



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. SUCCESSION CAUSE NO. 11 OF 2014

**IN THE MATTER OF THE ESTATE OF CORNELIUS NYANGICHA NYANCHOKA
(DECEASED)**

AND

IN THE MATTER OF AN APPLICATION BY

ESTHER KEMUNTO KEBASI.....APPLICANT

-VERSUS-

1. CHRISTINE BOSIBORI NYANCHOKA

2. WESLEY OUKO NYANCHOKA

3. JAVASON NYANCHOKA

4. HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

(1) The present application by the applicant, **Esther Kemunto Kebasi**, is premised on the originating summons dated 21st January 2014, in which orders are sought against the first, second and third respondents (i.e Christine, Wesley and Javason) to compel them to refund for proper allocation money paid or released to them by the public trustee as death gratuity respecting the late Cornelius Nyangicha Nyanchoka (deceased).

Further orders are sought against the fourth respondent (Attorney General) on behalf of the public trustee to compel remission of the pension funds to the public trustee for distribution after succession to the beneficiaries of the estate of the deceased.

(2) The application is made on the basis of the averments contained in the supporting affidavit dated 21st February and a supplementary affidavit dated 13th February 2014, both deponed by the applicant. These are supplemented and fortified by the oral evidence of the applicant and her two witnesses, **Joseph Oichoe Nyangicha (PW 2)**, and **Levine Kwamboka Nyanchoka (PW 3)**.

In opposition to the application, the respondents filed respective replying affidavits dated 11th January 2014 and 7th March, 2014.

The first replying affidavit was deponed by the first respondent on behalf of herself and the second and

third respondents.

The second replying affidavit was deponed by the Deputy Administrator General, **Tom Ombori**, on behalf of the fourth respondent.

(3) In essence, the applicant's case is based on the fact that she was one of the deceased's two wives but when the deceased passed away in the year 2002, the first, second and third respondents fraudulently and unlawfully instigated **Succession Cause No. 211 of 2013** at Kisii high Court in which they excluded other beneficiaries from the deceased's death gratuity and proceeded to receive a sum of Kshs. 350,000/= from the office of the public trustee which amount formed part of the total sum of Kshs. 618,000/= due to all the beneficiaries of the deceased's estate.

(4) For the first, second and third respondents, their case is essentially that the deceased was married to their late mother as his only wife and as such the applicant was never his second wife as claimed and neither was she entitled to his death gratuity. It is their contention that they were not party to a Succession Cause No. 211 of 2013. They also contended that the applicant lacks the necessary capacity to institute this case.

With regard to the fourth respondent, his case is that the public trustee received Kshs. 618,116/= from the pension department being the deceased's death gratuity and in accordance with Rules 22 and 23 of the Public Trustee Act (Cap 163 LOK) a sum of Kshs. 350,000/= was advanced to specified children of the deceased who included the first, second and third respondents.

(5) It is contended by the fourth respondent that it is not the mandate of the public trustee to decide who should be included as heirs of an estate as this is a function of the local district administration officers or the courts upon due application by an applicant. That it was upon the applicant to demonstrate that she was a widow to the deceased and in any event necessary letters of administration had not been obtained.

It was further contended and implied by the fourth respondent that the alleged Succession cause No.211 of 2013 is non-existent as its purported reference number is actually a reference number of the public trustee to wit KSI/PT/211/2013 which would have converted to a court file number only after the filing of the necessary succession cause.

(6) The averments and contentions by all the respondents were supplemented and/or fortified by the oral evidence of the first respondent (**DW 1**) and a state counsel at the office of the public trustee Kisii, **Irene Nyaboke Nyariki (DW 2)**.

The record shows that the application was in the first instance presented in court in the absence of the respondents under a certificate of urgency on 5th February 2014, when it was slated for inter parties hearing on 11th February 2014, but was stood over to the **25th February 2014**, when it was again stood over to the 11th March 2014 on which date it was dismissed by the court for non-attendance by the applicant.

What followed thereafter was an application by the applicant vide a Notice of Motion dated 12th march 2014, seeking orders to set aside the order of dismissal made by the court.

(7) The Notice of Motion was heard inter parties on the 25th July 2014 and a ruling on the same was made on the 9th January 2015, allowing the application to the effect that the dismissal order was set aside and the present application re-instated for hearing. It was further ordered that the funds withheld by the fourth respondent be withheld until the suit was heard and determined.

The application was thus fixed for hearing on 7th July 2015, when in the presence of all the parties the court ordered that the application be mentioned on 13th October 2015, and the money held by the public trustee should not be released pending final order of the court.

(8) On 13th October 2015, the matter was stood over to 9th November 2015, so that the public trustee could shed some light on the status of the money being held in his office respecting the estate of the deceased. The necessary explanation was made by the public trustee, **Tom Momanyi Ombori**, vide his affidavit dated 6th November 2015 and filed on 9th November 2015.

