



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E408 OF 2019

SARAH WANGARI KANGARI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF
JOSEPH KANGARI MUU (DECEASED)).....PLAINTIFF

VERSUS

SERAH MWERU MUHU.....1ST DEFENDANT

J. M. KANGARI & J. K. MUHU INVESTMENTS COMPANY LIMITED.....2ND DEFENDANT

VARIANT REALTOR LIMITED.....3RD DEFENDANT

AND.

JAMES MUGO KANGARI.....1ST INTERESTED PARTY

TIMOTHY KAMAU KANGARI.....2ND INTERESTED PARTY

RULING

(On Notice of Preliminary Objection by the Defendants Dated 17th December 2019)

Introduction

1. By notice of Preliminary Objection (hereafter PO) dated 17th December 2019, the Defendants asked this Court to strike out this suit on the ground that it lacks jurisdiction to hear and determine the suit on the following grounds:-

- a. That the suit is incurably and/ or fatally defective and incompetent as there exists a similar suit between the same parties over the same subject matter being **HCCC No. E045 of 2018- Sarah Wangari Kangari vs. J. M. Kangari & J. K. Muhu Investments Company Limited & 2 Others** scheduled to be heard on 4th March 2020.
- b. That the entire suit and the Motion flies in the face of the mandatory provisions of **Section 6 of the Civil Procedure Act** and therefore the same should be struck out in limine with costs to the Defendants.
- c. That the suit is fatally and incurably defective for want of authority of the Co-administrator of the Estate of the Plaintiff and by virtue of the Court of Appeal decision of **Zeinab Khalifa Khator & 4 Others vs Abdulrazak Khalifa Salim & Another, Civil Appeal No. 102 of 2016**, the same is a non-starter.
- d. That the Orders sought as framed are incapable of being granted at an interlocutory stage of the proceedings.
- e. That the Plaintiff/Applicant in the suit lacks locus to institute the present proceedings and seek for the reliefs sought both at an interlocutory stage and in the final Orders.

f. That the entire suit and the motion lacks both legal and factual basis as the Plaintiff is yet to become a shareholder and/ or director of the 2nd Defendant company.

2. In opposition to the PO, the Plaintiff filed a Replying Affidavit sworn on 30th January 2020 by **Sarah Wangari Kangari**, the Plaintiff's Widow/ Administratrix and the biological mother of the Interested Parties.

Background

3. The Plaintiff instituted this suit by way of Plaint dated 14th November 2019 seeking judgement against the Defendants jointly and severally for:-

a. An injunction do issue compelling the Defendants whether by themselves, their agents and/ or servants from collecting rent from the property L. R. No. 209/940 also known as Kilimambogo House.

b. This Honourable Court be pleased to issue an order that all rent collections relating to the property L. R. No. 209/940 also known as Kilimambogo House be made, preserved and managed by the Forty Pearl Limited.

c. In the alternative the court be pleased to issue an order compelling the Defendants to pay the estate of Joseph Kangari Muhu (Deceased) the sum of Kenya Shillings Two Million One Hundred and Seventy Five Thousand (Kshs. 2,175,000/=) per month being such reasonable provision to pay for the upkeep and education of the children and dependants of the deceased pending the hearing and determination of this suit.

d. An order do issue compelling the Defendants to prepare and file in court the proper books of account under their management and control, declaring and disclosing all the rents collected from the property L. R. No. 209/940 also known as Kilimambogo House from the year 2014 to date.

e. In the alternative that the Court do appoint an Auditor to carry out an audit of the book of accounts of the company and submit its report to Court.

f. An order do issue compelling the 3rd Defendant to furnish the Plaintiff with the particulars of all the tenants in occupation of the property L. R. No. 209/940 also known as Kilimambogo House.

g. Costs of this suit.

h. Any other relief that this Honourable Court may deem fit to grant.

