



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**E.L.C. NO. 16 OF 2020 (O.S.)**

**PETER MUNGAI NJOROGE.....APPLICANT**

**VERSUS**

**RACHEL NYAMBURA NJOROG.....1<sup>ST</sup> RESPONDENT**

**JOSEPH NJUGUNA NJOROGE.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. By an originating summons dated 8<sup>th</sup> July, 2020 expressed to be based upon **Order 34 of the Civil Procedure Rules (the Rules), Section 28 of the Land Registration Act, 2012 and all other enabling provisions of the law**, the Applicant, Peter Mungai Njoroge, sought determination of the following questions:

- a. Whether the Respondents hold in trust Nyandarua/Olgoro Orok Salient/14021, Nyahururu/ Municipality Block VI/495, Nyahururu/Municipality Block 8/803, Nyahururu Municipality/Block 3/311, Laikipia/ Marmanet North/Rumuruti Block 2/8370, Laikipia/ Marmanet North/Rumuruti Block 2/8371, Nakuru/Municipality Block 22/3134 and Motor Vehicle Registration No. KAX 245E for themselves and for the Applicant and Penninah Wangui Njoroge.
- b. Whether the Respondents have excluded the Applicant from benefiting in the properties which are the subject matter of this suit and whether the Respondents have acted equitably in allocating benefit on the suit properties as trustees and whether the Respondents ought to be compelled to render a just, true and fair account of all proceeds and rental income derived from the properties they hold in trust.
- c. Whether the Applicant is entitled together with other siblings to an equal and equitable share and benefit of the suit properties.
- d. Whether the trust created herein should be determined and the above stated properties shared equally and equitably while taking into account past benefits and the other beneficiaries to the trust created.
- e. Who should bear the costs of this originating summons.

2. The said originating summons was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by the Applicant on 8<sup>th</sup> July, 2020. The gist of the summons was that the Applicant was aggrieved by the conduct of the Respondents who had allegedly denied him his fair share of the estate of his deceased father (the deceased) and prevented him from benefitting from the estate of the deceased in any other manner. The Applicant was also aggrieved by the certificate of confirmation of grant which allowed the Respondents to hold the entire estate of the deceased in trust for themselves and other beneficiaries (including the Applicant) instead of having the estate distributed in the usual manner so that each beneficiary could enjoy his share absolutely.

**B. THE APPLICANT'S APPLICATION**

3. Simultaneously with the filing of the originating summons the Applicant filed a notice of motion dated 8<sup>th</sup> July, 2020 under **Section 3A of the Civil Procedure Act (Cap. 21), Order 40 Rules 1, 2, 3, 4 and 5, and Order 51 Rule 1 of the Rules, and all other enabling provisions of the law** seeking the following orders:

- a. Spent.

b. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the Respondents from alienating, misappropriating, transferring or in any way dealing with Nyandarua/Oljoroorok Salient/14021, Nyahururu/Municipality Block VI/495, Nyahururu/Municipality Block8/311, Laikipia/Marmanet North/Rumuruti Block 2/8370, Laikipia/Marmanet North/Rumuruti Block 2/8371, Nakuru/Municipality Block 22/314 and Motor Vehicle Registration No. KAX 245E and the rental and business proceeds therefrom.

c. That the Respondents be compelled to render a just, true and fair account of the properties listed above and which they hold in trust for themselves and for the other beneficiaries from the date of such entrustment and that the Applicant be reinstated to the family business, Daran Hardware Nyahururu and that he be given his equal and equitable share of the proceeds thereof.

d. That the costs of this application be provided for.

4. The said application was based upon the grounds set out in the supporting affidavit sworn by the Applicant on 8<sup>th</sup> July, 2020. The grounds set out in the said affidavit were essentially the same ones set out in the originating summons and the affidavit in support thereof. The Applicant contended that the Respondents who are the administrators of the estate of the deceased had excluded him from the use and enjoyment of the estate and that they had continued to apply the proceeds of the estate to their own personal use.

