



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. CIVIL APPLICATION NO. E1305 OF 2020**

**BETWEEN**

**HOTSTAR INVESTMENTS LIMITED.....APPLICANT**

**AND**

**MUIGAI COMMERCIAL AGENCIES.....RESPONDENT**

**RULING**

1. The Applicant (“the Company”) commenced this matter by an application dated 15<sup>th</sup> December 2020. In the Notice of Motion made, inter alia, under **Order 40 rule 2(1)** of the **Civil Procedure Act**, the Applicant sought an order compelling the Respondent to write a cheque for KES. 401,000.00 in the name of Margaret Wanjiru for purposes of banking the money in account number 144\*\*\*\*142 held at Equity Bank in the name of Margaret Wanjiru and that the Respondent take back the cheque in the name of HOTSTAR INVESTMENTS LIMITED. The facts and grounds for seeking the order are set out in the face of the application and the supporting affidavit of Margaret Wanjiru sworn on 15<sup>th</sup> December 2020.

2. According to the deposition, as directors of the Company, Eunice Muthoni and Margaret Wanjiru, entered into an agreement with the Respondent to collect rent. Due to disputes regarding the shareholding of the Company, its Bank accounts were closed hence it was impossible for the rent collected to be banked in its account at Family Bank. That in 2018, the Respondent was therefore directed to issue cheques in the name of Margaret Wanjiru in her account at Equity Bank. Despite being instructed to do so, the Company complained that the Respondent wrote a cheque for KES 410,000.00 in the Company’s name despite the fact that the Company resolved that all payments be made the said Margaret Wanjiru.

3. The application was ultimately settled by the following consent recorded on 30<sup>th</sup> December 2020 (“the Consent”):

**1. THAT the application dated 28th December 2020 and this matter is marked as withdrawn with no orders as to costs on the terms hereunder and in terms of the consent dated 28th December 2020 signed by the parties.**

**2. THAT the MUIGAI COMMERCIAL AGENCIES LIMITED, shall continue to remit all due monthly rental collections for HOTSTAR INVESTMENTS LIMITED, less agency deductions, to the Bank Account Number 144xxxxxxxx held at Equity Bank in the names of MARGARET WANJIRU only and not any other Bank Account whatsoever, and that MUIGAI COMMERCIAL AGENCIES LIMITED will continue to act on instructions from the said MARGARET WANJIRU and EUNICE MUTHONI only who are the Bona Fide Directors of the Plaintiff Company and/or on the basis of a Court Order only.**

**3. THAT upon receipt of this Consent for attestation MUIGAI COMMERCIAL AGENCIES shall accept receipt of Cheque No. 021136 dated 14th December 2020 and contemporaneously, the HOTSTAR INVESTMENTS LIMITED shall attest to this Consent immediate upon remittance of rental income fund from MUIGAI COMMERCIAL AGENCIES in the amount of Kshs. 401,100/= (four hundred and one thousand only) to Equity Bank Account No. 144xxxxxxxx in the names of MARGARET WANJIRU and this suit shall be marked as withdrawn.**

4. The Consent precipitated a Notice of Motion dated 24<sup>th</sup> February 2021 by Phyllis Wangari Njoroge, Peter Kuria and Simon Muhia Njoroge (“the Proposed Interested Parties”) seeking to be joined to the matter and to set aside the Consent. The application is supported by the affidavit of Phyllis Wangari Njoroge sworn on the same date. They seek an order that the Respondent be directed to deposit rents

received on behalf of the Company in court or in an account in the Company's name pending the hearing and determination of the suit.

5. The application is supported by Phyllis Wangari Njoroge sworn on 24<sup>th</sup> February 2021. It is opposed through the Notice of Motion dated 15<sup>th</sup> March 2021 on the grounds that the application is *res judicata*. It is supported by the affidavit of Margaret Wanjiru sworn on 15<sup>th</sup> March 2021. The parties have filed written submissions in support of their respective positions. Peter Kuria has also filed written submissions in which he supports the intended interested parties.

