



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MILIMANI CIVIL SUIT NO 756 OF 2008

FREDRICK NJORA MWANGI.....1ST PLAINTIFF

STEPHEN MAINA KIMANGA.....2ND PLAINTIFF

PRISCAH WANJIKU MWANGI.....3RD PLAINTIFF

VERSUS

NEW KIONA LIMITED.....1ST DEFENDANT

THIONG'O KIUNGA.....2ND DEFENDANT

AND

ALICE WANJIKU MWANGI..... INTERESTED PARTY

RULING

1. This ruling relates two notice of motion applications dated 6th and 11th December 2018. The first application is filed by the Interested Party and brought under the provisions of; Order 40 Rule 1(a), Rule 10 (1) (a), Order 51 Rule 1 of the Civil Procedure Rule 2010, section 3, 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant is seeking for orders that:

a) That she be granted leave to be enjoined in this suit as an Interested Party and by an order of the Honourable court, be allowed to participate in the court proceedings relating to the suit property herein;

b) That the Honourable court do issue an order barring the Plaintiffs herein namely; Fredrick Njora Mwangi, Stephen Maina Kimanga and Priscah Wanjiku Mwangi or any other person acting through them, from receiving any proceeds, benefits, dividends, funds or assets comprising or forming part of the estate of; the late Mwangi Kimanga; held in New Kiona Limited, the 1st Defendant herein;

c) That costs of the application be provided for.

2. The application is supported by the grounds on the face of it and an affidavit of the even date sworn by, Wangalwa Oundo the Advocate for the Applicant. He deposed that, the Applicant has instructed him to swear the affidavit as she is aged ---- and therefore elderly and unable to depose to the matters herself. That she has a claim to the estate of; Mwangi Kimanga (herein "the deceased") yet the Plaintiffs seek to disinherit the Applicant.

3. That, the grant of letters of administration issued to, the 2nd and 3rd Plaintiffs; Priscah Wanjiku Kimanga and Stephen Maina Kimanga, on 19th March 2001 and confirmed on 20th October 2004 was revoked by an order of; Justice A.O Muchelule, issued on 11th December 2015, in Nairobi Succession Cause No. 1728 of 2000. The order cancelled any transactions that had been carried out in respect of any of the assets of the deceased and ordered the ownership thereof reverts back into the name of the deceased. It was further ordered that, the legal representative of the estate immediately file a Petition for grant of letters of Probate and Administration, on the basis of the will.

4. It was further averred that, the 2nd and 3rd Plaintiffs lodged an appeal against the decision nullifying the grant and confirmation of grant,

but the appeal has not been determined. The Court of appeal on 20th July 2016, issued orders of status quo, thus the orders of the High Court, issued on 11th December 2015, nullifying and revoking the grant of letters of administration and confirmation remain in force.

5. However, the Plaintiffs are demanding to be paid dividends accruing to the estate of deceased held in the 1st Defendant without any lawful or justifiable cause, yet all assets and including in the 1st Defendant company were frozen pursuant to the orders issued on 11th December 2015. As such the Plaintiffs will be intermeddling with the estate of the deceased by receiving the dividends accruing to the estate of the deceased.

6. The Applicant averred that it is necessary for the Plaintiffs be restrained from receiving any dividends, funds, assets or any proceeds accruing to the estate until the final determination of the pending dispute in Nairobi Succession Cause No 1728 of 2000

7. However, the Plaintiffs opposed the application through an affidavit dated 12th January 2019, sworn by the 1st Plaintiff. He deposed that, the deponent of the supporting affidavit does not show the sources of his information. Be that as it may, the Applicant is unknown to the Plaintiffs, as there is nothing shown to confirm that, she is a dependant of the estate of the deceased.

8. Her being enjoined herein as prayed, is a machination of the directors of the 1st Defendant (sic) to distract the attention of the court from the consents signed and which consents should in any case be set aside. The application is therefore premature, misconceived and meant to defeat the process of the court.

9. That following negotiations between the Plaintiffs and the Defendants, a consent order dated 22nd November 2018, consent was reached confirming the shareholding in the 1st Defendant. It had nothing to do with the payments of dividends. Finally, each party has a right to protect its interest when and where necessary and more so dividends for the last thirteen (13) years.

10. The 2nd application dated 11th December 2018 was filed by the Plaintiffs under the provisions of; Order 51 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act (Cap 21) laws of Kenya and all the enabling provisions of the law.

