



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 56 OF 2016

BETWEEN

**KENYA COMMERCIAL BANK.....APPELLANT**

**AND**

**ISAAC INGATI ABONG' .....1ST RESPONDENT**

**CAROLINE AYOTI ARIEDO ....2ND RESPONDENT**

(An appeal from the Ruling of the High Court of Kenya at Kakamega (E.C. Mwita, J), dated 14th October, 2015 **In Succession Cause No. 151 of 2009**)

\*\*\*\*\*

JUDGMENT OF THE COURT

Isaac Ingati Abong' and Carolyne Ayoti Oriedo, the 1st and 2nd respondents respectively, are administrators of the estate of their late mother Alice Oriedo Akeng'o (the deceased) who died on 14th February 2004. A certificate of confirmation of a grant dated 28th December 2010 was awarded in their favour in **Kakamega Succession Cause No. 151 of 2009**.

The respondents moved the High Court in their capacities as beneficiaries and administrators of the estate by way of a Summons filed on 25th April, 2012 and sought 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.\*\*\*\*\* 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 was founded on five grounds on the face of it and was supported by an affidavit sworn by the 2nd respondent. She deposed that prior to filing the succession proceedings, together with the 1st respondent, she visited the appellant's Kakamega Branch where the deceased used to work. On inquiry they were informed that the deceased's bank account had a balance of about Kshs. 2,000,000. Once they obtained the confirmation of grant and had the power to access the funds, they discovered that the money therein was no longer available.

This necessitated the filing of the Summons as the 2nd respondent was of the opinion that the money in the deceased's account formed part of her estate and therefore the beneficiaries of the estate were entitled to it.

The application was opposed by the appellant, through a Replying Affidavit sworn by Matano Nyaa, its Pension Liaison Manager (the Manager). The deponent confirmed that, indeed, the deceased was an employee of the appellant and was entitled to pension under the Kenya Commercial Bank Staff Pension Fund (the Scheme). It was averred that prior to the deceased's retirement, via a letter dated 9th December 1999, the Manager wrote to her seeking certain information about her dependants. He specifically sought for a certified copy of the

deceased's husband's national identity card; certified copies of birth certificates of the deceased's children who were under the age of 21 years; and a certified copy of the deceased's marriage certificate. The deceased responded in a hand written letter dated 10th December 1999 indicating nil for all the three questions.

The fund secretary wrote a letter to the deceased dated 11th February 2000 and informed her that she had been awarded pension of Kshs. 341,593.00 per annum. The letter also detailed two options from which the deceased could choose to apply her pension. Out of the two, the deceased opted to commute part of her pension for a lump sum payment of Kshs. 540,000 and a reduced monthly pension of Kshs. 24,510 per month.

The said monthly payments continued to be remitted into her account until the respondents informed the appellant of the death of the deceased on 25th February 2011, which was 7 years after her demise. Due to the non-disclosure by the respondents, the appellant erroneously continued to remit the monthly payment to the deceased's account which totalled to Kshs. 2,111,447.35. This was contrary to the Trust Deed and Rules which stated that the payment was to be made to a pensioner during their lifetime. As the deceased did not disclose any beneficiaries, the respondents and the other beneficiaries of the estate were not entitled to the pension as provided for under Rule 12 and 14 of the Trust Deed.

The manager deposed further that upon being informed of the deceased's death, the appellant debited the funds from the deceased's account into the Scheme's account since the money was only payable to an existing pensioner. Since the money did not belong to the pensioner, it could not form part of the estate of the deceased and since the beneficiaries did not qualify as dependants, the appellant had no power to release the money to them.

The learned Judge E.C Mwitwa, J delivered a judgment on 14th October 2015 in which he faulted the appellant for debiting the account of the deceased without establishing whether or not she had beneficiaries. He went on to hold that the respondents and the rest of their siblings were beneficiaries of the pension and the same should be distributed in accordance to the Trust Deed and Rules. Therefore, the learned judge gave the following orders;

**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 14th February, 2004.**

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

The appellant, being dissatisfied with the judgment, filed the instant appeal containing 16 grounds, which, condensed, are that the learned judge erred in law and in fact by;

- a. Holding that the pension formed part of the deceased's estate contrary to the provisions of the Retirement Benefits Act.
- b. Failing to appreciate that the deceased was entitled to a pension only during her lifetime.
- c. Failing to appreciate that he was not seized with the requisite jurisdiction to hear and determine the application.
- d. Failing to appreciate that the appellant and the trustees of the fund and the administrator were different and distinct entities.
- e. Failing to appreciate that the impugned ruling could not be issued against the administrator of the scheme in his individual capacity.

During the hearing of the appeal, learned Counsel **Mr Mukele** appeared for the appellant, while learned Counsel **Ms Asuma** held brief for **Ms Muleshe** who is on record for the respondents. Both parties had filed written submissions and both Counsel chose to rely on the same.

In their submission, the appellant's Counsel submitted that the court did not have jurisdiction to hear and determine the application as the same did not fall under the purview of the **Law of Succession Act (LSA)**. This was in accordance to **Section 36A** of the **Retirement and Benefits Act (RBA)** which provided that pension funds do not form part of an estate of a deceased. The determination of the application ought to have been in accordance to the provisions of the **RBA**.

It was stated that the deceased was given an opportunity to nominate her beneficiaries and she failed to do so. This, according to **Regulation 19** of the **Retirement Benefits (Individual Retirement Benefits Schemes) Regulation, 2009** (the Regulations), meant that none of the beneficiaries of the estate were entitled to any payment having not been nominated as such by the deceased. Further, the deceased was only entitled to monies paid from 9th May 2000, the date of her retirement to 14th February 2004, the date of her demise. This is because the deceased entitlement to pension lapsed at the time of her death and any money paid after her demise was done so erroneously.

It was contended that Section 34 of the Trust Deed provides for parties to refer any grievance for arbitration. The same is also provided for in **Section 46** of the **RBA**. The respondents were thus in blatant disregard of those provisions in filing the suit in court without exhausting the remedies made available to them by the law and the Deed. As a result, the High court erred by entertaining the application while the respondents had failed to adhere to mandatory procedures.

Counsel for the appellant argued that the Scheme was a separate legal entity from the appellant, the same having been duly registered under

the **RBA** with capacity to sue and to be sued. The action ought to have been brought against the Trustees of the Scheme and not the appellant. Therefore the learned judge misapprehended the law when he held that the respondent had a cause of action against the appellant and the resultant order issued was unenforceable, null and void as the same could not be executed.

Moreover, continued Counsel, the action by the learned judge offended **Article 47** and **Article 50** of the Constitution as he condemned a party unheard and issued adverse orders against it. The learned judge further erred by issuing orders against the administrator of the Scheme in his individual capacity since his duties and those of the trustees are only exercised subject to the provisions of the Trust Deed and Rules. It was pleaded that the Court allows the appeal and set aside the ruling of the High court.

In opposing the appeal, the respondents submitted that the High court had jurisdiction to hear, determine and make a finding on the matter. **Section 47** of the **LSA** gives the court unfettered jurisdiction to deal with any disputes under the Act and make pronouncements thereon. The respondents were children of the deceased and the money which is subject to this appeal was in the account of the deceased at the time of her death which makes it part of her estate. They are beneficiaries as provided for in **Section 29** of the **LSA** and as per the definition in the Trust Deed. Thus, they were beneficiaries regardless of whether or not the deceased mentioned them as such. The Court was urged to look at the pension money at the Bank as that which was available for distribution since the same would have been at the disposal of the deceased.

Counsel concluded by urging that the learned judge did not err in issuing the said orders since the trustees must have received the money back with the assistance and consent of the appellant, in whose Bank the account was domiciled. Therefore, both entities had the onus to execute the order and the Court was urged to uphold the ruling and dismiss the appeal with costs.

I have considered the record of this appeal and distilled the main issues for consideration as whether the pension money formed part of the deceased's estate and whether the learned judge erred by issuing the orders against the administrator of the Scheme. I shall consider these issues whilst keeping in mind our mandate on a first appeal as expressed in **SELLE -VS-ASSOCIATED MOTOR BOAT CO [1968] EA 123**.

Foremost, it is prudent to establish the gist of the application as filed by the respondents in the High court. It was their contention that they went to their deceased's mother account which was domiciled at the appellant's Kakamega Branch and were informed that it had a balance of Kshs. 2,000,000. They went ahead and obtained confirmation of grant and attempted to access the said funds only to be informed that the money was no longer available. They sought the intervention of the court in order to access what they believed to be part of the estate of the deceased and therefore was due to them as beneficiaries.

I think, with respect, that the appellant's case proceeded on a misapprehension of the issues at hand. The respondents were not demanding benefits from the Scheme. Rather they claimed money that was already deposited into the deceased's account that was domiciled in the appellant's Kakamega branch at the time of her death. Counsel invoked **Section 36A** of the **RBA** at the High court and before this Court. However, it seems to me that the provision relates to monies payable, or that is which is still accruing to beneficiaries but not what has already been disbursed.

The fundamental issue before us is whether or not the money already deposited into the account of the deceased formed part of the estate. Having considered the arguments made before us on this question, and the authorities relied on by the appellant on the same, it is apparent that they are off the mark in one crucial aspect; they speak to funds that are still within the control of the Scheme, not paid out to the deceased and therefore still accruing to the beneficiaries as named. That however is not the situation obtaining herein.

Given that distinction, I will not get into the purview of how pension funds are handled since that is not relevant to the facts in issue. The Court must not allow itself to go off on a tangent on a wild goose chase no matter how tempting. It must utilize precious judicial time to distil the relevant issues for determination and give a just verdict on the same expeditiously. In **R V. GRANT 2015 SCC 9**, the Supreme Court of Canada held;

**“[18] The truth-seeking function of the trial creates a starting premise that all relevant evidence is admissible (R. v. L. (D.O.), [1993] 4 S.C.R. 419; R. v. Corbett, [1988] 1 S.C.R. 670). Evidence is logically relevant where it has any tendency to prove or disprove a fact in issue (Corbett, at p. 715).”**

Back to the issues for determination, it is not disputed that the Scheme, whether in error or not, had deposited funds into the deceased's account which at the time of her death had credited Kshs. 2,111,447.35. Therefore the said funds were no longer bound by the rules and regulations of the Scheme or the **RBA**. The funds were the property of and formed part of the estate of the deceased as provided for in the **LSA Section 3** whereof defines “estate” as meaning the free property of a deceased person. This refers to the property which a person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

It would seem to me that, however, herein lies the legal lacuna since the **RBA** and the Trust Deed and Rules do not have a provision clearly stating that the death of a pensioner automatically lapses the contract. That being so, the appellant on behalf of the Scheme did not have a legal right to debit the account of the deceased based on that argument. The only logical way to categorise the funds in the deceased's account was that they formed part of the estate of the deceased.

This Court in **ADMINISTRATORS OF THE ESTATE OF MAXWELL MAURICE OMBOGO v STANDARD CHARTERED BANK KENYA LTD & ANOTHER [2000] eKLR** had the same dilemma concerning whether or not a deceased advocate's client accounts formed part of the free estate of a deceased, and it expressed itself thus;

**“Coming back to the definition of "free property": in view of what we have stated above, it is quite clear that the phrase connotes not only the personal property of a deceased person, but also, all the property which was in his possession or control or under his power, and the disposal of which, would legally have required his authority, but for his death. Money**

**held in a deceased advocate's 'client account' falls into that category. It then follows that the late Ombogo's two bank accounts were part of this free property and, therefore, subject to the provisions of the Law of succession Act."**

It follows that, the money that was already distributed into the deceased's account formed part of the estate and the beneficiaries are therefore entitled to it. The same should not be distributed in accordance to the Trust Deed and Rules but must be deposited back into the account and the respondents will administer it in accordance to the **LSA**.

Finally, the learned judge did not err by issuing the order to the administrator of the Scheme as the same was addressed to his office and not his personal capacity. The administrator is an appointee of the trustees who run the Scheme for the benefit of the appellant. However, I would alter the orders given by the learned judge to the extent that the money which subject to this appeal shall not be distributed as per the Trust Deed and Rules but rather under the **LSA** as the same formed part of the estate of the deceased as I have found. The same should therefore be credited into the account of the deceased so that respondents can access it.

In the result, this appeal fails in entirety and I would dismiss it with costs.

As Asike Makhandia, JA agrees, it is so ordered.

This judgment is delivered under **Rule 32(3)** of the **Court of Appeal Rules**, our learned brother Odek JA having died before signing it.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of April, 2020.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**