



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 2855 of 2005

IN THE MATTER OF THE ESTATE OF JACKSON KAMAU CHEGE (DECEASED)

RULING

The application before me is dated 13th September 2007 and is brought by one beneficiary of the estate of Jackson Kamau Chege deceased. It is brought on behalf of her self and on behalf of several of her children who are also entitled as beneficiaries, who include Yvonne Nduta Chege and Jeremy Kamau Chege.

Her original application sought payment from the estate of Kshs.5,257,000/-. Thereafter a sum of Kshs.3,793,660/- was paid leaving a balance of Kshs.1,463,340/- which figure was however increased by additional requirements and claims of Kshs.2,774,926/- further made by the said beneficiaries. The total sum now sought is Kshs.4,238,266/-. The Applicant with leave of court amended his application to claim the above figure.

The Applicant was seeking

- 1) On behalf of Jeremy Kamau Chege: -
 - (a) Â£2990 for a drama trip to Canada and United Kingdom
 - (b) Ksh.21,000/- a balance of shopping list.
 - (c) Kshs.20,000/- being balance for school uniform costs.
- 2) On behalf of Yvonne Grace Nduta Chege
 - (a) Kshs. 660/- being balance of living expenses
 - (b) U.K Â£250 being refund of rent deposit
 - (c) U.K Â£8320 being rent from October, 2007 to may, 2008
 - (d) Kshs. 67350/- being refund of Air ticket (September, 2007)
 - (e) U.K 769.23 being 2007 London Local Bus Fare
- 3) On behalf of applicant's family maintenance costs: -
 - (a) Kshs. 40,000/- being maintenance costs.

- (b) Kshs. 44,000/- vehicle repair.
- (c) Kshs. 9,939/- being medical insurance premium.

In her submissions for Jeremy's Canada Trip, Mrs. Mbugua admitted that drama was not an examinable class subject. She however felt that it is a school subject that could help develop Jeremy's life horizon, which is why it is offered at the school in the first place. She also urged the Court to note that the travel to Canada through the United Kingdom would open up Jeremy's general life perspective. Jeremy was going to travel in a group of other students and teachers and would that way be given an opportunity to learn other things involved in long distance travel. In other words, she said, the trip would become a part of his larger education over and above class education.

Mrs. Mbugua further argued that since the Estate was notified as early as May-June, 2007 but failed to respond to the notice, the applicant had reason to believe that the Respondent had accepted to finance the trip, otherwise, she argued, they would have objected to it. That, even when the applicant filed this application in September and included the trip finances in their claim, the Respondent did not file any objection to it until December, 2007. Mrs. Mbugua accordingly argued that to secure the trip in the meantime, the applicant went ahead and booked for it by paying United States \$500 in September 2007. That by November 2007, a first deposit for the trip was called for by Jeremy's school. The Applicant, again good faith, had to pay United States \$1500 on 15th November 2007. Mrs. Mbugua concluded that since the Respondent so far had failed to challenge applicant's notice over the trip, the applicant went ahead and applied for and obtained the visas to the United Kingdom and Canada. That the child had become excited about the trip and that although the estate had failed to provide the funds amounting to Kshs.250,000/-, the applicant had to personally raise the same to avoid hurting the child who was eager to make the trip. Accordingly, Mrs. Mbugua urges the court to order for refund.

On the shopping list Mrs. Mbugua sought Kshs.36,000/- but conceded that Kshs.15000/- had been paid on account so that she now sought Kshs.21,000/- balance. She argued that in the past the estate had on this score granted kshs.36,000/- per year.

On school uniform Mrs. Mbugua asked for Kshs.30,000/- per year of which the estate had already given Kshs.15,000/-. She sought the balance of Kshs.15,000/- for the relevant year.

The second main claim is in respect to the requirements for Yvonne Nduta. The Applicant sought rent, travel, air ticket and Insurance. Rent was emotively contested. It was the Applicant's case that when Yvonne Nduta left London University Halls of residence sometimes in May 2007, it became necessary to secure a room or house outside where she could live and study from. Although the first second year term was starting in October 2007, it became necessary to secure a place, early. That she then had no adequate information about rental houses and that for that reason she hurried to commit herself. When she was offered a house at Â£265 a week she wrote to the Respondent seeking approval on 23rd May 2007 with copy of the proposed lease enclosed. She at the same time sought deposit funds to be sent to London to secure the premises. When the respondent did not respond by June 15th June, 2007 the Applicant decided to sign and return the lease with a deposit of Â£250 from her own funds while believing that the same would be recouped by the Respondent later. When the said deposit had been received, the applicant sent a copy to the Respondent with receipt, but again there was no response from the Respondent.