11. The Applicants prays are seeking for orders that: -

a) That the consent dated 22nd November 2018, be set aside having entered into it through mala fide, misrepresentation and in bad faith;

b) That all developments owned by the 1st defendant specifically; LR 209/4385, at the Junction of; Network Road and Quarry Road, Nairobi P.O. Box 12813 Nairobi and Branch at Plot No 2763/36 Pumwani Road Nairobi P.O Box 72813 be managed and or controlled by; Mastive Enterprises Ltd, with all rents being deposited in court till this matter is heard and determined;

c) That the 1st and 2nd defendants/respondent be directed to pay the outstanding unpaid dividends in the ration used to pay all other shareholders and or as directed by the court vide an order dated 14th January 2009;

d) That the matter proceeds to full hearing;

e) That the costs of the application be in the cause;

12. The application is supported by the grounds on the face of it and on the affidavit of, the 1st Plaintiff; Fredrick Njora Mwangi sworn on 10th December 2018. He averred that, on 22nd November 2018 the parties herein recorded a consent in court whose implementation was to be confirmed on mentions date, on the 5th and 6th December 2018 and a further consent recorded.

13. However, the Defendants reneged on the consent seeking for more time to record a further consent and implement the same, but have failed to do so, thus defeating the purpose and aims of the consent. That as a result the Plaintiffs continue to incur losses as their dividends are illegally held by the 1st Defendant notwithstanding the court order.

14. That the consent was entered into through collusion and/or misrepresentation as the Defendants were unwilling to implement it. Thai in order to ensure security for the dividends payable, all the subject properties should be managed or controlled by; Mastive Enterprise Ltd and all rents be deposited in court until the matter is heard and determined. Therefore it is only fair that, the consent be set aside and the suit proceed to full hearing to enable justice to be done.

15. However, the Defendants, opposed the application vide a replying affidavit sworn by its director Lucy Waithera, who deposed that, on 17th December 2008, the court issued an order directing the Defendants to allocate dividends to the Plaintiffs accounts from the year 2000 to 2008, on the strength of the grant of letters of administration issued to the 2nd and 3rd Plaintiffs but the grant was revoked. Therefore, Defendants cannot therefore legally pay further dividends and can only determine how much has accrued as dividends.

16. She further averred that, the issues which were a subject of the consent were the dividends payable and shareholding of the company. The parties deliberated and recorded a partial consent on the 22nd November 2018, conclusive on the issue of shareholding. It was agreed the parties consider accrued dividends and record a further consent on 13th December 2018.

17. That, the Defendants tabulated the accrued dividends and shareholding and forwarded to the Plaintiffs and on the following day the 13th

December 2018, the Plaintiffs filed the current application.

18. The Defendants argue that, the Plaintiffs have not disclosed which facts were not disclosed and or misrepresented. That the Plaintiffs have ulterior motives and want to get out of the consent and thus making baseless allegations. The Plaintiffs will not suffer prejudice, so long as the dividends are not payable until an Administrator of the deceased estate is appointed. The Defendants averred that, 1st Defendant is also a going concern and there is no risk that it will not be in a position to pay the dividends once the administrator is appointed.

19. That, the Plaintiffs should seek to enforce compliance and appoint an Administrator for them to access the dividends as the only issue is the compliance with the consent order of 2nd November 2018, which the Defendants have complied with and there is no ground to set it aside the subject consent. The Defendants are willing to pay accrued dividends to the lawfully party or a party appointed by the court.

20. Further, the dividends are not payable to the Plaintiffs because there is a pending application by; Wangalwa Oundo on unresolved issues in the estate. Neither have the Plaintiffs proved fraud, mistake or misrepresentation for the consent to be set aside.

21. However, the 1st Plaintiff replied to the Defendants averments and argued that, there is an order directing the Defendants to allocate dividends. The issue of revocation arose in the year 2015, yet the dividends have not been agreed upon or declared. Further the Defendants have failed to annex bank statements to show the financial status of the 1st Defendant. That the ascertainment of dividends was to be done in the presence of the Plaintiffs and involved going through the bank statements and has not done.

22. The parties disposed of the both applications by filing submissions which I have considered herein. The Interested party vide submissions are dated 4th March 2019, argued that, based on the fact that, being a widow of the deceased, she successfully challenged the grant of letters of administration in the Succession Cause No 1728 of 2000, she has genuine interest in all matters affecting the estate of the deceased.

23. That, being a party to this suit will enable her to demonstrate to the court that following the ruling of the court delivered on 11th December 2015, revoking the grant to the Plaintiffs they are meddlers in the estate of the deceased and they have no locus standing.

