



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE 404 OF 2002

JAMES BUNDI TENGEYA)..... PLAINTIFF/APPLICANT

-VERSUS

ASSISTANTPUBLIC TRUSTEE ELDORET DEFENDANT/RESPONDENT

RULING

Before me is a Chamber Summons dated 16th April 2005 filed by Messrs. Okile and Company Advocates for the applicant. The application is said to have been brought under Order 39 Rule

1(a) and Rule 2(1) of the Civil Procedure Rules as well as section 3 and 3A of the Civil Procedure Act (Cap.21). It seeks for three orders. The first order has been spent. The remaining two orders are that –

a) Spent.

b) There be a mandatory injunction compelling the defendant/respondent to release the death gratuity benefits belonging to the late Grace Bosibori Njoga to the plaintiff/applicant herein, pending the hearing and determination of the main suit filed herein.

c) Costs of the application to be provided for. The application has grounds on the face of the Chamber Summons and is supported by a supporting affidavit sworn by the applicant James Bundi Tengeya on 16th April 2005 as well as a further supporting affidavit sworn by the same deponent on 9th May 2005. The application is opposed and a replying affidavit sworn on 14th June 2005 by Philip K. Cheruiyot Assistant Registrar General North Rift was filed.

This application arises from a suit brought by way of a plaint, which was filed on 24th February 2005 and purportedly amended on 14th June 2005. The plaint averred that on the 29th October 2004 the death gratuity of the estate of the late Grace Bosibori Njoga was remitted by the Teachers Service Commission through the Ministry of Finance Pensions Department to the Assistant Public Trustee at Eldoret.

On learning of the same, the plaintiff who is also the applicant herein, visited the respondent's office requesting and demanding that the said death gratuity be released to him as he was the legal administrator of the deceased's estate. The respondent adamantly refused to release the said death gratuity to him. That at that time, the applicant had already been appointed the legal administrator of the estate of the deceased. That the applicant required the money to be released to him for the smooth administration of the estate of the deceased.

According to documents filed in the application, and especially the supporting affidavit of the applicant, the amount of gratuity paid to the Assistant Public Trustee Eldoret was Kshs.496,818/40. It is deponed that the applicant was appointed the administrator of the estate of the deceased vide Kitale High Court Succession Cause No.164 of 2004 on 9th December 2004. Therefore the respondent had no legal basis for refusing to release the gratuity money to the applicant. The applicant had been straining to pay school fees for the children of the deceased, and they were likely to drop out of school if the money was not released.

At the hearing of the application Mr. Okile for the applicant submitted that his client was asking for a mandatory injunction to compel the respondent to release the death gratuity of the late Grace Bosibori Njoga, pending the hearing of the main suit. The applicant was appointed the administrator of the late Grace Bosibori Njoga. The death gratuity was sent to the respondent who had totally refused to release the same for administration purposes. The applicant urgently needed the funds to pay school fees for the children of the deceased, otherwise they would drop out of school causing irreparable damages. The respondent did not have a locus standi to hold the funds. The respondent's action of holding of the funds was meant to intermeddle with the estate of the deceased as the Public Trustee did not have an interest in the estate. The refusal to release the gratuity was unlawful and unjustified. The applicant was the husband of the deceased. He further submitted that the respondent, in the replying affidavit, did not state what documents the applicant was required to produce for the release of the money. That was the reason why these proceedings were brought to court.

Mr. Cheruiyot for the Public Trustee opposed the application. He admitted that the Public Trustee was paid the amount of gratuity as claimed. However, in order to release the money the Public Trustee required a list of the heirs from the District Commissioner. The applicant had refused to comply with those requirements. Consequently the Public Trustee was not satisfied and could not make the payment out. Secondly the relief sought was not a correct relief. The applicant should have sought orders for judicial review. Therefore the application was bad in law. He submitted further that, if the orders sought were granted and later an error was discovered, then no redress would be adequate. He urged this court to dismiss the application.

This is an application for orders of an interlocutory mandatory injunction. Such orders may be issued by the court, but in special situations. A mandatory injunction is an equitable and discretionary remedy. The courts issue interlocutory mandatory injunctions with reluctance and only in special circumstances. This was the position held by the Court of Appeal in the case of Trade Agrain Limited –vs- Awal Limited – Mombasa Civil Appeal No.269 of 2002 (unreported). In that case the Court of Appeal cited with approval what was held by the Court of Appeal for East Africa in the case of The Despina Pontikos [1975] EA 38 at page 57 that – “We should begin by remarking that this court has held more than once that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances.”

The applicant herein has stated that he is the administrator of the deceased's estate and he requires the money for administration of the estate as well as paying school fees for the children of the deceased. The respondent does not deny that they are holding the money. They do not deny the fact that they have not been appointed as administrators of the estate of the deceased by the court. They also state that they can release the money subject to having the list of the beneficiaries.

I have considered the documents filed and the submissions of counsel. The applicant, in my view, has not given any special circumstances that would warrant me to grant orders of interlocutory mandatory injunction. The mere fact that he needs the money of gratuity for administration of the estate and payment of school fees are not special circumstances. Those are very general statements that do not raise any special circumstances.

There is a second reason why the orders of interlocutory mandatory injunction sought herein are not merited. The suit herein is for the same orders. Prayer (b) of the plaint is for the release of the money. The interlocutory orders sought herein are for the release of the money. If I grant the interlocutory orders for mandatory injunction sought, that will have the effect of determining the entire case herein. Interlocutory

orders should not determine the main suit, otherwise they will cease to be interlocutory. It is my view that the application is premature and it is not appropriate to issue the orders sought at this preliminary stage. Thirdly, this matter is subject to a Probate and Administration Cause at Kitale. I have been shown a copy of the Grant of Letters of Administration issued to the applicant herein on 9th December 2004 in Kitale High Court Succession Cause No.164 of 2004. I have not been shown any application for payment out that was made before the Kitale High Court. The Public Trustee does not deny holding the money. There is no order from the Kitale High Court for payment out money for of school fees, for any of the children of the deceased.

In my view, the money with the Public Trustee is safe where it is so long as the Public Trustee does not release it to anybody. It forms part of the estate of the deceased which is being handled through Kitale High Court Succession Cause No.164 of 2004. That court is seized with the power to order what should be done with the money that is now in the hands of the Public Trustee. Any application for release of the funds for use or payment of school fees etc has to be made in the Succession Cause at Kitale. I consider that this application for payment out of the money which forms part of the deceased's estate is not in the right forum. The applicant (as administrator) should disclose in Kitale High Court Succession Cause No.164 of 2004 that there is an amount for death gratuity of the deceased which is being held by the Public Trustee. If he requires any orders for the release of the money by the Public Trustee for any purpose, he should make an application in the Succession Cause at Kitale.

For the above reasons, I find no merit in this application and I dismiss the same. I order that costs of the Public Trustee in this application be borne by the applicant.

Dated and delivered at Eldoret this 11th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Cheruiyot for the Public Trustee

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