



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 94 OF 2018
IN THE MATTER OF THE DEATH BENEFITS OF THE LATE PROF. STEPHEN MUSEMBI NZUVE
IN THE MATTER OF THE TRUSTEES ACT, CAP 167 OF THE LAWS OF KENYA

BETWEEN

**THE TRUSTEES OF THE UNIVERSITY
OF NAIROBI PENSION SCHEME 2007.....APPLICANTS**

AND

ROSE KATUNGE1ST RESPONDENT
ROSEMARY MUMBUA.....2ND RESPONDENT
FRANCESCA MUTINDA.....3RD RESPONDENT
CECILIA KITHEI4TH RESPONDENT
MUTIE NZUVE.....5TH RESPONDENT
JOAN LOUIS.....6TH RESPONDENT
CHRIS NZIOKI.....7TH RESPONDENT
THE RETIREMENT BENEFITS AUTHORITY...INTERESTED PARTIES

JUDGMENT

1. The Applicants(THE TRUSTEES OF THE UNIVERSITY OF NAIROBI SCHEME 2007) filed the Originating Summons dated 13th July, 2018 seeking determination of the following questions:

(i) Who are the rightful beneficiaries of the death benefits (Ksh.19,800,870.80) held by the Applicants relating to the deceased scheme member, the late PROFESSOR STEPHEN MUSEMBI NZUVE under the scheme's trustee deed and rules?

(ii) What is the rightful shares of the death benefits payable to each of the rightful beneficiaries as determined by this Court?

(iii) Who pays the Costs of this case?

2. The Originating Summon is supported by the Affidavit of DR. STEPHEN WANYONYI LUKETERO (PHD) who is the current Chairman of the Applicant's board.

3. The Chairman of the Board deponed that the late PROF. STEPHEN MUSEMBI NZUVE (the deceased) joined the scheme on 1.2.1987 until his demise on 12.12.2015.

4. Further, that the deceased had listed his beneficiaries as JACINTA LOKO (WIFE), ROSEMARY MUMBUA (DAUGHTER) FRANCESCA MUTINDA (DAUGHTER) CECILIA KITHEI (DAUGHTER) and GABRIEL MUTIE (SON).

5. The Deceased's first wife JACINTA LOKO died in 2003 and the deceased married the 1st Respondent ROSE KATUNGE on 27th October, 2010 but the deceased did not update the records.

6. The Family was unable to agree on the distribution of the benefits and the Applicant filed this Petition for the Court to determine the rightful beneficiaries and the rightful share of each beneficiary.

7. The parties were referred to the Court Annexed Mediation where they reached a compromise and a mediation agreement was entered into on 30.1.2019 which compromised the Originating Summons.

8. On 28.2.2019, the 2nd to 5th Respondents filed an application seeking the following orders:

(i) THAT the Court be pleased to declare the marriage between the 1st Respondent and the deceased a nullity.

(ii) THAT the Court issues a declaration that the 1st, 6th and 7th Respondents are not dependants of the Deceased and therefore are not entitled to inherit from the Estate or the Pension of the deceased.

(iii) THAT the Proceedings of 20th April 2017 appointing the 1st Respondent the 1st Administrator to the Estate of the deceased be revoked.

(iv) THAT the agreement entered into on 30.1.2019 between the 1st Respondent and the 2nd to 5th Respondents be set aside.

(v) THAT the Pension and Estate of the Deceased be distributed to the 2nd to 6th Respondents who are the children of the deceased.

(vi) THAT Costs be provided for.

9. The Court directed the parties to file written submissions in both the Originating Summons dated 13.7.2018 and the Application dated 28.2.2019 which I have duly considered.

10. I find that the following issues are not in dispute.

(i) THAT the deceased who died intestate on 12.12.2015 was a member of the University of Nairobi Pension Scheme (2007) form 1st February 1987 to the time of his death on 12.12.2015.

(ii) It is also not in dispute that the deceased had listed his beneficiaries as JACINTA LOKO (Wife - now deceased), ROSEMARY MUMBUA (DAUGHTER) CECILIA KITHEI (DAUGHTER) and GABRIEL MUTIE (SON).

(iii) The Deceased's wife JACINTA LOKO died in 2003 and the deceased had not updated his nomination of beneficiaries by the time he died on 12.12.2015.

(iv) It is not in dispute that the deceased subsequently got married to the 1st Respondent who is also the mother of the 6th and 7th Respondents.

11. The issues for determination in both the Originating summons dated 13.7.2018 and the Application dated 28.2.2019 are as follows:

(i) Who are the rightful beneficiaries of the death benefits of Kshs.19,800.870.80 held by the Applicants in the Originating Summons dated 13.7.2018?

(ii) Whether the deceased's subsequent marriage to the 1st Respondent should be declared a nullity.