6. The Proposed Interested Parties contend that they are directors of the Company who have been locked out of the day to day operations of it as well as administrators of the late Eliud Njoroge Kuria who founded the Company and who represent the interests of the beneficiaries to whom the shares of the Company which is a subject of this proceedings are to be transferred to. They state that what they seek to protect are the Company's funds which, as has been the norm, been divided equally among the beneficiaries of the estate of the late Eliud Njoroge Kuria, but which are now solely being utilized by the Applicant to the exclusion of the other beneficiaries who are dependent of such funds. They reject the claim by the Applicant that they have been distributing the funds to them as there is no evidence of such distribution.

7. Regarding the prayer for setting aside the consent order, counsel for Proposed Interested Parties cited the decision of the Court of Appeal in ***Flora N. Wasike v Destimo Wamboko* [1982 - 88] 1 KAR 625** where the court held that a consent order may be set aside or varied on the grounds of fraud, collusion, if the consent is contrary to the policy of the court, if the consent is given without sufficient material facts or if in general there is a reason which would enable the court set aside the agreement.

8. The Proposed Interested Parties therefore contend that Margaret Wanjiru who came to court did not have the capacity to enter into the consent as she lacked the authority of the Company to institute the proceedings on behalf of the Company itself. They add that the court did not have the opportunity to verify the legitimacy of the consent presented or if the Company consented to the terms of the consent. The Proposed Interested Parties submit that the rent be deposited in an account that will be accountable to all parties and that will avoid diversion of funds. The other proposed interested party, Peter Kuria, supports the position taken by the Proposed Interested Parties.

9. The Company's position is founded on the orders of the court dated 22<sup>nd</sup> September 2020 in **HC COMM. PETITION NO. E003 OF 2020 *Simon Muhia v Eunice Muthoni Kuria and Margaret Wanjiru Kuria*** in which the court ordered that within 60 days of the order, the existing shareholders to ensure that all beneficiaries, who are all adults, obtain their shares and become members of the Company, and that is conditional because if a meeting to elect directors was to be held, then all members would participate. They contend that to the horror of the rest of the beneficiaries, the Proposed Interested Parties have failed to comply, with the requirement that beneficiaries first become members, as they purportedly already held their own Annual General Meeting in which, they purported to appoint themselves as additional directors, because this Court in **PETITION NO E003 OF 2020** refused to interfere with management as prayed, and thus in sheer arrogance, have proceeded to make resolutions touching on management of Company funds, such as directing the Respondent herein, who is the plaintiff's agent, and on the basis of this fraudulent misrepresentation, where to Bank the Company funds and thus occasioning this suit yet their resolutions were null and void. The Company contends that in view of the decision in **PETITION NO. E003 OF 2020**, the present case is *res-judicata*.

10. Before I deal with the application, let me set out a background of the matters in issue. The Company is the owner of a property: LR 209/2788/17. This matter is intimately connected to previous litigation namely **PETITION NO. E003 OF 2020**. The substance of the dispute concerns the Company which was incorporated by the late Eliud Njoroge Kuria, the family patriarch, as a property holding company. At the time of his death, the deceased held 90 shares while Eunice Muthoni held 10 shares. The family members applied for and Peter Kuria, Bernard Njoroge, Simon Muhia and Phyllis Wangari Njoroge were granted letters of administration intestate for the estate of the deceased on 10<sup>th</sup> June 2011 in **Nairobi HC Succession Cause No. 2423 of 2010**. The grant was confirmed by a judgment dated 10<sup>th</sup> May 2019. A Certificate of Confirmation was issued distributing the deceased's 100 shares to the deceased's two houses as follows: 67 shares to the 1<sup>st</sup> family comprising Margaret Wanjiru, Peter Kuria, Lucy Wanjiku, Nelly Nduta, Bernard Njoroge, Eunice Muthoni and Geoffrey Kiarie and 27 shares to the 2<sup>nd</sup> family comprising Phyllis Wangari, Simon Muhia and Joseph Kuria.

