



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 231 OF 2016(O.S)
LNN.....PLAINTIFF
- VERSUS -
GNN.....DEFENDANT

JUDGMENT

INTRODUCTION

1. LNN (L) is the plaintiff in this case. GNN (G) is the defendant. LNN has filed this case seeking the following prayers amongst others.

- (1) That this Honourable Court be pleased to declare that LNN is a valid and legal director and shareholder of N ENTERPRISES LIMITED situated on Land Parcel L.R. No. Kikuyu Township/ [....].
- (2) That this Honourable court be pleased to order that the Applicant LNN and the Respondent GNN are the only legal and valid Directors and shareholders of the N Enterprises (sic) situated on land parcel No. Kikuyu Township/ [....] with equal number of shares.

BACKGROUND

2. LNN and GNN were husband and wife. They were married on 1st November 1969. They were divorced on 17th February 2006. LNN filed a cause, being HCC Misc. No. 45 of 2002 (O.S) being LNN V GNN (2012) eKLR. In that case she sought division of matrimonial property. The court in that matter proceeded to divide the matrimonial property acquired during the subsistence of the marriage between LNN and GNN. By its Ruling dated 16th March 2012 the court did not divide the property kikuyu township/ [....] (herein after plot [....]) registered in the name of N Enterprises Limited (hereinafter N). The court by that Ruling ordered that plot [....] “be shared out in accordance with the companies Act.”

3. As stated before plot [....] is registered in the company name of N. GNN’s case is that LNN is not and has not been a director or shareholder of N and is accordingly not entitled to share of plot [....]. LNN’s case is that plot [....] was purchase with her direct and indirect contribution to the purchase price and that it was registered in the company name of N which is an acronym name formed from the names of N(N) and N(N) together forming N. LNN stated in evidence that she was a director and shareholder of N. She supported her case by relying on her signature on the surrender of lease in 1993 of plot [....], in her capacity as director of N while GNN signed as the secretary of N. It is not denied by GNN that LNN signed that surrender of lease. GNN however stated that LNN signed because she was his wife and because his co-director of N, Hannah Wairimu was not available. GNN’s case is that he decided to register the company N in 1986 whereby he held 50% shareholding whilst Hannah Wairimu held 50%. GNN stated that LNN was unsuccessful in attempting to fraudulently changing the shareholding of N. GNN reported that fraud to the police who carried out investigation which concluded that LNN had forged documents purporting she had purchased shares of N from Hannah Wairimu. That the police, after that investigation recommended prosecution but out of sympathy for LNN, a mother of his children, GNN requested the police not to prosecute her. GNN stated that LNN’s attempt to fraudulently change ownership of N proved beyond doubt that she was a fraudster and a liar whose word cannot be trusted.

ANALYSIS AND DETERMINATION

- 4. The only issue for determination is: who are the directors and shareholders of N Enterprises Limited and what is their shareholding.
- 5. LNN contends that N is acronym name of both her name and GNN’s name. GNN accepted this to be so. Plot [....] is registered in the name of N.

6. Although the parties, herein in their evidence, attempted to stir this court to consider what was already considered and determined in the matrimonial property case I decline to so consider because this case is neither an appeal or review of that matrimonial property case. The court in that case stated that plot [...] would be considered under the Companies Act because the same is registered under N Enterprises Limited, a company registered under the companies Act. It will however assist this court to consider some of the holdings of the court in that matrimonial property case, where it is relevant to this case.

7. In paragraph 22 of that Matrimonial property case, which is reported on the Kenya Law report website as LNN V GNN (2012) eKLR, the court held thus:
“22. From evidence on record, it is clear to me that the Plaintiff’s argument that she raised money to buy most of the properties is supported by the Defendant’s own evidence that the Plaintiff was able to raise Kshs.670,000/- to purchase Kiambu/[...]. That money could only have come from the bookshop and farming businesses that she was undertaking. Similarly, it is agreed that Kikuyu Town/[...] was purchased on account of the same ventures with likely contribution from the Defendant and the same is registered in the family company’s name.”

8. It is clear from that holding the court held that LNN contributed to the purchase of plot [...] and that it was registered in the family company name. The family unit at the time the said plot [...] was registered in the company name of N was made out of LNN, GNN and their three children. There was no appeal filed against the Ruling in that matrimonial property case and it follows that this court is bound by that Ruling.

9. As stated before GNN case was that his co-director of N is Hannah Wairimu. Because of that and because LNN brought before court a letter dated 25th June 2014, by the Assistant Registrar of Companies, which showed that N’s directors/shareholders were GNN, with one share, and EWN with one share; I ordered that Hannah Wairimu and EWN (E) to appear before court to give evidence on their directorship and shareholding of N.

10. Only EWN attended court and adduced evidence and was cross examined. Her evidence as in her affidavit dated 1st November 2019 can be seen in paragraphs 4 to 6 of that affidavit. Those paragraphs provide:

“4. THAT I am a current co-shareholder and co-director of N ENTERPRISES LTD with GNN, the defendant herein. I own one (1) ordinary share in the company and my co-shareholder also owns one (1) ordinary share.

5. THAT I replaced HANNAH WAIRIMU as shareholder and director in the company after having purchased her share. Annexed hereto and marked as EXHIBIT –EWN-1 is a copy of CR-12 of the company.

6. THAT when I was joining the company, the company records at the companies Registry indicated that the Company N ENTERPRISES LTD was incorporated in 1986 with the following shareholding and directorship:

a. Hannah Wairimu - One (1) ordinary share – Director

b. GNN (Defendant) -One (1) Ordinary share-Director”.

11. EWN on being cross examined stated that she has been married to GNN for more than 15 years. She stated that although she signed papers of transfer of those shares by Hannah Wairimu to her EWN however confirmed that she had not attached those transfer documents to her affidavit.

12. Having considered the evidence adduced by LNN, GNN and EWN I find and hold that EWN is not a director/shareholder of N. She alleges to have purchased shares from Hannah Wairimu but nothing was before court to prove such purchase. What is more odd is that GNN by his witness statement and the evidence he adduced before court on 15th February 2019 did not state, not once, that EWN had purchased shares from Hannah Wairimu. This is despite the fact that EWN, allegedly, is his wife for more than 15 years.

13. In my observation of the parties before me I found that GNN and EWN were not truthful witnesses. It seemed to me that EWN had been coached before giving her evidence. This was obvious because she was unable on many occasions to answer questions put to her in cross examination in regard to the status of N. She did not know where N’s registered office was and she did not know if N had filed its annual returns with the Registrar of Companies. It was also very telling that Hannah Wairimu, the alleged first director of N declined to appear in court at the hearing of this matter.

14. GNN also failed to produced before the court evidence that Hannah Wairimu was a director of N. The one page of what seems to be the Articles of Association, (at page 21 of LNN’s documents) does not suffice to show that Hannah Wairimu was his co-director. That one page does not reveal to what document it was related to it. It simply does not prove the directorship of N.

15. On the other hand, LNN who was a more truthful and credible witness has shown that she signed, in November 1993, the surrender of lease relating to plot [...]. She signed it as a director of N.

16. In my summation of the evidence before me I find that, just as LNN testified, that she and GNN were purchasing properties, including plot [...], as a way of contributing to their family’s wealth. That is why they formed N Enterprises Ltd which is acronym name of both of them. It would seem that when the marriage began to fail GNN contrived a means of denying LNN the benefit of sharing plot [...] by manipulating the records at the Registrar of companies in regard to the directorship of N. That clearly explains why Hannah Wairimu refused to appear in court and it explains why EWN, who attended court, had to be coached on what to say in evidence.

17. This court has the power as provided under section 864 of the Companies Act to order the rectification of the register of a company. That section has to be read together with section 863. Those sections provide:

“863. (1) The Registrar shall remove from the Rectification of the Register under Court No. 17 Register any entry—

(a) that derives from anything that the Court has declared to be invalid or ineffective, or to have been done without the authority of the company; or

(b) that the Court has declared to be factually inaccurate; or to be derived from something that is factually inaccurate or is forged, and that the Court has directed to be removed from the Register.

(2) The Court shall specify in the order the entry that is to be removed from the Register and indicate where in the Register it is to be found.

(3) The Court may not make an order for the removal from the Register of any entry the registration of which had legal consequences as mentioned in section 861(3) unless it is satisfied-

(a) that the presence of the entry in the Register has caused, or may cause, damage to the company concerned; and

(b) that that company's interest in removing the entry outweighs the interest (if any) of other persons in the continued appearance of the entry in the Register.

(4) If, in such a case, the Court makes an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the entry because it has appeared in the Register.

864. (1) If the Court makes an order for the removal Powers of Court on ordering removal of an entry from the Register under section 863, it may also entry from the give any of the following directions:

(a) that any note on the Register that is related to the entry that is the subject of the order is to be removed from the Register;

(b) that the order is not to be available for public inspection as part of the Register;

(c) that no note is to be made on the Register as a result of its order, or that any such note is to be restricted to such matter as are specified by the court.”

18. The finding by this court that GNN manipulated N's records to reflect other persons, but LNN, were directors needs to be rectified. Such rectification, in my view will be in the interest of N Enterprises Ltd. The rectification will reflect, as it ought to have done, that LNN is a director and an equal shareholder of N Enterprises Ltd.

19. It will be recalled that the court in the matrimonial property case ordered plot [...] to be shared out in accordance with the companies Act. According to the finding of this court LNN holds 50% share whilst GNN holds 50% share of N. They both contributed to the purchase of plot [...]. Accordingly, LNN is entitled to 50% of the share of plot [...], the only asset owned by N.

20. Evidence was adduced by LNN, and it was confirmed by GNN, that LNN has not benefited from the rental income of plot [...]. On plot [...] is a commercial cum residential building. On the ground floor is a hotel, bakery and six shops, four rear shops and garage on the open yard. On the first floor is eleven business rental units.

21. I will order that the property on plot [...] be sold and the proceeds be shared 60% to 40% in favour of LNN. LNN will get 60% because she has been denied rental income. Until such sale I will order that the rent be collected by an independent agent who shall be appointed by this court, if the parties are unable to agree.

22. LNN has succeeded in her claim and she is entitled to the costs of this suit.

THE ORDERS

The judgment of this court is as follows:

a. The register of members of N ENTERPRISES LIMITED and all the records and files kept by the Registrar of companies in relation to N ENTERPRISES LIMITED be and are hereby ordered to be rectified to reflect the following directorship and shareholding of N ENTERPRISES LIMITED:

(i) GNN – director shareholder with 1 (one) share;

(ii) LNN – director shareholder with 1 (one) share.

b. The following documents relating to N ENTERPRISES LIMITED are hereby expunged from all files, registers and records held by the registrar of companies at the companies registry in respect to N ENTERPRISES LIMITED:

(i) Any return of allotment purportedly allotting shares to HANNAH WAIRIMU or EWN in N ENTERPRISES LIMITED;

(ii) Any document prepared or made pursuant to or on the basis of the allotment referred to in paragraph (i) above.

(c) An order is hereby made that property LR. Kikuyu Township/ [...] be sold at a public auction at a date to be set by the Deputy Registrar of this court when settling the terms and conditions of sale at a date to be set at the reading of this judgment.

(d) pending such sale as set out in paragraph (c) above there shall be an independent Real Estate agent collecting the rent over property LR Kikuyu Township/ [...] and depositing it in court under this file.

(e) Parties shall within 30 days from this date hereof agree on who shall collect the rent as set out in paragraph (d) above. Failure to agree within 30 days this court will appoint such a person.

(f) Parties shall within 30 days from this date hereof present their valuation report of property LR Kikuyu Township/ [...]. Such valuation report will assist the court to set a reserve price for the sale of the property LR Kikuyu Township/ [...]. Failure to present such valuation the court will set the reserve price.

(e) The costs of this suit shall be paid by GNN.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the COVID-19 pandemic and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this 28th day of April, 2020.

MARY KASANGO

JUDGE