He explained that on 10th June 2014, letters of administration respecting the estate of the deceased were issued to the first respondent and one **Merceline Kemuma**, vide Kisii Succession Cause No. 669 of 2013 and on the 13th August 2014, the two presented the court order made on 11th March 2014 and a letter from the District Commissioner Nyamache District indicating that the applicant herein was not a member of the family of the deceased. Consequently, the money held by the public trustee being death gratuity was released and paid to both the first respondent and Merceline as the administrators of the estate of the deceased. The two then signed the necessary Discharge and Indemnity instrument in favour of the public trustee.

(9) In the meantime, the aforementioned Succession Cause File No. 669 of 2013, was availed for purposes of perusal and reference in the present application which was fixed for hearing on 16th February 2016 on which date it was stood over to 17th June 2016 but it was not heard. Instead, a mention date for 24th August 2016 was given and this was later extended to 19th October 2016 and then to 7th December 2016 when the applicant made an application for transfer of the case from another court to this court.

The application was granted and finally on 3rd May 2017, the hearing of the present application dated 21st January 2014, commenced by “viva-voce” evidence.

As noted hereinabove the applicant relied on her supporting affidavit and oral evidence in support of the application and urged this court to grant the orders sought against the respondents.

The respondents on the other hand relied on their respect replying affidavits and oral evidence in opposing the application.

All the parties filed their respective written submissions.

(10) The entire evidence and the submissions have been considered by this court. They give rise to four (4) points or issues for determination. These are:-

(I) Whether the death gratuity which is the bone of contention in this matter was held by the public trustee on behalf of the beneficiaries of the deceased as at the **21st January 2014**, when this application was filed and as at **9th January 2015**, when the court made an order setting aside the dismissal order respecting the application.

(II) Whether the applicant and/or the first, second and third respondents were entitled to the death gratuity as beneficiaries and/or dependants of the deceased.

(III) Whether the death gratuity was properly and lawfully released and paid out by the public trustee to any of the beneficiaries of the deceased.

(IV) Ultimately, whether the applicant is entitled to the specific orders sought against the respondents i.e prayers (1) and (3) of the application.

(11) With regard to the first issue, no dispute arises that the public trustee indeed held the deceased’s death gratuity on behalf of the beneficiaries of his estate.

Prior to his death, the deceased was a civil servant and according to the witness for the public trustee (DW 2 – Irene Nyariki) the functions of the public trustee include the administration of the estate of a deceased civil servant.

The witness (DW 2) confirmed that the public trustee through his Kisii office received a sum of Kshs. 618,106/= from the government pension department as death gratuity respecting the deceased herein.

The necessary advice was received vide a letter dated 3rd May 2013, which was accompanied by a schedule of the amount and the beneficiaries dated 14th June 2013.

(12) It was the testimony of the witness (DW 2) that upon receipt of the death gratuity, the necessary file was opened and given a reference number PT KISII 211/13. It is instructive to note that this reference number was obviously confused by the applicant to be a reference number for a succession cause purportedly filed in court. Such a cause is non-existent even in the appropriate court register which this court has taken the liberty to peruse.

Be that as it may, DW 2 stated that the first respondent presented herself at the office of the public trustee as a beneficiary and next of kin of the deceased. She identified herself vide a letter from the area District Commissioner and applied for an advance payment of Kshs. 400,000/= from the total amount of Kshs. 618,106/= but was only paid a sum of Kshs. 350,000/= for which a receipt was issued. Other beneficiaries were also identified in the D.C's letter of 3rd July 2013 but they did not include the applicant and/or her children.

(13) The remaining balance of the death gratuity i.e Kshs. 275,325/= or thereabout continued to be held by the public trustee as at the 21st January 2014 when this suit was filed by the applicant.

It is notable that the testimony of DW 2 shows that after the payment of the initial amount of Kshs. 350,000/= to the first respondent, the applicant lodged a complaint with the public trustee on basis of being a second wife to the deceased. The complaint was made on 9th December 2013, prior to the filing of this suit. However, on 22nd May 2014, the public trustee was given a court order by the first respondent to the effect that the applicant's application of the 21st January 2014 was dismissed and on 21st July 2014, a grant of letters of administration dated 10th June 2014 was received by the public trustee.

The grant was issued to the first respondent and one Mercyline Kemuma Nyanchoka in Kisii Succession Cause No. 669/13 and it was on its strength and the aforementioned dismissal order that the balance of the death gratuity (i.e Kshs. 275,235/=) was paid out to the first respondent and Mercyline Kemuma. A letter of indemnity dated 13th August 2014 was duly signed by them.

