



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 280 OF 2010

**PETER THUNGU WANYOIKE (*Suing in his capacity
as a co-administrator of the estate of the late
ARTHUR WANYOIKE THUNGU*).....PLAINTIFF**

VERSUS

**NAKURU STEAM LAUNDRY &
DRY CLEANING (1975) LTD.....1ST DEFENDANT/RESPONDENT**

MARGARET NJERI MBURU.....2ND DEFENDANT/RESPONDENT

JANE WAMBUI WANYOIKE.....3RD DEFENDANT/RESPONDENT

RULING

The application dated 29/10/10 is brought pursuant to **Section 39 Rules 1 and 9** of the **Civil Procedure Rules**. It is brought by Peter Thungu Wanyoike (suing on his capacity as a co-administrator of the estate of the late ARTHUR WANYOIKE THUNGU against Nakuru Steam Laundry & Dry Cleaning (1975) Ltd, Margaret Njeri Mburu and Jane Wambui Wanyoike. The deceased, was a shareholder in the 1st defendant company with the late Silas Mburu. Both Arthur Thungu and Silas Mburu Gichua have left their shares in the charge of their personal representatives. In the plaint the plaintiff seeks to temporarily stop the defendant from transferring shares of the late Thungu to the 3rd defendant with the authority of the personal representatives of the deceased, an injunction to restrain the defendant from selling, disposing or dealing with the 1st defendant's assets which include Nakuru Municipality Block 4/78 in any way without the resolution of the 1st defendant in a properly convened meeting pursuant to the company's memorandum of association and a declaration that the plaintiff is entitled to all statements of accounts and audited reports of the 1st defendant from 1998 to date. By the Chamber Summons the applicant seeks the following orders:-

3. That pending the hearing and determination of this suit the court be pleased to restrain the defendants/respondents herein by themselves, their servants and or agents from transferring the shares of the late Arther Wanyoike Thungu to the 3rd defendant herein or any other person and or selling and or transferring the assets of the 1st defendant among them Nakuru Municipality Block 4/78 to the 2nd defendant herein or any other person whatsoever.

4. That the court be pleased to suspend all the operations of the 1st respondent/defendant herein until the said company provides to the applicant herein full statement of account and or audited reports for the period between 1998 and 2009 and convenes a general meeting of the

shareholders within such period as the court may find just and reasonable.

The application is based on grounds found on the face of the application and the affidavit of the plaintiff dated 29/10/2010, a further affidavit dated 2/3/2011 and another further affidavit dated 18/4/2011. The applicant is a co-administrator of the estate of Wanyoike Thungu.

The plaintiff/applicant a co-administrator in the estate of Arthur Wanyoike Thungu having been appointed in Succession Cause No. 1874/06. Upon appointment, he sought to know the correct status of the 1st defendant from the 1st defendant and by a letter of 6/9/2010 the 1st respondent through its advocate replied that the deceased's share had been transferred to the 3rd defendant, (PTW5) one of the deceased's widows out of 8 of them. He checked with Registrar's office on 27/10/2010 and obtained the list of current documents (PTW7) and it all affected the deceased's name. He is aware that the defendants have been trying to transfer the deceased's share to the 3rd defendant and that they also intend to sell Nakuru Municipality Block 4/78 which was valued at Kshs.20,764,000/- in 1994, that they have also agreed to sell the 1st defendant to the 2nd defendant and the administrators wrote to the 1st defendant on 24/2/05 enquiring about the financial position of the 1st defendant and if any dividends were paid. It is the applicant's contention that the defendants stand to act in a manner prejudicial to the deceased's estate. He visited the Lands office the green card could not be traced. The applicant further deponed that the payment of allowance to the 3rd defendant/respondent is illegal as she is not a director or an administrator of the deceased's estate.

In opposing the application, Peter David Kagotho, the secretary of the 1st defendant swore an affidavit bearing a wrong date, 22/12/2011 but filed in court on 16/2/2011. He deponed that a resolution was made in 1995 to sell the 1st defendant and that the applicant has no knowledge of the facts relating to the company, that he has no locus standi in the matter and that application is an abuse of the court process. He averred that even though the property was advertised for sale in the 1990s, it has never been sold though it has been incurring losses. That nothing stopped the applicants from requesting the Board that they wanted to see the books. It was argued that no case has been made to warrant the grant of the orders sought. It is also averred that the matters raised herein touch on management of the 1st defendant and should have been raised under **Rule 8** of the **Companies (High Court) Rules** and the court should have been moved by way of a petition and Notice of Motion. Mr. Wambeyi urged that this suit is premised on fear and orders should not be granted.

The 2nd defendant, Margaret Njeri Mburu also filed a replying affidavit dated 22/12/2010 and denied that any cause of action has been disclosed and that the prayer that the operations of the 1st defendant be suspended has no basis and that the prayers in the plaint do not relate to her. She also denied wanting to sell off the company's assets.

The 3rd respondent filed a replying affidavit dated 20/2/2011 in which she deponed that before the deceased's death she had been nominated by him to sit on the company's Board when he was unwell. She also denied planning to sell the 1st defendant or transfer shares to herself and that the applicant has not been keen on finding out about the company. That if he wanted records of the Company he should have moved under **Section 166** of the **Companies Act** for the court to appoint an inspector and only if the request was declined only then would he move the court.

Locus Standi:

Does the applicant have the necessary locus standi to bring this suit and application? The applicant has deponed to being one of the administrators of the estate of his later father, Arthur Wanyoike Thungu. He exhibited an order of the court dated 13/7/2010 (PTW1) confirming that he was made a co-administrator together with the 3 other existing administrators to the estate of Wanyoike Thungu. The existing administrations were Michael Thungu Wanyoike, Joseph Gichuhi Thungu and Mbugua Gichua as indicated in the Grant of letters of administration dated 16/11/2002. The court ordered that the parties agree on distribution within 30 days of that date. It is obvious that distribution has not been agreed upon

because if it had been, this application would not have been filed. The applicant being one of administrators of the estate of Arthur Wanyoike Thungu, he has a direct interest in the 1st defendant since the deceased's shareholding in the 1st defendant form part of the deceased's estate.

Is the deceased's interest threatened with disposal?

By the letter dated 17/7/2010, the firm of Waiganjo wrote to the secretary of the 1st defendant seeking to know the state of affairs of the company (TW4) and the firm of Sheth Wathigo wrote back on 6/9/2010. The letter read in part:-

“That according to our client's records which your client can verify and/or obtain from the Registrar of Companies, the late Arthur Wanyoike Thungu's shares had been transferred to one of his widows M/s Jane Wambui Wanyoike.”

In the circumstances our client is unable to supply you with the information sought.”

Contrary to the averments in the letter, the secretary of the 1st defendant, Mr. Kigotho, depones that though there was a resolution passed in 1995 to sell the shares of the company, it has not been sold and there has been no plan to dispose of the deceased's shares. Jane Wambui Wanyoike also denies plans to dispose of the shares. The respondents have not explained the contents of the letter from their advocates, Sheth Wathigo indicating that the shares of the deceased had been transferred. A search from the Companies registry, (PTW7) revealed that the deceased's shares were still intact. The respondents have steered clear of that letter. I find that the applicant's fears are not far fetched. Why would the respondent create the impression that the deceased's shares were already transferred when they were not. That is a question only the respondents can answer.

Jane Wambui Wanyoike claims to have been nominated by the deceased to sit on the Board of Directors when he was unwell. That does not make the said Jane a director of the Company nor is she a shareholder. Upon the death of a member **Article 19** provides for what will happen:-

“(19) In the case of the death of a member, the survivors or survivor where the deceased was a joint-holder, and the executors or administrators of the deceased, where he was a sole or only surviving holder, shall be the only persons recognized by the Company as having any title to his share, but nothing herein contained shall release the estate of a deceased joint-holder from any liability in respect of any share jointly held by him.”

In this case, since there was no joint holding of the shares, upon the deceased's death, it is the administrators of the deceased's estate whom the company shall recognize as having title to his shares. If at all Jane Wambui was acting in place of the deceased when he was alive, upon his death, the administrators are the ones to agree on whom to sit on the Board. Shares can only be transferred to beneficiaries by the administrators in accordance with **Article 8**. It reads as follows:-

“Article 8. Any share may be transferred at any time by a member to his or her lineal descendant or his wife or her husband; and any share of a deceased member may be transferred by his or her executors or administrators to the widow or widower or any such relative as aforesaid of such deceased member. A share may be transferred at any time to any member of the Company.”

In this case there is no evidence that any share had been transferred to the 3rd respondent. The shares are still in the name of the deceased and therefore form part of the deceased's estate and they should be preserved pending the distribution of the deceased's estate.

Whether the application is defective or incompetent:

It was Mr. Wambeyi's submission that the applicant has a dispute with the management of the company and should have therefore brought this application under the **Companies Act** and the **Companies (High Court) Rules**. **Rule 4** provides the manner in which a party approaches the court in the event of disputes

relating to Companies and it will be by way of Petition, Notice of Motion or Summons. The Rules then specify the matters that will be brought by Notice of Motion, Petition or Summons. I have read the contents of Rule 8 of the Companies High Court Rules and I find that they are not entirely applicable to this case.

What the applicant seeks to do by this application is to preserve the estate of the deceased. The applicants want an Annual General Meeting to be held to determine the way forward for the company. It has not been shown that any Annual General Meetings have been held as required by the law. The applicant has also demonstrated that he has not been told about the deceased's shareholding on making inquiry; there is evidence that the 3rd respondent gets an allowance from the 1st defendant and sits on the Board, should she continue to sit on the Board and draw allowance after the deceased's demise? The applicant has also shown that the names of the 1st respondent's premises and on the laundry bags have changed to "**Steam Laundry and Dry Cleaning**" in place of "**Nakuru Steam Laundry and Dry cleaning (1975) Ltd?**" (PTW3). Has that been done within the articles of the Company and are there are resolutions to that effect. I find that the applicant has established a prima facie case with high chances of success that if the interim orders are not granted, the estate's interest in the 1st respondent are likely to be adversely affected.

I hereby grant prayer 3 of the application dated 29/10/2010 to restrain the respondent from transferring or interfering with the shares of the deceased in any adverse manner till this suit is heard and determined. As respects prayer 4, I decline to halt the operations of the 1st respondent but do order that the 1st respondent do convene a Annual General Meeting with the shareholders within 60 days hereof, where these issues will be resolved. Costs to be in the cause.

DATED and DELIVERED this 12th day of October, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Wanderi holding brief for Mr. Waiganjo for plaintiff.

Mr. Bii holding brief for Mr. Simiyu and Wambeyi for the respondents.

Kennedy – Court Clerk.