



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 116 OF 2011

IN THE MATTER OF THE ESTATE OF JOHN MUTWEIA ITUMO (DECEASED)

SOPHIA KUTHEA MUNGALA APPLICANT/OBJECTOR

VERSUS

JANE MBITHE NZIOKI

RAPHAEL MANZA ITUMO

MOURINE MUENI MUTUA aka MAURINE MBITHE

TELKOM KENYA LIMITED

RICHARD KEMOLI(*Sued as Trustees of Alexander Forbes Financial Services (EA) Ltd.*)

JANET MBATI

JAMES OLUBAYI

LUCY KUMBUNI

JOHN OKONDO

ANTONY KILAVI..... RESPONDENTS

RULING

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1. The application dated 14/6/2012 is predicated under **section 47** of the **Law of Succession Act (Cap 160) Laws of Kenya** and **rule 73** of the **Probate and Administration Rules** made thereunder.

2. The application seeks orders that the Respondents be ordered to deposit Kenya Shillings One Million and Ninety Three Thousand, Eight Hundred and Eighty Five Cents. (KSHS.1,093,820) as security to the estate of the deceased person herein, pending the determination of this application and the Applicant's/Objector's affidavit of protest against the confirmation of Letters of Administration filed in court on 13/12/2011. The application is supported by the affidavit of the Applicant, **Sophia Kuthea Mungala** and a further affidavit sworn by the Applicant on 19th February, 2012.

3. The background to the application is that the 1st and 2nd Respondents are the administrators of the estate of the deceased, **John Mutweia Itumo**. The 1st Respondent applied for the Grant of Letters of Administration intestate as a widow and brother to the deceased respectively. The 3rd Respondent, **Maurine Mueni Mutuku** aka **Maurine Mbithe** is listed as a beneficiary and a child of the deceased. The 4th Respondent was the employer of the deceased. The 5th Respondent was the administrator of the pension scheme of the employees of the 4th Respondent. The Grant of Letters of Administration was issued on 12th November 2010.

4. Although an application for the confirmation of the grant was filed on 22nd November, 2011, an affidavit in protest was filed by the Applicant on 14th December 2011. Directions are yet to be taken for the hearing of the Summons for Confirmation.

5. In the meantime, the application at hand was filed. According to the Applicant, she is the wife of the deceased with whom they had three children. The Applicant's complaint is that the Administrators concealed from the court her existence and that of her children. That on the strength of the interim grant the Respondents drew or caused to be drawn from the estate of the deceased Kshs.793,820.85cts. being deceased's pension benefits. That the Administrators further disposed of a motor vehicle registration No. **KAP 883 P** which was registered in the name of the deceased. The Applicant has further complained that the Administrators failed to disclose all the assets of the deceased.

6. According to the Applicant, her marriage to the deceased was not lawfully terminated. That the 1st Respondent was legally married to another man and her relationship with the deceased can best be described as a concubine.

7. In opposition to the application, the 1st Respondent, **Jane Mbithe Nzioki** filed a replying affidavit sworn on 14/9/2012. The 1st Respondent concedes to the apportionment of the retirement benefits by AFRF. It is contended that the motor vehicle in question was sold by the deceased before his demise. That the extent of the estate of the deceased and its beneficiaries will be determined by the court and that the deed of settlement of the benefits was subject to succession.

8. The 2nd and 3rd Respondents have not filed any papers in response to the application.

9. The 4th Respondent, **Telkom Kenya Limited** opposed the application. According to the replying affidavit by the 4th Respondent the deceased was its employee and a member of **Alexander Forbes Retirement Fund** (hereinafter AFRF). That the 4th Respondent provided the AFRF with the correct information concerning the deceased and the ambiguous position on who his beneficiaries were. The 4th Respondent's position is that it is the responsibility of the trustees to pay the benefits to the eligible dependants and beneficiaries.

10. The 5th Respondent also opposed the application. According to the 5th Respondent, it is the responsibility of the 4th Respondent to provide AFRF with the correct and an up to date personal details of its employees for the proper distribution of the employees' benefits. The 5th Respondent has further averred that it distributed the benefits of the deceased to the 1st Respondent and three children as per the documents produced by the 4th Respondent and as a precautionary measure called for the Letters of Administration notwithstanding the fact that benefits under the **Retirement Benefits Act 1997** are not subject to the **Law of Succession**. The 5th Respondent further stated that the sums due to the children which amount to 75% of the total sum were placed in a Trust Fund and are available to such beneficiaries as may be determined by the court.

11. The application was canvassed by way of written submissions which I have duly considered.

12. From the foregoing, it is clear that AFRF has already released 25% of the deceased's benefits to the

1st Respondent. The position of the motor vehicle belonging to the deceased which is said to have been sold is not clear. That is a question that requires to be determined.

13. It is observed that interim Grant has not been confirmed. Any party purporting to have acted under the said Grant is therefore an intermeddler in the estate of the deceased. The exemption of retirement benefits from part of the estate of a member is not an exemption from paying the benefits to the rightful beneficiaries/dependants. I opine that in cases where there is ambiguity as to who the beneficiaries/dependants are, only a confirmed grant can be relied on.

14. On the issue of who is to blame between the 4th and 5th Respondent for the payments already made out, that probably is a civil matter and not a subject matter of this Succession Cause. For this Succession Cause, the parties should move to fix the Summons for Confirmation for directions for hearing so that the question of the extent of the estate, who the beneficiaries/dependants are and their share of the estate can be determined by the court.

15. With the foregoing application that the Respondents do deposit security fails with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of February, 2015.

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JUDGE