



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.151 OF 2009**

**IN THE MATTER OF THE ESTATE OF ALICE ORIEDO OKENG'O ALIAS ALICE AKENG'O  
ORIEDO (DECEASED)**

**ISAAC INGATI ABONG' ..... 1<sup>ST</sup> PETITIONER**

**CAROLYNE AYOTI ORIEDO ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

**RULING**

*Isaac Ingati Abong'* and *Carolyn Ayoti Oriedo*, (Petitioner/Applicants) have moved this court by way of Summons dated 23<sup>rd</sup> April, 2012 and filed in court on 25<sup>th</sup> April, 2012 seeking the following orders:-

1. THAT the respondent, Kenya Commercial Bank Ltd, Kakamega Branch, and specifically, Bank Manager, to show cause why they should not pay the petitioners/applicants money due to the deceased worth over Kenya Shillings Two Million (over Kshs.2,000,000/-) only on the deceased's account No.243-842-609 Kakamega Branch.
2. THAT the respondent Kenya Commercial Bank Ltd, Kakamega Branch, Specifically, the Bank Manager, be ordered to pay the petitioners/applicants money on the deceased's Alice Oriedo Akeng'o alias Alice Akengo Oriedo) Account No.243-842-609, Kakamega Branch.
3. THAT the respondent Kenya Commercial Bank Ltd, Kakamega Branch, specifically, the Bank Manager, to disclose the whereabouts of the monies on the deceased's (Alice Oriedo Akeng'o alias Alice Akengo Oriedo) Account No.245-842-609 Kakamega Branch.

The summons are supported by the grounds appearing on its face and the affidavit of Carolyn Ayoti Oriedo sworn on 23<sup>rd</sup> April, 2012. Carolyn has deponed that before filing the succession proceedings while in the company of the co-petitioner, they visited the respondent, Kakamega Branch where the deceased used to work and on inquiry, they were informed that the deceased's account had about Kshs.2,000,000/-. They obtained a Grand of Letters of Administration and visited the branch again but were informed that they needed a Certificate of Confirmation of Grant before they could access the account. The petitioners had the Grant confirmed and when they went back, they were this time informed that the account had no money; although no family member had withdrawn any money from that

account. The applicants are of the view that the money in that account formed part of the deceased's estate and they need it for distribution among the beneficiaries thus the reason why they have filed the present application.

The application is opposed and the Bank, through *Matano Nyaa*, the Pension Liaison Manager, has sworn an affidavit opposing the application. The deponent has stated that they had written to the deceased pensioner informing her of her pending retirement. The deceased was entitled to a pension under the Kenya Commercial Bank Staff Pension Fund. The manager of the Fund wrote to the deceased seeking certain information about her dependants but the deceased wrote back with the letter showing nil on the information sought.

Thereafter the deceased was paid a lump sum of Kshs.540,000/- and she was to get a monthly pension of Kshs.24,510/-. The lump sum of Kshs.540,000/- was paid to the deceased and the monthly pension continued to be paid to the deceased's account No.243-842-609 (now 101920570). Payment of pension benefits to dependants is paid in accordance with rules of the Pension Fund and dependants are to be paid under *rule 14* of the Trust Deed.

The deponent states that at the time of the deceased's demise, she did not have dependants who qualified under the rules of the scheme. The Trustees continued to remit monthly pension to the deceased's account which stood at Kshs.2,111,447/35 by 2011 yet the deceased was only entitled to Pension upto the time of her death. On being informed of the pensioner's demise, the Trustees debited the deceased's account with Kshs.2,111,447/35. Since the said monies did not belong to the pensioner, it is held by the Trustees of the scheme for the respondent's staff/or beneficiaries under the Trust Deed and Rules.

Parties were to file written submissions, and while the respondent filed its submissions, the applicant's counsel elected to rely on the affidavit in support of the application. Counsel for the respondent submitted that the deceased having been a member of the pension scheme, was entitled to pension on normal retirement under *rule 8*. Under *rule 13* and *14*, pension was payable to a widow or widower or dependent children if at the time of death he/she was in receipt of pension from the scheme.

