



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & MWERA, JJ.A)

CIVIL APPEAL NO.87 OF 2007

BETWEEN

MESHACK OWINO ONYANGO

(Suing as legal representative of the Estate of

SILAS OCHIENG ONYANGO (Deceased).....APPELLANT

AND

THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND

NAFTALI O. MOGERE

TOM DIJU OWUOR.....RESPONDENTS

FRANCIS ATWOLI

ESTHER C. TUM

PETER KIBATI

AMBASSODOR JOSHUA K. TERE

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ransley, J.), dated 16th February, 2006

in

H.C.C.C. No.627 of 2003)

JUDGMENT OF THE COURT

On 16th February, 2006 the High Court (*Ransley, J.*), delivered a judgment in which the present appellants, and one other *Caroline Adhiambo Juma* sued the respondents on behalf of the estate of the late *Silas Ochieng Onyango* by way of plaint instituted and filed on 3rd October, 2003. It was amended

on 10th June, 2005 whereby the present appellant alone remained as the plaintiff **Caroline Adhiambo** having passed on. After describing the parties, it was pleaded that the deceased, **Silas**, was once an employee of the 1st respondent, the Board of Trustees, National Social Security Fund and a member of the Pension Scheme whose trustees were the 2nd to the 7th respondents. The deceased, it was averred further, was entitled to be insured by the 1st respondent's Group Life Assurance Scheme with UAP Provincial Assurance Company Ltd. That each of the two schemes provided for benefits to accrue to the deceased and or his dependants in the event of his death – Sh.1,077,072/= and Sh.1,137,072/ respectively worked on the formulae known and applicable. Silas died on 7th June, 2001 and thus his dependants were entitled to be paid a total of Sh.2,214,144/= from the two stated schemes. After filing the suit the respondents paid the sum due under the group insurance, but the 1st respondent failed/refused to pay the sum of Sh.1,077,072/= due under the pension scheme. And that was what was prayed for together with costs and interest.

In joint defence filed on 22nd November, 2013, the respondents pleaded *inter alia*, that although the deceased's estate was entitled to Sh.1,077,072/= which the 1st respondent was ready and willing to disburse, the sum had to be reduced by Sh.60,000/= which had already been paid. It would then put in a long term investment the balance of Sh.1,043,804/45 less Sh.33,467/55 which the deceased's widow had consented to be deducted as his liabilities to the 1st respondent. The clauses in the pension scheme were pleaded at length, ending with the position that the trust deed governing the pension scheme, did not impose on the trustees an obligation to effect an assurance policy in respect of its members, including the deceased, so long as they made provision for a lump sum payment from the pension fund. And that such lump sum could be made from the pension fund or any sums received from any assurance scheme and thus the regime did not admit to making double payments from the pension fund and the assurance scheme.

Accordingly, it was averred that it was a misconception on the part of the legal representative of the deceased, the appellant, of the deceased to expect two separate payments from the pension fund and the assurance policy in the event of the death of a member. It was further pleaded that if such two claims were tenable, the one against the 1st respondent was separate from the one laid against the 2nd to the 7th respondents whereupon the two claims were wrongly joined. And finally, that the interest claimed at 14% p.a. from the date of filing the suit was misconceived.

The reply to the defence filed on 30th October, 2003 which joined issue with the respondents said, *inter alia*, that even with the sums admitted in the defence, the respondents had ignored to make due payment thereof despite demands. The appellant denied seeking double payment, insisting that there stood to be made two separate payments one from the pension scheme and the other from the group assurance policy. The appellant asserted that on behalf of the estate of the deceased he had *locus standi* to seek payment under the group assurance scheme under which what was called the Last Expense of Sh.60,000/= was paid to the appellant, itself on admission that the estate had benefits to be enjoyed under that scheme. And finally, that the interest rate claimed of 14% p.a. was justified since the pension scheme payment had not been made within 30 days of the subject death.

The trial started before **Waweru, J.**, on 14th June, 2005. It continued before **Ransley, J.** when the only witness, the appellant (PW1) completed his testimony. The court then heard

Nichodemus Kieti Mutula (DW1), another single witness for the defence and the trial closed after submissions were heard. Each side produced exhibits some of which were the same, including the trust deed governing the 2nd to 7th respondents, the group life policy and many other relevant documents.

In his judgment, **Ransley, J.** noted that the 1st respondent had since the suit was filed paid Sh.1,043,604/45 on 8th March, 2004 (or 2nd) claiming. Appearing to be of the mind that that was all that the appellant was entitled to, what remained for determination was whether the appellant was entitled to any sums under the pension scheme. The learned judge, putting particular focus on Rule 6 of the Pension Scheme, headed "*Death in Scheme Benefits*", found that:

“There is no dispute that the sum paid during the course of the case to the plaintiff on 2nd March, 2004 was the correct amount of the sum as received by the trustees from the insurer. The plaintiff was not, however, entitled to the lump sum claimed as well as the monies received from the insurers by the trustees as the insurance was for the purpose of providing for the lump sum only.”

And for the fact that the appellant was only entitled to the sums paid after the suit was instituted, the judge granted him half the costs from the date the suit was filed, until payment was made. He also awarded interest at court rates over the same period. In essence, the learned judge agreed with the respondents that two separate payments were not to issue both from the pension and group assurance funds.

The appellant was dissatisfied by that decision so the present appeal was filed in a memorandum containing six grounds. **Mr. P.R. Amuga**, learned counsel argued those grounds while his counterpart **Mr. Simiyu**, learned counsel holding brief for **Mr. Lubulellah** for the respondents’, opposed the appeal.

Explaining that the appellant was entitled to the benefits both under the pension scheme and the group assurance policy, **Mr. Amunga** argued that while the pension scheme was contributory i.e. both by the employer (1st respondent) and the employee (the deceased), we heard that the benefits thereunder were based on a lump sum equal to four times the employee’s annual basic salary. And for the deceased here that amounted to Sh.1,077,072/=. Under the group assurance the benefits were a lump sum of four times the employees (deceased) annual basic salary which came to Sh.1,137,072/=. That the latter benefit is paid by the relevant insurance company. Under this scheme all employees benefit whether they are members or not, while under the pension scheme, a member whether retired or not gets paid. The deceased was a contributor and he was thus entitled. When he died, his family used to receive the monthly payment until they died or attained majority.

Citing the case of ***Blantine Achitsa Induli vs the Board of Trustees, National Social Security Fund HCCC 549/2002***, **Mr. Amuga** urged us to find, as it was in that case, that indeed, an employee was entitled to 2 separate payments as claimed here from the pension scheme and the group assurance fund. He also gave an example of a deceased employee of the 1st respondent (**George O. Nondi**), whose payment the appellant had exhibited in the High Court that benefits to that employee’s estate, were paid from the two separate schemes. It was therefore the appellant’s case that the High Court was wrong in only sanctioning payment from one fund and awarding half the costs. That the appellant was forced to file the suit because the respondents had unjustifiably denied to make the deserved payments. And that interest ordered ought to have run from the time the suit was filed, on the entire sum, up to the time payment was partly made. To support that contention the case of ***Kimani vs Attorney General [1969] EA 502*** was cited.

Ms. Simiyu held a contrary view but essentially was in agreement with the High Court decision. Counsel argued that the deceased had no insurable interest covered by the group insurance contract and that under **section 27 of the Civil Procedure Act**, half the costs awarded fell, under the learned judge’s discretion.

Mr. Amuga responded that the life of the deceased was insured by the 1st respondent and benefits thereunder would only accrue to his dependants. That payment was made. What is claimed now is the lump sum due under the pension scheme under which the dependants had enjoyed monthly payments.

We have considered the rival arguments in the light of the High Court judgment. It was argued by **Mr. Amuga** that the dues under the group assurance scheme were paid and that is not in issue. What fell to be determined by the High Court and that is what is before us is whether there were benefits to be paid to the deceased’s estate, by the pension scheme. To counsel, that was so.

Focusing on **Rule 6 of the Trustee Deed** applicable, it says thus:

“6. DEATH – IN SERVICE BENEFITS

(a) Upon an eligible employee becoming member of the scheme the Trustees shall provide for or effect such Assurance Policies as they shall think advisable in respect of each member for an amount equal to four (4) times such member's pensionable emoluments and shall increase such cover from time to time as shall be necessary to maintain its equivalent in amount to four times the members pensionable salary.