4. Alongside the Plaint, the Plaintiff filed a Notice of Motion Application on 15th November, 2019 seeking, among others, orders that:-

a. This Honourable Court be pleased to issue an order that all rent collections relating to the property L. R. No. 209/940 also known as **Kilimambogo House** be made, preserved and managed by the **Forty Pearl Limited** pending the hearing and determination of this suit.

b. In the alternative the court be pleased to issue an order compelling the Defendants to pay the estate of **Joseph Kangari Muhu (Deceased)** the sum of Kenya Shillings Two Million One Hundred and Seventy Five Thousand (Kshs. 2,175,000/=) per month being such reasonable provision to pay for the upkeep and education of the children and dependants of the deceased pending the hearing and determination of this suit.

c. An order do issue compelling the Defendants to prepare and file in court the proper books of account under their management and control, declaring and disclosing all the rents collected from the property L. R. No. 209/940 also known as **Kilimambogo House** from the year 2012 to date.

d. An order do issue compelling the 3rd Defendant to furnish the Plaintiff with the particulars of all the tenants in occupation of the property L. R. No. 209/940 also known as **Kilimambogo House**.

e. That the said orders to be enforced by the Officer Commanding Station, **Central Police Station**.

5. On 18th December, 2019, this Court directed that the PO is disposed of first.

Submissions

6. When the matter came up for hearing on 17th May 2021, the Parties agreed to canvass the PO by way of written submissions. The 1st and 2nd Defendants' submissions dated 14th December 2020 were filed by **Kanyi Ndurumo & Co. Advocates**. The Plaintiff's submissions dated 29th January 2021 were filed by **Atuti & Associates Advocates**.

The Defendants' submissions

7. The Defendants submitted that the Plaintiff's suit is incurably and/ or fatally defective and incompetent as there exist similar suits between the same parties over the same subject matter, that is, **HCCC No. E045 of 2018-Sarah Wangari Kangari vs. J. M. Muhu Investments Company Limited & 2 Others** and **HCCC No. 16 of 2018-James Muhu Kangari (Administrator of the estate of the late Joseph Kangari Muhu vs. Muhu Holdings Limited and Serah Mweru Muhu)**. It was pointed out that in this matter 2 Notice of Motion applications were made by the Plaintiff against the Defendants and these resulted in the Court delivering 2 different rulings on 20th April, 2018 and 5th April 2019.

8. In addition, the Defendants stated that several applications were made between the parties in **Succession Cause No. 1027 of 1989**, in the matter of the estate of **James Muhu Kangari** which culminated in the Rulings dated 12th May 2017 and 23rd May 2019 by **Hon. Musyoka, J.** and **Hon. Ali-Aroni, J.** respectively. There was also **Court of Appeal Civil Application No. 165 of 2017 Sarah Wangari Kangari vs. Serah Mweru Muhu & Muhu Holdings Limited** and **Court of Appeal Civil Appeal No. 123 of 2018 – Sarah Wangari Kangari vs. Sarah Mweru Muhu & Muhu Holdings Limited**.

9. The Defendants relied on the cases of **Republic vs. Registrar of Societies - Kenya & 2 others Ex-parte Moses Kirima & 2 others** and **Kampala High Court Civil Suit No. 450 of 1993 – Nyanza Garage vs. Attorney General** concerning the conditions that must be shown to exist for the principle of *res sub judice* to apply and the rationale for the principle which were cited with approval in **ASL Credit Limited vs. Abdi Basid Sheikh Ali & Another [eKLR] HCCC No. E111 of 2018**. They also relied on the case of **Zeinab Khalifa Khator & Others vs. Abdulzarak Khalifa Salim & Another, Civil Appeal No. 102 of 2016**, submitting that the Plaintiff did not seek the consent of her co-administrator and son, **James Muhu Kangari** to file the instant suit.

10. The Defendants also contended that the Plaintiff lacks the locus standi to institute the proceedings. They expounded that this is because the Plaintiff has not disclosed that the suit has been filed for the benefit of the estate of **Joseph Kangari Muhu (deceased)** and its beneficiaries and is yet to become a shareholder and/ or director of the 2nd Defendant company.

11. The Defendants further submitted that the Plaintiff cannot seek for the reliefs sought both at an interlocutory stage and in the final orders. In this regard, the Defendants cited the case of **Kenya Electricity Transmission Company Limited vs. Kitobu Limited [2019] eKLR, E.L.C. No. 107 of 2019** and **Nation Media Group & 2 others vs. John Harun Mwau [2014] eKLR, Civil Appeal No. 298 of 2005** where the courts found that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of a special circumstance.

The Plaintiff's Submissions

12. The Plaintiff submitted that the allegation of *res sub judice* is far-fetched and only meant to divert the attention on real issues before the Court. The Plaintiff filed **Nairobi HCCC No. E045 of 2018 – Sarah Wangari Kangari vs. J. M. Kangari & J. K. Muhu Investments Company Limited, Muhu Holdings Limited and Serah Mweru Muhu**, the same was withdrawn on 14th November 2019 and the Defendants' advocates served with the Notice of Withdrawal of the said suit before filing of the instant suit.

13. Challenging the Defendants' contention that there is no authority from the co-administrator to file this suit, the Plaintiff's Advocates referred to the **Zeinab Khalifa Khator case**. It was further submitted that the Plaintiff's application dated 14th November 2019 seeks provision for beneficiaries and accountability for the management of the property left for the estate of **Joseph Kangari Muhu (deceased)** and the same orders can be granted at the interlocutory stage as granting the orders will not determine the case.

14. In addition, it was submitted that the Plaintiff was appointed director of **J. M. Kangari and J. K. Muhu Investments Company Limited**, and was granted the shares in the said Company to hold in trust for her own children by virtue of the Certificate of Confirmation of Grant issued on the 8th of April 2014 and therefore nothing stops the Plaintiff/ Applicant from approaching this Honourable Court to seek order for the interest of the survivors of the deceased's estate, the co-administrator included. Further, it was submitted that the Plaintiff has the power as the Administratrix to collect and preserve all the assets of the late **Joseph Kangari Muhu (deceased)** for distribution to the beneficiaries of the said estate.

Analysis and determination

15. I have considered the PO, the Reply and the respective rival submissions. The issues arising for determination in the matter are whether this suit is *res sub judice*; whether the Plaintiff's co-administrator's consent to file this suit was required and whether the Plaintiff has the locus standi to bring the suit and whether the Plaintiff can seek for the reliefs sought both at an interlocutory stage and in the final orders.

16. In the case of **Mukisa Biscuits Ltd vs West End Distributors Ltd [1969] EA 696** the Court of Appeal for East Africa defined a preliminary objection in the following terms:-

“A preliminary objection is in the nature of what used to be called a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Whether this suit is res sub judice

17. The principle of *res sub judice* is provided for under **Section 6 of the Civil Procedure Act, Cap 21, Laws of Kenya**, as follows:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having

jurisdiction in Kenya to grant the relief claimed”

18. I have perused the court file and I find that on 14th November 2019 the Plaintiff filed a Notice of Withdrawal of Suit dated 7th November 2019 in respect of **HCCC No. E045 of 2018**. I also note that the same was served on the Defendants’ advocates on 14th November 2019. Therefore, I find that the doctrine of *res sub judice* fails in this case.

19. I also note that in the affidavit of the 1st Interested Party, **James Muhu Kangari** sworn on 3rd December 2019, all the previous suits between the parties have been set out. However, the Defendants’ have not challenged nor demonstrated that the present suit is defective on grounds of *res judicata*.

Whether the Plaintiff’s co-administrator’s consent to file this suit was required and has the locus standi to bring this suit

20. As to whether the Plaintiff’s co-administrator’s consent to file this suit was required, I have looked at the **Zeinab Khalifa Khator case (supra)** which was relied on by both the Plaintiff and the Defendants. According to the Defendants’, the Court of Appeal had cited with approval an English decision of **Hancock v Lightfoot 3 SW & TR. 555 page 1391** delivered on 14th July 1864 where **Sir J.P Wilde** stated:-

“When a joint administration is granted to two persons, they together make but one administrator. Can one of them act without the other? Would not the proper course be for Miss Hancock to renounce, and then that administration should be granted to the cestui que trust?”

21. In the **Zeinab Khalifa Khator case (supra)** the appellants’ counsel had relied on the aforementioned case to support his argument that the Court could not entertain two separate applications filed by two administrators who were appointed as joint administrators. Interpreting the above provisions, this is what the Court of Appeal observed:-

“Apart from the above case being so ancient, a reading of the basic facts of the case reveal that, the estate of Mr. John Hancock was left to a trustee who also died and the issue was whether one administrator could be appointed out of his three children where one could not be found and the other had died. Moreover, we have not come across any provisions in the Law of succession and also the Probate and Administration Rules of Cap 160 laws of Kenya that prohibit joint administrators from seeking different orders from court. Indeed in our view what would be prohibited is one administrator dealing with the assets of the estate singularly where there is joint administration.”

[11] It is also necessary to state that until the estate of a deceased person is fully administered and distributed, the Court is actively involved. From experience many joint administrators fail to agree on the mode of distribution and make all manner of applications in court for directions and orders on the mode of distribution or administration of the assets. Section 47 of the Law of Succession, gives the High Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. We also wish to point out that this issue of jurisdiction was also not raised before the High Court, and as was rightly pointed out by Mr. Hanyaga, learned counsel for the 2nd respondent, a question of jurisdiction ought to be raised at the earliest opportunity and in any event, an issue that is not predicated on grounds of appeal cannot be canvassed in submissions. We therefore find no merit in the first issue that incorporated several grounds of appeal touching on what counsel for the appellant referred to as “discordant applications”.

22. From my reading of the above excerpt, it is clear that there is no prohibition on joint administrators seeking different orders from court. Therefore, I am inclined to agree with the Plaintiff’s position in this regard.

23. As regards the *locus standi* to sue, it is not disputed that the Plaintiff is an administrator of the estate of **Joseph Kangari Muhu (deceased)** as evidenced by the Grant of Letters of Administration Intestate dated 26th April 2013 and the Certificate of Confirmation of Grant dated 8th April 2014. I also find no merit on the Defendants’ claim that the entire suit and the motion lacks both legal and factual basis as the Plaintiff is yet to become a shareholder and/ or director of the 2nd Defendant company. I have looked at the record and I find that the copy of the CR12 of the 2nd Defendant company dated 3rd March 2014 shows that as at that date, the Plaintiff was a director of the 2nd Defendant. Therefore, this ground also fails.

Whether the Plaintiff can seek for the reliefs sought both at an interlocutory stage and in the final orders

24. Finally, regarding the issue of whether the Plaintiff can seek for the reliefs sought both at an interlocutory stage and in the final orders, it is my considered view that this is an issue that goes into the merits of the Plaintiff’s claim. The same applies to the Defendants’ contention that the property which is the subject of the suit is not listed amongst the properties to be distributed under the Confirmation of Grant of the estate of **Joseph Kangari Muhu (deceased)**. It is not proper for a party to bring a preliminary objection based on matters which ought to be resolved judicially. This was clearly set out in the **Mukisa Biscuits Ltd case (supra)**. I am further guided by the Supreme Court of Kenya in the case of **Independent Electoral and Boundaries Commission vs. Jane Cheperenger & 2 Others [2015] e KLR** which, expounding on the same point, stated as follows:-

“1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.

2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. In the instant case the prayer for consideration of extension of time to file a notice of appeal out of time tied with a claim that the issue had been overtaken by events was a factual issue, to be established by evidence from both parties. Therefore the Court was unable to dispose of the question, without first evaluating evidence from the parties. It raised no pure point of law on its own.

3.

4. The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

Disposition

25. The totality of my analysis is that the Preliminary Objection dated 17th December, 2019 is without merit. I accordingly dismiss it with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH JULY, 2021

G.W.NGENYE-MACAHRIA

JUDGE

In the presence of:

1. Ndurumo for the Defendants/ Objectors.

2. Nyangoro for the Plaintiff.

3. Waweru for the Interested Parties.