



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO.16 OF 2014

IN THE MATTER OF AL APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT OF WORK INJURY BENEFIT ACT NO.13 OF 2013

BETWEEN

THE REPUBLIC OF KENYA..... APPLICANT

VERSUS

THE ATTORNEY GENERAL RESPONDENT

ISAIAH KIPNGETICH ROTICH EX PARTE APPLICANT

RULING

1. The applicant filed applications dated 29th January, 2016 and 3rd February 2016 and seeking for orders that;

1. The court do issue an order of mandamus compelling the Attorney General to make payments to the applicant as ordered by the Director of Occupational health Services vide letters dated 21st May, 2010 plus interest thereon at the rate of 18% per annum from 21st May, 2010 till date of payment in full.

2. ...

3. ...

2. The application is supported by the annexed affidavit of the *ex parte* applicant and the Statutory Statement attached thereto.

3. In the statement, the applicant's case is that the respondent should be compelled to pay kshs.1, 920,480.00 plus costs and interest to the applicant as computed by the Director of Occupational Health and Safety Service vide letter dated 21st May, 2010.

4. The grounds in support are that the applicant's son Kipyegon Eric Koros dies on 7th January, 2009 as a consequence of accident while in the cause of state duty; the applicant obtained grant of letters of administration to the estate of the deceased son where upon he approached the Ministry of State for

Provincial Administration and internal Security. The Director of Occupational health and Safety Services computed the work injury benefit of the deceased at Kshs.1, 920,480.00. Such computation was forwarded to the ministry for payment but this has not been effected.

5. The applicant's advocates wrote to the respondent on the matter and seeking payment but this has not been effected. The respondent on 2nd October 2012 wrote to the ministry to pay but did not oblige.

6. The work injury benefits is a statutory right and to refuse to pay it as the ministry has is illegal and contravenes the Work Injury benefits Act.

7. In the affidavit of the applicant, he avers that as the father to Kipyegon Eric Koros (deceased) whose estate is the subject matter herein, as the administrator *ad litem* of the deceased, the Director of Occupational Health and Safety Services and pursuant to the Work Injury benefits Act computed the dues owing to the estate. The computations were forwarded to the Ministry of State for provincial Administration and Internal Security for action but to date this has not been paid. On 8th November, 2012 the applicant made demand from the respondent under the provisions of the Government Proceeding Act and on 7th November, 2012 the respondent wrote to the ministry to pay but this has not been effected. The affidavit is made in support of application seeking the respondent be compelled to pay Kshs.1,920,480 together with interest at 18% and costs due.

8. The respondents filed Grounds of Opposition and oppose the application by the *ex parte* applicant. That the order of mandamus sought for payment of Kshs.1, 920,480.00 together with interest at 18% and costs is against the respondent for the Ministry of Internal Security and hence the wrong party is sued. If the order sought is granted, the respondent will not be able to enforce it and the respondent is not the authorised officer mandated to make payments for and on behalf of the ministry of internal security.

9. That the orders sought if granted will contravene section 45 of the Law of Succession Act for the reasons that the applicant is not the legal representative of the Estate of the deceased authorised to collect and distribute the estate.

10. That the purported directive for payment by the Director of Occupational health Services is neither signed or stamped and accompanied by a letter to verify its authenticity. Also the interests sought at 18% is excessive and unjustified and the application should be dismissed.

11. Both parties made their oral submissions in court.

12. The *ex parte* applicant submits that the case relates to an officer who died in the course of duty and the due payments are through the office of director of Occupational health and Safety Services. The right party has been sued being the respondent as the advisor of government. The *ex parte* applicant is the right party to be paid the due monies as there exists a limited grant in this case. The Director of Occupational Health and Safety Services will be paid by the Minister and such passed on to the *ex parte* applicant. The letter of the Director of Occupational health and Safety service though not signed was a response to the communication by the respondent on this matter and which matters are within the knowledge of the respondent.

13. That the question of interests due to the *ex parte* applicant shall be determined by the court.

14. The respondent submit that the office of the Attorney General has wrongly been cited in these proceedings. The respondent is only a representative and cannot make payments. The proper person/party to be cited is the permanent Secretary, Ministry of internal Security.

15. The respondent also submit that if the orders sought are granted, such will be in conflict with the provisions of section 45 of the law of Succession as this will be intermeddling with the deceased estate. There is a limited grant *ad litem* and no evidence that there is a successor to the deceased estate and where an administrator exists, then this is the person to receive the monies due. That an *ad litem* letter was issued in 2010 and the amounts due not stated therein. The letter issued speaks of 10 dependants of

the estate but the applicant has not set out who these dependants are and such should be clarified before the orders can issue.

