



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 3652 of 2004

IN THE MATTER OF THE ESTATE OF KAMAU GATHARIA NJENGA
(DECEASED)

RULING

On 15.11.06 Fredrick Njenga filed summons dated 14.11.06 applying for the following orders:-

1. THAT the Managing Trustee of the National Social Security Fund (NSSF) be ordered to urgently provide an account of the above deceased person's dues and entitlement under the said Fund's Group Life Benefits, Pension Scheme, Medical Insurance Scheme, Survivor's Benefits Scheme and Funeral Expenses Cover.
2. THAT the Managing Trustee of the NSSF be ordered to account for any other benefits due to the estate of the deceased person from the said Fund.
3. THAT costs of the application be paid by the said Fund.

The grounds upon which the application is based are:-

- i. THAT on 07.09.06 the said Fredrick Njenga, the administrator of the estate of the deceased, was presented with a cheque for Kshs.1,353,067/25 by the NSSF, the former employers of the deceased person, being the deceased's dues under the Group Life Policy in which the Fund is insured by UAP Provincial Insurance Company.
- ii. THAT the Fund has however refused to supply him with the particulars of how the said amount was arrived at or inform him what other dues and entitlements are due to the deceased.
- iii. THAT in addition, the administrator has confirmed from the said Insurance Company that it paid in excess of Kshs.1,600,000/= and not Kshs.1,353,067/25 that was paid to him, but the balance of the moneys remains unaccounted for.
- iv. THAT the administrator of the estate of the deceased has confirmed from the Fund that it has released Kshs.60,000/= and Kshs.28,384/=, being funeral expenses and survivor's benefits, respectively, to a purported widow of the deceased, one Nancy Muthoni Wanja, in the absence of any proof of marriage and/or letters of administration of the estate of the deceased.
- v. THAT the administrator of the estate of the deceased is therefore apprehensive that the said money has been and continues to be fraudulently paid out to a person not entitled to such payment, to the exclusion of the estate of the deceased.

The application is supported by Fredrick Njenga's affidavit sworn on 14.11.06 and his further affidavit sworn on 23.07.07.

At the hearing of the application before me, the administrator/applicant was represented by learned counsel, Mr J.M. Muu while the respondent/NSSF was represented by learned counsel, Mr J. Makori.

Applicant's counsel relied on the grounds on the face of the application plus the applicant's supporting affidavit and further affidavit.

Respondent's counsel relied on the replying affidavit of Said Chitembwe, Corporation Secretary of the NSSF sworn on 24.05.07.

The gist of the applicant's case is that he enquired from UAP Provincial Insurance Company with which NSSF had an Employee Group Life Policy regarding the deceased's dues under the policy and he (applicant) was led to believe that the company had paid the NSSF in excess of Kshs.1,600,000/= for onward transmission to him as administrator of the estate of the deceased herein, who used to be NSSF's employee. However, the insurance company was unwilling to confirm the payment of over Kshs.1.6 million in writing on the ground of privity of contract between the said company and NSSF, to which the applicant was not a party.

One of the averments in the replying affidavit of Said Chitembwe of NSSF is that UAP Provincial Insurance Company paid Kshs.1,396,996/= by cheque No.983301 to NSSF for which NSSF issued its receipt No.344563 in acknowledgement. Said Chitembwe added that NSSF paid to the applicant the sum of Kshs.1,396,996/= less Kshs.43,928/75 being liabilities for medical expenses not covered by the NSSF Scheme. I interpose here to note that the difference between the Kshs.1,396,996/= received from UAP Provincial Insurance Company and the Kshs.43,928/75 deducted by NSSF is Kshs.1,353,067/25 which the applicant has acknowledged receiving from NSSF. Applicant's counsel's rejoinder to the deduction by NSSF of Kshs.43,928/75 from the amount received by NSSF from the insurance company has not been supported by any documents. Applicant's counsel likewise complained that there are also no documents in support of other alleged payments on account of the deceased herein. In particular, applicant's counsel queried the payment of Kshs.60,000/= and Kshs.28,384/= alleged by NSSF to have been made to one Nancy Muthoni Wanja as a purported wife of the deceased on account of the deceased's funeral expenses while, according to the applicant, the deceased was not married. Applicant's counsel pointed out that the applicant as administrator of the deceased's estate is apprehensive and convinced that there is a scheme to defraud the estate of the deceased of the entire entitlement of the deceased.