It was further submitted on behalf of the respondent, that at the time of death, the deceased did not have dependants within the meaning of the Trust Deed. He cited *rule 19(e)* which says that payment of pension is conditional upon evidence of survival and Trustees may defer any payment until such evidence is produced. They further cited *section 36* of the Retirement Benefits Act which provides that upon death benefits payable from the scheme does not form part of the Estate of the deceased but shall be paid out by Trustees in accordance with the scheme. They submitted that the deceased having died on 14<sup>th</sup> February 2004, benefits payable to her did not therefore form part of her estate.

It was also submitted that the petitioner/applicants are not entitled to payment because upon death, the scheme collapsed. They argued that under *section 33* of the Trust Deed, the petitioner/applicants do not have a cause of action against the respondent who does not hold any money in the deceased's account and any money under the scheme is held by the Trustees of the scheme.

The deceased, *Alice Oriedo Akeng'o*, was an employee of the respondent and joined the respondent's pension scheme as such. She retired from employment and was paid Kshs.540,000/- in lump sum by the pension scheme and thereafter was entitled to monthly pension of Kshs.24,510/- which she continued receiving upto 14<sup>th</sup> February 2004 and thereafter pension continue being deposited in her account. By the time pension was stopped, there was Kshs.2,111,447.35/- but the respondent debited that account with the same amount, arguing that the estate of the deceased was not entitled to that payment which has prompted the application. The respondent has argued that pension is not part of the deceased's estate according to the Trust Deed and Rules made there under, while the applicants maintain that that money is payable to the estate. The respondent has also argued that the deceased had no dependants hence the applicants cannot get the money. They argue that the deceased did not say she had any dependants at the time she was retiring and they have annexed a letter which was, according to the respondent, written by the deceased showing she had no dependants.

The first question that arises for determination is whether or not the deceased left behind dependants.

According to the petition filed herein for grant of letters of Administration, Isaac Ingati Abong' and Carolyne Ayoti Oriedo, the petitioners/applicants, now administrators, described themselves as son and daughter to the deceased. The petition shows the following as those left surviving the deceased (1) Kerry Frank Oriedo, (2) Carolyne Ayoti Oriedo, (3) Rose Margaret Sang'ona (4) Jacqueline Achieng Oriedo, (5) Isaac Ingati Abong' (6) Mercy Peggy Nyahera and (7) Sarah Alfredah Onyona. The letter from the chief dated 10<sup>th</sup> September, 2007 contains the same names and the relationship between them and the deceased is that of either son or daughter.

That being the case, and given that there is no one challenging the truth of this fact that the persons named by the chief as children of the deceased are not such children, and the court having granted letters of Administration to the estate of the deceased with these persons as the beneficiaries, I find that they are indeed the dependants of the deceased and therefore beneficiaries of her estate. The fact that the deceased had indicated NIL in her letter to the respondent cannot, as a matter of law, be taken to be conclusive evidence that the deceased had no dependants. She may have not wished to have them disclosed for her own reasons, but that cannot remove them from a factual and legal position as dependants.

Further more 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 necessaries of life ...”*

From the above definition, it is clear that it is not mandatory that the pensioner must have disclosed them but that is left to the opinion of the Trustees. There is no doubt therefore that the petitioners/applicants and their siblings are dependants of the deceased.

Having disposed of the first question, that of dependency, the second question that presents itself for determination is whether pension from the Pension Scheme forms part of the deceased’s estate.

Section 5 of the Trust Deed gives the purpose of the scheme as follows:-

*“The main purpose of the scheme is the provision of pension and other retirement benefits for members upon their retirement from employer’s service and relief for dependents of members, and for that purpose the Trustees shall hold the contributions paid to them by the employers and the members any other sums, investments and income and all lump sums representing the same upon trust for the respective persons for whose benefit such sums and other benefits are expressed to be payable in accordance with the provisions of this Deed and the Rules.”*  
(emphasis provided)

The scheme was meant for the benefit of the employees and on their death, their dependants. Upon the deceased’s death, the pension scheme continued to pay monthly pension into her account and this is the money that the petitioners/applicants have sought to have released by the respondent. The respondent has argued that they debited the account on realising that the pensioner had died. The respondent has further argued that pension benefits did not form part of the deceased’s estate under the scheme upon death.

To determine this question, one has to look at the Trust Deed and the Rules. The pension fund as said earlier was for the benefit of the deceased on retirement and thereafter for her dependants. Rule 12 provides as follows:-

*“A pension shall become payable under rule 13 and 14 on the death of a member or former*

member who is survived by a widow/widower or dependent children provided that at the time of death, the member –

(i) ...

