



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2730 OF 2008

IN THE MATTER OF THE ESTATE OF JOYCE RONNIE WAIGANJO(DECEASED)

RULING

1. The Court has before it an application under certificate of urgency filed on 28th February 2018. The Application was filed by the well known firm of Triple OK Law Advocates said to be acting as “Advocates for the Applicant”.

2. The Applicant to the Application is a limited company called Just Chicken Limited. No certificate of incorporation has been filed. The Application is brought under a Summons for Revocation or Annulment of Grant. The Application seeks the following Orders:

1. THAT leave be granted to join Just Chicken Limited as an interested party in L.R. No. 13797/1.

2. THAT grant of letters of administration made to Kiran Manubhai Patel and Anne Kibutu be revoked

3. THAT in the interim, eviction Orders issued on 18th January 2018 be stayed pending the hearing and determination of this Application

4. THAT the Court be pleased to review and set aside the orders issued on 18th January 2018.

5. THAT L.R. No. 13797/1 be excluded from the grant over the Estate of Joyce Ronnie Waiganjo pending the hearing and determination of **HCC No. 7 of 2007: Just Chicken Limited –vs- Joyce Ronnie Waiganjo.**

6. THAT Costs be provided for

3. The Application relies on the Grounds that appear on its face they will not be set out verbatim in the interests of brevity. In short the Applicant claims to be entitled to occupy the property known as L.R. 13797/1 pursuant to a sale agreement in relation to which there is ongoing litigation. There is no evidence of the litigation and the sale agreement exhibited relates to an agreement with an “*administrator of the Estate of Fred Waiganjo*”, not in her personal capacity. It is interesting also to note that one of the Directors of the Applicant Company, a Betty Ndanu Kasinga claims to have built a mansion on the property in question and occupied it as well as farmed the property. There is also an admission that the full purchase price under the purported sale agreement was never paid. The Application is said to be supported by the annexed affidavits of NANCY KAVINYA KIOKO and BETTY N DANU KASINGA. The Application was to be served on the Executors of the Estate and not the Advocates properly on the Record.

4. In relation to the property in question. It is described in the Succession Cause as L.R. No 13979. However, the Application seeks to ascribe to it a different number, as stated above. However, the Respondent has filed a Replying Affidavit which exhibits as the Ruling of Hon J. Mutungi of 13th March 2007 where he records that the Applicant’s caveat was lodged against L.R. No 13979 and not L.R. No 13979/1. That suggests more than inconsistency, it demonstrates an intention to mislead the Court. Whether that was deliberate or inadvertent will become clear after cross-examination.

5. When the Matter came before the Court on 8th March 2018 the Court gave directions for the hearing of the Application. The Applicant’s Advocate submitted that the Court should consider making an order in the terms of prayer 3 of the Application as a matter of urgency to avoid the injustice to the Director and her family who occupied the property of being made homeless so summarily. That prayer asks the Court to stay its order issued on 18th January 2018. In fact the Court did not make any orders on that date. The Court did however, make an Order for delivery up of vacant possession on 18th January 2017. That was 12 months earlier. For reasons that are unclear it was not executed until late January/early February 2018.

6. The Court would be justified in dismissing an application relating to a non-existent order *in limine*. There is no subject matter on which the application can attach rendering it irredeemably flawed. However, given the circumstances of this case the matter cannot be allowed to

rest there. The first Order made by this Court on that file was made on 18th January 2017. It seems the Order was not executed until 2nd February 2018. The reason for that is unclear. Assuming it is that Order that the Applicants wish the Court to stay and/or review and set aside. The starting point must be to ascertain the locus of the Applicant to bring that Application. Then there is the question of delay and whether or not it is inordinate.

7. The first question that must be asked is; who are the Advocates on the Record as Acting for Just Chickens Ltd? The Court file shows that on 20th February 2018 the firm of Messrs Murage Juma & Company wrote to the Hon DR to say that they intended to come on record for an interested party (Just Chicken Limited). They used that to peruse the file and make photocopies of the pleadings. On the next day 21st February 2018, they filed a Notice of Appointment which was to be served on the Advocates for the Executors. Those are not the Advocates who are bringing the current Application. There is nothing on the file to show Messrs Triple OK Law is properly on the record as acting for either the company or the directors.

8. The Directors of the Company state that they were authorised by a meeting of the Board to bring this Application. They have not exhibited any minutes showing such a resolution was ever passed. The same was true in the ELC matter, they failed to demonstrate due authority.

9. The gist of the Application is that the Applicant “purchased” the property the subject of the Application in 2002 and has been occupying it ever since. They say that ownership was disputed and that there are court proceedings in the Environment and Land Court ***HCC No 7 of 2007*** that will decide the issue of ownership. In addition, it is alleged that the title number given to the property in the Order and succession cause is incorrect and should be 13979/1. The Affidavits in Support collectively exhibit a sale agreement for the sale of plot No. LR 13979/1 Karen drawn up by Messrs Sande-Makhandia Advocates. The Agreement records that “The interest sold is the lease hold term to be granted by the Government of the Republic of Kenya on the property subsequent to the finalisation of the title process.”. In the circumstances, it lacks certainty. What exactly, if anything, was sold? In addition the preamble states that the Deceased was selling as an Administrator. However, she was the beneficial owner before the date of the purported sale and the property was registered in the name of a company. That raises serious credibility issues for the Applicant to address.

10. The Respondent Executors rely on the Replying Affidavit of Mr Tom Waiganjo, filed on 7th March 2018. From the Replying Affidavit, the Court was upraised of a number of relevant facts. Firstly, that the land reference number stated is correct. Secondly, that there are no pending proceedings relating to the property because ***HCC 7 of 2007*** was finally determined by Hon Mutungi J on 13th March 2007. The Summons was dismissed and Just Chicken Limited was ordered to pay the costs of the Respondent who was then living. In the circumstances, the Applicant and its directors have demonstrated no locus whatsoever entitling them to bring the Application.

11. The Applicants also rely on the allegation that they were not served. That is a bare assertion. The Order was served by a licenced process server. There are no particulars given as to the facts and matters contained in the Affidavit of Service are untrue and/or incorrect.

12. The Applicants have failed to demonstrate any locus or justification for their joinder whether as an interested party or otherwise. They are simply interlopers hoping to first benefit somehow from the Estate of Fred Waiganjo and now Joyce Ronnie Waiganjo.

13. The Parties were directed to file Written Submissions by 4pm on 27th March 2018. The Respondents did so on that morning. The Applicants have not filed any submissions whatsoever. The Court has considered what was filed.

14. The Respondents have produced a number of authorities setting out the well known proposition which is expressed in latin as *ex turpi causa non oritur actio*. In other words that there can be no cause of action arising from an illegality. The illegality they refer to is that Ms Betty Ndanu Kasinga claims to have been in continuous occupation of the property for about 14 years. That is without the benefit of an enforceable sale agreement and/or a lease agreement. How then did she occupy, if indeed she did? According to the Police record from the eviction, the main house was not occupied at the time of the eviction. Therefore the Applicants have failed to demonstrate any occupation.

15. Although the purpose of this Ruling was to deal only with the issue of stay of the eviction order, having considered the evidence on the Court file and the serious weaknesses and inconsistencies in the Applicant’s case, this Court has resolved that it is in the interest of justice to dismiss the Application in its entirety. The inconsistencies not only amount to a deliberate attempt to mislead the Court but also justify an order to pierce the corporate veil. This Order is made by application of ***Section 1A, 1B and 3A*** of the ***Civil Procedure Act Cap 21 Laws of Kenya***

16. The facts of this matter and the repetition of litigation on the basis on the purported sale agreement raise concerns. In the circumstances, if the Applicant or any of its directors attempt to re-open this matter they shall only be permitted to do so AFTER establishing locus. In order to do so they must file in Court proof of payment of an occupation charge for at least the 14 years they allege to have occupied the property.

17. It is therefore ordered that:

a. Application dismissed

b. Applicant directors to personally pay the costs of the Respondent on an indemnity basis. For the avoidance of doubt this is a joint and several liability.

c. Any further applications by either Just Chicken Ltd or its directors shall not be filed without proof of full payment for whatever interest is claimed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, Dated and Signed at Nairobi this 29th day of March 2018

In the Presence of:

Clerk: Patrick Mwangi

Applicant: Mr Kipngeno Holding Brief for Mr Mandala

Respondent: No Appearance from either firm