



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 552 OF 2019**

**IN THE MATTER OF THE ESTATE OF TABITHA NJOKI NGIGI (DECEASED)**

**IN THE MATTER OF AN APPLICATION BY**

**ROBERT TOM MARTINS KIBISU.....APPLICANT**

**V E R S U S**

**ITSL COMPANY LIMITED .....1<sup>ST</sup> RESPONDENT**

**JANE JUMA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Tabitha Njoki Ngigi, the deceased herein whose estate these proceedings relate died intestate on 3<sup>rd</sup> November 2018. Vide a petition dated 15<sup>th</sup> May 2019, and purported to have been filed on 10<sup>th</sup> May 2019, one Robert Tom Martins Kibisu cited Jacqueline Wairimu Wanyoike, Samuel Wainaina Wanyoike, Daniel Ngigi Wanyoike and AWA (minor) being children to the deceased to show cause why they could not accept or refuse letters of administration of all the estate of the deceased and in default show cause why the same could not be granted to him.

2. In response, the citees entered appearance on 24<sup>th</sup> March, 2019 through the law firm of J. M. Njenga. Subsequently, on 21<sup>st</sup> June, 2019 the citees filed an objection to making of grant to the citor. In their objection, they referred to Robert Muturi Kibisu as a stranger to the estate and therefore not a beneficiary. That the citor was merely a boyfriend of the deceased and had no business applying for letters of administration in respect of the estate in the alleged capacity of having been a husband to the deceased. They further stated that the petitioner filed this cause without consulting them and that he had concealed material facts from the court among them non-disclosure of the fact that he was a boyfriend to the deceased and not a husband.

3. In her supporting affidavit sworn on 21<sup>st</sup> June 2019, Jacqueline Wairimu on her behalf and that of her siblings averred that, by the time their mother died, she was still married to their father one Joseph Wanyoike Wainaina.

4. On 2<sup>nd</sup> August, 2019 Jacqueline Wairimu and Daniel Ngigi Wanyoike filed a petition for grant of representation. In Form P&A 5, they listed the following as beneficiaries;

**(i) Jacqueline Wairimu (adult)**

**(ii) Samuel Wainaina Wanyoike (adult)**

**(iii) Daniel Ngigi Wanyoike (adult) and**

**(v) AHW (daughter minor)**

5. The petitioners listed several assets valued at 10m comprising the estate as follows;

**(i) Naivasha/Mwihiringiri Block 4/1908**

**(ii) Malindi/Pumwani Block 11/54**

(iii) Makuyu/Kimorori 1 Block 1/2487

(iv) Kajiado/Kaputiei-North/69080

(v) Kajiado/Mailua/8451

(vi) Juja/Juja East Block 1/6005

(vii) Weiteithie Block 1/689

(viii) Mavoko town Block 3/72160

(ix) Karangaita Ballot No. Q 2176, Parcel No. 533

(x) Samuru/Mwitingiri/Block 1/1145

(xi) Farmers Choice Housing Co-op Society Ltd Plot No. 3

(xii) Broad Boarders (sale agreement) for Nginda/Samar/Block 1/1419

(xiii) Muroto Mwenga (sale) Transfer Agreement for Ruiru/Ruiru East Block 2/3770 Plot No. 4

(xiv) Embakasi Ranching Plot No. V14107

(xv) Ekeza/Urithi – Tabitha Njoki Ngigi

(xvi) Motor vehicle Reg. No. KBR 633D

(xvii) Motor vehicle Reg. No. KAM 394B

6. In support of this application is an introductory letter from the Chief Muthuri Location listing Joseph Wanyoike Wainaina as the husband to the deceased and the children as per the list in form P&A 5 above stated.

7. In response to the petition, Robert Tom Kibisu lodged an objection dated 11<sup>th</sup> September 2019 and filed on 13<sup>th</sup> September 2019 objecting to making of grant of representation to Jacqueline and Daniel on grounds that he was a husband to the deceased and that the children have no locus standi where there is a living spouse.

8. He further stated that the value of the estate is over 25 million and not 10m as stated by the petitioners in which they excluded pension and group benefits and other properties like: NSSF benefits, two plots in Lamu Society and Standard Chartered Bank in Lamu Branch Account No. xxxx.

