2021, the estate was still paying accommodation for the minor AGN which is valued at a sum of Kshs. 45,000/= monthly. It appears that the Estate stopped paying towards the school fees and maintenance of the minors upon payment into the respective accounts of the Applicants a sum of Kshs. 2,882,494/=, being the subject minors' share of the deceased's Gratuity proceeds.

25. Interestingly, there is also on record copies of two letters both dated 21st March, 2020 duly signed by the respective Applicants in their respective capacities as guardians of the subject minors. The contents of the letters are identical and they bear the subject “*Payment of portion of benefits & entitlements due to dependents of the Late James Nderitu Gachagua.*” Both letters are in response to a letter dated 21st March, 2020 authored by Messrs Musyimi & Company, the lawyers of the estate of the deceased. In the letters, each of the Applicants state that upon receipt of the payment of the sum of Kshs. 2,800,000/= to them, as guardians of the subject minors, “*no further amounts shall be due to me from the Estate whether by way of maintenance or otherwise howsoever until the earlier of distribution of the Estate (in part or in full) and the expiry of two years from the date of the letter.*”

26. Upon further interrogation of the funds previously paid out to the Applicants in their respective capacities as guardians of the subject minors, it appears that the amounts paid to them out of the Gratuity proceeds would have been sufficient to cater for the school fees and maintenance needs of the minors in the interim. It is imperative to point out that this is not a child maintenance case but rather a probate and administration cause. It is therefore the duty of this court to see to it that the deceased’s net estate is not only distributed in accordance with his will, but also that the bequests to be held in trust for the subject minors are not otherwise squandered to their detriment.

27. Notably, the Applicants have not demonstrated how the Gratuity proceeds paid out to them have been utilized for the benefit of the minors, or specifically towards their school fees and maintenance. Instead, they have come to court demanding additional monies towards maintenance of the minors and to claim arrears in school fees and monthly maintenance from March 2020.

28. It is true that children have a right to education and to equal parental responsibility as rightfully deposed in the respective affidavits. The **Constitution** under its **Article 53(2)** further provides the pertinent principle of law that in any matter concerning a child the best interest of the child is paramount. Due regard must therefore be had to this best interest principle in the instant case to ensure that monies entrusted to the Applicants in their respective capacities as guardians of the subject minors should be used for no purpose other than for the benefit of the minors.

29. Article Six of the deceased’s will is categorical that the bequests to the subject minors shall be held in trust by the Applicants, otherwise known as a testamentary trust. The **Black’s Law Dictionary, 10th edition** in defining a trust of this kind provides thus:

“In its technical sense, a trust is the right, enforceable solely in equity to the beneficial enjoyment of property, the legal title of which is vested in another and implies separate coexistence of the legal and the equitable titles vested in different persons at the same time; in its more comprehensive sense, the term embraces every bailment, every transaction by agent or factor, every deposit, and every matter in which the slightest trust or confidence exists. The word trust however, is frequently employed to indicate duties, relations and responsibilities which are not strictly and technically trusts.” William C. Dunn, Trusts for Business Purposes 2 (1922).

“...In the wide sense a trust exists when property is to be held or administered by one person on behalf of another or for some purpose other than his own benefit. ... In the narrow or strict sense, a trust exists when the creator of the trust...hands over or is bound to hand over the control of an asset which, or the proceeds of which is to be administered by another (the trustee or administrator) in his capacity as such for the benefit of some other person (beneficiary)...”

30. Therefore, since the Applicants are to hold the bequests to the minors in trust, it follows that they are fiduciaries who ought at all times to act in good faith and in the best interests of the subject minors. A “fiduciary” under the **Black’s Law Dictionary, 10th edition** is defined as “*someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure. Someone who must exercise a high standard of care in managing another’s money or property.*”

31. The Applicants ought therefore, at all times, to remember that the advancements made in respect of the minors are to ensure that the minors’ education, accommodation and maintenance are catered for but also whilst ensuring that the bequests are not squandered or otherwise mismanaged. The Applicants ought not to lose sight of the purpose of the advancements and of their fiduciary duty to the subject minors. It is herewith reiterated that this is not a maintenance cause but rather a probate and administration cause.

