



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 122 OF 2013

AMELIE DERE..... PLAINTIFF

V E R S U S

AMINA MADRERE & ANOTHER1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

RULING

PRELIMINARY

1. This Ruling ought to have been delivered on 23rd April 2015. That date fell on a day I was attending training at the Judicial Training Institute. Thereafter I proceeded on my annual leave. On resuming duty I found that my secretary and court assistant were being transferred out of the Mombasa Law Courts Station. The incoming staff took time to settle down and consequently I could not deliver this Ruling any earlier. The delay, indeed is regretted.

APPLICATION SUBJECT TO THIS RULING

2. There are two separate applications but both filed and dated 17th December 2013. Their hearing was delayed by a preliminary objection dated 18th November 2013 filed by the 1st Defendant. A Ruling on that objection was delivered on 5th June 2014.

3. In one of the notice of Motion dated 17th December 2013 the plaintiff seeks a mandatory injunction to compel the 1st defendant to deposit, into court, the amount of money she has withdrawn from 23rd October 2013 from Account Nos. 1143613384 and 1143613163 herein after called accounts held in the 2nd Defendant's bank.

4. The second application of similar date is directed towards the 2nd Defendant to provide full statement of the accounts.

5. The Plaintiff relied on one and the same affidavit in support of the above prayers. The depositions of the Plaintiff in those affidavits are that she is the daughter of GEERT DERERE (deceased). The deceased in his life time transferred funds in Euros from his account in Luxemborg to the joint accounts, the

accounts herein. That the deceased travelled to Kenya on 23rd October 2013 and on that day he died in a house at Nyali, Mombasa. That his said death was suspicious. That the purpose for which he transferred the money into the accounts was defeated. That 1st defendant withdrew 90% of the funds in the accounts.

6. It is important to state that the Plaintiff, by this action, seeks a declaration that there was a resulting trust in her favour in respect of those funds.

7. It is also important to state that the accounts were in the names of the deceased and the 1st Defendant.

8. The 1st Defendant opposed both applications on the ground that both are devoid of merit and should be dismissed with costs.

9. 1st Defendant in support of that opposition alluded to the contract between the deceased, herself and the 2nd Defendant bank. That the deceased and herself were holders of joint account. Learned counsel for the 1st Defendant submitted in writing in the did opposition as follows:

“It is trite Law that the demise of one party in a joint account leaves the survivors the sole beneficial owner of the funds held in the joint account.”

1st Defendant through her counsel stated that even if the account opening document did not state the principal of survivorship applied that did not defeat her claim under that principal.

10. 1st Defendant also opposed the prayer that she/be ordered to deposit the amount withdrawn from the accounts. Opposition to this prayer was on the grounds that Plaintiff had not obtained letters of administration in respect to the estate of the deceased and it was not clear if she could claim any right to the account. That such right can only be determined in a succession cause.

11. 2nd Defendant relied on the case **ISABEL CHELANGAT _VS_ SAMUEL TIRO (2012) eKLR** to advance the argument on the principal of survivorship which principal was relied on by 1st Defendants. It relied on the following position:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

i) The unity of possession

ii) The unity of interest

iii) The unity of title

iv) The unity of time.”

12. That principal was also discussed by the court in the case **Republic v Funyula Land Disputes Tribunal & Another [2014]eKLR**, where the court said thus on that principal:

“That land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. Counsel referred the court to a passage in Laws of

Succession by W.M. MUSYOKA, at page 3, which states;

“Property is capable of passing upon death other than by will. It may pass by survivorship.....This applies in cases of joint tenancies that is where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically pass to the surviving tenant upon their death by virtue of the principle of survivorship.....The principle of survivorship operates to remove jointly owned property from the operation of the law of succession upon the death [of one of the joint tenants].”

13. 1st Defendant also relied on foreign authorities on the principles to be considered where there are joint accounts.

ANALYSIS

14. I am very aware that mandatory injunction as sought by the Plaintiff by both application ought not to be granted at interlocutory stage in the absence of special circumstances. This was what was stated in the case **LOCABAIL INTERNATIONAL FINANCE LTD V AGROEXPORT & OTHERS (1986) ALL ER 901**.

15. The discussion on that principle to mandatory injunction was the subject of discussion in the case **RAFIQUE EBRAHIM –V- WILLIAM OCHANDA T/A OCHANDA & CO ADVOCATES (2013)** and since that discussion is relevant to the this case I will reproduce it here.

Rafique Ebrahim v William Ochanda T/A Ochanda & Co Advocates [2013]eKLR

“The threshold for granting mandatory injunction orders is well set out in the case of Locabail International Finance Ltd v Agroexport & Others (1986) All ER 901 wherein the court stated;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibition injunction.”

This finding was echoed in the Court of Appeal case of Trinity Prime Investment Ltd v savings & Loan & Another Civil Appeal No. 90 of 1998, referred to in the ruling of Waithaka, J in Shedrach Kiruki M’Laari v. Samuel Kiptanui Korir & 2 Others Civil case no. 262 of 2012; (2013) eKIR, where it was held interalia;

“...where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end.”

Similar sentiments were reiterated by the Court of Appeal in Africa safari Club Ltd v Commissioner of Police & 6 Others Civil Application No. 248 of 2011; (2013) eKLR, where the court reiterated the ruling of Gicheru, JA (as he then was) in East African Fine Spinners Ltd (In Receivership) & 3 Others v Bedi Investments Ltd Civil Application NAI. 72 of 1994 (UR) who cited Megarry, J (as he then was) in Shepherd Homes Ltd v Sandahm (1971) 1 Ch. 34 where the learned judge stated:

“...it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action,

the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. (emphasis added). If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, the assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint."

16. I have considered the parties affidavit evidence and their submissions. The 2nd Defendant deponed through its officer that the deceased and the 1st defendant opened a joint account and according to the survivorship principal the 1st Defendant was entitled to operate that account. In my view that issue of whether this indeed was a joint account will be an issue to be determined after trial once the court receives evidence from the parties.

17. Apart the 2nd Defendant alluding to the survivorship principal I did not find anything in its affidavit opposition the Plaintiff's application for it to supply bank statements of the account. But even if the 2nd defendant did oppose I would have found, as I do not now, that the issue of the funds in the account is so central to this case that the court would need to have those statements to ensure that the justice of the case is met. I will therefore order for the release of those statements.

18. On the issue that the 1st defendant do deposit in court funds withdrawn from account I find that such order, in view of the lack of information of the amounts involved cannot be granted. I will therefore not grant that prayer.

CONCLUSION

19. In the end I grant the following orders:

a) The 2nd Defendant shall supply to all the parties in this case, at their expenses, bank statements of accounts 1143613384 and 1143613163 at Kenya Commercial Bank, Mvita Branch. Such statements shall be from the inception of those accounts to date.

b) The application seeking for an order that the 1st defendant deposit funds withdrawn from the above stated accounts is dismissed.

c) The costs of both applications dated 17th December 2013 shall be in the cause.

d) At the reading of this Ruling the court shall give a date to enable the court give directions on the hearing of this matter and whether this matter should be considered together with the Succession cause. To that end parties shall inform the court the case number of the Succession Cause.

DATED and DELIVERED at MOMBASA this 25th day of June, 2015.

Coram

Before Justice Mary Kasango

C/A Kavuku

For the Plaintiff:

For the 1st Defendant:

For the 2nd Defendant:

Court

Ruling delivered in their presence/absence in open court

MARY KASANGO

JUDGE