It is the Applicant's further case that when there was a meeting sometimes before September 2007 and the Applicant became aware that Nduta could secure premises to lease for less than Â£265 a week, she abandoned the earlier lease and found a cheaper premises at Â£160 a week. In doing so, the Applicant lost the earlier deposit of Â£250. She however claims a refund of the same, stating that it was paid bona fides on behalf of the Respondent. She argued further that the Respondent, by keeping silence over the request for the money when the lease draft was sent to them, had acquiesced to the lease arrangement and payment to secure it.

The applicant then further that after giving up the original lease she secured a fresh lease at Â£160 a week and had been and will continue paying the same from October, 2007 until the end of the school term

in May 2008. She displayed receipts “ exhibit JC 3. She further argued that the Applicant settled at £160 as the best she found in the market and was not at the time aware that an even better deal for less would be found. She also argued that settling at a premises costing £160 per week was done in October, 2007 and was bona fides and that had she been given information for a decent premises costing less at the relevant time, she would have given in for it. She concluded that it was not until middle December of 2007, when the Respondent filed a replying affidavit that she learnt of a possibility of getting even cheaper accommodation. She agreed to seek such cheaper accommodation for the next year which starts in June or September, 2008.

Further to the above argument, the applicant argued this court to find that rental costs for Yvonne Nduta Chege’s accommodation was not part of living expenses and that exhibit JC 3 in so far it portrayed so, was misleading and erroneous. She argued that the cost of residence should be paid separately from living costs.

In relation to Yvonne Nduta’s day-to-day travel while she is studying in London, the applicant conceded that £69.93 per month offered by the Respondent is sufficient provided it is not assumed to be part of living expenses.

As to Nduta’s air travel Mrs. Mbugua stated, only one London-Nairobi-London was remaining for the year ending May, 2005 “ amounting to Kshs.67,000/-.

Insurance of £200 was also claimed. Mrs. Mbugua could see the reason for refusing it as it was earlier-on provided by the Respondent and since it is a prudent step to have the cover. It had not been paid for the year ending May 2008, and is outstanding.

The third main claim was what would be generally termed family costs of the Applicant Jennifer Chege. She sought Ksh.105,000/- per month, which adds to Ksh.1,260,000/- per year. Of this kshs.420,000/- had been paid and the balance of Kshs.840,000/- was being claimed. The purpose of this amount Mbugua argued, was to maintain the Applicant’s family. The applicant’s argument was that the figure was decided by negotiation and was earlier accepted by the Respondent who paid to for the last two years before this claim was filed. Mrs. Mbugua failed to understand why the Respondent would unilaterally refuse to pay, or even attempt to vary the figure. Under the Family Costs the Applicant raised a motor vehicle repair claim of Ksh.31,000/- and a Medical Insurance Premium of Kshs.9,939/-.

A fourth major issue was introduced. It is whether or not the “*Dairy Project*” in respect of which the Respondent had already paid the applicant Kshs.1,000,000/- to generate additional income to the Applicant, should affect the monthly maintenance allowance of Kshs.105,000/-. If it took off and started generating income, would it become a reason to reduce the allowance to the Respondent?

Mr. Miller for the Estate-Respondent replied to the Applicant’s claims. He stated that the Respondent as the executor of the deceased’s estate understood his responsibility to the beneficiaries. That generally the Respondent had properly and fairly released much of what was required by the beneficiaries but would resist any demands that were unreasonable and/or outside agreed needs.