16. That the letter by the Director of Occupational health is not authentic, not dated or signed. As part of the disciplined forces, the deceased had a force number and not a personal file number with the employer. There are therefore issues that require clarification before the orders sought can issue.

17. The respondent also submits that the 18% interest sought by the applicant has no legal basis and the applicant should be dismissed.

Determination

18. On the orders sought by the *ex parte* applicant, the same based on the application of the provisions of the Work Injury Benefit Act, there is the limited *ad litem* obtained over the estate of the deceased, Kipyegon Eric Koros, for purposes of filing suit and for the collection of the dues owing to the estate.

19. In this regard, the respondent, the Attorney General in response and reply to the application has raised fundamental issue of law regarding the parties cited herein and the application of the Law of Succession Act. Such are crucial and important matter of law and not just procedural technicalities and the court must address before delving into the orders sought.

20. The *ex parte* applicant is clear to the extent that the respondent is sued in the capacity of advisor of government. The respondent is therefore cited in the Statutory statement as being sued on behalf of the Cabinet Secretary for Internal Security pursuant to article 156(4)(b) of the constitution and the Government Proceedings Act. Article 156(4) of the constitution provides that;

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President. [Emphasis added].

21. Thus the office of the Attorney General as the principle advisor to the government is given a constitutional mandate to represent the national government in court on in any legal proceedings, to *which the national government is a party*. The national government of the functions that have now been allocated to the national government must be the subject of proceedings for the respondent office to be seized and take over *representation*. It is therefore imperative from these provisions that the subject line ministry and function of national government is properly cited in the ongoing proceedings before the office of the respondent can be called upon to offer representation and based on article 156 of the constitution. The line ministry takes the primary responsibility for the acts of omission or commission complained of. Such cannot be moved to the office of the respondent for purposes of taking accountability and or enforcement in proceedings such as this one.

22. the line ministry responsible herein and the one required to effect payment for and to forward the same to the Director of Occupational Health and Safety Service under the Work Injury Benefits Act is the Minister/Ministry, Provincial Administration and Internal Security. Such is the responsible party based on the averments made and deposed by the *ex parte* applicant. To therefore move without the inclusion and enjoinder of such a party, such leaves out a crucial element to the proceedings herein for purposes of effectively ensuring the orders of the court are enforced.

23. The proceedings as currently framed are however not fatal. There is recourse in an amendment and notification to the line and responsible ministry before the orders sought can be gone into. Such shall be

done for the court to effectively be able to address the laps and or non-compliance with the matters complained of as to move herein against the office of the respondent alone and without the citation of the line ministry would defeat the purpose of the orders sought. The court cannot act in futility.

24. The other question raised by the respondent touching on the basis and foundation of the application by the *ex parte* applicant is that he has not applied under the correct provisions of the Law of Succession Act. That section 45 of the Law of Succession Act will be negated if the orders sought are granted.

25. The basis of a limited grant is found in **Section 54** of the Law of Succession Act, which states that:

'54. A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'

26. The grant limited *ad litem* is one normally used for prosecuting or defending proceedings in court. This type of grant is covered within the Law of Succession Act in the 5th schedule para 11-16. It is described as Grant for Special purposes. In this regard, Limited Grant of Letters of Administration *Ad Litem* which is provided for under **Form 14** of the **Fifth Schedule** of the Act deals with suits. The said provision states that;

when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution'.

27. From the above, it is clear that a Limited Grant of Letters of Administration *Ad Litem* is usually used when the estate of a deceased person is required to be represented in court proceedings. See the case of **Greenway versus Mc Kay (1911) 12 CLR 310**. On the other hand a Limited Grant of Letters of Administration *Ad Colligenda Bona* is usually used in an emergency for purposes of dealing with the property of a deceased person which is subject to waste or danger and where there is no sufficient time to obtain a full grant. See the case of **Re Cohen (1975) VR 187**.

28. The submissions by the respondent that the *ex parte* applicant should have obtained grants as under section 45 of the Law of Succession Act and or obtained Letters of Administration *ad colligenda Bona* has no context herein as there exists proper and appropriate letters for the special purpose upon which the *ex parte* applicant has applied for. As such to require the *ex parte* applicant to apply in any other form or manner would not be appropriate.

29. Ultimately, noting the above and particularly the non-joinder of a crucial and important party, the orders sought shall not issue.

On the application dated 29th January, 2016, the *ex parte* applicant shall amend the pleadings herein as appropriate and be at liberty to move the court.

Delivered in open court at Nairobi this 19th day of January, 2017.

M. MBARU

JUDGE

In the presence of
