



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1197 OF 2018**

**IN THE MATTER OF THE ESTATE OF ALEX NYUMU MULEI (DECEASED)**

**JOYCE MWENDE MUSILA.....PETITIONER**

**~VERSUS~**

**PAUL NYUMU NZUKI & ANOTHER.....RESPONDENT**

**RULING**

1. The undated preliminary objection herein relates to the jurisdiction of this Honourable Court.
2. The Court has considered the submissions made by the counsels for the respective parties in support of and against the preliminary objection . The respondent has averred that the this Honourable Court lacks jurisdiction to hear and determine this matter.
3. Counsel for the petitioner argued that Section 19(1) of the Work Injury Benefits Act provides that compensation is not capable of attachment. He further argued that Section 20 of the Act that compensation falling under working injury benefits as provided herein does not form part of the employee’s estate, as such the beneficiaries articulated under the Succession Act are not the beneficiaries provided for in the work injury benefits act. In that regard parliament ousted the jurisdiction of this Honourable court to handle matters in relation to compensation for work injury. He further argued that the applicant was seeking letters of administration ad colligenda to collect benefits of the deceased employee and yet the deceased passed on in the course of his employment and as a result of a work related injury.
4. Counsel raising the Preliminary Objection relied on Rule 54 of Probate and Admsinstration Rules which grants a court powers to limit any grant when it has jurisdiction. He also relied on Section 51 and 52 of the Work Injury Benefits Act which bestows upon him/her the power to compensate employees and the procedures involved make the application. An agrrieved party has a right to appeal before the Industrial Court. He submitted that this court being a probate and Adminstration Court lacked jurisdiction to handle the matter herein.
5. He revisited Rule 36 of the Probate and Adminstration Rules which provides for the procedure of acquiring letters of Adminstration ad colligenda. It was his submission that only beneficiaries to the estate of the deceased are entitled and qualify to make such an application. It was his submission that the petititoner herein is NOT benefitiries and lacks the locus standi both in the succession act and the work injury benefits act to insitute such an application
6. In response to the Preliminary Objection Counsel for the applicant Ms Mutuku submitted that the preliminary objection did not raise any issues of law. It was her submission Rule 36 of the Probate and Adminstration Rules provides for instances where individuals are entitled to benefit.
7. The issue raised relates to the jurisdiction of this court to handle this application. In the famous case of *Owners of the motor vessel ‘Lillian S. Vs. Caltex Oil (Kenya) Ltd Civil appeal No. 50/1989*, the court held that a question of jurisdiction may be raised by a party or a court on its own motion and must be decided forthwith on the evidence before the Court.
8. The essence of a preliminary objection was given by JA old sir Charles Hewbold P in *Mukhisa Bisquits manufacturing Co. Ltd Vs West End Distributors (1969) E.A 696 at page 700 law JA stated that,*

***“Apreliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a pleriminary point may dispose the suit. Examples are an objection to the jurisdiction of the Court.....”***

**9. The Work Injury Benefits Act provides:**

**Sec 19. Compensation not to be alienated**

(1) Notwithstanding any provision to the contrary in any written law, compensation shall not be—

- (a) assigned or pledged;
- (b) capable of attachment or any form of execution under a judgment or order of a court of law; or
- (c) set off against any debt of the person entitled to the compensation.

(2) Any provision of an agreement in terms of which an employee assigns, purports to assign, relinquishes or purports to relinquish any right to benefits in accordance with this Act, shall be void.

**Sec 20. Compensation not to form part of deceased employee's estate** Compensation paid under this Act for the death of an employee shall not form part of the employee's estate.

#### 10. 24 of the Employment Act provides for death of an employee

#### 11. Probate and Administration Rules

(1) When the death of an employee from any cause whatsoever is brought to the notice or comes to the knowledge of the employee's employer, the employer shall as soon as practicable thereafter, give notice of the death in the prescribed form to the labour officer or, if there is no labour officer, to the district commissioner of the district in which the employee was employed.

(2) Upon the death of an employee during the term of a contract of service, the legal representatives of the employee shall, upon proof of capacity as required by law, be entitled to be paid wages and any other remuneration and property due to the employee as at the date of death within thirty days of submitting the proof.

(3) The employer of the deceased employee shall, within seven days of such payment provide the labour officer or in his absence the district commissioner with evidence of the payment.

(4) Where on expiry of three months after the employee's death—

(a) no legal representative has laid claim to the wages or property of the employee; or

(b) where the employer is in doubt of or has rejected any claim made to the wages or the property of the employee, the employer, shall deliver to the labour officer or district commissioner, as the case may be, all wages due to the employee at the date of his death and shall deliver to him all property of the deceased employee to be held by the labour officer or the district commissioner in trust subject to the Law of Succession Act (Cap. 160) or any other written law applicable to the disposal of a deceased person's property.

(5) Where an employee is, during the course of his employment killed or incapacitated by injury for a period exceeding three days, his employer shall as soon as practicable, send to the labour officer or, if there is no labour officer to a district commissioner a report in the prescribed form.

#### 12. Grant *ad colligenda bona* under s. 67 of the Act

(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

(3) Application for such a grant shall be by petition in Form 85 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing the material facts together with the reasons for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.

(4) The provisions of rule 7(4) shall not apply to applications under this rule.

(5) Copies of the proceedings and of the grant when issued shall be served upon such persons (if any) and in such manner as the court shall direct.

13. On the issue of locus standi of the applicant to bring this proceedings, the arguments made by the respondent were that the applicant lacked locus as a beneficiary both under the succession Act and the work injury benefits Act.

#### **MEANING OF DEPENDANT.**

**Section 29. of the Succession Act 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 immediately prior to the date of her death.

**Under the Wok Injury Beneficts Act.**

6. Meaning of dependant

(1) In this Act “dependant” means—

- (a) the widow or widower of an employee;
- (b) a child of the employee who has not attained the age of eighteen years including a posthumous child, a stepchild and an adopted child, adopted prior to the accident, but excluding a child who is married or who is self-supporting;
- (c) a parent, step-parent or an adoptive parent who adopted such employee if he adopted prior to the accident or death;
- (d) a child of the employee not contemplated by paragraph (b);
- (e) a brother, sister, half-brother, half-sister or parent, grandparent, or grandchild of an employee; and
- (f) any other person who at the time of the accident was wholly dependent upon the employee for the necessities of life.

(2) In the case of an employee who leaves two or more widows, such widows shall be entitled to share such compensation as would be payable to a single widow of the deceased employee.

14. On the issue of the preliminary objection, I uphold the same as section 20 of the Work injury benefit Act is clear that Compensation is not to form part of deceased employee’s estate. That section states as follows;

**"Compensation paid under this Act for the death of an employee shall not form part of the employee’s estate".**

15. The matter should be handled by the Director of Occupational Safety and Health Services and any appeal should be made to the industrial court( now known as the Employment and Labour Relations Court) .

The Application is struck out with no orders as to costs.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF DECEMBER, 2018**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**

**IN THE PRESENCE OF:**

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