11. Some of the prayers sought in **PETITION NO. E003 OF 2020** concerned management of the Company property and collection of rent from the said property as follows:

[a] *Leave be granted to the Petitioner/Applicant to continue with the suit for the benefit of the affected party as a derivative action.*

[b] *A declaration be made by this Honourable Court that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants are not directors of the affected party (Hotstar Investments Limited).*

[c] *A permanent mandatory injunction to prevent the 2<sup>nd</sup> defendant herein from diverting the rental proceeds into her own personal account.*

[c] *An Order be made that the affected party's (Hotstar Investments Limited) revenue collected from the rental proceeds be deposited in an account in the company's name.*

[d] *An Order be made that the affected party's (Hotstar Investments Limited) revenue collected from the rental proceeds be deposited in an account in the company's name.*

[e] *An order for the Respondents to render accounts and furnish the petitioner & the Honourable Court with detailed financial accounts from the year 2014 to date.*

[f] *An order be made that a general meeting of Hotstar Investments Limited be convened to appoint another director(s) to act with the continuing director and to streamline the operations of the 3<sup>rd</sup> defendant company.*

12. I heard the matter and as regards the relief sought concerning the management of the Company and its property, I stated as follows:

*Prayers (b), (e) and (f) of the petition, which I have set out above, deal with matters ordinarily dealt with at the Company Annual General meeting. Prayers (c) and (d) concern management of the Company which ordinarily vests in the directors of the Company. It is therefore evident that the dispute in this case can only be resolved by having a General Meeting to appoint new directors who will deal with the issues concerning the management of the Company. The Company directors have the power and authority to deal with the way the Company property is managed, where and how the Company's is secured and expended. In addition, the management has the responsibility of maintaining and compiling books of account to be tabled at the General Meeting.*

13. I then considered fact that the Company's management was in flux as a result of failure to wind up the affairs of the estate of the deceased patriarch and concluded the matter as follows:

*[11] Another issue of concern which must be dealt with in order to move forward, is that the administration of the deceased's estate must now be completed by ensuring that each beneficiary of the deceased shares is entered on the register of shareholders. This must be done as a matter of urgency and should be part of the agenda of the proposed meeting and for the new members to elect new directors to manage the affairs of the Company.*

*[12] I now invite submissions on the proposed directions of the meeting to held by the Company before I make final orders on the matter.*

14. Following the submissions referred to, I made the following order on 22<sup>nd</sup> October 2020 thereby concluding the matter:

*[1] The first order of business shall be for the current shareholders to ensure that all beneficiaries, who are all adults, obtain their shares and become members of the Company.*

*[2] The General Meeting for that purpose shall be held within 60 days from the date hereof.*

*[3] Thereafter the new members shall at an appropriate meeting elect directors to run the Company.*

*[4] There shall be no order as to costs for this application.*

15. I have had an advantage of dealing with **PETITION NO. E003 OF 2020** which was filed by the Proposed Interested parties seeking relief from oppression. I concluded the matter by giving clear directions on how the Company's matters should be resolved with finality. It was my understanding of the affairs of the Company that I dealt with the present application brought by the Company and allowed the consent which is now the subject of the application.

16. I agree with the Company to the extent that allowing the application for joinder and setting aside the consent would be, in effect, re-litigating the issues I directed be dealt with in **PETITION NO. E003 OF 2020**. The substance of the dispute is whether the Company can deposit the rent income from the Company's asset in the account of one of its directors. As I stated in the previous ruling, how the asset and its income is controlled is a matter of the management. Further, permitting the interested parties to join these proceedings and litigate the matter would re-open the matter which I dealt with in **PETITION NO. E003 OF 2020** where I held the matter was one for management.

17. The directions to the directors of the Company and the beneficiaries of the Estate of late Eliud Njoroge Kuria were in order to wind up the Estate and ensure that all beneficiaries are members of the Company. The shareholders of the Company will then give directions to the Company's management on all issues relating to its assets including entering into agreements with third parties and calling for accounts in the hand of any of the directions. In my view, any further litigation will undermine the orders I have made and will open another parallel line of litigation. I emphasise that the parties must endeavour to comply with my orders in **PETITION NO. E003 OF 2020** and if any issues arise in regard then the court should be moved in that case.

18. For the reasons stated, I dismiss the Notice of Motion dated 24<sup>th</sup> February 2021. As this is a family matter, each party shall bear its costs.

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> day of APRIL 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Mwaura instructed by Mwaura Kelvin Karuga and Associates Advocates for the Applicant

Mr Okeyo instructed by Kioko Munyoki and Company Advocates for the Proposed Interested Parties.

Mr Peter Kuria in person.