



The background information is that the proceedings herein relate to the estate of late Dr. Peter Eliud Njeru Njagi. There is on record a letter from the chief of Lenana Sub location Nairobi which recognized the dependants of the deceased as: -

- (1) *R.J.G ID No. 7765157.*
- (2) *S. M. N daughter 11 years.*
- (3) *S.W.N mother of the deceased 80 years.*

The petition was presented to court, by two persons namely J.G.R and S.P.M. The list of survivors given in form P & A 5 is as follows:

- (1) S.W.N – mother.
- (2) N.N.N – Widow
- (3) J.G.R – Widow
- (4) A.K.N – son (married) 35 years.
- (5) J.W.N (daughter) married 33 years.
- (6) M.W.N (daughter) married 31 years.
- (7) A.J.K – son 28 years.
- (8) S.M.N daughter 11 years.

Also traced on the record, is a summons dated 24th day of October 2007 and filed on the same date presented by one N.N.N seeking extension of time within which to lodge objection, to the making of the grant, which objection is dated 14th February 2008 and filed on the 15th February 2008. There is also traced on the record, an application dated 2nd day of May 2008 and filed the same date. It was brought under section 26 and 29 of the Law of Succession Act and Rule 45, 49 and 73 of the Probate and Administration Rules. Four (4) prayers were sought. The central theme being that the application sought for provision for the dependant in terms of school fees, and other monthly maintenance costs required for the maintenance and education of the said S.M.N (minor), in such a manner, and amounts as this honourable court, may direct, and that N.N.N do furnish a full account of the rental income accrued from the said properties from the deceased's death to date.

A similar application has been traced on the record dated 1st day of August 2008 and filed on the 5th day of August 2008. This application also sought similar reliefs as the previous one.

Also traced on the record is an application dated 27th April 2009 and filed on 29th day of April 2009. It is brought under the same provisions of law as the previous two and also seeks the same reliefs.

Lastly there is the application subject of this ruling dated 29th day of September 2009 and filed the same date. 4 prayers are sought namely:

- (1) *That this application be certified urgent and be heard exparte in the first instance.*
- (2) *That pending the final determination of this succession cause, the Respondent N.N.N, be ordered and directed to effect such payments from the rental income accruing from the properties constructed on the deceased's properties known as Title Numbers GATURI/Githimu/3537*

GATURI/Githimu/3538

GATURI/Githimu/3541

GATURI/Githimu/3542 as may be sufficient to pay such school fees and other monthly maintenance costs, required for the maintenance, and education, of the said S.M.N (minor) in such a manner and amounts as this Honourable court, may direct.

- (3) *That the said N.N.N do furnish a full account of the rental income accrued from the said properties from the deceased's death to-date*
- (4) *That costs of this application be provided for.*

The grounds in support are contained in the body of the application, supporting affidavit, annexures and oral highlights in court, and the sum total of the same are as follows:-

- Rental income from the said properties exceed 42,000.00 per month, which rents are in the sole receipt of the Respondent N.N.N who has failed to account for the same.
- That the subject of this ruling namely S.M.N is a child of the deceased and was being maintained as such by the deceased prior to his death.
- That the properties mentioned in prayer 2 of the application were solely constructed by the deceased and as such any rental income accrued from them is deemed to belong to the estate of the deceased.
- The subject attends school at Riara group of schools.
- That school fees for the said minor is outstanding.
- The applicant who is the mother had made efforts and taken a loan to pay off the 2nd term fees.
- Concede a similar application had been presented in April for second terms fees but the same was not finally determined.
- That the current application deals with school fees outstanding as at the beginning of the 3rd term which if not paid the minor might be barred from sitting her exams, which fees have recently been reviewed upwards.
- The applicant petitioner moved to court, to seek this relief because there is reluctance on the part of the objector who has custody of the said rental income to release the fees for the minor dependant.

In his oral representation to court, counsel for the applicant petitioner simply reiterated the content of the supporting grounds and stressed that the subject minor is a daughter of the deceased who was wholly depended on the deceased for her general maintenance including school fees.

- That the proceedings herein are still pending and as such the deceased's estate has not been

distributed hence the need for the said estate to provide for the minor child.

- It is their stand that the reasons given by the objector Respondent for failing to pay fees for the minor is because there is an allegation that the income has been used to pay for the repairs of the dilapidated said rental premises, school fees for a son of the objectors hospital bill, for the deceased hospital bill expenses for the objector, all of which have not been demonstrated and which this court has been called upon to disregard when determining the issues herein.

In response to that submission counsel for the respondent objector relied on the content of the replying affidavit and oral submissions in court. A summary of them are that:-

- Objector respondent was married to the deceased under the African Christian marriage Act.
- The petitioner applicant was never married to the deceased and there are objection proceedings pending herein.
- Contend that a similar application had been presented to this court, dated 27th April 2009 on which the learned judge then seized of the matter declined to make a pronouncement on the same on the merits on the grounds given off the record that the learned judge did not know how the applicant was going to arrange to pay back that money should she fail to succeed at the close of the determination of the objection proceedings.
- It is their stand that the paternity of the said minor is in dispute as there is a 3rd party one Charles Musyoka who is claiming to be the father of the said child, and from whom the petitioner applicant has made no efforts to seek contribution for the said child's upkeep for.
- They raise objections to the court, making a final pronouncement on the application subject of this ruling, when the similar one dated 27/4/2009 is still pending and has not been withdrawn.
- Concede that indeed there are rental premises belonging to the estate of the deceased known as Njeru Kathungu having units but state that these only bring in a gross income of Kshs 42,500.00.
- Further that the said premises are dilapidated and whatever is realized is applied towards maintenance.
- The income from the same has dwindled to as little as Kshs 23,000/- because of the dilapidated state of the premises which condition has forced tenants out of the premises.
- The Respondent has personal knowledge that the applicant petitioner is a Director of Pegasus consultants limited from which she earns income and as such she has not demonstrated that she is not in a position to raise fees for her daughter.
- She, respondent also has knowledge that the applicant withdrew an amount of Ks 80,000.00 from bank accounts belong to the deceased which amounts should be spent on the education of the minor.
- She has knowledge that the funeral committee agreed that the amount of Kshs 150,000.00 which was excess funeral expenses for the deceased should go towards fees for Susan Mwendwa.
- That there has been no demand for the said fees furnished to this court.
- It is her stand that it is her duty to preserve the estate a matter the applicant is not contributing to.
- She also has personal knowledge that the applicant and brothers of the deceased have been collecting and selling tea and coffee from the deceased's farm whose income is unknown to the respondent and which income can be used for the maintenance of the said S.M.
- The property from which tea and coffee is picked and sold is known as BeragweThumaita/691.

- The Respondent deponed in her replying affidavit that she has been locked out of her matrimonial home thus preventing her from accessing the house as well as the tea and coffee growing there on for her benefit. Instead they are the ones who are benefiting from the same.
- By reason of what has been stated above the respondent urged the court, to find that the application has no merit and dismiss the same with costs.

In the Respondents counsel's oral highlights in court, the learned counsel, reiterated the content of the replying affidavit, and then added the following in a summary form:

- Application subject of this ruling is a replication of the one dated 27/4/2009 and in the absence of the same being withdrawn or dealt with a pronouncement on the merits of this application cannot be made and the application subject of this ruling should be dismissed.
- It is not disputed that objection proceedings are pending herein, and it is their stand that since the entitlement of the applicant and the subject minor to the estate is being contested, it is only proper that the objection proceedings be determined first before the two can draw any benefits from the said estate.
- It is their stand that the judge then seized of the matter expressed reservation as to how the applicant proposes to compensate the estate with funds paid out to her and the minor, should it turn out that she and the subject minor are not entitled to a share of the estate of the deceased.
- Concede that a birth certificate has been displayed herein but according to them, it is not conclusive proof of paternity more so when there is a 3rd party who is claiming the paternity of the said subject a matter which has not been controverted by the applicant.
- Still urges, the court, to find that whatever income is generated by the rental premises the same is depleted through repairs of the dilapidated buildings which dilapidation has led to the exodus of the tenants from the said premises and in the process reducing the income accruing there from.
- That the respondent has a duty to maintain the estate and to prevent it from going to ruins.
- Asserts that there are expenses to be met from the said income.
- From her own deponents in the supporting affidavit, the applicant lives lavishly and as such can afford to pay fees for her daughter.
- By reason of what has been stated above, the court is urged to hold that the estate is not in a position to do what it is being asked to do and as such the application should be dismissed.