5. The Applicant further contended that the Respondents had failed to render an account of the rental income generated from the estate of the deceased. He further contended that he was an adult male of sound mind capable of holding and managing his own share of the estate hence the Respondents ought not be allowed to hold the entire estate in trust for all the beneficiaries for an indefinite period.

6. Finally, the Applicant stated that although he had filed an application for review, variation and setting aside of the certificate of confirmation of grant the same was dismissed by the Magistrates' court for lack of jurisdiction. He did not, however, exhibit a copy of the ruling dismissing his application as indicated in his supporting affidavit.

### **C. THE RESPONDENTS' RESPONSE**

7. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 30<sup>th</sup> September, 2020 on her own behalf and on behalf of the 2<sup>nd</sup> Respondent in opposition to the said application. The Respondents conceded that the Applicant was a beneficiary of the estate of the deceased which was administered vide *Nyahururu PM Succession Cause No. 38 of 2016 – In the matter of the Estate of Njoroge Mungai (Deceased)*.

8. The Respondents stated that the Applicant fully participated in the said succession cause and a certificate of confirmation was issued by consent of all the beneficiaries of the estate of the deceased, including the Applicant. The Respondents annexed a copy of the relevant consent which was apparently executed by the Applicant.

9. The Respondents denied that they had been enjoying and utilizing the proceeds of the estate to the exclusion of the Applicant. They denied having converted the proceeds to their personal use as alleged by the Applicant. They further stated that they have been paying school fees for the Applicant's three sons; paying his house rent; paying for NHIF medical cover; and contributing towards the subsistence of the Applicant's family. They exhibited various documents to demonstrate the relevant payments and disbursements.

10. The Respondents further contended that the Applicant was not entitled to join the family business since he was not one of the administrators of the estate and that he was an irresponsible person who was out to plunder the estate of the deceased. The Respondents pointed out that the Applicant had not identified a single need which had not been taken care of by the Respondents. Consequently, they asked the court to dismiss the application for lack of merit.

### **D. DIRECTIONS ON SUBMISSIONS**

11. When the said application was fixed for hearing on 5<sup>th</sup> October, 2020 it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that Respondents filed their submissions on 26<sup>th</sup> January, 2021 whereas the Applicant's submissions were not on record by the time of preparation of the ruling.

### **e. THE ISSUES FOR DETERMINATION**

12. The court has considered the Applicant's notice of motion dated 8<sup>th</sup> July, 2020 together with the supporting affidavit and annexures thereto, the Respondents' replying affidavit and the annexures thereto, and the submissions on record. The court is of the opinion that the following issues arise for determination in the instant application:

a. Whether the Applicant has made out a case for the grant of an injunction.

b. Whether the Applicant has made out a case for the Respondents to be compelled to render an account of the estate of the deceased.

c. Whether the Applicant is entitled to be reinstated into the family business and to be given an equal and equitable share of the proceeds thereof.

d. Who shall bear the costs of the application.

### **F. ANALYSIS AND DETERMINATION**

#### **a. Whether the Applicant is entitled to the interim injunction sought**

13. The court has considered the material and submissions on record on this issue. The main question for consideration is whether the Applicant has satisfied the requirements for the grant of an injunction as set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A. 358**. In the said case, it was held that an Applicant for an interlocutory injunction must satisfy the following requirements in order to succeed:

- a. The Applicant must demonstrate a prima facie case with a probability of success at the trial.
- b. An injunction will not normally be granted unless the Applicant demonstrates that he shall otherwise suffer irreparable loss which cannot be remedied by an award of damages.
- c. If the court is in doubt on the second principle, it shall decide the application on a balance of convenience.

14. It would appear from the material on record that the Applicant is aggrieved by the certificate of confirmation of grant of the estate of the deceased by which the Respondents were allowed to hold all the assets of the estate in trust for themselves and other beneficiaries of the estate. It would further appear that the Applicant sought a review or variation of the confirmed grant without success. He did not pursue the matter by way of appeal to the High Court but he commenced fresh proceedings before the Environment and Land Court for determination of the various questions set out in the originating summons dated 8<sup>th</sup> July, 2020.

15. It is evident from the material on record that the Applicant was party to the consent pursuant to which the Respondents were handed the management of the estate of the deceased on behalf of all the beneficiaries. He did not file any further or supplementary affidavit to dispute the consent which was exhibited by the Respondents. The court is of the opinion that the Applicant is bound by the terms of the consent and the certificate of confirmation of grant unless otherwise lawfully set aside on grounds which would vitiate a contract in law.

16. In **Flora N. Wasike v Destimo Wamboko [1988] eKLR**, the Appellant sought to challenge a consent judgment which was recorded by her advocate on the ground that she had not consented to it and that her advocate had done so without her authority. In dismissing the appeal, the Court of Appeal held, *inter alia*, that:

**“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J.M. Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 2 ALL ER 671. Winn LJ said at 676;**

**‘It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of the a contract entered into with knowledge of the material facts by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.’**

17. The court is of the opinion that since the Applicant is essentially aggrieved by the certificate of confirmation of grant which was made pursuant to a consent to which he was party, the court is far from satisfied that the Applicant has demonstrated a *prima facie* case with a probability of success at the trial. It would be an uphill task for the Applicant to succeed in overturning the terms of the confirmed grant in the instant proceedings having failed to do so in his application for review before the succession court.

18. Since the court is of that opinion, it shall not be necessary to consider the other two principles for the grant of an injunction. The application has simply failed at the first of the three sequential hurdles which the Applicant was required to pass in order to succeed.

#### **b. Whether the Respondents should be compelled to render a true and fair account of the estate of the deceased**

19. The court has considered the material and submissions on record on this issue. The Applicant has not placed any material before court to demonstrate that a request for account was ever made and that the Respondents had declined to comply with it without a lawful cause or excuse. On that ground alone, the court is not inclined to grant the order for account.

20. The court is further of the opinion that the prayer for account must fail in the instant application for at least two reasons. First, one of the main questions for determination in the originating summons is whether or not the Respondents should be ordered to render a true, fair and accurate account of the estate of the deceased. It would, therefore, follow that such a remedy cannot be granted at the interlocutory stage before the originating summons is fully canvassed.

21. The second reason is that all matters to do with administration of estates of deceased persons is governed by the **Law of Succession Act (Cap. 160)**. The question of account therefore falls within the province of the succession court which issued or confirmed the grant. It is doubtful if the Environment and Land Court sitting as such would have jurisdiction to supervise the management of estates under the **Law of Succession Act (Cap. 160)**.

#### **c. Whether the Applicant is entitled to be reinstated into the family business**

22. Although the Applicant claimed that he was expelled from the family hardware business after the death of his father, the Respondents contended that it was the deceased who sent him off on account of theft and irresponsible behaviour. The Applicant did not controvert the Respondents’ allegations by a further or supplementary affidavit.

23. However, the court's determination on this issue shall lie with the consent which gave rise to the certificate of confirmation of grant. The management of the entire estate of the deceased was placed in the hands of the Respondents in trust for all the beneficiaries of the estate of the deceased. The Applicant clearly consented to that position at the material time. The hardware business into which the Applicant wants to be admitted appears to be part of the estate of the deceased. It would, therefore, follow that since the Applicant is not one of the administrators of the estate, there would be no legal basis for incorporating him into the running of the business.

24. It is, again, doubtful whether the Environment and Land Court sitting as such would have jurisdiction to give orders or directions on the management of a hardware business, Daran Hardware, which forms part of the estate of the deceased. The court is thus of the opinion that the prayer for reinstatement into the hardware business must be rejected.

**d. Who shall bear costs of the application**

25. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the application. Accordingly, the Respondents shall be awarded costs of the application to be borne by the Applicant.

**G. CONCLUSION AND DISPOSAL**

26. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 8<sup>th</sup> July, 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**RULING DATED and SIGNED** at NYAHURURU and **DELIVERED** via Microsoft Teams Platform this **18<sup>th</sup>** of **February, 2021**.

**In the presence of:**

Ms. Muigai holding brief for Mr. Gakuhi Chege for the Respondents

No appearance for Applicant

Court Assistant - Carol

**Y.M. ANGIMA**

**JUDGE**

**18.02.2021**