REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.387 OF 2001

IN THE MATTER OF THE ESTATE OF ALLOYCE MELITUS OBIERO (DECEASED)

JOSEPH LEO OCHIENG……..…….1ST APPLICANT

FELICITA OWUOR OCHIENG……..…….....…… 2ND APPLICANT

VERSUS

JACQUELINE MORAA OBIERO……...……..... ……..1ST RESPONDENT

PATRICK M. ODUDE…….....…… 2ND RESPONDENT

RULING

Alloyce Melitus Obiero, the deceased to whose estate these proceedings relate died on 30th January 2000. A dispute arose between the Applicants, the parents of the deceased, and the 1st Respondent, the widow of the deceased in regard to how the properties that comprised the estate of the deceased were to be distributed. The dispute was heard by Nambuye J (as then was). She delivered her considered Judgment on 18th October 2011. In the material part of the judgment, the learned Judge made the following orders:

> ***"a. THAT the Trustees of the NCR funds have sixty (60) days from the reading of the judgment to file a correct statement of account of invested funds as at the date of the reading of this judgment to enable this court effect that amount both capital and accrued interest in this judgment as the amount distributed and invested for the minor children of the of the deceased for completeness of the judgment.***
>
> ***b. THAT the joint administrators of the estate be made joint Trustees of the said funds alongside the Trust Corporation for purposes of proper safe guarding protection and accountability with regard to the said minor's funds.***
>
> ***c. THAT the Kenya Airways compensation funds of 300,000 US Dollars be distributed as follows:***
>
> ***i. 150,000 US Dollars be distributed to the widow Jacqueline Moraa Obiero.***
>
> ***ii. 150,000 US Dollars to Joseph Leo Ochieng and Philister Awour Ochieng in***

equal shares.

iii. That the share of Kshs.1,250,000/= already paid out to the Protestors be reduced from this apportioned share of 150,000 US Dollars.

iv. That the interest accrued from the said Kenya Airways compensation funds be reduced by any such amount applied towards the maintenance of the minors as at the time of delivery of this judgment.

v. That the resultant balance of the accured interest be shared equally between the widow Jacqueline Moraa Obiero and the Protestors Joseph Leo Ochieng and Philister Awour Ochieng with the widow getting half the accrued interest and the Protestors sharing the other half of the accrued interest equally.

d. THAT the Deputy Registrar of the High Court, Family Division executes all the necessary documents on behalf of any defaulting Administrator in order to give effect to the judgment.

e. THAT a copy of the Judgment as well as the extracted Order be served upon the advocate holding the Kenya Airways funds who has sixty (60) days from the date of the reading of this judgment to furnish to the court a true statement of account of both the capital and interest accrued on the said funds to enable the court reflect the said figure in the judgment as the correct figure distributed.

f. THAT likewise a copy of the judgment as well as the extracted order be served upon the Trustees of the NCR funds for the minors for them to forward a true account of those invested funds from the date of receipt up to the date of judgment to enable the Court reflect the figure as the amount distributed to the minors.

g. THAT there will be general liberty to apply to either party should any need arise."

A dispute has arisen in regard to the payment of the sum of US Dollars 150,000 that was decreed in favour of the Applicants. According to the Applicants, the learned Judge ordered the sum of US Dollars 150,000 to be paid to the Applicants from the Kenya Airways compensation funds. However, at the time the judgment was delivered, the entire compensation fund had been withdrawn and applied towards the education and maintenance of the then minor children of the deceased. The Applicants now wants the court to order that the sum of US Dollars 150,000 (or its equivalent in Kshs.19 million) be paid to the Applicants from the NCR funds. The Applicants state that at the time the court delivered its judgment, the Kenya Airways compensation funds had been exhausted. Since the learned Judge appreciated that the Applicants ought to benefit from the estate of the deceased, it is only just that the court directs that the said sum be paid from the NCR funds which are part of the estate of the deceased.

The Application is opposed. The 1st Respondent swore a replying affidavit in opposition to the application. She was emphatic that the NCR funds were not part of the estate of the deceased that were available for distribution. This is because the NCR funds were governed by a Trust Deed which stipulated that only the disclosed beneficiaries therein would benefit from the funds. She deponed that the Applicants were not entitled to the said funds. She urged the court to take into consideration the needs of the children of the deceased as contrasted with the 1st Applicant who was elderly and the 2nd Applicant who is now deceased. She explained that the only funds that could have been applied to pay the Applicants was exhausted and therefore there is nothing that the court can do about it. She stated that she required the funds from the NCR funds for the education of a son of the deceased. She therefore urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Kamaara for the Applicants, Mrs. Ndungu for the 2nd Respondent and Mrs. Khayesi for the 1st Respondent. Counsel for

the parties agreed by consent that Mssr. Alexander Forbes Financial Services draw up and account for the NCR funds within fourteen (14) of the date of the consent. As regard their submission in respect of the matter in dispute, learned counsel basically reiterated the contents of the affidavits filed by the parties herein in support of their respective opposing positions. Two issues, however, emerged that were not stated in the affidavits. The first issue was that the 2nd Applicant had since the delivery of the judgment died. However, the fact that the 2nd Applicant is deceased does not mean that that which was decreed in her favour lapsed. Her share shall benefit her estate. The second issue is that part of the NCR funds had been converted into real property at the behest of the Respondents. It became apparent that the said conversion had been done without the authority of this court.

The issue for determination by this court therefore is whether the NCR funds can be applied to settle the distribution that was made by the court in favour of the Applicants. It is common ground that the judgment in issue has not been appealed against. It is still valid and capable of enforcement. There is no dispute that the Applicants are entitled to be paid the sum of Kshs.19 million from the estate of the deceased. It was clear from submission of counsel that the designated funds where the Applicants were supposed to be paid from i.e. the Kenya Airways compensation fund were exhausted to cater for the needs of the 1st Applicant and the children of the deceased. The funds were exhausted before the court rendered its judgment. The principle that the Applicants ought to be compensated from the estate of the deceased has not been challenged. This court was not persuaded by the argument advanced by the 1st Respondent to the effect that the NCR funds were not available for distribution because the Trust Deed that created it designated certain persons as beneficiaries. The fact of the matter is that in the circumstance of this case the designated beneficiaries could only benefit after a grant of administration has been issued by this court. Since the said funds were disclosed as part of the properties that comprised the estate of the deceased, they are within the mandate of this court to distribute.

Taking into consideration the entire circumstances of this application, it is clear that this court has power to direct any property that comprises the estate of the deceased to be redistributed to satisfy the judgment of this court. In the premises therefore, this court directs that the sum of Kshs.19 million decreed by this court in favour of the Applicants be appropriated from the AMO Trust of NCR or any properties purchased from the said AMO of NCR. Any income that has accrued from the said funds shall be shared equally between the Applicants and the 1st Respondent as earlier decreed by the court. The sum due to the 2nd Applicant will be released to the Administrators of her estate. Since this is a family dispute, there shall be no orders as to costs.

DATED AT NAIROBI THIS 9TH DAY OF MAY, 2014

L. KIMARU

JUDGE