



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

MISCELLANEOUS CIVIL APPLICATION NO. 48 OF 2014 (OS)

IN THE MATTER OF E N M (DECEASED)

AND

IN THE MATTER OF C M AND A M (MINORS)

AND

IN THE MATTER OF THE CHILDREN ACT

AND

AMM.....1ST APPLICANT

PCM.....2ND APPLICANT

-VERSUS-

VMM.....1ST RESPONDENT

CFC LIFE ASSURANCE LIMITED.....2ND RESPONDENT

RULING

1. The proceedings herein relate to benefits accruing on account of the death of ENM (hereinafter referred to as the deceased), arising from a death in service scheme administered by the 2nd respondent, wherein the 1st respondent and the two children of the deceased are named as beneficiaries.
2. The deceased and the 1st respondent were married and blessed with two children. The deceased entered into a pension scheme with the 2nd respondent wherein she nominated her husband and the children as beneficiaries. The investment was made payable upon death, among others. The deceased was murdered on 7th October 2010 and on 5th September 2013 the 1st respondent was convicted of the murder. The applicants were subsequently appointed guardians of the minors by the Children's Court and granted full legal custody, care and control of the minors.
3. The suit herein seeks that the 2nd respondent be restrained from paying the death in service benefits, which have accrued on the death of the deceased, to the 1st respondent as per the scheme, and to instead make the payment directly to the applicants. They ground their application on the fact that the 1st respondent was responsible for the death of the deceased and that the death in

service benefits have accrued on account of that death by the hand of the 1st respondent. They also argue that the Children's Court had appointed them guardians of the children and had granted them custody. The benefits were therefore needed for the upkeep of the children.

4. The 1st respondent did not file any papers in reply to the application. I granted a chance to him, who was during these proceedings in prison custody, to file his papers, but he never did.
5. The 2nd respondent responded to the application through an affidavit sworn on 28th November 2014 by Kivuitu Musili, its head of strategy, risk and compliance. The 2nd respondent does not oppose the application. It acknowledges that under the relevant law the scheme manager or administrator is not bound by the nomination made by the policy-holder and they need not pay the benefits to the nominees of the nominator. The 2nd respondent proposes that since the 1st respondent is in prison and is not able to care for the children, the benefit due to him should be put together with that due to the children and paid to the applicants to be utilised for the benefit of the children.
6. The application was argued orally on 30th July 2015 and 24th September 2015. Miss Mukururi stated the case for the applicants, while Miss Ngonde urged the case for the 2nd respondent. The 1st respondent was in person and he argued his own case.
7. Miss Mukururi and Miss Ngonde based their submissions entirely on the papers that had been lodged in the matter on behalf of the parties they represented. On his part, the 1st respondent argued that his conviction for the murder of the deceased was not final for he had preferred an appeal against it. He also submitted that pension benefits are not subject to appeal and should be paid directly to the persons named in the scheme as beneficiaries. He had been nominated as beneficiary and he urged the court to uphold the nomination in his favour.
8. Although this matter is expressed to be brought as a matter of the Children Act, the fact of the matter is that it should be anchored on the Retirement Benefits Act, which is the law that regulates schemes of the kind the subject of these proceedings. Under that law, nominations that are discretionary are not binding on the scheme managers. The managers are given discretion to make payments contrary to the nominations, to the persons that in their opinion are entitled to the payment.
9. The relevant provision is in Regulation 19 of the Retirement Benefits (Individual Retirement Benefit Schemes) Regulations, 2000. A similar provision is found in Regulation 23 of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations 2000. Regulation 19 states as follows:-

“The scheme rules shall provide that on the death of a member the lumpsum benefits payable from the scheme shall be paid to the nominated beneficiary, as if the deceased member had not named a beneficiary then the trustees shall exercise their discretion in the distribution of the benefits to the dependants of the deceased member: provided that the trustees may refuse to pay the nominated beneficiary and furnish reasons for the refusal which shall be recorded.”
10. The administrator of the scheme in this case is the 2nd respondent. In the response to the application, in the affidavit referred to in paragraph 6 hereabove, the administrator has indicated it would not be bound by the nomination made by the deceased in the application form received by the 2nd respondent on 10th March 2010 and as per the schedule of the contract data dated 20th May 2010, and that instead it would pay the benefits to the applicants who have been granted custody of the children by the Children's Court. The position was repeated in court by Miss Ngonde during oral argument of the application.

11. The discretion belongs to the scheme administrator, and not the court. The court should interfere with the same only upon it being satisfied that the discretion was exercised unreasonably or in an arbitrary matter. I am convinced that the grounds advanced by the 2nd respondent are cogent and reasonable.

12. Owing to the foregoing, I do find merit in the application dated 19th March 2014 and I do hereby grant the same in terms of prayers 2 and 3 thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE