**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2804 OF 2015**

**IN THE MATTER OF THE ESTATE OF JAMES OCHOGO WASWANI (DECEASED)**

**C O J.....APPLICANT**

**VERSUS**

**DAVID OWINO OWITI.....1ST RESPONDENT**

**THE AGA KHAN EDUCATION SERVICE KENYA.....2ND RESPONDENT**

**RULING**

1. The deceased James Ochogo Waswani died intestate on 21st February 2004. His wife Christine Wamari Ochogo had predeceased him. They had three children –

(a) C O J (the applicant);

(b) M A O and

(c) J S O.

2. When the deceased died the children were minors. He was an employee of the Aga Khan Education Service Kenya (the 2nd respondent) when he passed on. He hailed from Nyamninia sub-location in Siaya County. His total terminal benefits held by the 2nd respondent were Kshs.90,000/=. Upon his death, the Assistant Chief of his sub-location wrote to the 2nd respondent seeking Kshs.15,000/= of the deceased's terminal benefits to be given to one Henry Otieno Oyolo to use to transport his (the deceased's) property from Nairobi to his rural home. The 2nd respondent gave the money to Henry Otieno Oyolo who applied it as sought. Subsequently, the Assistant Chief wrote a second letter to the 2nd respondent to release the balance of Kshs.75,000/= to David Owino Owiti (the 1st respondent who was the guardian of the deceased's children) to use to take care of the children. The money was released to him.

3. About eleven years later, on 12th November 2015, the applicant petitioned the court for the grant of letters of administration in respect of the estate of the deceased. The grant was issued to him on 16th March 2016, and confirmed on 30th November 2016. In the certificate of confirmation, one of the properties listed was the Kshs.75000/= that the 2nd respondent had released to the 1st respondent in 2004 for their upkeep. The certificate indicates that the money was owing to the estate and that it was going to be shared equally among the three children of the deceased.

4. In the present application dated 10th July 2017 the applicant sought that –

(a) the respondents be answerable to him to the extent of the assets with which they had intermeddled; and

(b) failing to render a satisfactory account, the court be pleased to reprimand and sanction them.

5. His case was that, upon his appointment as the administrator of the estate of the deceased, he went to the 2nd respondent for the deceased's terminal benefits. He was surprised to learn that the benefits had been released to the 1st respondent. According to him, the 2nd respondent

had no authority to release the money to the 1st respondent. He stated that what the respondents had done amounted to intermeddling as they were not the administrators of the deceased's estate. He sought that the respondents be ordered to account to him or be reprimanded for the intermeddling.

6. The response by the 2nd respondent was through the affidavit of Apollo Gabazira (the Regional Chief Executive Officer). He stated that the benefits had been released on instruction of the Assistant Chief under **section 46** of the **Law of Succession Act (Cap 160)** as the deceased's children were minors, and the estate had no administrator.

7. The 1st respondent's case was that the Kshs.75,000/= were part of the deceased's terminal dues that were subject to nomination and were therefore not part of the deceased's estate to form the basis of the allegation of intermeddling. Secondly, when the deceased died his children came to live with their maternal grandmother who was his mother. The children's mother was his sister. This is how the children came under his care. On the day he went to collect the benefits he was with the applicant. Of the money, Kshs.10,000/= was used to offset a loan of Kshs.10,000/= owed to the 2nd respondent. There were other amounts the deceased owed to the 2nd respondent's school canteen, to a shylock and to his fellow employees at the school. He ended up collecting only Kshs.35,000/= in cash. He spent the money to pay the children's fees and shopping. He did not have the specific receipts or account of how he applied the money. He said that this was because he never thought that a day would come when he would be called upon to account for the money.

8. M A O filed an affidavit to oppose the application. She stated as follows:-

> **"7. THAT I wish to confirm that I live with my uncle who has taken care of me as my guardian since the passing on of my late mother and he has continued to provide me with shelter, clothing and food.**
>
> **8. THAT I am currently undertaking training in tailoring under the support of the 1st respondent.**
>
> **9. THAT I therefore request that this Honourable Court should not reprimand my uncle who is the 1st respondent herein for he has played a critical role in our upbringing since the demise of our parents."**

9. The applicant swore a supplementary affidavit. His case was that the duty of the Assistant Chief was to protect and preserve the terminal benefits under **section 46** of the **Act**, and therefore it was unlawful for the 2nd respondent to release the benefits to the 1st respondent on the instructions of the Assistant Chief, or at all. He denied that the benefits were the subject of nomination. In any case, he stated, there was no evidence that the 1st applicant had been nominated. He stated that upon the death of their parents they were taken in by their maternal grandfather and it was not true that the 1st respondent became their guardian. He narrated the suffering he went through seeking secondary school fees after he had completed class 8. It was third parties, he said, who had educated him. He stated that he had been paying for the tailoring course of his sister with whom he was staying until she was persuaded away by the 1st respondent.

10. Counsel for the parties filed written submissions which I have considered.

11. Under **section 82(a)** of the **Act**, the applicant, as the administrator of the estate of the deceased, has power to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survived the deceased or arose out of his death for his personal representative. Ideally, therefore, if the applicant has a claim on behalf of the estate of Kshs.75,000/= against the respondents he was obliged to sue them to recover the money. I say this because the application sought the court to ask them to account for the money or be reprimanded for intermeddling. The applicant was shy to ask for the refund of the money to the estate.

12. An application to account means that the respondent should give a satisfactory record of how he spent the money or property in question. If, therefore, the applicant is seeking that the respondents do account to him in respect of the Kshs.75,000/= it would be sufficient if the respondents were to explain how the money was applied. The responsibility of the 2nd respondent would end with them saying they gave the money to the 1st respondent. Duty would then fall on the 1st respondent to explain how he had spent the money.

13. I consider that when the parents of the applicant and his sister and brother died, they were left as minors who went to stay within the home where their late mother was born. They grew up here. The 1st respondent was brother to their late mother. He states that he became their guardian. The applicant states it was the 1st respondent's father who took them in. The applicant's sister agrees with the 1st respondent. She stated that the 1st respondent became their guardian and brought them up. The 1st respondent states that out of the Kshs.75,000/= what he actually received was Kshs.35,000/=. I find that, on the evidence available, upon the death of the deceased the applicant and his brother and sister went to the care of the 1st respondent who bought them up. There may have been difficulties in the education of the applicant and his siblings, but one cannot deny that bringing up three children was not an easy task. I find that, even if all the Kshs.75,000/- was given to the 1st respondent, there has been reasonable explanation how the money was applied. I agree with both the 1st respondent and M A O that it was not expected that, many years later, there would be detailed and minute record of how the money had been applied.

14. I, however, agree with the applicant that under **section 46** of the **Act** the role of the Assistant Chief of Nyamninia Sub location was to protect and preserve the benefits of the deceased, and not to instruct that they be given to the 1st respondent, or any other person, to use them in whichever way **(Administrators of the Estate of Maxwel Murine Ombogo –v- Standard Chartered Bank Ltd & Another [2000] eKLR** and **Peter Makowe Mitungu & Another –v- Mary Wangari Mutungu [2013] eKLR.**

15. The estate had no administrators. What was open was for the 2nd respondent to hand over the money to the Public Trustee, and not to the 1st respondent or to any other person.

16. It was also open, now that the deceased's children were minors, for the 1st respondent to petition for the grant of letters of administration to have power to deal in the funds released by the 2nd respondent.

17. There was no evidence that the terminal benefits due to the deceased were the subject of any retirement benefits scheme, or that they were the subject of a nominated beneficiary under **Regulation 23** of the **Retirement Benefits (Occupation Retirement Benefits Schemes Regulations) 2010**. I know that funds that are the subject of nomination do not form part of the nominator's estate, and therefore the funds cannot pass under the Will of the deceased or vest in his personal representative **(In the Matter of the Estate of Carolyne Achieng Wagah (Deceased) Nairobi Court Succession Cause No. 1374 of 2004)**.

18. Lastly, intermeddling under **section 45** of the **Act** is a criminal offence. Any person who has no authority under the **Act**, or under any other written law, or is not an executor or administrator of the estate of the deceased, or has no court order, takes possession of or disposes the free estate of the deceased, or does any act to waste or cause loss of damage to the estate, or makes it impossible for the executor or administrator to administer the estate, is guilty of intermeddling with the free estate of the deceased **(Re Estate of Damaris Njeri Kimani (Deceased) [2015]eKLR).** It is common ground that the respondents were not the executors of the Will of the deceased and neither were they personal representatives of his estate.

19. However, intermeddling requires the alleged intermeddler to have a guilty mind before he is found guilty. I have found in the foregoing that the intention of the respondents was to apply the terminal benefits for the upkeep and upbringing of the minor children of the deceased. The children included the applicant.

20. The result is that, I find the application by the applicant lacks merit. It is hereby dismissed. I make no orders as to costs.

**DATED and DELIVERED at NAIROBI this 23RD SEPTEMBER, 2019.**

**A.O. MUCHELULE**

**JUDGE**