24. The Applicant relied on the provisions of Article 50(1), of the Constitution of Kenya, Order 1 Rule 1 and Rule 10 of the Civil Procedure Rules, 2010 to support her argument that, she is an interested party and a beneficiary to the estate of the deceased

25. The case of; Parsaloi Ole Meikoki & others v Commissioner of Lands & 9 Others (2017) eKLR and Trusted Society of Human Rights v Mumo Matemo & 5 others (2014) Eklr were cited where it was held inter alia that, an Interested Party is one who has a stake in the proceedings though, he or she may not a party to the cause ab initio but will be affected by the decision of the court when it is made either way. Such a person also feels that his or her interest will not be well articulated unless she appears in the proceedings to champion his or her cause. That, she has certified the principles laid to be enjoined as an Interested Party in the case of Joseph Njau Kingori v Robert Maina Chege & 3 others (2002) eKLR

26. However, the Plaintiffs responded vide submission dated 14th March 2019 and reiterated that the Interested Party has not presented any form of evidence linking her to the deceased and therefore she has no locus standi to bring this application. That only a person with a grant of letters of administration has the capacity to represent the estate of the deceased. Where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is null and void ab initio and cannot be cured by a party subsequently obtaining letters of administration. The case of; Isaya Masira Momanyi v Daniel Omwongo & another (2017) Eklr was relied on.

27. Further the Interested Party has not demonstrated that she has a prima facie case with probability of success and stands to suffer irreparable damages, as decided in the cases of; Giella v Cassman Brown & Company Ltd (1973) EA 358, Mrao Ltd v First American Bank of Kenya Ltd (2003) eKLR and Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others (2016)eKLR.

28. Similarly, dividends are in the form of money and can be easily reimbursed by the Plaintiffs thus negating the aspect of irreparable harm. Further her rights will be protected once the consent order of 11th December 2018, is set aside.

29. At the conclusion of the arguments by the parties herein, I have considered all the evidence presented and find that, the 1st Defendant herein is one of the companies that form part of the estate of the deceased and therefore is subject of the succession cause and to which the orders of the court dated 11th December 2015 apply.

30. The Interested Party successfully challenged the grant of the probate and Administration letters therein. Thus, the locus standi therein, gives her the locus standi herein. The 2nd and 3rd Plaintiffs were also parties in the Success Cause. Therefore, she has a right to be involved in the litigation herein. The Respondents apparently argue that she needs letters of grant to be enjoined herein, but the Plaintiffs did not get the same after the other grant was revoked before filing this suit.

31. In the given circumstances, I allow her to be enjoined as an Interested Party, pursuant to the provisions of Order 1 rule 1 of the Civil Procedure Rules and principles in; Society of Human Rights v Mumo Matemo & 5 others (2014) eKLR.

32. As regards the second prayer for an injunction, I find that, first and foremost it should have been sought for after the Interested Party becomes a party to the suit but in the interest of justice I will consider it. In that regard, by dint of the orders, in Succession cause No, 1780 of 2000, all transactions that were carried out in relation of any assets of the deceased were cancelled and ownership of the asset ordered to revert back to the name of the deceased.

33. Therefore, none of the parties herein can seek to deal with the assets of the estate of the deceased otherwise. If it is true as alleged that,

the Plaintiffs are receiving proceeds, benefits, or dividends from the assets forming part of the estate of the deceased, then that is in contravention of that court order.

34. However, the appropriate cause of action in my opinion, would be to file contempt proceedings in that matter. That is informed by the fact that, the main ground relied on by the Interested Party is that the Plaintiffs are violating the orders made in that cause. Therefore, I shall not grant the prayer for an injunction.

35. I shall now consider the prayer to set aside the subject consent order. The Plaintiffs submitted that, the misrepresentation by the Defendants is based on fact they consented to implement and release the dividends as per the court order of 14th January 2009 but did not. Further, consent was obtained without disclosing material facts of unavailability of funds as alleged by the Defendants.

31. However, the Defendants maintained that, the subject consent, was entered into by the parties freely. There was no misrepresentation and Plaintiffs are merely seeking for a way to get out of the consent. No grounds have been shown to set aside the consent. The case of; Flora Wasike v Dostimo Wamboko 1(982-88) KAR 625 was relied on.

36. That, the delay in implementing the consent is attributed to the Plaintiffs due to the fact that, the Plaintiffs did not respond to the email requesting for information. The 1st Defendant is willing to pay the dividends to the Administrator of the estate of the deceased as done earlier. However, there is an order of the court barring any dealings with the deceased property. Therefore, the order to pay dividends to the Plaintiffs cannot be granted.