Upon the death of a member the following payment shall be made:-

i. Lump sum Payment

Such sums as shall be received by the trustees from an insurance company in respect of such member pursuant to the provisions of Rule 6(a) shall be held by the Trustees upon trust to be paid by them in accordance with Rule 5(e)(1) mutatis mutandis.

b. Pension payments.

i. ... (iv) ...”

Turning to Rule 5(e)(1), it fell under PART III, BENEFITS. It reads:

“5. PENSION BENEFITS

(a) ... (d) ...

e. Death of a Pensioner

1. Lump Sum Payment

Should a pensioner die before sixty (60) monthly installment of pensions shall have been paid, then the Trustees shall hold a sum equivalent in value to the difference between the total monthly installments of such pension and the total of the monthly installments paid prior to the date of death of such pensioner UPON TRUST with power to be exercised (if at all) within two years of the rate of death of the pensioner;

(i) ... (ii) ...

(2) (i) ... (iv) ...”

Along with the Trustee Deed, we perused the Group Life Policy issued by Union Insurance Company of Kenya Ltd, to the employer, National Social Security Fund (NSSF). The relevant part appears on the first page and says, in the main, that:

“Now this policy witnesseth that in consideration of the payment already made to the Company of the First Premium for an assurance of the amount and on terms stated in the said Schedule one, and on condition that the subsequent premium (if any) be duly paid as thereby provided, the Company does hereby agree that upon proof satisfactory to the Directors of the Company of (1) the happening of the Event or Events on which the sum assured is to become payable as specified in the said Schedule; (2) the title of the claimant or claimants; and (3) the completeness and accuracy of statements in that Proposal and Declaration before referred to, the Company will pay the sum stated in the said Schedule as the sum assured to the Person or

Persons to whom in the said Schedule the sum is made payable.”

Between the period 1st July, 1997 and 30th June, 1998 the employer (NSSF) took-out a group life insurance scheme for a total of 1831 of its staff, **Silas Onyango** (the deceased) being No.1493. This list was produced before court and was not disputed being the current one. In any case, membership of the deceased was not disputed, neither was the payment made by the insurer to his estate.

What the respondents disputed, by way of the defence, was that:

“7. The Trust Deed and the Rules thereto do not impose any mandatory obligation on the Trustees to effect an assurance policy in respect of members of the Pension Schemes provided that the Trustees make provision for the payment of the payable pension lump sum. Such pension lump sum is payable from the pension itself or from proceeds of any assurance and it is hereby averred for the avoidance of doubt that the Rules do not provide for double payment of the pension lump sum from the Pension Fund and from the proceeds of any assurance either simultaneously or successively. The defendants shall at the hearing hereof rely upon the Pension Scheme Rules for their full force effect.”

The respondents thus denied that a pension scheme member or his/her estate was entitled to double payment of benefits – from the pension scheme and the assurance policy.

The respondents’ witness **Nichodemus Mutula** (DW1) told the trial judge that their Staff Retirement Benefits Scheme is the only fund they run. It pays benefits for employees who die. The deceased was a member of that scheme. On his death a lump sum of Sh.1,043,604/45 was paid after deducting liabilities totaling Sh.33,467/55, otherwise the total sum was Sh.1,077,145/=. Moving to the group assurance policy, DW1 told the learned trial judge that:

“Group Insurance Policy did not exist. The Group Life Insurance Policy premiums are paid by the staff pension scheme. The insured are members of the Staff Pension Scheme. They are also beneficiaries --- taken out by Trustees. He was entitled to four times annual salary plus Sh.60,000/= death benefit. The widow is entitled to pension for five years. The children are entitled to be paid until 18. The children are being paid. The insurance policy was to cover the fund to guard against risk of adverse mortality. When the insurance company is paid to --- the proceeds of the cheque paid (sic) to beneficiary.”

In cross-examination (some parts not so clear) DW1 said, *inter alia*, that:

“There are people not in the Pension Scheme. The scheme is a contributory one”

Then after producing the policy document, DW1 told the court:

“If you did not die (sic) you would not be entitled to anything.”

Further, down in cross-examination DW1 said that:

“There was an anomaly that there was a payment by mistake to another widow of a deceased staff.”