In response to that submission, counsel for the applicant had this to say:-

- The current application is not Resjudicata, neither is it a replication of the application of 27/4/2009 which has been overtaken by events as it related to school fees for the 2nd term, where as the current application is for school fees for the 3rd term.
- There is no denial that the objector is the wife of the deceased.
- The court, is urged to take the birth certificate as conclusive proof of paternity.
- No reliance should be placed on the alleged affidavit of one Charles Musyoka who allegedly is said to be the biological father of the subject child as there is no proof of the same.
- The court, is urged to take into consideration documentation from the school which confirmed to the effect that the deceased paid fees for and maintained the subject child in school.

- Asserts that the subject was a dependant of the deceased and is entitled to be maintained by the estate of the deceased.
- Facts placed before the court, satisfy the ingredients set out in section 29 of the law of succession Act
- Despite allegation of income from the estate being applied towards the maintenance of the deceased's rental premises, no proof of this has been demonstrated. There is also no proof of payment of school fees of any of the objectors children or her medication.
- Asserts that no income accrues from Pegussus Ltd to the petitioner as the company which relied on customers sourced by the deceased, ceased operations upon his death.
- To avoid repeat applications, the court, is urged to make a standing order to the effect that fees be paid from the estate funds till the matter is finally determined.
- Further proof that the subject minor is a child of the deceased is from the fact that she is named after the deceased's mother who was present in court.
- No case law was referred to the court.

On the courts assessment of the facts herein, it is clear that the court has been invited to decide the issues in controversy on the basis of facts only. Due consideration has been made by this court, on the facts presented to it by the rival arguments herein and the following do not appear to be in dispute:-

- (1) That the deceased estate has not been distributed.
- (2) That it is the applicant petitioner who moved and initiated the succession proceedings, and then served a citation onto the objector, who moved and filed objection proceedings, contesting the entitlement of the petitioner applicant to administer the deceased's estate in the first instance, and in the second instance, that she is not entitled to benefit from the estate because she was not a wife of the deceased. Also contested is the entitlement of the minor who is subject of this ruling.
- (3) It is common ground that the objection proceedings which are going to determine not only the rightful administrators of the estate of the deceased, but also the rightful beneficiaries of the estate of the deceased are pending disposal.
- (4) It is apparent that the petitioner applicant is not contesting the entitlement of the Respondent objector and her household as one who has a right to administer the estate of the deceased as well as a beneficiary. But it is the respondent objector who is objecting to the entitlement of the petitioner and her minor child.
- (5) It is not disputed that the estate has some property from which rental income accrues to the estate, and from which the applicant says that funds should be availed to meet the school fees of the minor, where as the objector alleges that whatever is realized is not even enough to cater for the maintenance of the estate leaving it dilapidated.
- (6) It is on record and as outlined herein, that there are 3 applications on record brought under the same provisions of law, and seeking the same prayers. The objector respondent has no complaint about the earlier one which the court, was made to understand that orders had been made in respect of the same and the objector met that obligation by paying part fees of the said minor. The complaint is about the second application which is still pending and no pronouncement on its merits has been made by this court. Neither has it been withdrawn or abandoned.
- (7) The objector respondent has deponed that, there are other properties belonging to the estate from which the petitioner applicant and brothers of the deceased receive income which the objector has no access to and which income can be utilized to pay off the minors fees.

(8) That indeed there is an affidavit purporting to have been deposed by one Charles Musyoka purporting to be the biological father of the said minor. The copy annexed to the replying affidavit is not properly commissioned but there is the copy filed in court on the 7th October 2008 which has been traced on the record by the court. As asserted by the objectors counsel no response has been made to rebut those allegations save for submissions from the bar that the said allegations are subject to proof.

(9) It is on record that on 11/6/2008 Onyancha J gave an order to the effect that Mrs Njuguna do give a professional undertaking to refund any provisions to be possibly made in favour of S.M.N pending the final determination of the cause should it turn out that she was not entitled to benefit from the estate of the deceased.

(10) It is on record that upon the court, being notified as to the giving of the undertaking, an order for payment of school fees to the tune of Kshs 25,000.00 was made by Onyancha J on the 24/6/2008.

(11) There is entry for a consent made on 9/12/2008 for the objector to pay school fees of Kshs 25,000.00 for the minor.

(12) Indeed an attempt was made to fix the application dated 27/4/2009 but for reasons not noted on the record the same was shelved. It has been submitted from the bar that the learned judge then seized of the matter declined to hear the said application, and instead advised parties to proceed with the objection proceedings which would finally determine the rightful beneficiaries to the estate.

It is therefore against the afore set out rival arguments and the undisputed facts outlined above, that this court, has been invited to rule and determine the matter as to whether an order for payment of school fees for the subject minor is to be made or not and if so why. As mentioned by the applicants counsel, of paramount consideration herein should be the welfare of the child. The court, does not think that any of the disputants can deny the fact that education is of paramount importance to the minor. Of greater importance is the fact that if the threat by the institution to shut her out of the examination is carried through, the minor is likely to be affected more so when it is being alleged that she has been topping her class and is hopeful of doing well in the anticipated exams. It is therefore agreed in principle, that all should be done to ensure that the minor is retained in school and is thus enabled to do her exams. This enabling can only come from fees being paid either by the estate or the mother. Arguments on this are already on the record and with the estate through the objector saying that the mother should use other proceeds from the other estate property earnings, from Pegussus Company and her own resources to keep the minor in school. Where as the applicant says the estate should solely meet that expense.

To be considered along side this, is the fact that objection proceeding are pending and it is not possible for this court, to state conclusively which direction the determination will take. More so, when the court, had to require one party to give an undertaking to refund to the estate monies expended on the school fees of the minor should the end result be against them. The court, is aware that indeed an undertaking was given and payment effected against that undertaking either once or twice.

It is also on record that when a similar move was made in April 2009, the court, then seized of the matter declined to hear the application, but made no remarks on the same on the record, and instead opted to take evidence to have the issue sorted out. It was alleged that reasons were given off the record. This court has no access to the learned judges reasons for not making a pronouncement on that application. That notwithstanding the court is entitled to revisit the issue and make its own findings.

Due consideration has been made of the whole issue in its totality and the court, is of the opinion that the interests of both parties will be served better if the whole objection proceedings is fully determined so that it is known whether the petitioner and the minor are lawful beneficiaries of the estate of the deceased or not. This will thus avoid duplication of disputes whereby the petitioner may be called upon to refund to the estate whatever they have expended onto the minor as per the undertaking. The matter therefore calls for a balancing act on the part of the court, to ensure fairness and justice to both sides.

When resolving this matter, the court, has skirted the issue of the affidavit of Charles Musyoka and the

presence of the birth certificate of the minor, issues likely to form the central core of issues for determination by the objection proceedings. For now the court, is comfortable in drawing in an inspiration that there have been previous payments in favour of the minor. But in making the order, it should not lose sight of the action taken by the previous judge of opting to conclude the objection proceedings first as opposed to revisiting the issue of school fees as and when the need arises. The court, appreciates as submitted by the respondents counsel, that the mother also has a duty to struggle and raise fees for the minor especially in circumstance as this where a dispute is pending determination.

The court, recalls being called upon to make a standing order for payment of school fees to avoid repeat applications while the court, agrees that this is an option, it is of the opinion that in view of the pending objection proceedings it is better to have the rights of the parties entitlement from the estate determined first. The court, is therefore not inclined to make a standing order. Instead it will allow an order for payment of an amount similar to the one previously made of 25,000.00 to be paid by the objector towards the school fees of the minor. The rest should be met by the petitioner in her capacity as the mother of the minor in the first instance, and in the second instance as having been shown to be also earning income from certain property belonging to the deceased's estate jointly with brothers of the deceased, a fact deposed to by the respondent in the replying affidavit, and not controverted by the petitioner applicant. The court has no doubt that the minor is equally entitled to the income reaped from the estate by her mother as well.

For the reasons given in the assessment, the court, proceeds to make the following orders.

- (1) It is preferable that objectors proceedings be heard on priority and be concluded so as to crystallize the rightful beneficiaries entitlement from the said estate and to avoid prolonging the proceedings through filing of interlocutory applications.
- (2) In the interests of the welfare of the minor, the court makes an order that an amount similar to the previous one of Kshs 25,000.00 be paid out from the rental income accruing to the estate of the deceased and the same be applied towards the school fees of the minor.
- (3) The balance do come from the other income from the deceased's property mentioned in the replying affidavit and not controverted by the petitioner as accruing to the petitioner and brothers of the deceased.
- (4) In view of the circumstances displayed herein, it is advisable that no further interlocutory applications be fielded herein. Instead, parties do process the objectors proceedings to their finality so that the rights of the minor are determined once and for to ensure certainty as to who will be responsible for her future educational expenses instead of having it hanging in the balance leaving it at the whims of the court, to decide when to make an order for payment of school fees from the estate or when to withhold the same.
- (5) Each party will meet own costs.

Dated, Read and delivered at Nairobi this 26th day of October 2009

R.N.NAMBUYE

JUDGE