32. Further, the prayer to appoint a third party to manage the assets of the Defendant cannot be granted for reasons that there is no evidence to show that, the company is not in a position to pay the dividends, if so ordered. The deceased was just one of the shareholders in the 1st Defendant company and his interests does not surpass the interest of other shareholders. That prayer therefore lacks merit and should be rejected. The Plaintiffs' application is unnecessary and an abuse of the court process and they should be condemned to pay costs.

37. Having considered the application dated 11th December 2018, and the submission thereto, I find that as regard to prayer (2) the subject consent is a partial consent and therefore it is important to the understand why it has not been concluded. The parties are shifting blame for the same to each other.

38. Be that as it were, the grounds for setting aside a consent are similar to grounds that would call for setting aside a contract. The vitiating factors are the same and include inter alia; fraud, misrepresentation and mistake. The Plaintiffs herein avers at paragraph 8 of the affidavit in support of the application that, "the consent was entered through collusion and or misrepresentation as from the "demeanor" of the Respondents unwilling to implement it and was more of a delaying and or diversion tactic employed to defeat a lawful cause of justice." which indicates that, in their mind they were unwilling to implement it.

39. The Applicants further aver in their submissions that: -

"Your Ladyship, there (sic) is no disputed that the consent exists, what is in dispute is the implementation of the same. From its wording it is clear that parties were to strictly adhere to it but till today the respondents have failed, ignored and or neglected compliance and as such it is in our submissions that, the respondents entered into this consent in bad faith and knowingly they were not going to comply with the said consent".

40. From the averments above the issue seems to be the implementation of the consent, which in my opinion does not amount to fraud, mistake or misrepresentation. Implementation can only be reinforced through intervention of the court, once it is moved through the appropriate application.

41. It also suffices to note that, the consent on record does not relate to the distribution of dividends. It is only dealing with shareholding. Yet the main grave man of the Plaintiffs is the payments of dividends. Therefore, the setting aside of the consent will not solve the issue. I am inclined to deny the Plaintiffs the prayer to set aside the subject consent.

42. I also find that, closely related to the aforesaid issue, is the prayer for payment of dividends. First and foremost, the parties were supposed to deal with the same in the partial consent, they did not. Secondly, it seems that the parties have completely forgotten the order in the Succession Cause freezing any dealings with the asset of the deceased, until a proper application of grant of letters is made and/or the legal representative and administrators are appointed.

43. It is not clear why the parties have not moved the court as directed in the of 11th December 2015 in the Succession Cause. What the parties seem to be doing is to complicate this matter by litigating the same issues in that cause herein and/or failing to determine the rightful beneficiaries of the estate of the deceased. It is evident from the orders sought for by the Interested Party in the Application dated 6th December 2018 for an order of injunction. The battle field has shifted. The grant of the subject prayer to pay dividends will be in contravention of the order in the Succession cause and I decline to grant it.

44. Finally, the prayer to appoint a third party to manage the assets of the estate of the deceased will not only contravene the order in the Succession Cause but will aid and abet the parties' deliberate conduct of non-compliance with that order and convolute the matter. I decline to grant it.

45. In conclusion, therefore save for the grant of the leave for the Interested Party to be enjoined herein, I decline to grant any of the orders sought for in the applications dated 6th and 11th December 2018. However, I think it is in the interest of justice to maintain the status quo relating to preservation of the assets of the deceased in accordance with the order in the Succession Cause.

46. If any party is apprehensive that the assets may dissipate or be depleted, that party should move and cause the appointment of the legal representative of the estate at the earliest and/or prioritize the hearing of this matter. so that all the issues are resolved at once.

47. Before I pen off, I wish to apologise to the parties for the delay in delivery of the ruling on the subject applications. However, it does appear that after the matter was fixed for ruling, the file was not noted or availed and remained so for long. It was revived upon a call from the Plaintiffs' counsel who inquired into the status of the matter. I personally took up the matter and caused the relevant documents to be availed. I got the last documents yesterday at 3pm.

48. Therefore, in recognition of the aforesaid, I committed time to have the ruling herein prepared and delivered overnight. I am aware one of the parties has sought for the file to be recalled and re-allocated to another court, due to a perceived delay on the part of the court. In that regard having dealt with the applications herein, the matter can now proceed for hearing as per the laid down procedure and before the next trial Judge. The registry should trace the original file and/or a new file be reconstructed. Any inconvenience is regretted.

49. Those then are the orders of the court.

Dated and delivered this 18th Day of September 2020 virtually

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mugwa holding brief for Mr. Omenge for the Plaintiff

Mr. Githiri for the Defendants

Evelyne Adhiambo for the Interested party

Robert-----Court Assistant