(iii) Whether the 6th and 7th Respondents who are the Children of the 1st Respondent are dependants of the deceased and therefore entitled to inherit from his estate or the Pension of the deceased.

(iv) Whether the appointment of the 1st Respondent as the 1st administrator of the deceased's estate should be revoked.

(v) Whether mediation agreement entered into on 30.1.2019 between the 1st Respondent and the 2nd to 5th Respondents should be set aside.

(vi) What is the rightful share of the death benefits payable to each of the rightful beneficiaries of the deceased?

(vii) Who should pay the costs of this suit?

12. On the issue as to who are the rightful beneficiaries of the death benefit held by the Applicants, I find that this will depend on the determinations of the 2nd (ii) to 6th (vi) issues herein. I will accordingly revisit this issue later in this Ruling.

13. On the 2nd issue as to whether the deceased's subsequent marriage to the 1st Respondent should be declared a nullity, I find that the 1st Respondent did not deny that before she got married to the deceased on 27.10.2010, she was married to one STEPHEN MUTISYA

MASIKA.

14. The 2nd to 5th Respondents in their Affidavit in Support of the Application dated 28.2.2019 stated that they obtained a certified copy of a marriage certificate between the 1st Respondent and one STEPHEN MUTISYA MASIKA.
15. The said marriage between the 1st Respondent and STEPHEN MUTISYA MASIKA was celebrated on 6.2.1998 at the Nairobi Marriage Registrar's Office.
16. The 2nd to 5th Respondents have asked the Court to declare the subsequent marriage between the 1st Respondent and the Deceased a nullity on the basis that the 1st Respondent had no capacity to enter into another marriage when her first marriage to STEPHEN MUTISYA MASIKA was subsisting.
17. The 1st Respondent filed a Replying Affidavit dated 12.3.2019 in which she stated that at the time she married the deceased the first marriage had been dissolved.
18. The 1st Respondent attached a letter from the Chief Matungulu Location dated 6.3.2019 stating that the marriage between STEPHEN MUTISYA MASIKA and the 1st Respondent was dissolved on 5.12.2001.
19. The 1st Respondent also filed Affidavits by several witnesses among them the uncle to the said STEPHEN MUTISYA MASIKA, his mother and brother stating that the said marriage was dissolved when the 1st Respondent took back the bride price together with a goat known as Mbuzi ya Maleo which marks dissolution of a marriage.
20. I find that the 1st Respondent did not deny that she got married to STEPHEN MUTISYA MASIKA sometime in 1997. Her testimony was that the said STEPHEN MUTISYA MASIKA disappeared in 1999 and in 2001, the marriage was dissolved.
21. However, the 1st Respondent did not deny that the said first marriage to Stephen Mutisya Masika was solemnized on 6.2.1998 at the Registrar of Marriages office in Nairobi. That marriage was monogamous and could only be dissolved through a divorce petition or a declaration of presumption of death. There are two marriage certificates on record which are not disputed by the 1st Respondent.
22. The 1st Respondent did not produce evidence that the first marriage had been dissolved through a divorce petition before she got into another monogamous union on 27.10.2010 with the deceased and neither did she seek a declaration of presumption of death on account of her first husband who purportedly disappeared.
23. In her submissions the 1st Respondent stated that the Registrar ought to have carried out due diligence to confirm whether she had the capacity to contract a Christian marriage with the deceased.
24. I find that it was the duty of the 1st Respondent to seek a declaration of presumption of death after her first husband disappeared for over 7 years.
25. I find that the 1st Respondent did not have capacity to enter into marriage with the deceased since her first marriage to STEPHEN MUTISYA MASIKA was and is still subsisting.
26. The first Respondent does not qualify to be regarded as a wife because her union would not be recognized in law. The 1st Respondent's conduct amounts to bigamy contrary to section 171 of the Penal code.
27. The 1st Respondent stated in her submissions that deceased had nominated her. However the records had not been updated and the definition of a spouse under the Pension rules refers to a union which "**would be recognized by a Court of Law in Kenya**"
28. On the issue as to whether the 6th and 7th Respondents who are the Children of the 1st Respondents are dependants of the deceased who are entitled to inherit from the estate or pension scheme of the deceased, I find that the birth certificates of the two children bear the name of the deceased as their father.
29. The 2nd to 5th Respondents alleged that the said birth certificates are forgeries. The 6th Respondent was born on 2nd May 1995 while the 7th Respondent's date of birth was 5th September, 2000. The 1st Respondent married the deceased on 27.10.2010.
30. I find that the 1st Respondent in her Replying affidavit dated 12.3.2019 stated in paragraph 10 that the deceased had accepted the 6th and 7th Respondents as his own children.
31. I find that this is an admission that the 6th and 7th are not the children of the deceased but he had accepted them as his children and he was taking care of them immediately prior to his death.
32. **Section 29** of the Law of Succession Act states as follows:

Meaning of dependant

For the purposes of this Part, "**dependant**" means—

(a) The wife or wives, or former wife or wives, **and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her prior to her death.