To close his testimony, DW1 concluded that the cheque from the insurer (UPA) was sent on 7th June, 2001 after the matter had come to court.

From all the foregoing, we are unable to find from the group assurance policy or the pension scheme document where it was stated that a deceased employees’ estate (**Silas Ochieng Onyango**) could not be paid both under the insurance policy and the pension scheme. Neither did DW1 say so in support of the pleading in the defence (above). Indeed he had even said earlier in examination in-chief that the group insurance scheme did not exist yet in re-examination the witness told the trial court that a cheque came

from UPA on 7th June, 2001 and payment was made to the deceased's estate after this suit had been instituted. DW1 also told the court that under the pension scheme, the deceased's estate was entitled to four times his annual salary. Then, if we may ask: What happened to the payment of lump sum from this scheme? That is why the suit was instituted. All in all, we are left with the impression that there being no clause or provision that a deceased's estate could not benefit under the group assurance policy as well as under the pension scheme, we conclude that the appellant was and is entitled to the two payments calculated on the applicable formula. And that the group assurance payment was made by UPA, the appellant ought to be paid the lump sum from the pension scheme. Or to put it the other way, in case the decision by the High Court was right that only one payment was deserved and warranted, and one was made from the group assurance scheme, what happens to the contributions and benefits due to the deceased under the pension scheme? Can it be presumed that it remains in the assets of the 1st respondent? Such a scenario does not commend itself to us. Without a specific and express bar to benefit or justification not to benefit from two payments, from the group assurance and the pension scheme, then both are payable.

We are also buttressed in our conclusion by adverting to the two payments made to one **George Onyango Nondi** – a former staff member of the 1st respondent. On 29th April, 1999, M/S Wayahead Insurance Brokers Ltd forwarded a cheque for Sh.1,365,579/= on account of group life to the 1st respondent to pay. It was paid. The 1st respondent had earlier paid the deceased's widow, **Beatrice Onyango**, Sh.714,566/15 as pension benefits on 13th August, 1997. So two payments were made. DW1 alluded to a mistake having once been made when payment was made to a certain widow. It was not clear if he was referring to this case. But to date, no refund of the same has ever been made. It therefore remains that two payments do and should issue in such cases.

The foregoing matter of **George Onyango Nondi** was cited, as an example, in **HCCC No.549/2002, Blantine Achitsa Induli and Another (Re the Estate of Adrian Nondi Shikali) vs the Board of Trustees, National Social Security Fund (Khamoni, J.)**, whose judgment

was delivered on 30th May, 1997. The learned judge found that:

“Evidence was also adduced by the plaintiff to show that the defendant has in the past paid pension as well as insurance money to the family of a deceased employee... they were payments made in respect of the late George O. Nondi where the widow was paid both the pension and the group insurance.”

In the **Blantine Induli** case, a witness had also taken a position as DW1, **Nicodemus Mutula** did here but not much turned on such a claim and the learned judge said:

“The claim by Mr. Charles Njiru Njeru that payment for insurance was made in error is not acceptable as no such error was demonstrated and the money has never been recovered.”

After so expressing himself **Khamoni, J.** granted the prayers for the two payments to issue. There was no appeal against that decision, which we agree with.

Moving to the issue of costs, now that we have concluded that the appellant was and is still entitled to two payments, with group assurance one having been made, the one from the pension scheme is deserved, warranted and is ordered to be paid. Accordingly, we set aside the learned judge's decision that only one payment was deserved and in its place order that two payments were and are deserved. If the learned judge awarded half costs because the appellant had succeeded only in a part of his claim, not only was that in the discretion of the court, but it appeared to be the correct position. However, now that we have found that the appellant was entitled to succeed on the whole of his claim, we order full costs to be paid to him.

Concluding with the interest rate applicable, the learned judge awarded it at court's rates on the group insurance sum which was paid as the proceedings were under way. We have found that the appellant was

also entitled to the lump sum under the pension scheme. So we direct that interest payable at court rates do and run from the institution of the suit to the date the sum is paid in full, and not from an earlier date. There has been no strong reason advanced as to why interest should cover that period.

In the result, this appeal is allowed in the orders stated above and with costs.

Dated and delivered at Nairobi this 8th day of May, 2015.

R. N. NAMBUYE

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR