



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1795 OF 2011

IN THE MATTER OF THE ESTATE OF CYRUS KARIUKI WAIHAKA (DECEASED)

CECILY WANGARI KARIUKI.....APPLICANT

VERSUS

DENNIS MITHAMO KARIUKI.....1ST RESPONDENT

ANNE MUMBI KARIUKI.....2ND RESPONDENT

RULING

1. The deceased Cyrus Kariuki Waithaka died intestate on 18th May 2011. He was predeceased by his wife Millicent Wanjiku Kariuki who died on 4th January 2003. He was survived by Cecily Wangari Kariuki (1st administrator/applicant); Kevin Waithaka Kariuki; Dennis Mithamo Kariuki (1st respondent/2nd administrator); Anne Mumbi Kariuki (3rd administrator/2nd respondent); Jessica Muthoni Kariuki (4th administrator); and Livingstone Ndungu Kariuki. A joint grant of letters of administration intestate was issued jointly to the applicant, and the 1st respondent. It was confirmed on 4th November 2013. On 26th February 2014 the grant was revoked and a fresh grant jointly issued to the two and the 2nd respondent and Jessica Muthoni Kariuki. On 9th June 2014 the rectified grant was confirmed in which all the properties of the estate were registered in the names of the administrators to hold in trust for themselves and for the other beneficiaries in equal shares.

2. Before the court are two summonses dated 5th March 2019 and 6th May 2019 by the applicant and the respondents, respectively.

3. In the application dated 5th March 2019 the applicant sought orders that the honourable court does stay the distribution of deceased's estate in terms of the confirmed grant pending hearing and determination of the application; all original titles/ownership documents of properties/assets owned or held by the deceased either individually or through Cyka Manpower Services Ltd, Afro Freight Forwarders Ltd, Cyka Estates Ltd, Cyka Holdings Ltd, Cyka Shipping and Logistics (E.A) Ltd, Cyka Fuelmart Ltd, Cyka Investments Ltd and Cyka Traders Limited be deposited in court for safe keeping pending the hearing and determination of the application; the honourable court be pleased to appoint an estate agent to collect, control, manage, value and account for the estate; honourable court be pleased to order cancellation of all irregular, fraudulent and illegal changes made after the death of the deceased in respect of the directorship and shareholding of the aforementioned companies; a declaration do issue declaring all properties/assets held by and registered in the names of the companies be held in trust for the benefit of the deceased and his estate; the confirmed grant be amended to include all properties/assets owned by the deceased through the company as listed in schedule of assets; the respondents be ordered to give a proper, up to date and lawful accounts of the deceased estate; and the honourable court be pleased to distribute the deceased's estate equally among all beneficiaries of the estate.

4. It was the applicant's case that prior to the death of the deceased he had the aforementioned companies incorporated in which he held majority of the shares and also appointed directors thereto. She summarized the status of the said companies in her affidavit. She stated that the deceased exercised sole control/discretion over the distribution/allotment of the companies' shares and appointment of directors and none of the shareholders was independent of the deceased. Further, at the time of his demise he was not only the managing director but the majority shareholder of the said companies. That at the time of his death, he had changed and/or transferred most properties and assets held in his name to the names of his companies as mere agents and for his benefit. The said assets comprised the deceased's estate, she stated. Further, there existed unity of interest and ownership of assets between the deceased and his companies. It was her case that the deceased used titles for the properties held in the names of the companies to secure loans for his different companies and he personally guaranteed the loans. She stated that the deceased used the assets and funds of the companies without segregation or corporate distinction, the funds thereto