9. He described the Chief's letter as geared towards disinherit him. Consequently, he filed a cross petition dated 11<sup>th</sup> September 2019 seeking a grant of representation to the estate in his capacity as a widower. He listed himself as among the beneficiaries together with the children. He claimed to have cohabited with the deceased for over 10 years prior to her death. He further claimed to have taken full parental responsibility of the children herein after their biological father brutally beat and chased away the deceased. He further stated that he jointly acquired most of the listed properties with the deceased.

10. Among the properties listed in the list of assets is pension under Farmers Choice Ltd ICEA Lion worth approx. Kshs. 8.0 million (National Security Funds (NSSF) Benefits and Group Life under Farmers Choice Ltd ICEA Lion approx. 8.0 million.

11. In response, Jacqueline filed a replying affidavit sworn on 14<sup>th</sup> October 2019 stating that her father Joseph Wanyoike and her late mother were engaged in a monogamous marriage and by the time the mother died, the same had not been dissolved and any marriage with the objector Robert Martins was null and void.

12. Vide a certificate of urgency dated 24<sup>th</sup> October 2019 and filed on 25<sup>th</sup> August 2019, the objector appearing in person sought orders hereunder against the trustees of the deceased's pension namely; ITSL Company Ltd (1<sup>st</sup> respondent) and Jane Juma (2<sup>nd</sup> respondent);

(i) ....

**(ii) That this Honourable Court be pleased to grant that a reasonable provision be made for the applicant herein at Kenya Shillings Fifty Thousand per month as a dependant of TABITHA NJOKI NGIGI (deceased) out of her group life and pension benefits, effective from her death on 3<sup>rd</sup> November 2018 till the final settlement of the grant of administration applied for herein or in the alternative a one off of 20%.**

**(iii) That the Respondents provide a true account of the trust fund operations in respect of TABITHA NJOKI NGIGI (deceased) to the applicant herein till it terminates.**

13. The application is brought under Section 26 of the Law of Succession Act on grounds that the deceased had a pension that was linked to a group life insurance according to her terms of employment with Farmers Choice (K) Ltd. That the instructions for beneficiaries initially included only biological children of Tabitha Njoki Ngigi (deceased), which after her death the trustees, who are the respondents herein included the minor, AAWM a dependant and left him out thereby discriminating him.

14. He averred that the trustees did not give him full disclosure of what was at stake in complicity with the former employer Farmers Choice (K) Ltd.

15. In reply, Jacqueline filed a replying affidavit sworn on 14<sup>th</sup> November 2019 opposing the application stating that the application is misconceived, bad in law, oppressive, devoid of merit, frivolous, vexatious and abuse of the court process.

16. She averred that the application is res subjudice as the applicant's status in these proceedings is contested and is yet to be determined considering that Robert was a mere boyfriend to her mother.

17. That the applicant is a parasite and lazy person seeking to benefit from where he does not deserve as he is not a dependant to the estate under Section 26 of the Law of Succession.

18. On 11<sup>th</sup> December 2019, the respondents (trustees) filed a Notice of Preliminary Objection dated 10<sup>th</sup> December 2019 against the application dated 24<sup>th</sup> October 2019 stating that;

**(i) The petition is premature, otherwise an abuse of the legal court process and filed in breach of specific procedure provided for under Article 169 of the Constitution of Kenya and read together with Section 3(1); 7(1) (b) and 9(3) of the Fair Administrative Action Act and Section 46 and 48 of the Retirements Benefits Act as read with Section 2 thereof.**

**(ii) That the application is bad in law, frivolous, vexatious and otherwise an abuse of the court process and should be struck out, dismissed with costs.**

19. In response to the Preliminary Objection, the objector filed grounds of objection dated 16<sup>th</sup> December 2019 and filed on 17<sup>th</sup> December 2019 stating that; a preliminary objection cannot be raised where both facts and the law have to be ascertained; the application before court is not moot nor has it abated; the preliminary objection is time barred having been filed in breach of court orders and Order 51 rule 14(1)(2) & (3). He claimed that the petitioners' response to his application was filed after 14 days had lapsed hence disobedience to court orders; that allegation of abuse of court process is a factual issue to be proved by facts; the impugned decision was not administrative or quasi-judicial; the law and facts on record have not been disputed nor have they been challenged; judicial review is not a remedy available to the respondents; the preliminary objection is frivolous, vexatious and an abuse of the court process.