32. What is eventually due to the minors is not to be determined by this court as the Will is already clear on the terms of distribution of the estate. Sadly, the distribution of the deceased’s estate has stalled largely due to the difficulty in liquidating the assets of the deceased a factor that cannot, without any proof, be attributable to the Executors of the Estate. It is only upon liquidating the assets of the estate that the Executors can settle the deceased’s liabilities and subsequently distribute the net proceeds in terms of Article Six of the will.

33. In respect of the prayer to substitute the 3rd Executor Njoroge Regeru, I am not convinced by the arguments propounded by the Applicants in this respect. In any event, the Applicants have not demonstrated why they would be better managers of the deceased’s estate. The Executor Njoroge Regeru was rightfully appointed as Executor under the deceased’s last written will and it is right to assume that unless the contrary is proven, he is best suited as co-executor to realize the deceased’s last wishes.

34. Additionally, under Article Two of the Will, the deceased authorized his named Executors to make use of the assets from his estate and make necessary arrangements for payment of *inter alia* the deceased’s personal debts and obligations. The monies due and owing to M/s Njoroge Regeru & Company Advocates on account of legal fees were in fact, listed among the deceased’s liabilities under Article Ten of the written will. It is trite that debts and liabilities of the estate must be settled first before the bequests are distributed. The argument by the Applicants in respect of the payments made out to M/s Njoroge Regeru & Company Advocates, without more, are therefore unfounded.

35. While it is imperative that the subject minors get quality education, it is important to bear in mind that what is due to the minors is only a percentage of the deceased’s net estate, as specified under Article Six of the Will, upon settlement of liabilities. Additionally, since the bequests are to be held in trust, it is upon this court to ensure that the monies are not otherwise wasted or squandered at the behest of the subject minors.

36. In any event, under **Article 53** of the **Constitution**, the Applicants also have equal parental responsibility over the subject minors. It is therefore not for them to rely entirely on the minors' bequests for the maintenance and upkeep of the minors. The Applicants should be alive to the fact that the person who worked and maintained these minors in a certain standard of life has long since died and the Applicants must learn to cut their coat according to the cloth at hand.

37. The minor AGN was born on 30th April, 2015 and is therefore about 6 years old now. It appears that his school fees ranges at a monthly sum of Kshs. 18,000/-. Therefore, unless otherwise demonstrated, it appears that the share of the gratuity proceeds paid to the Applicant ought to have been enough to cater for the minor's school fees and accommodation to date. It is therefore alarmist for the 1st Applicant to claim that the minor is at risk of being removed from school for school fees arrears. There is no dispute that the share of the Gratuity proceeds due to the subject minor, being Kshs. 2,882,494/=, was transferred to the Applicant.

38. KGN was born on 9th September, 2009 and is therefore aged about 12 years as at the date of this ruling. Notably, some of the receipts annexed to the 2nd Applicant's affidavit in support of her claim for a revised maintenance fees are for the period between 2010 and 2012, which was about five years prior to the deceased's death. In any event, the bequests under the will are not intended to support the 2nd Applicant's lifestyle or for her maintenance but rather for the benefit of the minor KGN. Thus far, payments in respect of the minor KGN are over Kshs. 24,000,000/=.

39. Three things come to the fore in this matter. First, that it has been demonstrated that the Estate is financially strapped owing to the effects of the Covid-19 pandemic which has not only resulted in the closure of the hotel which was the key income generator of the estate, but also delayed the liquidation of assets comprising the deceased's estate. Second, that the advancements made to the subject minors are only but to avert any financial difficulty that may be occasioned owing to this delay and were not provided for in the deceased's Will. Third, that it must also be remembered however that there are several other beneficiaries in the estate and they are yet to receive any payment on their part.

40. In the end, I find that the orders sought in the summons application dated 14th June, 2021 as amended on 14th July, 2021 cannot be granted at this time. The application is consequently dismissed with no orders as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicants.

In the presence of.....Advocate for the Respondents.