(ii) was in receipt of a pension from the scheme.”

Rule 14 which is relevant to this case provides:-

*“In addition to the widow/widower’s pension provided in rule 13, there shall be payable at the discretion of the Trustees a pension twelve and a half (12.5%) of the widow/widower’s pension subject to a minimum pension of Kshs.1,000/- per annum in respect of each dependent child upto a maximum of four (4) dependent children at anyone time. The payment of each dependent child will continue to be made until the child in question reaches the age of twenty-one (21) years.”*

Section 26 of the Retirement Benefits Act (Cap 197) laws of Kenya provides that upon death of a member of the scheme, the benefit payment shall not form part of the estate of the member for purposes of administration but *shall be paid out in accordance with the scheme.* (emphasis provided) Under the scheme, the benefits are to be paid in the case of the deceased, to her dependants. The deceased’s pension was paid into her account for several years but that was later stopped and the account debited with the pension money paid into it.

The word “Estate” is defined by the Law of Succession Act cap.160 Laws of Kenya as - *“The free property of a deceased person.”* While the word ‘free property’ is defined in the same Act as *“The property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”*

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 applicants as dependants of the deceased are entitled to payments from the scheme in terms of both the Trust Deed and the Rules thereto. The respondents upon learning that the deceased’s estate had administrators who were dependants of the deceased, should have moved to find out who they were and make payments in accordance with the Trust Deed and Rules. They could have even placed a caveat on the account and only release the money that was due to the dependants instead of debiting the account with all the amount that had been paid into the deceased’s account. The assertion by the respondent that the money is not payable for reasons that the deceased had no dependants is far-fetched. As stated elsewhere in this ruling, the fact that the deceased did not mention the dependants was not in law conclusive. Under the Trust Deed, they were entitled to payments.

On whether the applicants have a cause of action, it is clear that the benefits were for the deceased and upon death, her dependants. I do not therefore agree with submissions on behalf of the respondent, that the petitioners/applicants have no cause of action. They are dependants of the deceased and the scheme was for both the employee during her life-time and thereafter to her dependants. The applicants are dependants of the deceased and both in law and under the Trust Deed, they are entitled to benefit from the deceased’s entitlement under the scheme.

I have carefully considered this matter and the arguments of both sides. I have also perused the Trust Deed and the Rules there under. It is my considered opinion that it is the responsibility of the Trustees of the scheme to pay the benefits due to the eligible dependants of the deceased who have been known to them for a couple of years from the time the grant was obtained. Upon learning of the death of the pensioner, and the coming to the fore of the beneficiaries of the estate, it would have been prudent for the respondent and the administrator of the scheme to inquire into the matter and make payments that were due, but not to rush to debit the account in total disregard of their duties to the dependants of the deceased. If in doubt, as to who the dependants were, they could have approached the court for determination of that issue.

The funds that were debited from the account were, according to counsel for the respondent, placed in a Trust fund and should therefore be available for disbursement to the dependants in accordance with the Trust Deed. The interim grant of letters of Administration of the estate of the deceased has since been confirmed which means there is no more doubt as to who the beneficiaries or dependants are. The fact that retirement benefits are exempt from forming part of the estate does not exempt the Trustees from paying the benefits to the rightful beneficiaries or dependants. I therefore find that the applicants as legal representatives of the Estate of the deceased and dependants of the deceased, have a cause of action against the respondent and the managers of the pension scheme.

For the above reasons I allow the application dated 23<sup>rd</sup> April 2012 as follows:-

*1.) The respondent, Kenya Commercial Bank Ltd, Trustees and the administrator of the Kenya Commercial Bank Staff Pension Fund within three months from the date hereof do disclose to the petitioners the amount the dependants of the deceased, ALICE ORIEDO AKONG'O alias ALICE AKONG'O ORIEDO) were entitled to at the time of her death and make arrangements to pay the said amount to the dependants of the deceased in accordance with the Trust Deed from the time of her death that is 14<sup>th</sup> February, 2004.*

2.) Costs of the application to the petitioner/applicants.

**Dated and delivered at Kakamega this 14<sup>th</sup> day of October, 2015.**

E. C. MWITA

**J U D G E**