



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 419 OF 2013

IN THE MATTER OF THE LATE N N N

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY STAFF PENSION SCHEME

BETWEEN

REPUBLIC.....APPLICANT

AND

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE REGISTERED TRUSTEES OF KENYA REVENUE AUTHORITY STAFF PENSION SCHEME.....2ND RESPONDENT

EX PARTE: J M O

JUDGEMENT

Introduction

1. By a Notice of Motion dated 27th November, 2013 filed the same day, the applicant herein, **J M O**, seeks the following orders:
1. **THAT an order of Mandamus be and is hereby issued compelling and directing the Respondents jointly and/or severally to forthwith disburse the death benefits, proceeds of Group Personal Accident Cover, Spouses and Children’s Pension and all other related benefits payable in respect of the Late N N N who died on the 27th August 2007 to the lawful and/or nominated beneficiaries thereof.**
2. **THAT costs be provided for.**

Applicant’s Case

2. *According to the applicant, she was at all material times the lawful wife of the Late N N N*

- (hereinafter referred to as “the deceased”) who passed away on 27th August, 2007 from injuries sustained in a road accident. According to the applicant, there was one issue of her marriage to the deceased namely **H M**, born on 29th December, 2003.
3. It was averred that prior to his death the deceased worked for the Kenya Revenue Authority (hereinafter referred to as “the Authority”) and was a member of Kenya Revenue Authority Staff Pension Scheme, the 2nd Respondent herein (hereinafter referred to as “the Scheme”). It was contended that the deceased had nominated the said **H M** and **J N** as his beneficiaries of his death benefits at the ratio of 80% and 20% respectively.
 4. It was disclosed that there was a previous suit in the High Court Nairobi being Succession Cause No. 2830 of 2007 in which the Court on 9th June, 2011 found that the applicant was the legal wife of the deceased at the time of his death and that the deceased was survived by a minor child being **H M N**, born on 29th December, 2003.
 5. Until his death the deceased worked for Kenya Revenue Authority (hereinafter referred to as “the Authority”) and was a member of Kenya Revenue Authority Staff Pension Scheme (hereinafter referred to as “the Scheme”) and had nominated the said **H M** and **J N** as the beneficiaries of his death benefits in custody of the Authority in the ratio of 80% and 20% respectively.
 6. Prior to this cause, it was disclosed that there was Nairobi High Court Succession No. 2830 of 2007 (the Succession Cause) in which the Court on 9th June, 2011 found that the applicant herein was the legal wife of the deceased at the time of his death and that the deceased was survived by a minor child being **H M N**. By a further ruling dated 3rd April, 2013, the High Court inter alia ordered that the Public Trustee be appointed administrator of the deceased’s estate and found that the Pensions benefits and investments in the deceased’s Sacco are not subject to the law of succession hence the same should have been paid forthwith to the lawful beneficiaries immediately upon the deceased’s death.
 7. According to the applicant, the Respondents had previously, by way of an affidavit, enumerated their version of the benefits payable in consequence of the deceased’s death as including Kshs 218,373/= by Ushuru Co-operative Savings & Credit Society Ltd; Kshs 1,483,454/= payable by the 2nd Respondent being Death Gratuity; Kshs 2,225,182/= being proceeds of a Group Personal Accident Cover; and Spouses’ and Children’s’ Pension payable to the surviving spouse and child until the age of 18 years.
 8. However despite being called upon by the applicant’s advocates to disburse the benefits due to the said beneficiaries, such payment was not forthcoming notwithstanding the fact that since the demise of the deceased, the applicant has had to struggle to provide for the surviving minor.
 9. It was this failure to pay the said amounts which in the applicant’s view constitute a statutory obligation that provoked these proceedings in which the applicant seeks an order of mandamus.
 10. With respect to the issue of **H N N**, it was the applicant’s position that the same issue was the subject of the Succession Cause in which the Respondents were duly represented and by a ruling delivered on 9th June, 2011 the Court found that the deceased was only survived by a minor namely, **H M N** and the mother of the said **H** did not participate in the said proceedings.
 11. It was accordingly contended that the issue of Henry ought not to be a basis for withholding the benefits due to the applicant and her daughter **H**, a nominated beneficiary of the deceased. While **J N** received her cheque as far back as 31st July, 2013, the applicant was unable to understand why her share and that of **H** still remained unpaid. On the issue of the Group Personal Accident Cover, the applicant averred that the Respondents conceded that the Applicant was only informed of the same on or about 3rd April, 2013 and on 9th July, 2013 the applicant furnished all the required documents in support of her claim in respect thereof and from that date no communication was received and the allegation of the claim being time barred was made for the first time in these proceedings. Apart from that there was a Court order in the said Succession Cause barring the release of any funds until confirmation of grant and a certificate of grant which was issued to the Public Trustee via a ruling read on 3rd April, 2013 was one of the documents that were furnished by the applicant. Therefore no claim could be made therein and the beneficiaries could not file the claim. It was further contended that the delay in making the claim was due to misadvice by the Respondents. In the applicant’s view the claim is formally filed at the KRA offices for onward transmission to the Insurance Company hence there was no need to sue

- the Insurance Company.
12. It was submitted on behalf of the applicant that the Respondents have an obligation to pay out the death benefits of the deceased to the beneficiaries who include the ex parte applicant herein as provided in rule 23 of the **Retirement Benefits (Occupational Retirement Benefits Scheme) Rules, 2000**. The deceased having nominated his beneficiaries for both Ushuru Co-op Savings and Credit Society Ltd and Kenya Revenue Authority Staff Pension Scheme and as the status of the applicant as the deceased's wife had been determined by the Court in the ruling dated 9th June, 2011, the applicant was entitled to the spousal pension. The issue of the second child, it was contended could not be brought up having been determined by the Court in the Succession Cause. Based on Michael Mungai vs. Registrar of Companies & Another [2013] eKLR it was the applicant's position that the Respondents have a statutory obligation as the Scheme is established under the provisions of the **Retirement Benefits Act, 1977** and **Trustees Act, Cap 167**.
 13. The applicant further submitted on the strength of Francis Chachu Ganya & 4 Others vs. Attorney General & Another [2013] eKLR that the respondents acted contrary to the principle of legitimate expectation.

1st Respondent's Case.

14. According to the 1st Respondent, the Authority, the initial ruling delivered by the Family Court in the said Succession Cause on 9th June, 2011 ordered the Trustees of the Scheme not to release any funds due until the beneficiaries petitioned for, obtained and confirmed letters of administration. However at that time there was no petition for the said grant, yet the applicant was seeking orders to compel the release of the funds to her. In its ruling dated 3rd April, 2013, it was contended that the Court held that the pension benefits held by the Scheme and the investments in Ushuru Savings & Co-operative Society were not subject to the law of succession but the law governing the same as stipulated under the **Retirement Benefits Act** and the **Co-operative Societies Act** hence the Court found that the Pensions Benefits and Sacco benefits did not form part of the deceased's estate.
15. According to the 2nd Respondent, the consolidated information on the total death benefits due to the deceased was promptly conveyed to the Court in the said Succession Cause. Upon receipt of the ruling dated 3rd April, 2013, a letter was written to the Sacco and copied to the Authority's Human Resource, informing them to immediately disburse any funds in their custody in accordance with the **Co-operative Societies Act** and in accordance with the Court's ruling. Following the said decision a decision was made that there was a death gratuity and an annuity pension due to the beneficiaries of the deceased which gratuity amounted to Kshs 1,140,485/= net of tax which was apportioned between the deceased's nominated beneficiaries, **J N**, deceased's mother (20%) and **H N**, deceased's daughter (80%) and the Trustees of the Fund resolved that Kshs 228,097/=, constituting the said 20% be paid to **J N** which sum she was invited to collect and she duly sent a representative to do so on 22nd August, 2013. With respect to Kshs 912,388/= being the balance, the Board of Trustees resolved that the said sum be held in trust for the minor, **H N** in the Scheme pursuant to rule 7(c)(i).
16. It was disclosed that from the death benefits a total sum of Kshs 1,302,181/= was available from the Scheme for purchase of pension for the spouse and child/children and the applicant was duly advised and identified UAP Insurance for the Spouse's and Children's pension though it was always the intention of the Scheme Trustees to pay this amount.
17. However on 23rd August, 2013 KRA received a letter from a firm of advocates to the effect that the deceased left behind a son born on 21st January, 2007, **H N N**, who had not been provided for and produced a letter stating that the legal representative of the said son was **N B N**, a sister to the deceased, who had been assigned a Power of Attorney by the mother and guardian of the said son.
18. The 1st Respondent explained that Alexander Forbes are the actuaries for the KRA Staff Pension Scheme and as such are the ones who compute the amount payable in respect of an individual as pension. Standard Chartered Bank (K) Ltd on the other hand is the custodian of the KRA Staff Pension Scheme Funds, while Genesis Kenya Investment Management Ltd is the fund manager. The Board of Trustees, it was disclosed are responsible for the disbursement of funds in

accordance with the Scheme's Rules.

19. According to the 1st Respondent, the Pension Trustees were always ready and willing to pay a lumpsum sum cheque of Kshs 1,140,485.00 to an annuity provider of the widow's choice, for purchase of spouses' and children's pension, but for the reasons disclosed hereinabove, the Pensions Unit had no choice but to first wait for the Board of Trustees to sit and make a decision on the matter of the new child, **H N**, which meeting is quarterly.
20. Whereas previously, the Scheme was the one to pay out the pensions benefits by a pay roll, by an amendment of the **Retirement Benefits Act**, a retiree or spouse or widow/widower and children under the age of 18 are given an opportunity to identify an annuity/pension provider of their choice from the insurance market to which the pension to the retiree or dependants is paid in accordance with the greed terms of the contract. Accordingly the Scheme no longer undertakes to pay the pension beneficiaries from a monthly pay roll.
21. It was however disclosed by the 1st Respondent that on 21st April, 2013, the Scheme Board of Trustees resolved as follows:
 - a. The balance of Death Gratuity amounting to Kshs 912,338.00 being held in trust for **H M** only be re-distributed equally between **H M** and **H N** (daughter and son, respectively of the deceased). The Trustees to continue holding the amount in the scheme for the benefit of the two children. Part of the amount may be utilised to meet educational expenses for the children upon production of original fees structures together with report forms and any balance thereafter to be paid to the children directly upon attainment of the age of majority (i.e. 18 years).
 - b. The accumulated amount in the Pension Scheme be distributed equally amongst the three (3) dependants to the late **N N**, **Ms J M O** (widow), **H M** (Daughter) and **H N** (son). The share due to the daughter and her daughter be paid to her chosen Pension/Annuity Provider for provision of Spouses'' and Children's Pension. The share due to the son be held by Trustees in the Scheme for the benefit of **Master N**.

2nd Respondent's Case

22. According to the Kenya Revenue Authority Staff Pension Scheme, upon receipt of the ruling dated 3rd April, 2013, the applicant was informed that KRA had taken out an accident Insurance Cover for all its staff including the deceased and that the applicant was one of the beneficiaries of the said Group Personal Accident Insurance Cover amounting to Kshs 2,225,182/= and that in order for her to claim the money, she was required to avail the original Death Certificate, Original Post Mortem report, claim form duly filled, copy of the deceased's National ID, 3 copies of the deceased's payslips. The applicant however availed the said documents around 9th July, 2013.
23. It was however contended that the said sum is payable by the Insurance Company, APA Insurance, which is a third party while the insurance Brokers are Canopy Insurance Brokers and this information was given to the applicant. However, the said Insurance Company has not paid the said sum to the 2nd Respondent but has instead alleged that the claim is time barred, despite the 2nd Respondent's attempts to have the said sum paid.
24. The 2nd Respondent's position was therefore that the applicant was to blame for the delay in filling the claim. Further the applicant is not the only beneficiary to the claim and ought to sue the Insurance Company for the settlement of the claim and not KRA, who is neither the claimant nor the insured and hence cannot pay out the insurance claim.
25. In was submitted on behalf of the Respondents that Ushuru Co-operative Savings & Credit Society Ltd is an independent entity registered as such hence the Respondents cannot be legally held liable for the dues payable therefrom. Further the deceased nominated his sister, **N B N**, to be awarded 50% of his savings while his mother, **J K N**, was awarded 50% thereof. It was disclosed that the applicant was not privy to the fact that the said persons had already been paid their shares. Since the law governing Sacco Savings is the Cooperative Societies Act, Cap 490, which is not governed by the Respondents whose mandate is provided for under **Kenya Revenue Authority Act, Cap 469** and the **Retirement Benefits Act**, the Respondents cannot be held liable to the Applicant for the sums held on behalf of the deceased by the Sacco, which has paid the named nominees of the deceased.

26. With respect to Group Personal Accident Cover, amounting to Kshs 2,225,182/= it was submitted that the same was not payable by the Respondents but by the Insurance Company that insured the deceased.
27. On the Staff Pension Scheme in the sum of Kshs 1,483,454/=, it was submitted that following the amendments to **Retirement Benefits Act**, rule 23 of the **Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000** provides that death benefits no longer form part of deceased's estate but is payable to the nominated beneficiary of the deceased and the applicant was not one of such beneficiaries. Pursuant to **Trust Deed and Rules of the Kenya Revenue Authority Staff Pension Scheme** as read with **Kenya Revenue Authority Staff Pension Scheme Rules and Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000**, death benefits of all Kenya Revenue Staff are paid to the nominated beneficiaries through the legal representative, who is given the funds upon receipt of genuine claim documents including a confirmed letters of administration. In this respect the deceased named **J K N**, his mother and his daughter, **H M N** as the beneficiaries and apportioned the same in the ratio of 20% to 80% respectively.
28. On the issue of **H N N**, the Respondents denied that his issue was dealt with in the Succession Cause and explained his omission from the list of nominees as due to the fact that he was born almost at the same time as the death of the deceased and that this fact was unknown to the Judge during the Succession Cause proceedings hence the need to make provisions for him.
29. Since the Respondents have no mandate statutory obligation or legal liability to pay the sum due from the Sacco and the Insurance Company it was submitted that an order of mandamus cannot issue in respect of the said sums of Kshs 218,373/= and Kshs 2,225,182,182/=. With respect to the Pensions, it was submitted that the claim was premature since on 9th June, 2011, the Court in the Succession Cause ordered the 1st Respondent and the Sacco and the Insurance not to release any amount to any beneficiaries until confirmation of the grant.
30. As the Respondents have not failed to act but to the contrary are committed to disbursing the funds according to the law the orders sought, it was contended ought not to issue. The Court was therefore urged that in the exercise of its discretionary jurisdiction, it ought not to issue the same. Accordingly, it was submitted that the principle of legitimate expectation was inapplicable.

Determinations

31. In this case what the applicant seeks is an order of mandamus. The scope of judicial review remedy of mandamus was the subject of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR**. In the said case the Court of Appeal held *inter alia* that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according

to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

32. The first issue for determination is therefore whether there is a legal duty imposed upon the Respondents to pay the sums claimed by the applicant with a corresponding specific legal right to receive the same by the applicant or that there is no specific legal remedy for enforcing that right and whether the Respondents have failed to perform the said duty to the detriment of the applicant who has a legal right to expect the duty to be performed.
33. However before delving into the said issues, it is important to deal with the status of *H N N*, the alleged surviving son to the deceased since his entry into the proceedings has had an effect on the distribution of the benefits the subject of this matter. In his ruling dated 9th June, 2011 in the said Succession Cause, **Kimaru, J** found that “the deceased was survived by a minor child”. It is not in dispute that the said minor child was none other than *H M N*. The Respondents however contend that the fact of the existence of *H* was unknown to the Judge when the Judge made that determination. That may be so. However, it is not the duty of the Respondents to amend the Court’s decision. If at all the said determination was arrived at in the absence of disclosure of all material facts, instead of purporting to amend the said decision on the basis of a letter purportedly written by an advocate, the said advocate ought to have moved the Court for appropriate orders rather than in the manner in which the said issue was brought up. I have no doubt at all in my mind that where a Court of law exercising its competent jurisdiction makes orders directed upon a particular person, that person is under a legal duty to comply with the said orders and failure to do so may in appropriate circumstances warrant the order of *mandamus* where there are no specific legal remedies for enforcing those orders.
34. In matrimonial matters and by extension matters concerning the welfare of the children it has been recognised that the Courts can upon fresh evidence alter, vary or discharge the order that they had previously made. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370:**

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

See also **Omari vs. Ali [1987] KLR 616.**

35. However, the Courts cannot alter their previous order when there is no evidence of any fresh circumstances. Secondly, the fresh evidence is not restricted as to subject matter but may include matters affecting the position of the parties. Thirdly, this new evidence takes the shape of the same sort of evidence as that upon which a new trial would be granted; it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. See **Uchai vs. Elkana Arusha HCCA No. 16 of 1967 [1970] EA 224.**
36. Therefore whereas I am not in a position to determine whether or not *H* was entitled to the benefits in question, I find that the manner in which the issue was introduced was highly unprocedural and amounted to unilateral review or variation of the orders of the Court by a party to the proceedings. Such a procedure is unknown to law. Therefore the failure by the Respondents to fulfil their statutory obligations on the basis of the status of *H* cannot be entertained by this Court in these proceedings.
37. In his ruling in the Succession Cause dated 3rd April, 2013, **Musyoka, J** held that the pensions benefits held by the Kenya Revenue Authority Staff Pension Scheme and the investments in the

Ushuru Savings & Cooperative Society are usually not subject to the law of succession but the law governing pensions and investments in cooperative societies as stated in the **Retirement Benefits Act** and the **Cooperative Societies Act**. It is contended by the Respondents that Pursuant to **Trust Deed and Rules of the Kenya Revenue Authority Staff Pension Scheme** as read with **Kenya Revenue Authority Staff Pension Scheme Rules and Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000**, death benefits of all Kenya Revenue Authority Staff are paid to the nominated beneficiaries through the legal representative, who is given the funds upon receipt of genuine claim documents including a confirmed letters of administration. In this respect the deceased named **J K N**, his mother and his daughter, **H M N** as the beneficiaries and apportioned the same in the ratio of 20% to 80% respectively. It was also contended that the Trustees have the power in their absolute discretion to apply the whole or any part of the said benefits to the purchase of an annuity or annuities for the beneficiaries in discharge of their duties of the Trustees. Whereas the Court cannot by an order of mandamus direct the Trustees on how to exercise their discretion, where they decline to exercise the same the Court is properly entitled to direct them to do so by an order of mandamus. See **Republic vs. Minister For Home Affairs and Others ex parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323**.

38. With respect to the sums due from Ushuru Co-operative Savings & Credit Society Ltd and the proceeds of a Group Personal Accident Cover, the applicant has not satisfied the Court that the same are held by the Respondents. To the contrary the same are clearly held by third party entities. The applicant therefore ought to have instituted proceedings against the said parties. Therefore this Court cannot in these proceedings determine the issue whether or not the claim in respect of the Group Personal Accident Cover is time barred. Whether or not the limitation can apply where payment is stopped by a Court order and whether or not in such circumstances time for making a claim can be extended are matters which are beyond the scope of this judgement.
39. Having considered the application I am satisfied that the applicant's claim in respect of spousal and children's pensions, taking into account the time it has taken to pay the same and the reasons behind non-payment, cannot be said to have been completely devoid of merits.

Order

40. In the premises, I hereby grant an order of mandamus compelling the Respondents to pay the applicant the sums due to her in respect of spousal pension and to settle the sum due to **H M N** in the manner provided by the law. The said actions to be undertaken within 30 days from the date of service of this order on the Respondents.
41. Liberty to apply granted to the parties.
42. The applicant will have half the costs of these proceedings.

Dated at Nairobi this 19th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sagana for Miss Maina for the ex parte Applicant

Mr Nyagah for Miss Lavuna for 1st Respondent

Cc Patricia