Applicant's counsel complained that Said Chitembwe's replying affidavit only addresses benefits under Group Life Policy but not other benefits called for by the administrator/applicant vide prayer 1 in the summons. The said counsel submitted that NSSF having held money of the deceased's entitlement and having made payments out of the deceased's funds, NSSF has a duty to account to the administrator/applicant for him to be satisfied that the payments were genuine and valid. Applicant's counsel urged the court to grant prayers 1 and 2.

On the other hand, respondent's counsel opposed the application, relying on the replying affidavit of Said Chitembwe sworn on 24.05.07.

With regard to applicant's belief that NSSF was paid Kshs.1.6 million as opposed to Kshs.1.3 million, respondent's counsel said there was no proof from the applicant that NSSF was paid Kshs.1.6 million. As regards applicant's claim that the respondent never responded to other benefits of the deceased apart from group life benefit, respondent's counsel said the answer is at paragraph 13 of Said Chitembwe's replying affidavit, which states that NSSF has neither retained nor withheld any part and/or service benefits from the applicant. It was respondent's counsel's contention that the applicant should have annexed the deceased's contract of employment with NSSF which was in the deceased's possession to prove what was due to the deceased's estate. Respondent's counsel submitted that there were no other dues to the deceased after payment of the group life benefits. Respondent's counsel noted that the grant of letters of

administration was made to the applicant on 27.03.06, i.e. some 6 years after the deceased's death, and accused the applicant of laches. Respondent's counsel said NSSF's position is as per its letter of 26.04.06 to the Kenya Anti-Corruption Commission, annexure 'FN 5' to the applicant's affidavit sworn on 14.11.06.

As regards the applicant's further affidavit sworn on 23.07.07, respondent's counsel noted that vide his letter of 25.05.2000 the applicant, *inter alia*, asked NSSF to furnish him with NSSF's Widow and Children Pension Scheme. Respondent's counsel further noted that the applicant had at paragraph 8 of his supporting affidavit sworn on 14.11.06 stated that the deceased herein had no wife or children. Respondent's counsel submitted that the applicant was on a fishing expedition.

Respondent's counsel said that the applicant had vide his letter of 12.09.06 to NSSF acknowledged at the second paragraph that the insurance sent NSSF a cheque for Kshs.1.3 million. I interpose here to note that a reading of the said second paragraph in conjunction with the first paragraph of the letter actually reveals that the applicant had been made to believe by some officers of the insurance company that it would pay him Kshs.1.6 million; that after two weeks he was told the insurance company had sent a cheque to NSSF which in turn was to write a cheque in his name but that when NSSF eventually sent him a cheque, it was for Kshs.1.3 million, contrary to his expectation of Kshs.1.6 million.

Turning to the prayers in the summons, respondent's counsel termed prayers 1 and 2 as ambiguous. He said that prayer 1 was asking the respondent to account for moneys without being shown the basis, e.g. whether there was privity of contract for survivor's benefits scheme or pension scheme. In respondent's counsel's view, prayer 2 alluding to any other benefits shows that the applicant does not know what he is talking about. Respondent's counsel submitted that if the court grants the orders sought, they would be in vain because the respondent would say it does not know of any other benefits scheme – just as paragraph 13 of Said Chitembwe's replying affidavit states that NSSF has neither retained nor withheld any part and/or service benefits from the applicant. Respondent's counsel submitted that a party who alleges a fact or contract must prove the same.

Regarding applicant's allegation of fraud, respondent's counsel said no particulars of fraud were pleaded in the summons or supporting affidavits. Respondent's counsel also faulted the summons, pointing out that no provision of the law it is based on were cited. In respondent's counsel's view, such application for accounts should be by way of originating summons. He referred to Order XXXVI in this regard and submitted that on account of the applicant not having cited the legal provision his summons has been brought under, the said summons is incompetent and urged that it be dismissed with costs.

In reply, applicant's counsel said that the contract relating to the deceased's employment with NSSF would not be in the applicant's possession but in NSSF's possession. Counsel added that at the time of the deceased's death, his contract of employment with NSSF was not found amongst his belongings; that NSSF must have the other copy; that if the administrator/applicant gets a copy of the contract, he would be able to calculate for himself what exactly is due to the deceased's estate; but that the respondent NSSF is hiding that information from him (applicant). Applicant's counsel submitted that giving the information about the deceased's contract of employment with NSSF will not prejudice the respondent NSSF in any way as the contract is not a secret document.

On the question of delay in the process of getting to the administration of the estate, applicant's counsel said the delay was caused by NSSF itself. In this regard, applicant's counsel referred to the applicant's supporting affidavit where the applicant has deponed that his efforts to get a proper account from the NSSF have been futile owing to unwillingness of NSSF officers to inform him how they arrived at the figure of Kshs.1,353,067/25 which they paid him or what happened to the balance of the moneys NSSF received from its insurance company for onward transmission to him.

With regard to his request for NSSF to, *inter alia*, furnish him with its widow and children pension scheme, applicant's counsel submitted that the request does not excuse the respondent from giving an account to the administrator/applicant, unless NSSF has something to hide.

Applicant's counsel denied the respondent's counsel's claim that prayers 1 and 2 are ambiguous. Applicant's counsel submitted that it is the respondent's duty to give a proper account and that if the respondent had given the information called for by the applicant, the parties would not be before court today.

I have given due consideration to application and the opposition thereto.

The application under consideration raises important issues pertaining to duties and responsibilities of administrators vis-à-vis deceased persons' estates under such administrators' charge. I shall address the main issues in the order in which they emerged during the parties' representations.

Deduction of Kshs.43,928/75 from Kshs.1,396,996/=

There is evidence that UAP Provincial Insurance Company Ltd issued to NSSF a cheque for Kshs.1,396,996/= being death in service benefits in respect of Stephen Kamau Njenga, who happens to be the deceased Kamau Gatharia Njenga in this case. The position of the applicant in this case, who is the administrator of the deceased's estate, is that he, *inter alia*, expected NSSF to issue its cheque for that entire amount to the applicant. However, NSSF issued him with a cheque for only Kshs.1,353,067/25. The applicant complained, firstly, that NSSF never explained how it had arrived at the lower figure of Kshs.1,353,067/25 before the applicant filed the present application. Secondly, the applicant complained that after he made the lower figure an issue in his present application, the only explanation the respondent NSSF gave was that it had deducted from Kshs.1,396,996/= the amount of Kshs.43,928/75 'liabilities which was medical expenses not covered by the NSSF scheme ...' Applicant faulted this explanation on the ground that the deduction of Kshs.43,928/75 was not supported by any documents showing there were medical bills for the deceased not covered by insurance. The essence of the applicant's complaint about the deduction is that he would like to be furnished with documentary evidence of the medical bills in question plus documentary evidence that such bills were not covered by insurance. My finding is that the applicant as administrator of the deceased's estate is entitled to the documentary evidence he seeks.

Alleged payment by NSSF of Kshs.60,000/= and Kshs.28,384/= to Nancy Muthoni Wanja.

The replying affidavit of Said Chitembwe, Corporation Secretary of NSSF sworn on 24.05.07 deponed at paragraph 4 as follows:

'4. THAT upon the deceased demise one Nancy Muthoni Wanja the wife to the deceased was paid Kshs.60,000/= and Kshs.28,384/= being funeral expenses after proving to our satisfaction that she was the wife to the deceased.'

It is the applicant's case that the deceased herein was not married. Indeed in the applicant's affidavit in support of his petition for letters of administration intestate in this case sworn on 26.04.04, the applicant listed himself as a brother of the deceased plus other siblings of the deceased as survivors of the deceased. There is no reference in the affidavit of any wife having survived the deceased. Documents supporting the petition for letters of administration include a letter from the Senior Chief of Kiambaa Location (S.M. Karanja) dated 21.05.01 stating, among other things, that the deceased was neither married nor did he have children. I also note from the court file that on 26.04.06 NSSF wrote to the Kenya Anti-Corruption Commission a letter (annexture 'FN 5' to the applicant's affidavit sworn on 14.11.06) in reply to the Commission's letter of 29.03.06 and stated, *inter alia*, as under:

'1. Upon notification of death of Kamau Githaria Njenga, funeral insurance proceeds of Kshs.60,000/= was paid to one Nancy Muthoni Wanja who presented herself to us as the widow. She was also paid Kshs.28,384/= in respect of survivor's benefits under the NSSF Act.'

The applicant herein questions the above alleged payments to the aforementioned Nancy Muthoni Wanja since according to the applicant plus the Senior Chief of Kiambaa Location, the deceased, who died on 03.04.2000, had no wife neither did he have children surviving him. The question immediately arises as to what evidence Nancy Muthoni Wanja presented to NSSF to establish that she was married to the

deceased? Secondly, did NSSF have anything in its official records to corroborate Nancy Muthoni Wanja's 'presentation' as the deceased's wife? These questions are begging for answers from the respondent NSSF. The said questions are of critical importance in view of the fact that the applicant had on 25.05.2000 written to NSSF alerting it that there was a dispute over the deceased's estate and that NSSF should stop any payment to anybody until the court issued letters of administration to the right dependants of the deceased. I find that NSSF, having held moneys of the deceased's entitlement and having made payments out of the deceased's entitlement, NSSF has a duty to account to the applicant/administrator for him to satisfy himself that the purported payments were genuine and valid.

Alleged payment of Kshs.1,600,000/= by UAP Provincial Insurance Co. Ltd. to NSSF

The applicant deponed in his affidavit sworn on 14.11.06 that after obtaining a certificate of confirmation of the grant of letters of administration and after receiving from NSSF Kshs.1,353,067/25, he lodged enquiries with officers of UAP Provincial Insurance Company where the money partly came from and that the officers led him to believe that the company had paid NSSF in excess of Kshs.1.6 million for onward transmission to him as administrator of the deceased's estate. Applicant added that the officers were, however, unwilling to confirm the information about payment of more than Kshs.1.6 million in writing, 'citing ... privity of contract between themselves and their client, the National Social Security Fund.' In response, respondent's counsel, quite correctly, reminded the applicant that he who alleges has to prove the allegation.

Respondent's counsel essentially made the point that in absence of documentary evidence to support the applicant's belief that the insurance company paid more than Kshs.1.6 million to the respondent NSSF for onward transmission to the applicant, the allegation of payment of more than Kshs.1.6 million remained unproved, and should be ignored. I find it a possibility that the applicant may have been told by some officers of UAP Provincial Insurance Company of payment to NSSF of more than Kshs.1.6 million for onward transmission to the said applicant. However, since the applicant was unable to get the officers concerned to confirm in writing the information they gave him, the court cannot act on the alleged information and I ignore the applicant's deposition regarding the said information relating to payment of Kshs.1.6 million.

Applicant's yearning for a copy of deceased's Contract of Employment with NSSF

At paragraph 13 of his replying affidavit sworn on 24.05.07, Said Chitembwe of NSSF deponed that the Fund neither retained nor withheld any part and/or service benefits of the applicant. The applicant's rejoinder was essentially that Said Chitembwe should have annexed to his affidavit the deceased's contract of employment with NSSF, of which the deceased must have had a copy but which copy was not found among his documents after his death. The applicant was here making the basic point that for him as administrator of the deceased's estate to be able to investigate meaningfully what might be the deceased's dues from his employment, examination of the contract of employment would be the logical starting point. The position taken by the applicant on the point is valid. In this regard, note should be taken that if the deceased had discovered before his death that he had lost his copy of the contract and asked for a copy from NSSF, the latter would have had no valid reason to decline giving him a copy. Since the applicant now stands in the deceased's shoes and he wishes to see a copy of the deceased's contract, I find NSSF has no valid reason to decline giving him a copy.

Applicant's request for Widow and Children Pension Scheme

Vide paragraph 4 of the applicant's further affidavit sworn on 23.07.07, the applicant referred to annexure 'FJ 2' thereto being his letter of 25.05.2000 to NSSF, *inter alia*, requesting NSSF to stop any payment to anybody until the court had issued letters of administration to the right dependants of the deceased. I note from the said letter that the applicant also asked for:-

1. Declaration form on the deceased's 1st employment.
2. Any other document that may help to identify the Will of the deceased.

3. Widow and children pension scheme.

Respondent's counsel criticized the applicant's request for the widow and children pension scheme since the applicant's position is that the deceased was not married and had no child or children. Applicant's counsel's rejoinder was that the fact that the applicant called for information on the widow and children pension scheme is no proof of marriage; and that the request does not excuse the respondent from giving an account to the applicant/administrator, unless the respondent has something to hide. My finding is that applicant's counsel evaded addressing the central point of the respondent's criticism, i.e. why call for the widow and children pension scheme if the deceased had no wife or children? The request does not make sense! Nevertheless, I agree with the applicant that the request does not of itself invalidate the present application.

Respondent's contention that if the orders sought are granted, they will be in vain.

Respondent's counsel hinted that if the court grants the orders sought, the respondent will simply say it does not know of any other benefits. With respect, that is a very simplistic and escapist approach to the grave and mixed issues raised in the application, which include the issue of payment to Nancy Muthoni Wanja as purported wife of the deceased; and no-provision of documentary evidence of medical bills amounting to Kshs.43,928/75 said to have been incurred by the deceased outside his insurance cover.

Summons not citing legal provision it is based on

It is true as stated by respondent's counsel in his criticism that the summons before court does not cite any legal provision upon which it is based. That is clearly a blameworthy omission on the part of the applicant and/or his advocates. The criticism was raised for the first time at the hearing of the present application and it came towards the tail end of respondent's counsel's address before the court. Strangely, applicant's counsel made no mention of the criticism in his reply. I note, however, that the respondent otherwise attempted to respond to virtually all substantive issues raised in the application, more or less on a blow-by-blow basis. Respondent appeared to have no misapprehension as to what the application is about. Non-citation of the legal provision or provisions relied on in bringing the application is, of course, a pure point of law which can be raised at any time, even by the court of its own motion. In the normal cause of events, however, a point of law ought to be raised at the earliest possible opportunity. Here it was raised towards the tail end of respondent's arguments. It does not seem to have been a priority in the respondent's scheme of attack or defence. I have duly considered the point of law and wish to address it briefly as follows.

The applicant holds letters of administration intestate of the estate of the deceased herein. The grant of the letters was made to him on 22.04.05 and confirmed on 27.03.06. As administrator of the deceased's estate, the applicant assumed the status of personal representative of the deceased and his estate. The material tendered before court, including legal submissions of the parties, does in my view place the matter within the purview of section 83 of the Law of Succession Act, Cap 160. The relevant subsections thereof are (b) and (i) as amended by Act No. 18 of 1986, which state as under:

'83. *Personal representatives shall have the*

following duties –

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.'

The applicant in this case seems genuinely committed to the task of discharging his duties as administrator of the deceased's estate diligently, comprehensively and to the satisfaction of all

concerned. He has made no secret of the fact that he feels frustrated by the respondent's reluctance to furnish him with vital documents to assist him in determining the deceased's dues from his employment, which reluctance he says has caused him problems at the domestic front. Paragraph 9 of the affidavit sworn by him on 14.11.06 in support of the present application well illustrates his domestic problems. It states:

'9. THAT as a result of the refusal by the National Social Security Fund to give a proper account, there has been raising (sic) tension in the family with my 3 brothers and 2 sisters now believing that I may have been paid more by the Fund than I am revealing.'

The applicant and his siblings have lost a brother, i.e. the deceased. That is painful enough. It is unfair for NSSF to subject them to further agony by refusing to avail to the applicant as administrator of the deceased's estate the documents he yearns for to enable him determine for himself what may be the deceased's dues from his employment with NSSF. I have come to the firm conclusion that the circumstances of this case, as narrated above, dictate that the court should intervene in the interests of the deceased's estate, notwithstanding the non-citation by applicant's counsel of specific legal provision or provisions the application has been brought under. Rule 73 of the Probate and Administration Rules provides:

'73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

Ideally the applicant should have cited the specific provision or provisions under which his application was brought. This was not done. The issues are, however, clear and the respondent made a gallant attempt to answer them relevantly. I find that no prejudice has been occasioned to the respondent by the omission. I invoke the inherent power vested in the court by rule 73 of the Probate and Administration Rules and deem the application to have been brought under section 83 (b) and (i) of the Law of Succession Act.

The summons dated 14.11.06 succeeds and prayers 1 and 2 thereof are hereby granted, the said prayers to be complied with within 3 (three) months. The respondent National Social Security Fund (NSSF) is also directed to provide the applicant with the deceased's contract of employment with the NSSF within 14 days.

The applicant's costs of the application shall be borne by the respondent NSSF.

Orders accordingly.

Delivered at Nairobi this 17th day of September 2008.

B.P. KUBO

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