



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 769 OF 2005

LONHRO HOTELS (K) LIMITED.....PLAINTIFF

VS

PARSINTEI OLE NTUTU & 5 OTHERS..... DEFENDANTS

SEENOI NTUTU & 3 OTHERS.....INTERESTED PARTIES

RULING

1. This ruling addresses preliminary issues which this court identified in its directions issued on 10th July 2012 and in respect of which the court directed the parties to submit upon for determination before the main application dated 18th June 2012 filed by one of the co-administrators of the estate of Lerionka Ole Ntutu (deceased) Mr. John Harrison Kinyanjui could be canvassed on its merits.
2. The preliminary issues identified were:
 - 1) *Whether Mr. Harrison Kinyanjui as co-administrator could unilaterally apply to the court for the orders sought in the application dated 18th June 2012;*
 - 2) *Whether Mr. Kinyanjui could be allowed to act in person in respect of the application of 18th June 2012;*
 - 3) *Which Division of the High Court was best placed to deal with the application of 18th June 2012;*
 - 4) *Whether the proposed substitution of the present defendants with the co-administrators as well as the proposed joinder of the interested parties as co-defendants was permissible.*
3. Counsel for the various parties filed written submissions addressing the above issues and these came up for highlighting on 25th July 2012.
4. In his submissions, Mr. Naikuni, counsel for the 1st to 4th Interested Parties/Objectors as well as for Mr. Thomas Mutiso Mutunga told the court that the estate of the late Paramount Senior Chief Lerionka Ole Ntutu had 10 wives and 73 beneficiaries. Upon his passing on 8th April 2000, letters of administration were applied for in ***Succession Cause No. 1263 of 2000*** by the current defendants to the present suit. However, an issue arose as to the daughters of the deceased who had not been considered for inheritance. A consent order was eventually entered on 27th May 2008 through which two co-administrators were appointed being Mr. Thomas Mutiso Mutunga and Mr. Harrison Kinyanjui. These were mandated to take over management of the estate from the current defendants. It was a fundamental term of the appointment

that the two co-administrators were to manage the estate professionally and to perform their duties in consultation with the majority of the family members viz. 75% of the members. The co-administrators were therefore not allowed to make any decisions without the consent of 75% of the family members. The Applicant's application seeking orders against the estate was a nullity as the Applicant had not sought the concurrence of 75% of the beneficiaries. The Applicant had no *locus standi* to institute the application, in the circumstances.

5. Mr. Naikuni submitted further that by taking the unilateral decision to bring the application, the Applicant was not acting in the best interests of the estate as he had placed himself in a position where he could not be cross-examined. Further, the Applicant was also on record as representing parties who were in direct competition with the estate hence could not represent the interest of the estate. He submitted further that the dispute before the court was about rent arrears but over which a settlement had been arrived at with 75% members' approval. Through that settlement, 80% of the members had been paid their respective shares. He urged the court to order that any other issues arising should be handled by the family Division under HCCC No. 1263 of 2000. He submitted that the interested parties had no interest in being substituted as the matter was *fait accompli*.

6. On his part, Mr. Chelang'a for the defendants and 56 of the beneficiaries associated submitted that his clients were not opposed to Mr. Kinyanjui acting in person. He submitted that the two administrators were not working in tandem. He was therefore seeking leave for his clients to be joined in the suit in this matter as the application by Mr. Kinyanjui was likely to prejudice them. He confirmed that his clients had received payment in the aggregate sum of Kshs. 29 Million in equal proportion and opposed the application by the co-administrator as being recipe for endless litigation. He relied on Mulla's Code of Civil Procedure which provides that beneficiaries could be enjoined if the co-administrators were at cross-purposes. He submitted that Order 31 of the Civil Procedure Rules did indeed allow beneficiaries to be joined as parties. He submitted that the suit in this matter should be transferred to the probate court.

7. For the Plaintiff, Mr. Chacha Odera submitted that Mr. Mutunga could not be forced to be substituted and only the probate court in which a consent order was entered could do the substitution. That consent required 75% of the beneficiaries to give approval of all actions by the co-administrators.

8. In reply, Mr. Kinyanjui submitted that Order 31 of the Civil Procedure Rules made it mandatory that where there are more than one administrator, they shall all be joined to a suit relating to the estate under their management. He denied that the suit in this matter was *fait accompli* on the ground that no final decree had been issued in this matter. On the question of which court was best placed to handle this matter, Mr. Kinyanjui stated that there was a dispute as to rent between the Plaintiff and the administrators of the estate arising from a lease. The lease was governed by the Registration of Land Act 2012 and the Land Act. In that case, he submitted that this suit should be adjudicated upon by the Environmental and Land Division of the High Court. He submitted further that the Civil Procedure Rules gave a person the right to act in person. In relation to the requirement of 75% concurrence of beneficiaries, Mr. Kinyanjui submitted that an administrator could not close his eyes on an illegality and that owing to the difficulty in getting the consents of beneficiaries of the estate, he was constrained to unilaterally seek the court's intervention to check on breaches which had come to his wake. He referred the court to the case *Nielsons vs. China Road* where it was held that it was contrary to public policy for a consent order to restrict access to courts. He cited several instances of name and signature discrepancies of beneficiaries who had allegedly been paid and which he relied on as evidence of fraud. As regards the proposed substitution, Mr. Kinyanjui submitted that the substitution was necessary as the lease document in question was between himself, Mr. Mutunga and Kingdom Kenya 01 Limited, the successor to the Plaintiff. The application was therefore merited.

9. In a brief rejoinder, Mr. Chelang'a refuted the allegation of fraud claiming that no complaint of forgery of signatures had been made by any of the beneficiaries. In any event, he submitted that the settlement agreement provided a dispute resolution clause.

10. I have carefully considered the respective submissions by counsel on the preliminary issues. I have also considered the court record in the same light. My view on the issues before me is as below.

11. From the respective submissions, there appears to be no contest to the issue of Mr. Kinyanjui acting in person in the present application. For that reason, I take it that the issue is now settled.

12. On whether Mr. Kinyanjui could bring the application dated 18th June 2012 unilaterally, the answer in my view lies on the terms of appointment of Mr. Kinyanjui as a co-administrator. These terms were well set out in the consent order entered on 27th May 2008 in Succession Cause No. 1263 of 2000 through which the two co-administrators Tom Mutunga and Harrison Kinyanjui were appointed. Paragraph 8 of the consent order provided as follows:

“The aforementioned Administrators under Consent Order No. 6 shall, with a view to managing the estate professionally and in an acceptable manner, perform their duties in consultation with a majority of the family members being 75% of the family members and shall not make any decisions thereon unless approved by such majority family members”

13. In bringing the application dated 18th June 2012, not only did Mr. Kinyanjui fail to consult his co-administrator but he indeed failed to consult the family members in terms of paragraph 8 of the consent order reproduced above. Mr. Kinyanjui therefore acted in breach of a fundamental term of his appointment as co-administrator.

14. Mr. Kinyanjui strongly argued that the terms of his appointment as co-administrator could not make him close his eyes on an illegality and that he was constrained to unilaterally seek the court’s intervention to check on breaches which had come to his wake. He claimed that he had difficulty in getting the consents of beneficiaries of the estate compelling him to so act. He also cited the case of **Nielsons vs. China Road** where it was held that it was contrary to public policy for a consent order to restrict access to courts. My take on this contention is two-fold: firstly, my perusal of the application and its supporting documentation does not reveal any documented attempt on the part of Mr. Kinyanjui to notify the beneficiaries of his intention to bring the application. Indeed, my reading of the bulk supporting affidavit leaves me with little doubt that the main concerns Mr. Kinyanjui revolved around lack of co-operation between him and his co-administrator Mr. Mutunga with whom they disagreed on numerous proposed actions with regard to the administration of the estate. These disagreements in my view were opportune grounds upon which Mr. Kinyanjui should have convened the beneficiaries to air his misgivings and obtain their go-ahead instead of seeking the court’s intervention without any knowledge of the appointing beneficiaries.

15. Secondly, it is trite law that an administrator as an agent of the beneficiary is obliged to act within the express and apparent authority donated to him by the appointing authority. In the present matter, it is evidently clear that Mr. Kinyanjui did not act within the powers donated to him as per the terms of his appointment as co-administrator. His action to bring the application was therefore ultra vires and void.

16. With regard to the issue of which Division of this Court should deal with the substantive issues the subject matter of the application of 18th June 2012, having made the finding that Mr. Kinyanjui did not have authority to bring the application in the first place, I consider the application as fatal in all the prayers it seeks. Consequently, I take the view that the application is now rendered as spent and all orders issued consequent thereto as fully discharged.

17. However, I find it apt to observe that should Mr. Kinyanjui regularize his authority from the beneficiaries to move the court in pursuit of the issues raised in the application, the court best placed to deal with the issues would be the family/succession court in where the consent order appointing the co-administrators were made. This is because all the issues raised including the lease over Land Reference Number CIS-Mara/Olchoro-Oirouwa/24, the take-over of the lease as between Lonrho Hotels (K) Limited and its successor Kingdom Kenya 01 Limited, the computation of rent due to the estate of Lerionka Ole Ntutu from the property; the distribution of the income amongst the family members and the claims of embezzlement of funds can all be handled by the succession court.

18. As regards the issue of substitution of the previous administrators of the estate with Mr. Kinyanjui and Mr. Mutunga, my take is that the issue should dealt with as a substantive issue in the family court.

Nevertheless, my view of the issue is that it is apparent from paragraphs 6 and 7 of the consent order of 27th May 2008 that upon appointment of the two co-administrators, the outgoing administrators were to hand over management of the estate forthwith and to vest all the records, bank and cheque books to the new administrators. This ipso facto meant that the power to pursue the rights of the estate in or out of court shifted from the previous administrators to the newly appointed administrators. Consequently, any court proceedings existing at the time of the take-over in the names of the previous administrators now vested in the new administrators so much so that the latter became entitled to seek substitution as prayed in the application brought by Mr. Kinyanjui.

19. In the result, and in line with the position taken in paragraph 16 of this ruling, I am inclined to dismiss the entire application dated 18th June 2012 with no orders as to costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF SEPTEMBER 2012.

J.M. MUTAVA
JUDGE