



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCCC NO.16 OF 2018

JAMES MUHU KANGARI (Administrator

of the estate of the Late Joseph Kangari Muhu).....PLAINTIFF

VS

MUHU HOLDINGS LTD.....1STDEFENDANT/APPLICANT

SERAH MWERU MUHU.....2ND DEFENDANT/RESPONDENT

RULING

1. The property of a man described by the Court of Appeal as ‘*an organized man who owned many properties in various parts of Kenya*’ continues to be the subject of acrimony between his relatives.

2. That man, James Muhu Kangari (the deceased) died testate on 26th March 1989. Amongst his survivors were Sarah Mweru Muhu (his wife or Mrs. Muhu) and James Kangari Muhu (a son or Kangari). Because of the Kikuyu system of naming children, the Deceased and his son share the same names but in different order.

3. On his part Kangari met his demise on 14th October 2012. He left behind a wife, Sarah Wangari Kangari (Sarah) and a son James Muhu Kangari (the Plaintiff herein or James). The Deceased and his grandson share all the three names in like order. James and Sarah are co-administrators of the Estate of Kangari and James brings this suit in that capacity. The suit is against Muhu Holdings Ltd and Mrs. Muhu. The former is a family Company.

4. In a nutshell the Plaintiff alleges that in his last Will and Testament dated 22nd July 1986, the Deceased appointed Kangari (his father) as alternate Chairman Director of the Company and allotted to him a share therein. In the same Will he appointed his wife (Mrs. Muhu) the Chairperson Director of the Company. The grievance of the Plaintiff is that the Estate of Kangari has been left out of the management and affairs of the Company and the Company is mismanaged. In addition, that the Company has failed to transfer shares owned by the Estate of Kangari therein to the beneficiaries or refused to appoint any of them as Director.

5. Separately, the Plaintiff complains that the Defendants have unilaterally decided to evict the Plaintiff and his entire family from LR NO. Dagoretti (Ruthimitu 177) which is a property under the Management of The Company.

6. The prayers sought by the Plaintiff are as follows:-

1. An order of Permanent Injunction do issue restraining the Defendants from harassing, intimidating or evicting the Plaintiff, his family and his mother SARAH WANGARI KANGARI from the Property known as LR. No. Dagorett/Ruthimitu/177.

2. THAT an order do issue compelling the 1st Respondent Company to prepare and avail an up-to-date Company records of Directors and Shareholders, audited Accounts and give full disclosure of all the rent collections and properties under its management from the year 2012 to date.

3. THAT an order do issue directing the 1st Respondent Company to include the administrators of the Estate of Joseph Kangari Muhu or any other family member of their choice as a Director(s) of Muhu Holdings Ltd to replace the late JOSEPH KANGARI MUHU.

4. THAT the Honourable Court do order the 1st Respondent to pay to the Estate of JOSEPH KANGARI MUHU all his entitled dues

and salaries due to the beneficiaries of the said JOSEPH KANGARI MUHU (Deceased).

7. Together with presenting the suit, the Plaintiff filed a Notice of Motion dated 11th January 2018 for the following orders:-

1. *Spent*

2. THAT an order of temporary injunction do issue restraining the Respondents from harassing, intimidating or evicting the Applicant and his mother SARAH WANGARI KANGARI from the property known as LR No. Dagoretti/Ruthimitu/177 pending the hearing and determination of this application.

3. THAT an order of temporary injunction do issue restraining the Respondent from harassing, intimidating or evicting the Applicant and his mother SARAH WANGARI KANGARI from the property known as L.R No. Dagoretti/Ruthimitu/177 pending the hearing and determination of the main suit or further orders of the Court.

4. THAT the Honorable Court do issue an order suspending and further operations, management and activities of the 1st Respondent Company in respect of the Estate of James Muhu Kangari (Deceased) under its management pending the hearing and determination of this Application and that of the main suit.

5. THAT an order do issue compelling the 1st Respondent Company to prepare and file in Court the proper books of account of the Estate under its management and control, declaring and disclosing all the assets and liabilities of the Estate including all other properties that are not contained in the schedule of the trust deed but belonging to the estate pending the hearing and determination of the main suit.

6. THAT pending hearing and final determination of the matter herein the Honourable Court be pleased to issue an order directing that all the rents and proceeds collected from the estate herein Muhu Holdings Ltd be deposited in Court forthwith until further orders of the Court.

7. THAT pending the hearing and final determination of the matter herein the Honourable Court be pleased to issue an order directing the 1st Respondent Company to include the administrators of the Estate of Joseph Kangari Muhu or any other family member of their choice as a Director(s) of Muhu Holdings Ltd to replace JOSEPH KANGARI MUHU.

8. THAT pending the hearing and determination of the suit herein the Honourable Court do issue an order directing the Respondents to file in Court Audited Accounts for the Company from the year 2012 to date.

9. THAT the Honorable Court to order the 1st Respondent to pay the Estate of JOSEPH KANGARI MUHU all his entitled dues and salaries due to the said JOSEPH KANGARI MUHU.

10. THAT the Respondents do bear the costs of the application herein.

8. The Suit and Motion faced an immediate headwind by way of a Notice of Preliminary Objection of 24th January 2018. The Objection asks this Court to strike out or dismiss the entire suit and Motion on the plea of *res judicata*. It is argued that the issues raised herein are issues directly and substantially in issue in a pending succession matter to wit Nairobi High Court Succession Cause No.1027 of 1989 (In the matter of James Muhu Kangari (the **Succession Cause**)). In addition, that the Orders sought in the Motion are the same as those sought in the Succession Cause and dismissed by Hon. Musyoka J. in a Ruling delivered on 12th May 2017 and in a subsequent application for Stay in the Court of Appeal in Civil Application NO. 105 of 2017.

9. The Succession Cause relates to the Estate of the Deceased. There has been disharmony between Mrs Muyu and her Daughter in Law which has culminated in several applications in the Cause. In the Ruling of 12th May, 2017, Hon. Musyoka J. was called upon to determine four applications dated 21st October 2014, 12th February 2015, 15th March 2015 and 24th June 2016.

10. Of relevance to the Objection taken up are the Applications of 21st October 2014, 12th February 2015 and 24th June 2016.

11. In his Ruling, the good Judge summarizes the substance of the three Applications and I can do no better than to reproduce them:-

“3. The application dated 21st October 2014 is brought by Sarah Wangari Kangari, an Administratrix of the estate of Joseph Kangari Muhu, a son of the deceased. She seeks several orders against Muhu Holdings Limited, which include payment of school fees, maintenance of the family of the Deceased, Joseph Kangari Muhu, Management of the Estate of the Deceased as per the wishes of the Deceased as expressed in his will, equal treatment of all family members, Registrar of Companies to be ordered to register the Applicant as a Director of Muhu Holdings Limited and the trustees and Directors of Muhu Holdings Limited be ordered to file accounts.

5. The second application is dated 12th February 2015. It is brought at the instance of the executrix and Muhu Holdings. The application seeks that the Respondent, Sarah Wangari Kangari be restrained from interfering with the executrix's occupation and enjoyment of Dagoretti/Ruthimitu/177, that she ordered to move her matrimonial home to Dagoretti/Ruthimitu/302 and that the police be directed to give effect to the said orders. The applicant avers that Dagoretti/Ruthimitu/302 is what was gifted to the estate of the Respondent's husband in the will of the deceased. She complains that the Respondent is abusive to her, and the two of them cannot live together in Dagoretti/Ruthimitu/177.

8. The application dated 24th June 2016 seeks orders that Muhu Holdings Limited be suspended from operating and the Company be closed until further orders of the court. It would like to have the rent collected by Muhu Holdings Limited to be deposited in Court and that the Directors of the Muhu Holdings Limited be ordered to disclose some properties not contained in the trust deed. The principal complaint is that the estate of Joseph Kangari Muhu has never benefited from Muhu Holdings Limited.”

12. The plea of *res judicata* is codified in Section 7 of Civil Procedure Act as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been 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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.

13. The Suit and Motion before this Court is broadly about two distinct issues. One is a challenge by the Plaintiff and his mother Sarah of an intended eviction from the suit land. The other are Orders sought against the Company in respect to Shareholding, Directorship and Management thereof and dues said to be entitled to the Estate of Kangari. Of significance is that the suit is presented on behalf of the Estate of Kangari.

14. In the Application of 12th February 2015 before the Probate and Administration Court, Mrs. Muhu sought to assert her right of occupation and enjoyment of the suit land and the removal of Sarah from it. The Court found the Application to be merited and allowed it in the following terms:-

“(b) That the Application dated 12th February 2015 is allowed in the terms proposed. The Respondent, Sarah Wangari Kangari is given three (3) months from the date of this Ruling to move out of Dagoretti/Ruthimitu/177 to Dagoretti/Ruthimitu/302, in default of which the executrix shall be at liberty to forcibly remove her”.

15. The rationale for that decision is to be found in paragraph 14 which reads:-

“The provision is in very simple language. The property given to the deceased husband of the Respondent is Dagoretti/Ruthimitu/302, not Dagoretti/Ruthimitu/177. It does not matter that when she got married she was settled on Dagoretti/Ruthimitu/177 by her husband, as her husband did not own that property. He was a mere licensee, and the licensor has by his Will given the licensee another place to settle. It also does not matter that that is where her husband left her when he died. It does not matter that her husband made developments on the piece of land; he did them on property that did not belong to him. The principles of adverse possession and prescription are of no application whatsoever in the circumstances. The Respondent appears to speak from both sides of her mouth, when she seeks in the application dated 21st October 2014 for the estate to be distributed and administered as per will of the deceased, while in the instant application she is unwilling to take up the gift that was made to her husband in the same will and to move to what is now her husband’s property.”

16. That Court in very explicit terms finds that the Deceased bequeathed Dagoretti/Ruthimitu/302, and not Dagoretti/Ruthimitu/177, to Kangari and it is on that basis that Sarah as the wife and Administratrix of the Estate of Kangari was asked to move out of the suit property to the property that was gifted to her husband. My understanding of the finding is that it was a pronouncement by the Probate and Administration Court that Sarah and the beneficiaries of the Estate of Kangari had no right to occupy the suit property.

17. Mr. Laichena for The Plaintiff argues that the Plaintiff herein was not a party to the Succession Cause and cannot be caught up in the proposition of *res judicata*. That argument however ignores an integral feature of the plea of *Res judicata* which is to bring within its application persons litigating under the same title. The Plea and suit reveals, if not betrays, the capacity in which the Plaintiff has approached Court. The Plaintiff brings this suit as a Co-administrator of the Estate of the late Joseph Kangari Muhu and in respect to the suit property makes the following averments:-

“(6) The Plaintiff avers that at all times they have always lived in one of the properties known as LR NO. Dagoretti/Ruthimitu/177

which is under the management of the 1st Defendant Company.

(7) The Plaintiff further states that as the beneficiaries of their late father as a Director-Shareholder, they are entitled to a share in the suit property as well as the management of the 1st Defendant Company.

(12) THAT sometime in the year 2015 the Respondents hired goons who demolished the Plaintiff's house without involving the beneficiaries of the Estate of Joseph Kangari Muhu who have equal rights and shares in the Company.

(13) THAT as if that was not enough, the Defendants have now unilaterally decided to kick out and forcefully evict the Plaintiff and his entire family from the suit premises LR No.Dagoretti/Ruthimitu/177 yet this is the only place thy call home”.

18. Ultimately, both in the Motion and the suit, he seeks protection not just for himself and family, but also for his mother Sarah. It seems to this Court that the question of whether those claiming through or under the Estate of Kingara are entitled to occupation of Dagoretti/Ruthimitu/177 was litigated and determined in the Succession Cause. It is against Public Policy and oppressive to the Defendants for this Court to allow the matter to be re-opened in another forum, albeit in a different shade.

19. And it has to be said that if the Plaintiff is pegging his right of occupation as a beneficiary to the Estate of his late father Kangari, then the place to agitate that right is in the Probate and Administration proceedings. If on the other hand he contends extended Stay and User as his basis, then the proper forum would be the Environment and Land Court. Whichever way this Suit is not the proper forum for that Dispute.

20. Also said to be a subject matter of two Applications in the Succession Cause and resolved in the Ruling of 12th May 2017 is the disagreement relating to the Company. The Defendants submitted that in that ruling, the Judge dismissed the Applications of 21st October 2004 and 24th June 2016 which were against the Company.

21. Whilst that is so, the decision of the Judge never determined the merit of those two applications as it was clear to the Judge that it was a Commercial matter and not one for a Probate Court. The Judge expressed himself as follows:-

“12. I shall determine the applications dated 21st October 2014 and 24th June 2016 simultaneously as they principally seek orders against a limited liability company. The said Company is not a party to the succession cause. It is in a sense an asset for distribution, to the extent that the deceased's shares in it are distributed in the will the subject of these proceedings. The Company is a separate legal entity from the persons who hold shares in it. The law which governs limited liability Companies is the Companies Act, Cap 486, Laws of Kenya, in terms of the formation, operations and liability of Companies. Any Orders against a limited Company by persons who claim entitlement to shares in and directorship of the Company can only be properly brought within the framework of the Companies Act, in proceedings properly brought before a Commercial Court as opposed to a Probate Court. I need not say more”.

22. The dispute revealed by those two Applications were not finally decided by the Court and do not fall foul of the plea of *Res judicata*.

23. The Court reaches this decision in respect to the Company Dispute even in the face of the argument by Counsel Njuguna for The Respondents that the issue of shareholding in the Company was a subject matter of the Will. Counsel had posed the question,” how can a commercial court then have jurisdiction?”. Careful not to be drawn into a detailed discussion of facts at this point when determining a Preliminary Objection, I observe that while the shares in the Company may have been “allotted” by the Will, the manner in which the affairs of the Company where or are managed and conducted thereafter may not be part of the administration of the Deceased's Estate. The role of a Probate and Administration Court is limited and cannot extend to resolving disputes that arise in respect to Estates which have been distributed. However, a fully-fledged hearing of the Motion or Suit will reveal whether all or part of the dispute in respect to the Company belongs to the Probate and Administration Court. This Court waits for that occasion before making any firmer finding.

24. Ultimately I find as follows:-

23.1 Prayer 1 of the Plaint dated 11th January 2018 is hereby struck out with costs.

23.2 Prayers 2 and 3 of the Notice of Motion dated 11th January 2018 is hereby struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Omondi for Plaintiff

Ndummo for Defendants

Nixon – Court Assistant