20. Touching on jurisdiction, he contended that the High court has unlimited jurisdiction both in civil and criminal cases under Article 165 (3) and (4) of the Constitution. He further contended that under Section 1A and 1B of the Civil Procedure Act the overriding objective of the Act is just determination of disputes expeditiously and efficiently. He further referred to Section 3 of the Civil Procedure Act which gives inherent jurisdiction to a court.

21. He went further to refer to the Trustee's Act which confers jurisdiction to the High Court over determination and or disputes involving trustee related actions. He also made reference to Succession Act Section 26 in which he claimed that as a dependant to the estate, he was entitled to reasonable provision and that the High Court has jurisdiction to determine.

22. Due to the acrimonious nature of the dispute between the petitioners and objector, the court on 18<sup>th</sup> December 2019 *suo motto* appointed Public Trustee as the interim administrator of the estate for purposes of preserving the estate hearing and determination of the issues in controversy. Further, the court directed for parties to file and exchange submissions in disposition of the Preliminary Objection dated 10<sup>th</sup> December 2019. Mention to confirm compliance was scheduled for 17<sup>th</sup> March 2020. Due to Corona Virus the court did not sit.

23. However, on 13<sup>th</sup> March 2020 the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their submissions. On 10<sup>th</sup> March, 2020 the objector / applicant filed his submissions. When the matter came up for mention on 26<sup>th</sup> May 2020, M. Olando for the 1<sup>st</sup> and 2<sup>nd</sup> respondents invited the court to make a ruling based on submissions filed by both parties.

#### **Petitioner's / Respondent's Submissions**

24. Through the law firm of C. M. Advocates LLP, the respondents submitted that the application dated 24<sup>th</sup> December 2019 is unlawfully seeking to invoke the honourable court's original jurisdiction thus by passing adequate and mandatory procedures for addressing and redressing his grievances. That the applicant's application amounts to a violation of the doctrine of exhaustion of remedies. That on account of lack of jurisdiction, the application should be dismissed.

25. It was submitted that, a claim for partial provision as a dependant out of pension which has its own regulatory procedures is not legal. That funds in Farmers Choice Ltd and Stiff Co. Ltd is held and managed by the 1<sup>st</sup> respondent, ITLS Transit Company Ltd as the trustee of the scheme.

26. Mr. Olando contended that, retirement schemes and their operation in Kenya are regulated by the Retirement Benefits Act. That any allegation of entitlement to any part of the deceased's pension lie to the Chief Executive Officer RBA and then to the Pensions' Appeals Tribunal. That although not specifically provided for in the Act, by dint of Article 165 (5) and (6) of the Constitution, a party aggrieved by the tribunal's decision can seek judicial review before the high court.

27. That the deceased during her lifetime had nominated to the pension Fund in accordance with the Trust Deed duly filed nomination forms confirming the parties she wanted to receive her pension dues in the event of her death. Relying on the holding in **Mukisa Biscuit Company v West End Distributors Limited (1969) JR. 1098** case, counsel submitted that a preliminary objection as well as facts relied on can be canvassed together.

28. Mr. Olando opined that there are undisputed facts that the deceased was a member of a pension scheme and that the funds held there are subject to management by trustees as per the law governing pension schemes.

29. As to whether the preliminary objection is time barred as claimed by the objector, counsel submitted that a preliminary objection can be raised at any time in the course of the proceedings.

30. Regarding the question on lack of jurisdiction, counsel submitted that the law applicable in determining issues regarding pension is the Retirement Pensions Act Cap 197 Laws of Kenya more particularly Part IV. That before the High Court assumes jurisdiction, the preliminary mechanisms provided must be exhausted first. Counsel contended that Section 46 and 48 of RBA provides for Dispute Resolution Mechanism which the applicant has not exhausted.

31. According to Mr. Olando, the applicant should have lodged his claim to the Chief Executive Officer retirement benefits scheme authority as provided under Section 46 of the RBA and if not satisfied to apply Section 48 by appealing to the Tribunal within 30 days.