(14) So, as at the 9th January 2015 when the dismissal order was set aside, the public trustee had paid the remaining balance of the death gratuity to the first respondent and another. His obligation to hold the money for the benefit of the beneficiaries of the deceased came to an end but rather, one may dare say, prematurely for reasons which will emerge herein shortly when the third issue for determination is considered.

As for the second issue for determination i.e whether the applicant and the respondents (1st, 2nd and 3rd) were entitled to the death gratuity as beneficiaries of the estate of the deceased, it was also not disputed that the first, second and third respondents are children of the deceased with a departed wife of the deceased. In that regard, they were indeed entitled to the death gratuity.

(15) The applicant claims that she was a second wife to the deceased with whom they had four (4) children including **Levine Kwamboka Nyanchoka (PW 3)**, who testified herein and confirmed the fact as did the brother of the deceased, **Joseph Oichoe Nyangicha (PW 2)**.

Although the first, second and third respondents disputed the fact, the evidence by the applicant and her two witnesses and in particular the documentary evidence from the children department and the office of a chief strongly indicate that most likely than not the applicant and the deceased had a form of marital relationship or otherwise which was laden with problems such that it collapsed prior to the demise of the

deceased. In the circumstances, this court may safely find and hereby finds that the applicant was entitled to the deceased's death gratuity either as his second wife or his dependant. Her children could also benefit as children of the deceased whether biological or not or as his dependants.

(16) From the foregoing and as regards the third issue for determination, it would follow that whereas the release or payment of the first segment of the death gratuity (i.e Kshs. 350,000/=) to the first respondent by the public trustee was proper and lawful at the time on account of the identification references availed to the public trustee, the second payment of Kshs. 275,325/= or thereabout to the first respondent and Mercyline Kemuma cannot be said to have been proper by reason of the fact that it was paid after the institution of this suit and prior to its conclusion.

Contrary to what the first respondent and the public trustee said, they both were aware of the subsequent court order made on 7th July 2015 for the money not to be released without such orders from the court even though the order came after the payment.

(17) The fact that the order was made in the presence of all the parties without objection from any of them was an acknowledgment that the matter was not over yet despite the dismissal order of the 11th March 2014 which was followed almost immediately by the applicant's application dated 12th March 2014 for reinstatement of the suit which was granted belatedly without fault from the applicant. The application was pending ruling as at 21st July 2014, when the public trustee received the grant of letters of administration dated 10th June 2014, made in favour of the first respondent and another. Even on the 22nd May 2014, when the public trustee was served with the dismissal order by the first respondent's advocate, the applicant's reinstatement application was pending.

The public trustee could not therefore pretend that he was not aware that this application was in court pending finalization on the merits when he released and paid out to the first respondent and another the remaining balance of the death gratuity. He in the process failed to exercise care and due diligence even though the whole process was ignited by the first respondent whom he blindly trusted.

(18) It could be that the public trustee acted on the strength of the grant of letters of administration intestate issued on the 10th June 2014 in Succession Cause No. 669 of 2013, in favour of the first respondent and another when he paid out the second segment of the death gratuity, but even then the grant had not been confirmed and remains unconfirmed today. In any event, there was an existing court order that the amount should not be released without necessary order from the court.

From all the foregoing reasons and with regard to the fourth issue for determination this court is satisfied that the applicant is entitled to the order sought against the first, second and third respondents i.e prayer (1) rather than the order sought against the fourth respondent i.e prayer (3).

It was apparent that in paying out the second segment of the death gratuity to the first respondent the public trustee was misled or dubbed into doing so by the first respondent.

In the circumstances, this court would be acting in vain if it were to compel the fourth respondent to remit through the pension department necessary funds to the public trustee. It has herein been established without dispute that the funds were released to the public trustee and eventually rightly and wrongly paid out to the first respondent and other beneficiaries of the deceased save the applicant.

(19) However, all is not lost for the applicant as she may claim her interest by necessary application for revocation of the grant issued to the first respondent on 10th June 2014 in Succession Cause No. 669 of 2013 or by necessary application in the said cause to secure her interest and that of her children as dependants of the deceased, prior to confirmation of the grant.

In the end result, this application is granted in terms of prayer (1).

The first, second and third respondents and in particular the first respondent must return to the public

trustee the part of the death gratuity respecting the deceased in the sum of Kshs. 275,325/= or thereabout and in default the amount be recovered personally from the first respondent by the public trustee in a lawful manner.

The costs of this application be borne by the first respondent only.

Ordered accordingly.

J.R. Karanjah

Judge

[Read and signed this 28th day of September, 2017].

In the presence of

Mr. Nyangwencha for 1st, 2nd & 3rd Respondents

Ms. Opiyo for 4th Respondent

Applicant – Present in Person

CC Mohe