33. Furthermore under the **Trust Deed** Definition section, a dependant is defined as:-

“The member’s spouse, adopted children, sons, daughters, grandsons, grand-daughters, step children, parents, grandparents, brothers and sisters living at the time of the member’s death and such other person or persons as were, in the opinion of the Trustees, immediately before the member’s death, substantially depended upon the member (whether alone or with others) for the provision of the necessities of life ...”

34. I find that the 6th and 7th Respondents are entitled to inherit the Pension benefits by virtue of having been taken up by the deceased who was maintaining them prior to his death.

35. The 2nd to 5th Respondents did not produce evidence that the birth certificates are a forgery and neither did they deny the claims that the deceased was taking care of the 6th and 7th Respondent prior to his death. I accordingly find that the 6th and 7th Respondents are entitled to inherit from the pension of the deceased.

36. On the issue as to whether the appointment of the 1st Respondent as the 1st administrator of the deceased's estate should be revoked, I find that the said issue should be raised in the Succession Cause and not in this Originating Summons.

37. Section 36A. Treatment of death benefits;

Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.

38. The pension payment cannot be said to be a free property of the deceased. The retirement Benefits Act has also excluded pension from a deceased person's estate for purposes of administration. However, that does not mean the dependants of the deceased are not entitled to payments. The 6th and 7th Respondents as dependants of the deceased and are entitled to payments from the scheme in terms of both the Trust Deed and the Rules thereto.

39. The Trustees are allowed under the Retirement Benefits (Occupations Retirement Benefits Schemes) Regulations 2000 under Regulation 23 to exercise their discretion in the distribution of the Estate where no beneficiary was named by the deceased member.

40. In the current case, I find that although the deceased had nominated beneficiaries, his wife pre-deceased him and therefore her nomination must fail in accordance with the pension rules.

41. The allegation by the 1st Respondent that the deceased had nominated her and her children is not valid as the records had not been updated at the time the deceased met his death and in the circumstances, she was not a nominated beneficiary at the time the deceased died.

42. On the issue as to whether the Mediation Agreement entered into on 30.1.2019 between the 1st Respondent and the 2nd to 5th Respondents should be set aside, I find that the same is not binding as it had not yet been recorded as the Judgment of this Court and I accordingly set it aside in view of the finding of this Court that the 1st Respondent had no capacity to enter into a valid marriage with the deceased.

43. I now come to the first issue as to who are the beneficiaries of the pension benefits of the deceased. My findings are that the 2nd to 7th Respondents are all entitled to benefit from the Pension scheme as the children of the deceased and also children he had accepted as his own prior to his death and was maintaining them (in respect of the 6th and 7th Respondents).

44. On the issued as to what rightful share of benefits is payable to the 2nd to 7th Respondents, I direct that the said beneficiaries are entitled to equal shares after deduction of the costs of this suit.

45. The Costs should accordingly be deducted from the pension benefits of the deceased and the balance shared equally amongst the 2nd to the 7th Respondents.

46. In a nutshell, this Court grants orders as follows:

(i) THAT the rightful beneficiaries of the death benefits of Kshs.19,800,870.80 held by the Applicants in the Originating Summons dated 13.7.2018 are as follows:

- a) ROSEMARY MUMBUA
- b) FRANCESCA MUTINDA
- c) CECILIAH KITHEI
- d) MUTIE NZUVE
- e) JOAN LOUIS
- f) CHRIS NZIOKI

(ii) THAT the marriage between the 1st Respondent and the Deceased was not valid as the 1st Respondent had no capacity to enter into a monogamous marriage with the deceased since her first marriage to one STEPHEN MUTISYA MASIKA is still subsisting and it was subsisting at the time the 1st Respondent entered into another marriage with the deceased on 27.10.2010. The 1st Respondent is therefore not a beneficiary of the deceased as the purported marriage would not be recognized under Kenyan Laws as required by the Pension rules.

(iii) The 6th and 7th Respondents who had been accepted by the deceased as his own children and who were dependent upon him at the time of his demise are entitled to benefit from the pension scheme as beneficiaries of deceased.

(iv) The appointment of the 1st Respondent as the 1st Administrator of the Estate of the deceased can only be challenged in the Succession Cause and not in this Originating Summons since the death benefits do not form part of the deceased's estate.

(v) The Mediation agreement entered into between the 1st Respondent and the 2nd to 5th Respondents be and is hereby set aside in view of the finding of the Court that the marriage between the 1st Respondent and the deceased was not valid. The said agreement had also not been adopted by the Court.

(vi) The 2nd to 7th Respondents are entitled to share death benefits in equal shares.

(vii) Finally, both the originating summons dated 13.7.2018 and the Application dated 28.2.2019 are allowed with costs and the said Costs to be paid from the pension scheme.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF JULY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI