



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 8 OF 2020**

**ERASTUS KANG'ARU WACHIRA.....PLAINTIFF**

**-VERSUS-**

**REUBEN KAMONJI KANG'ARU.....1<sup>ST</sup> DEFENDANT**

**JOB NDIRANGU KANG'ARU.....2<sup>ND</sup> DEFENDANT**

**TIMOTHY NJOGU KANG'ARU.....3<sup>RD</sup> DEFENDANT**

**SAMUEL MBUTHIKA KANGARU.....4<sup>TH</sup> DEFENDANT**

**AND**

**LEONARD WACHIRA KING'ARU.....THIRD PARTY**

**ERASTUS IRUNGU NJOGU.....INTERESTED PARTY**

**RULING**

1. I have before me for determination a Notice of Motion dated 20<sup>th</sup> February, 2020. By the said Motion, Erastus Wahome alias Erastus Kang'aru Wachira (*the Plaintiff*) prays for orders:

1. ...

2. ...

3. *That pending the full hearing and determination of this suit, all rent accruing from the building erected and standing on L.R No. Nyeri Municipality Block 1/237, Nyeri Municipality Block III/II, L. R No. Muhito/Gaturia/890, Plot No. 17, Plot No. 15 Kiahungu and Plot No. 27 Kiahungu be collected, accounted and shared equally amongst the registered proprietors by a reputable Estate Agent such as Tysons Limited; and*

4. *That the costs of this application be provided for.*

2. The application which is supported by the Plaintiffs affidavit is premised on the grounds that:

(i) *The Plaintiff, the Defendants and four others are the registered proprietors of the suit properties in common in equal undivided shares since the year 2002;*

(ii) *The Defendant have since then been collecting rent but have never accounted for the same to the Plaintiff or given him his share of the same;*

(iii) *The Defendants' actions are oppressive and unconscionable as the Plaintiff continues to languish in poverty, yet he is entitled to no less than Kshs.100,000/- per month out of the accrued rent;*

(iv) *The Plaintiff continues to suffer and will continue to suffer in abject poverty when his entitlement is being misappropriated by*

*the Defendants; and*

*(v) It is in the interest of justice and fair play to have the rent collected by an independent Estate Agent accountable to this Honourable Court.*

3. The application is opposed. In a Replying Affidavit filed herein on 16<sup>th</sup> March, 2021 as sworn on his own behalf and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Job Ndirangu King'aru (*the 3<sup>rd</sup> Defendant*) avers that the Plaintiff's portion of rent has always been collected by his father Leonard Wachira Kang'aru following the agreements between the family members dated 11<sup>th</sup> December, 2010 and 26<sup>th</sup> April, 2019. Those agreements allowed the Plaintiff's father to collect rent from Plot Nos 15, 17 and 57 Kiahungu.

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further aver that the divisions and distribution of the estate of the late Erastus Kang'aru Wachira (*deceased*) was not fully done in accordance with the deceased's will as family members held several meetings and entered into binding agreements after the valuation of the various properties bequeathed under the will.

5. The Defendant assert that on 28<sup>th</sup> June, 2007, the family contracted Messrs Rawa Enterprises, an Estate Management Company for purposes of rent collection and estate management for a number of the bequeathed properties. The said Estate Agent issues monthly statements to all the Defendants herein and the Plaintiff's father ought to give the Plaintiff an account of the revenue collected on his behalf.

6. The Defendant further assert that the Plaintiff has not demonstrated any incompetency and/or discrepancy emanating from the said Rawa Enterprises as the estate agent and as such it would be a waste of the family's funds to embark on contracting another agent, more so the one suggested by the Plaintiff who is known to charge very high fees.

7. I have perused and considered the Plaintiff's application and the response thereto by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I have similarly considered the submissions and authorities to which I was referred by the Learned Advocates for the parties. The 4<sup>th</sup> Defendant, the Third Party and the Interested Party did not have any objection to the Plaintiff's application.

8. These present proceedings were commenced by the Plaintiff against his four uncles – the Defendants herein vide a plaint dated 20<sup>th</sup> February, 2020 wherein the Plaintiff prays for Judgment to be entered against the said uncles for:

*(a) An order for accounts for all rent collected from the suit properties for the years 2014, 2015, 2016, 2017, 2018 and 2019;*

*(b) An order that the Defendants do immediately pay the Plaintiff his equal entitlement to the rent collected from the suit properties for the years 2014, 2015, 2016, 2017, 2018 and 2019 together with interest at Bank rates from due date;*

*(c) An order that all rent accruing from the suit properties be collected, accounted and paid to the registered owners on equal basis by a reputable estate agent firm, such as Tysons Limited;*

*(d) Interest on (b) and (c) above at court rates; and*

*(e) Any other or better relief that this Honourable Court may deem meet and just to grant.*

9. The properties whose accounts for rent are being sought by the Plaintiff are listed in the plaint to include L.R Number Nyeri Municipality Block 1/237; Nyeri Municipality Block III/II; Muhito/Gaturia/890, as well as Plot Numbers 15, 17 and 57 Kiahungu.

10. While they do not deny that the Plaintiff was a beneficiary of the said properties, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants however respond that the rent proceeds have always been shared. In this respect it is their case, that their elder sibling, Samuel Mbutia Kang'aru (now the Third Party) who is also the Plaintiff's father was the one receiving monies due to himself and the Plaintiff. Accordingly the Defendants applied to have the Plaintiffs enjoined herein as the Third Party and have asked him to account for the rental income he has received on behalf of the Plaintiff.

11. Having been enjoined as a Third Party, the Plaintiff's father in his statement of defence filed herein on 14<sup>th</sup> April, 2021 asserts as follows at paragraphs 4 to 6 thereof:

**“4. The 3<sup>rd</sup> Party denies receiving any rent on behalf of the Plaintiff and puts the Defendants to strict proof of their claim.**

**5. The 3<sup>rd</sup> Party states that all the suit properties were bequeathed to the owners by the late Erastus Kangara Wachira vide his will, and that the intention of the said testator was to have his family members provided for adequately.**

**6. However, the Defendants took advantage of the fact that some of the beneficiaries of the said will were minors, and that I am illiterate and decided to manipulate the management of the suit properties for their sole benefit. The Defendants are bound to account to the grandchildren of the testator and I, adequately.”**

12. Perhaps emboldened by the stance taken by the Third Party, Erastus Irungu Njogu, one of the grandsons of the late Erastus Kang'aru Wachira did file an application herein on 13<sup>th</sup> April, 2021 seeking to be added as an Interested Party and to have the Defendants account for the income generated from the properties bequeathed by his grandfather. His application was allowed.

13. Arising from the going, it was the common position between the Plaintiff, his father the Third party, his uncle the 4<sup>th</sup> Defendant as well as the Interested Party herein that they are all, together with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the registered proprietors of the suit properties in common and equal undivided shares since the year 2000. They accuse the Defendants of collecting rent since then through M/S Rawa Enterprises but not accounting or sharing the same as required.

14. While not disputing that initially they shared the properties as suggested by the Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are however particular that the properties were distributed in the year 2010 and that since then, the Plaintiff's share of rent was always collected by his father (*the Third party*) who should account for them. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have also told the court that since the said distribution which sought to place all grandsons under the sons of the late Erastus Wachira Kang'aru, the various individual families had invested heavily on the individual properties given to them and it would be unfair to re-distribute the same or the rent proceeds emanating therefrom as sought by the Plaintiff.

15. I have looked at the agreements purportedly entered into by the family of the late Erastus Wachira Kang'aru on 11<sup>th</sup> December, 2010 and again on 26<sup>th</sup> April, 2019. It is clear to me that the family continues to treat the properties as jointly owned even though the individuals were assigned various portions thereof. That must explain why they continue to be jointly run by M/S Rewa Enterprises and the continued affiliation with the family's business flagship name Kiiria Holdings Company Limited which now appears to be more in the hands of the Defendants.

16. Whatever the case, it was not lost on the court that both the Plaintiff and the Interested Party who have entitlements to the suit properties on their own were not parties to the Agreements executed in the years 2010 and 2019. Those agreements could not therefore divest them of their interests on the suit properties and they remain in my view, co-owners entitled to possession of the suit properties and the proceeds thereof.

17. As co-owners of the properties, both the Plaintiff and the Interested Party are entitled to the protection contemplated under **Article 40 of the Constitution** as well as the rights and privileges granted to a registered owner of land under **Sections 24, 25 and 26 of the Land Registration Act**. There is no reason why the two should continue wallowing in poverty while other co-owners of the suit properties continue to benefit therefrom

18. Arising from the foregoing and in view of the fact that the Defendants are amenable to this matter being subjected to the Court Annexed Mediation, and that various parties may need access to money before this suit is determined, I hereby allow the Plaintiff's application on the following terms;

*(a) Pending the hearing and final determination of this suit, all rental income accruing from all buildings erected on or standing upon the suit properties, namely, L.R. No. Nyeri Municipality Block 1/237; Nyeri Municipality Block III/II; L.R. No. Muhito/Gaturia/890; and Plot Nos 17, 15 and 27 Kiahungu to continue being collected and the same to be deposited in this court.*

*(b) The said rent to be collected by a reputable Estate Agent agreed upon by the parties within 30 days from today failure to which the Deputy Registrar of this court shall appoint a reputable Estate Agent within 45 days from the date hereof from a list of Estate Agents provided by the parties.*

*(c) Either party shall be at liberty to move the court at a reasonable interval for apportionment of the rental income equally and the court shall release to each party their respective share pending the hearing and final determination of the suit.*

*(d) The Deputy Registrar of this court to immediately forward this matter for Court Annexed Mediation.*

*(e) The costs of the application shall be in the suit.*

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2021.**

In the presence of:

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.....

**J. O. Olola**

**JUDGE**