32. In support of this proposition counsel referred the court to the decision in the case of **Jimmy R. Kavilu and 16 Others v Stanbic Bank Kenya Ltd and 7 Others (2019)eKLR** where the learned Judge held that she had no jurisdiction to determine matters concerning Pension Schemes and trustees thereof unless brought under Judicial Review contesting the decision of the Retirement Benefits Tribunal. The court was further referred to the case of **Joseph Kimani Kamau v Sundeep K. Raichura and 5 others (sued as the Trustees of Alexander Forbes Retirement Fund (Provident Section) 2019 eKLR** where J. Muchelule 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 Chief Executive officer of the Authority and if not satisfied to the tribunal set under Section 47 of the RBA and thereafter to the High Court for Judicial Review.

33. In reference to the applicability of the Fair Administrative Action Act, counsel submitted that, state and non-state organizations including any person exercising administrative or quasi-judicial function are under the supervision of the High Court pursuant to Section 7 of the Fair Administrative Actions Act. Counsel further referred to Section 9 of the Fair Administrative Action Act which provides that a court should not review an administrative action before internal mechanisms are determined.

34. Concerning the doctrine of exhaustion, counsel submitted that, courts have time and again held that courts should not interfere with any decision if internal mechanisms have not been exhausted. In support of this position, counsel referred to the decision in the case of **Speaker of National Assembly v Karume (1992)eKLR** where the court held that where there is a clear procedure of redress prescribed by the Constitution or Act of Parliament that procedure should be strictly followed.

35. To emphasize further on the part of exhaustion of internal mechanism, further reference was made to the decision in the case of **Geoffrey Muthinja Kabiru and 2 Others vs Samuel Munga Henry and 1756 Others and Okiya Omtatah Okiya vs Kenya Power and Lighting Company and 10 Others Petition No. 14 of 2017 (2018)eKLR** where the court held that where the law provides for a procedure to be followed parties are bound to follow that procedure.

### **Submissions by the Applicant**

36. Through his submissions filed in person on 10<sup>th</sup> March 2020, the applicant reiterated his grounds of objection to the notice of Preliminary Objection. He maintained that the High court has unlimited civil and criminal jurisdiction under Article 165. He contended that the Preliminary Objection is anchored on matters of facts and not points of law. He further submitted that the issues at hand are issues of fact and use of court's discretion to review Preliminary Objection does not apply. To support this position, the applicant also relied to the case of **Mukisa Biscuits (supra)**.

### **Analysis and Determination**

37. I have considered the Notice of Preliminary Objection herein against the application dated 24<sup>th</sup> October 2019 and counsel's submissions. Issues for determination are;

- (a) **Whether the Preliminary Objection herein raises pure points of law for determination.**
- (b) **Whether this court has jurisdiction to entertain the application dated 24<sup>th</sup> October 2019.**
- (c) **Whether the impugned application is bad in law, frivolous and an abuse of the court process.**

38. I will consider the 1<sup>st</sup> and 2<sup>nd</sup> issues together as they are related. As stated in the celebrated case of **Mukisa Biscuit Company v. West End Distributors Ltd (supra)**, a Preliminary Objection is described as follows:

**“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.”**

39. In the instant case, the applicant is seeking reasonable monthly provision of Kshs. 50,000/- as a dependant to the deceased out of the deceased's pension managed by the ITSL (1<sup>st</sup> respondent) and Jane Juma (2<sup>nd</sup> respondent). According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the issue of entitlement out of the pension scheme is an issue to be handled under the Parent Act i.e Retirement Benefits Act and not the Succession Act. To the extent that the applicable law is in question, itself is a point of law if determined will dispose of the application absolutely.

40. To that extent, I am satisfied that the notice of Preliminary Objection exhausts the requirement set out in the **Mukisa Biscuit** case. As to whether the Preliminary Objection pleads points of facts, it is trite that points of law must be pegged on facts which are not disputed and in this case they include; that the deceased was a member of a pension scheme known as Farmers **Choice Ltd**; that the said scheme is managed by trustees in this case the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that each member of a pension scheme has nominated beneficiaries in this case excluding the applicant and lastly, the applicant is claiming part of the pension. For those reasons, the undisputed facts do not render the Preliminary Objection obsolete as claimed by the applicant.

41. As regards lack of original jurisdiction which is the crux of the Preliminary Objection, the same is also a point of law. In the often quoted case of **Owners of Motor Vessel "Lilian S" vs Caltex One (Kenya) Limited (1989)KLR 1** Nyarangi J held that:-

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."**

Similar position was held by the Supreme Court **In the case of the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2/2011** where the court held that;

**"Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent ..."**

42. As correctly argued by the applicant, the High Court has unlimited criminal and civil jurisdiction (See Article 165(3) and (5) of the Constitution. However, that provision is not a licence for the High court to overlook and side step other legal provisions which equally provide for other lawful dispute resolution mechanism. Such provisions have the force of law and are not to be considered as derogating from the constitution in any way.

43. According to the respondents, they have wrongly been brought to the dispute herein. They argue that the dispute at hand is subject to the dispute resolution mechanism provided under the Retirement Benefits Act. For clarity purposes, I wish to refer to the critical sections under the Retirement Benefits Act which have a link to the issue at hand. Section 46 of the RBA provides for any member of a Pension Scheme who is dissatisfied with the decision of the management, administration, constitution, trustees of the scheme to request in writing that such decision be reviewed by the Chief Executive officer with a view to ensuring that such decision is made in accordance with provisions of the relevant scheme rules in the Act under which the scheme is established.

44. A member of the Scheme as defined under Section 2 includes, a person entitled to receiving a benefit under the Retirement Benefits Scheme. The applicant having claimed that he was entitled to the pension of the deceased, he is then required to follow the process laid under Sections 46 and 47 of the RBA. Any person or member for that matter who is unsatisfied with the decision of the Chief Executive Officer, has a recourse under Section 47 of the said Act to appeal to the Tribunal within 30 days of the making of the decision.

45. Decisions of the Tribunal can be challenged by way of Judicial Review to the High Court as a natural course of action even if not expressly provided under the RBA. Given that elaborate procedure as an internal dispute resolution mechanism, it was or is incumbent upon the applicant to exhaust this process before approaching the High Court under a succession cause. It is trite that, where a dispute resolution mechanism process is expressly provided in a statute, parties are bound as a matter of principle to exhaust such mechanism for the sake of consistence and orderly manner in which proceedings are conducted before bodies or organs with authority or quasi-judicial powers to adjudicate over a dispute. See **Speaker of National Assembly v Karume (supra)**.

46. While dealing with an almost similar situation as the one before me, Machelule J in the case of **Joseph Kimani Kamau v Sundeep K. Raichura & 5 Others (supra)** stated that, the court did not have jurisdiction to hear and determine disputes including retirement benefits between a member and a fund set up under the Retirement Benefits Act.

47. Under Section 36A of the RBA, the law provides that;

**"Upon the death of a member of a scheme, the benefit payable from the 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."**

48. In a similar situation such as the one before hand, Justice Musyoka in the case of **Re Estate of Carolyn Achieng' Wagah (Deceased) (2015)eKLR** held that:-

**"From the material before me, the deceased was a member of the Social Service League Staff Retirement Benefits Scheme. She had made a nomination in favour of her children. By virtue of Section 36A of the Retirement Benefits Act, the benefits accruing to the said children do not form part of the estate of the deceased, and should not be the subject of these proceedings. Where issues arise concerning those funds, the process for addressing them is that set out in the Retirement Benefits Act and the subsidiary legislation made under it. The probate court has no jurisdiction over such benefits and it cannot distribute them."**

49. Guided by the judicial precedents relied above, I am of the view that the applicant cannot seek provision or entitlement from the trustees of the pension scheme through this succession cause. He should lodge a claim properly under the RBA. It is therefore my finding that benefits that have specially recognized mode or method of distribution of pension with inbuilt mechanisms of redress should not be subject of adjudication in a court of law unless challenged by way of Judicial Review. It therefore follows that the funding sought by the applicant being funds insulated under the RBA cannot be touched as they do not form part of the estate perse.

50. The consequence of the above holding is that, the notice of Preliminary Objection dated 10<sup>th</sup> February 2019 is hereby upheld and the application dated 24<sup>th</sup> October 2019 dismissed. Regarding costs, I will order that each party bear own costs. Parties shall then proceed and prosecute the objection proceedings to determine on who is entitled to take out a grant of representation.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2020.**

.....

**J. N. ONYIEGO**

**JUDGE**