were used to sustain his livelihood and lifestyle and that of his family without corporate formalities as to resolutions or minutes. The deceased also deposited/withdrew and/or used funds/or assets of the companies without restrictions. It was her further case that following the confirmation of the grant, the respondents had unlawfully convened meetings and passed resolutions altering the directorship of the companies without the involvement of the other administrators and beneficiaries. The respondents also removed her as a director and threatened to distribute the shares allocated to her by the deceased. She averred that the two were operating the deceased's companies and businesses contrary to the **Companies Act** and the **Law of Succession Act**. That they had gone ahead and incorporated Cyka Fresh Limited on 25th October 2013 and allocated themselves majority shares in a bid to achieve exclusive control of the deceased's estate, by creating an illegal trust out of all the assets and properties owned by the deceased in his personal name or through the companies. It was her case that the respondents in a bid to further conceal the state, had operated Cyka Fresh Limited using assets, postal addresses, email addresses and employees of the deceased and his companies. They had further developed commercial premises registered in the name of Cyka Estates Limited out of the proceeds /incomes of the deceased's estate. They had also used employees of Cyka Manpower Services Limited to undertake private businesses contrary to the grant herein. She averred that they had secured personal loans against property L.R No 209/11296/190 owned by the deceased in the name of Cyka Estates Limited without the involvement of the other administrators/beneficiaries. They had charged the said property twice to Standard Chartered Bank Limited on 23rd February 2017 for Kshs.26,800,000/= and Kshs.13,200,000/=, respectively. She stated that the two had collected and diverted incomes from the sale of farm produce from the deceased's South Kinangop properties held in the name of Cyka Estates Limited worth Kshs.2,000,000/= per month. It was her case that they had also collected and diverted monthly rents from L.R No Block 1/480, Mombasa Shimanzi, L.R No. Nairobi /Block 72/1060-Akiba Estate, L.R No. 209/11296/190-Airport View Estate, L.R No. Mombasa/Block XX1/397 & 396, Flat No. 807, L.R No, Nairobi/Block 209/11088/15-Funguo Estate and L.R No. Mainland North /1/2457-Port Reitz all belonging to the deceased as beneficial owner and comprising his estate. She averred that the respondents had failed to make reasonable provision for her and the other beneficiaries, and had further failed to remit taxes due over the estate and to pay/cater for land rates rents and other liabilities of the estate. They had taken complete control and administration of the estate but failed to diligently collect the estate for purposes of administration/distribution. It was her case that the distribution of the deceased's estate as purported by the respondents was infeasible and unlawful as it would cause unjust enrichment of the respondents while disinheriting other beneficiaries as such it was necessary to have the distribution stayed. She asked that the net intestate should be equally divided among the surviving children, now that the deceased had died intestate.

5. In response, the respondents filed a replying affidavit dated 6th May 2019 asking that the summons be struck out for being fatally defective, malicious and an abuse of the court process. This was because the summons sought orders that had already been declined by this court vide its two rulings delivered on 22nd January 2018 and 20th November 2018; the orders of 22nd January 2018 dismissed the applicant's summons dated 10th November 2017 whereas the orders 20th November 2018 dismissed the applicant's summons dated 31st October 2016; and therefore that the present application was a replica of the two previous applications. They claimed that the said summons was a disguised appeal and should be dismissed accordingly. Further, that the prayer to have the court appoint an estate agent to manage and distribute the estate was premature as there was no evidence that the current administrators had failed or become unable to administer the estate. It was indicated that the summons were an afterthought having been filed 5 months after the delivery of the ruling of 20th November 2018 and the same aimed at halting the operations of the companies. Lastly, there was no proof of fraud, unjust enrichment, illegal charging of the estate or transfer as alleged by the applicant.

6. The respondents, on their part, filed summons dated 6th May 2019 seeking to have the summons dated 5th March 2019 dismissed on grounds that the summons and the issues therein were *res judicata* and an abuse of the court process. They reiterated the contents of their replying affidavit dated 6th May 2019.

7. Parties filed their respective submissions which I have read and considered.

8. **Section 7 of the Civil Procedure Act** provides for the doctrine of *Res Judicata* as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. In the Court of Appeal case of **John Florence Maritime Services Limited & Anor vs. Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR** it was stated;

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.

10. In the application dated 31st October 2016, and dismissed on 20th November 2018, the applicants (including the present applicant) claimed that following the confirmation of the grant, the respondents had secretly and unlawfully convened meetings and passed resolutions altering the directorship of the companies herein in which the deceased was a major shareholder and that this had been done without their involvement or that of the other administrators; that the respondents had changed signatories to the accounts (same held and operated in the names of the said companies) with the intention of excluding the applicants; the respondents had taken over exclusive control and management of the estate to the detriment of the applicants; the respondents were exclusively benefitting from the estate which they were wasting away and stashing money; that they had failed to make reasonable provision for the applicants; they had failed to provide full and accurate accounts of all the dealings with the estate; and had refused to have the estate shared in accordance with the certificate of

confirmation. The application sought the cancellation of all the changes made in respect of the directorship of the companies in question; they sought a full and accurate account and inventory; and so on.

11. These are the same matters that have formed the basis of the prayers in the present application. Part of the reason why the application was dismissed was that this succession court would not have the jurisdiction to deal with the grievances relating to the affairs and management of limited liability companies; that the jurisdiction belonged to the Commercial and Tax Division of the High Court.

12. Secondly, I see that this application seeks that the respondents be ordered to give a proper and accurate account of the estate of the deceased. This prayer was granted in the ruling of 20th November 2018. Further, the applicant sought that the certificate of confirmation be recalled and the estate be shared afresh in equal terms to all the beneficiaries. This was one of the prayers in the application subject of the above ruling.

13. In short, I agree with the respondents that this application is urging and dealing with matters that were substantially addressed and ruled on in the decision rendered on 18th November 2018 following the application dated 31st October 2018 by the applicant and her sister. Consequently, the plea of *res judicata* by the respondents is merited.

14. The result is that the applicant's application is dismissed with costs, and the respondents' application succeeds with costs.

DATED and DELIVERED electronically at NAIROBI this 28th day of OCTOBER 2020.

A.O. MUCHELULE

JUDGE