Mr. Miller disputed Jeremy’s drama trip which would cost almost Kshs.250,000/-. He argued that drama was not an examinable subject and saw no reason why the Respondent should spend the sum on a social trip however exciting it might be to the young Master Jeremy. He thought that the trip was for an elitist 25 students at Jeremy’s school and was really not necessary. It was for those who were rich and had too much money to spend. He thought it was a waste and was not mandatory. He further thought that refusal to sanction it would not be prejudicial to Master Jeremy. That the trip had been discussed in a meeting between the parties and ruled to be unnecessary before the funds were deposited by the Applicant in September, 2007, although it was then noted that some \$500 had been deposited. Mr. Miller also argued that he was prepared to stand down and give evidence that the trip had been scrapped in the alleged September 2007 meeting. If the Applicant thereafter decided on her own to fund the trip, she did it independently, and should not expect a recoup from the estate. Referring to the argument by the Applicant that the Respondent failed to respond to the Applicant’s notice of the trip and

applicant's notification of the deposit and of the first deposit of \$1500 in November, 2007 Mr. Miller said that apart from the booking, the deposit and any other funding was done by the Applicant deliberately and contrary to the August, 2007 agreement. Finally Mr. Miller said that the correspondence from the Applicant came after the latter had filed this application in September, 2007.

Turning to the second main issue which concerns Yvonne Nduta's rent, Mr. Miller did not deny the obligation to pay Nduta's weekly rent. He argued however, that £160 per week was still on the higher side and went into a lengthy excursion to establish what would have been a reasonable rent. He produced various material to prove that reasonable and decent premises were available for between as low as £80 to £120 per week outside or besides college accommodation which could have been taken by Nduta had she cared to search. Shared accommodation was also available for as low as £60 per week. Mr. Miller argued that these accommodations were available all the year round and the Applicant simply did not want to go for lower but reasonably priced premises. He also averred that he had advised the Applicant of the cheaper accommodation in sufficiently good time in the year 2007 to have enabled her to obtain cheaper premises but that she had refused to take his advise. Accordingly, Miller argued, there was no reasonable ground to pay her back the £250 deposited but forfeited to a landlord whose premises were not eventually taken.

Confronted with the assertion that the Respondent failed to respond to the Applicant's letters over Yvonne Nduta's rent requests until too late in December, 2007, Mr. Miller insisted that the Applicant had known the Respondent position all the time from June 2007 and that Respondent's failure to reply to requests was neither here nor there. The court understood him to be saying that the Applicant had no reasonable ground to assume that silence on the part of the Respondent meant acquiescence.

As touching small items like insurance, school uniform, motor vehicle repair etc. Mr. Miller stated that the Respondent had released £7500 as maintenance expenses which covered all these items. In fact Mr. Miller averred that after paying the said sum, the Respondent was not expected to pay separately any other expenses including Nduta's rent, local London travel tickets e.t.c. Mr. Miller also observed that the Applicant had conceded that local travel expense was no more than £70 per month and her claim for £103 therefore was unjustified.

As touches Family Household maintenance, Mr. Miller stated that the estate had released Ksh.420,000/- as maintenance allowance to the Applicant at the rate of Kshs.35,000/- per month instead of Kshs.105,000/- per month. He argued that this is because the Respondent had further released Kshs.1,300,000/- to the Applicant in relation to the Dairy Project. He argued that the project would produce income which would be used by the family for maintenance. Otherwise he was not heard to be denying that what the applicant was entitled was not Kshs.105,000/- per month. Mr. Miller was silent as to whether the dairy project had in the meantime started to produce income which would replace the stipend.

I have painstakingly perused the material upon which this application is based and have as well considered the arguments advanced by both Mrs. Mbugua and Mr. Miller. The following are my findings which are based specific items or headings.

I will start with the *œdrama trip* for Jeremy Kamau Chege. Evidence on record shows that Jeremy is in school Drama Club and that the school decided to participate in drama participation taking place in Canada. The applicant asserts that she sought a financial backing from the Respondent as early as June, 2007. However, the Respondent did not in writing respond to the notification. In the meantime there is evidence that there was a family meeting attended by the parties herein and their advocates in August 2007. It is not clear whether or not the issue of this trip was discussed and settled. Mr. Miller asserted that the issue was discussed and that he dissuaded the applicant from the idea of the drama trip. Mrs. Mbugua, on the other hand, denied any such agreement. Instead she asserted that when the booking charges for the trip were demanded and the Respondent did not respond to the notice served on him, the Applicant assumed that the Applicant had acquiesced to the idea and went ahead to pay the booking charge. The record shows that by November 15th 2007 a first installment of \$1200 was demanded by Jeremy's school and the applicant whose 2nd reminder to the matter had also been apparently ignored

by the Respondent, went ahead and paid the same. By December 7th, 2007, the Respondent, for the 1st time opposed the drama issue in the Replying affidavit to this application which had been filed in September, 2007. The three issues which arose over this **“drama”** issue are: -

- (i) Whether the Applicant notified the Respondent of the issue in writing?
- (ii) Whether the Applicant’s failure to respond entitled the Applicant to assume that Respondent had acquiesced to the idea of the trips to entitle her to pay and expect refund.
- (iii) Whether the trip was in any case necessary so that whether the Respondent accepted it or not this court should authorize it?

As already indicated above, the Applicant argued that she notified the Respondent of the trip in writing, more than once before she paid the booking charge of \$500. There is evidence on the record that the notice was indeed served upon the Respondent and copies thereof were exhibited. The Respondent was not heard to be denying receiving the notices in writing. There is also no denial that the Applicant made payment for the booking of the trip of \$500 and later in November, 2007 made payment of \$1200 being the partial trip charges. Again the Respondent did not argue that the estate was not aware of the same. Their case was that the trip was unnecessary and therefore the estate could not be responsible for it.

I have considered the Respondent’s stand. In my view, the drama trip and the knowledge to be gained from it, despite the subject of drama being non-examinable, was not a useless trip. If drama and the knowledge gained therefrom were as useless as the Respondent represented it, it would not in the past and presently be offered in our schools. **“Drama”** is described in our dictionaries as a story of life and action for representation by actors. It includes a composition intended to be represented on the stage. It further includes dramatic literature and theatrical entertainment. It also involves acting, production and study of literature plays. It is therefore partly through the interest and knowledge gained in **“drama”** that we can create future actors both in theatre and cinema acting. Drama in my view is a very useful school subject whether it is an examinable subject or not.

Having come to the above conclusion, I have no hesitation in also making a finding that the Respondent was under some substantial obligation to respond to the notices served on the Estate concerning the payment for the drama trip. The latter in ignoring the notices, was in my view exposing the estate to the presumption that it was not opposed to the trip. The fact that several notifications were received without the Respondent answering, allowed the Applicant not only to assume that the Respondent was not opposed to the trip but also to make necessary payments to save and secure the trip. Under those circumstances I would and do reject the argument by the Respondent that he successfully persuaded the Applicant to drop the drama trip proposal in a meeting in August, 2007. In any case no tangible or persuasive evidence to support that argument was presented.

While the Respondent is therefore entitled to protect the estate from unnecessary waste, money spent in the said trip cannot be said to have been wasted for an entitled beneficiary. In the circumstances I will allow the expenditure and if the same has not been released, it should be released forthwith.

There is also the shopping list for Jeremy Kamau Chege. Kshs.12,000/- per term for a student’s requirements in a boarding school does not appear unreasonable to this court. Indeed the Respondent appears to have provided the same earlier. I come to the same conclusion about school uniforms which would cost Kshs.30,000/- per year. Since part cost of these items had been paid, the Respondent should release balances of kshs.21,000/- for general expenses and kshs.15000/- for school uniform for Jeremy Kamau Chege.

The second main issue to consider is Yvonne Nduta’s claims, the main of which is the Rent. The Respondent does not deny her entitlement to rent while she studies in London. The issue is how much.

The Applicant admitted that she signed the first lease for Â£265 per week and deposited Â£250 to secure it. She admits that she later learnt that Nduta could secure reasonable premises at Â£160 per week

and proceeded to sign a lease for one year ending in May, 2008 at KSh160 per week. She argued that she later obtained information and knowledge that she can actually get reasonable premises at between KSh120 to KSh100 per week and offers to limit herself to the said bracket. She however argued that the relevant information aforementioned came to her piecemeal without her fault and that she should not therefore be penalized. She accordingly seeks a refund of KSh250 that she had deposited for the first proposed lease and for a refund of KSh160 per week paid in respect of the premises she occupied for the three terms starting October 2007 and ending in May, 2008.

The issue arising in respect of this item is whether or not the payment of KSh250 to secure the first lease and KSh160 per week paid for the present lease for this year were really necessary and therefore refundable.

I have considered the evidence. I find that the deposit of KSh250 to secure the premises was defensible. I find that a relevant notice was given to the Respondent-estate but the latter kept silent. Fearing loss of the premises, the Applicant went ahead to secure the same by paying the KSh250. The Respondent argued that Applicant ignored their advice in paying the KSh250. However the court finds no evidence on the record to support such argument. Respondent did not deny receiving the notice and the first draft lease from the Applicant. Nor was the Respondent heard to say that he returned the draft lease in writing giving all the relevant information to the effect that cheaper and reasonable premises could be found in place of the one shown in the draft lease. Indeed, while the said draft lease is shown to have been forwarded to the Respondent about May 2007, the latter did not respond until December 2007 when the Executor filed his replying affidavit. Furthermore, the information concerning availability of reasonable cheaper houses appears to have been sourced out between October and November, 2007 and was not released until December, 2007, when the replying affidavit was filed.

In the court's view failure to respond to the correspondence annexing the first draft in May or June 2007 was not right and/or proper. Applicant's fear of losing the premises which prompted her to secure the premises by paying the KSh250 was accordingly justified. She cannot be penalized due to the Respondent's deliberate failure to respond. Indeed after the Respondent got sufficient information that cheaper but reasonable houses could be found, she indicated willingness to abide accordingly. She appears to have looked for such premises and settled for one at KSh160 per week. The court is persuaded that she was acting bona fides and that her admission that Nduta would be prepared to take premises costing less than KSh120 per week for the next year starting in September 2008, appears to be further evidence of such good faith.

The Respondent through Mr. Miller argued that the Applicant was all along acting in defiance of advice and proper information about the house market given to the Applicant by the Respondent. However such argument is not supported by the undenied fact that the executor himself did not obtain the relevant information until late October or early November, 2007 while he did not release it to the Applicant until he filed his replying affidavit in Middle December, 2007. The conclusion which the court accordingly makes is that the events that led the Applicant to deposit KSh250 to secure the first house and later sealing a lease for KSh160 per week for the year ending May, 2007, are excusable. On the other hand, the Respondent's conduct towards the correspondence relating to the first draft lease and late release of information concerning the house market, is not to be admired.

The result is that the Applicant is entitled to a refund of the lost deposit of KSh250 and the KSh160 rentals paid from October 2007 to May, 2008, except where the same has been specifically released by the Respondent in the meantime.

I have also considered the information on the record and in view also of the admissions recorded by the applicant, Nduta's future rents per week should not exceed KSh110 without the written consent of the executor of the estate.

As touches the local travel, it was conceded by the Applicant that KSh70 per month is adequate. The court confirms the above figure for the future period of study. In respect of Air tickets, the outstanding refund of KSh.67000/- is ordered released by the Respondent. This refers to London-Nairobi-London for

September 2007. It is the view and finding of the court that the Respondent should avoid delays in releasing such Air Tickets in the future. It is commended that they be released at least 14 days before the date of travel.

Concerning Life Insurance Premium of Kshs.200 issued for Yvonne Nduta, it is the view and finding of court that it should be issuable only if the scheme covers all other beneficiaries of this estate. Otherwise it appears discriminatory since it is not mandatorily required by the University where Nduta is a student.

The next major item to be resolved is the Family cost. This consists mainly of the monthly maintenance allowance of Kshs.105,000/- original freely released but now apparently reduced to kshs.35,000/-. The sum was amounting to Kshs.1,260,000/- per year of which Kshs.420,000/- has been admittedly released, raising a dispute over the balance of Kshs.840,000/-

The Respondent argued that there is now a dairy project into which Kshs.1,300,000/- has been sunk, and which will produce income soon to replace the balance of Kshs.70,000/- not so far released by the estate to the Applicant. Mr. Miller did not say when the dairy project will mature to start producing income. He did not say how much income will be produced and why the Respondent withheld Kshs.70,000/- being part of the maintenance funds at this particular time without warning and without in anyway consulting with and obtaining the consent of the Applicant who has a right just like other beneficiaries.

In my view the dairy project is an excellent idea whose time may have come. However, its meaning, implications or impact should be fully be discussed between the Respondent and Applicant. There should be full agreement over it and such agreement should be reduced into a written memorandum of understanding and if possible its terms be made binding.

Until the above issues are resolved, I find the withholding of part of the maintenance funds unilateral and improper. The suitable direction in the circumstances is to order the release of the kshs.840,000/- still withheld by the Respondent.

Other family issue included the repair of the family car which finally cost Kshs.31,100/- and a medical insurance premium which cost Kshs.9939. If these sums have not been refunded, the Respondent should make immediate arrangements to do so.

The final issue raised in this application is whether or not accommodation (represented by weekly rents for Yvonne Nduta) is part of the living expenses. If it is, then there is a duplication of payment which needs to be sorted out. The records as borne out in the affidavit sworn by the Applicant, show that the University of London in its letter of admission for Yvonne Grace Nduta Chege categorized her expenses as: -

- i) Cost of fees - Kshs.8776
- ii) Cost of Residence - Kshs.3706
- iii) Cost of Living-single student - Kshs.7500

The structure clearly separates the cost of residence expenses from cost of living expenses. It would be extremely difficult for the Respondent to convince the court differently unless he argues that Yvonne Nduta colluded with the University authorities to produce the *Certificate of Acceptance* marked as exhibit JCI aforementioned. The court therefore finds that the cost of living of Kshs.7500 per year does not include the cost of residence quoted as Kshs.3706 per year but which is bound to be now adjusted as earlier herein determined.

In conclusion, the arguments raised by both sides in this application could be avoided if both parties stopped hitting at each other, responded to the other party's proper inquiries and needs and understood or appreciated the fact that the assets of the deceased's estate have reasonably and

lawfully to be protected for the future benefit of all the beneficiaries. It is improper and erroneous for some beneficiaries to try to take from the estate what they are not entitled to. They should appreciate that unless the estate is protected, it is bound to dissipate soon to their or their children's detriment. On the other hand those given the responsibility to control, administer and protect the estate, should do so reasonably, keeping in mind that they are only trustees.

May be it is time now for all the beneficiaries, the administrators and their advisors to come together to discuss a more reasonable and more transparent approach to issues affecting them with a serious view to avoid confrontations and even further litigations in future. Such confrontations and litigations often prove wasteful and probably, unnecessary.

The following in form of orders is the summary of the court's finding in this matter: -

ORDERS

1) The Respondent is hereby ordered to: -

(a) Pay to the Applicant for Jeremy Kamau Chege: -

- (i) USA \$2990 being refund for Canadian drama trip
- (ii) Kshs.21,000/- being balance of shopping list.
- (iii) Kshs.15,000/- being balance of yearly school uniform.

(b) Pay to the Applicant for Yvonne Grace Nduta.

- (i) Kshs.660/- balance of living expenses.
- (ii) U.K. Â£250 being refund of rent deposit.
- (iii) U.K. Â£160 x 52 weeks = Â£8320 being rent until May, 2008.
- (iv) Kshs.67,350/- being refund of Air ticket (September 2007)
- (v) U.K.Â£769.23 being the 2007 local Bus fair for year ending May, 2008

Â© Pay to the Applicant, family costs

- (i) Kshs. (105x12) = 420,000 already paid = Ksh.840,000/-
- (ii) Kshs. 31,100/- being refund for family motor vehicle repair.
- (iii) Kshs.9,939/- being medical cover insurance premium.

2) The Co-operative Bank of Kenya Ltd is hereby ordered to forthwith release directly to the Applicant a total sum of 2,481,014/- being the sum ordered above the said amount to be drawn from Account No. 0115064021800 in Kiambu Branch and to be deposited to Account No. 0110063985400 belonging to Jannifer M. Chege at the same Branch.

3) Yvonne's rent allowance except with the written consent of Respondent than Â£110 per week from 1st June 2008 onwards.

4) The family dairy project terms and conditions of establishment, should at the convenience of the parties and within a reasonable period, be discussed and be clarified.

5) Mention on 6th June 2008.

Dated and delivered at Nairobi this 4th day of June, 2008.

D A ONYANCHA

JUDGE