



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

HCCC NO.16 OF 2018

**JAMES MUHU KANGARI (Administrator of the
estate of the Late Joseph Kangari Muhu).....PLAINTIFF**

VS

MUHU HOLDINGS LTD.....1ST DEFENDANT/RESPONDENT

SERAH MWERU MUHU.....2ND DEFENDANT/RESPONDENT

RULING

1. What remains for consideration in the Notice of Motion of 11th January 2018 is a request for the following prayers:-

(4) THAT the Honourable Court do issue an order suspending any further operations, management and activities of the 1st Respondent Company in respect of the Estate of James Muhu Kangari (Deceased) under its management pending the hearing and determination of this Application and that of the main suit.

(5) THAT an order do issue compelling the 1st Respondent Company to prepare and file in Court the proper books of account of the Estate under its management and control, declaring and disclosing all the assets and liabilities of the Estate including all other properties that are not contained in the schedule of the trust deed but belonging to the estate pending the hearing and determination of the main suit.

(6) THAT pending the hearing and final determination of the matter herein the Honourable Court be pleased to issue an order directing that all the rents and proceeds collected from the estate herein Muhu Holdings Ltd be deposited in Court forthwith until further orders of the Court.

(7) THAT pending the hearing and final determination of the matter herein the Honourable Court be pleased to issue an order directing the 1st Respondent Company to include the administrators of the Estate of Joseph Kangari Muhu or any other family member of their choice as a Director(s) of Muhu Holdings Ltd to replace JOSEPH KANGARI MUHU.

(8) THAT pending the hearing and determination of the suit herein the Honourable Court do issue an order directing the Respondents to file in Court Audited Accounts for the Company from the year 2012 to date.

(9) THAT the Honourable Court do order the 1st Respondent to pay the Estate of JOSEPH KANGARI MUHU all his entitled dues and salaries due to the said JOSEPH KANGARI MUHU.

(10) THAT the Respondents do bear the costs of the application herein.

2. Whilst the Motion is anchored under some provisions of the Civil Procedure Code, it is said to be also founded on the provisions of Sections 122 and 123 of the Companies Act 2015.

3. The Plaintiff, alongside his mother Sarah Wangari Kangari are administrators of the Estate of Joseph Kangari Muhu (hereafter referred to as Muhu). In turn Muhu was the son of Joseph Muhu Kangari (Kangari) who is also deceased. In that way the Plaintiff is the grandchild of Kangari, a fact conceded to by Serah Mweru Muhu (the 2nd Defendant) the wife of Kangari and grandmother to the Plaintiff.

4. In his lifetime Kangari acquired what would appear to be substantial property in the Kenyan context and was a subscriber of Muhu Holdings Ltd (the 1st Defendant or the Company) (see a copy of the Memorandum of Association and Articles of the Company).

5. The common evidence available is that after the death of Kangari, the Estate of Muhu has been unhappy about the administration of the Estate of Kangari and the management of the 1st Defendant and a dispute arose. That dispute found its way to the Family Court in Nairobi Succession Cause No. 1027 of 1989 (In the matter of The Estate of James Muhu Kangari) (hereafter the Succession cause).

6. Although the Estate of Muhu had in the Succession Cause matter sought some orders against and in respect of the company, Hon. Musyoka J. made the following observations in a Ruling of 12th May 2017:-

“12. I shall determine the applications dated 21st October 2014 and 24th June 2016 simultaneously as they principally seek orders against a limited liability company. The said company is not a party to the succession cause. It is in a sense an asset for distribution, to the extent that the deceased's shares in it are distributed in the will the subject of these proceedings. The company is a separate legal entity from the persons who hold shares in it. The law which governs limited liability companies is the Companies Act, Cap 486, Laws of Kenya, in terms of the formation, operations and liability of Companies. Any orders against a limited liability company by persons who claim entitlement to shares in and directorship of the company can only be properly brought within the framework of the Companies Act, in proceedings properly brought before a commercial court as opposed to a probate court. I need not say more”.

7. This Court in a Ruling of 20th April 2018 took a similar view that matters in respect to the management of the affairs of the Company belonged to the Commercial Division of the High Court.

8. In a Plaint presented to Court on 15th January 2018, the Plaintiff asserts that the beneficiaries of the Estate of Muhu are entitled to shareholding in the Company as well as in its management. He complains that since the demise of Muhu, the Estate has been excluded from the management of the Company. Further that the Company has failed to transfer the shares owned by the Estate of Muhu into the name of its beneficiaries or to appoint any of the administrators to the Estate as a Director. The Defendants are accused of mismanaging the Company and failing to render full disclosure of the Company assets and liabilities and to render accounts. Ultimately, the Plaintiff seeks the following orders:-

1. An order of permanent injunction do issue restraining the Defendants from harassing, intimidating or evicting the Plaintiff, his family and his mother SARAH WANGARI KANGARI from the property known as L.R No. Dagoretti/Ruthimitu/177.

2. THAT an order do issue compelling the 1st Respondent Company to prepare and avail an up-to-date Company records of directors and shareholders, audited Accounts and give full disclosure of all the rent collections and properties under its management from the year 2012 to date.

3. THAT an order do issue directing the 1st Respondent Company to include the administrators of the Estate of Joseph Kangari Muhu or any other family member of their choice as a Director(s) of Muhu Holdings Ltd to replace the late JOSEPH KANGARI MUHU.

4. THAT the Honourable Court do order the 1st Respondent to pay to the Estate of JOSEPH KANGARI MUHU all his entitled dues and salaries due to the beneficiaries of the said JOSEPH KANGARI MUHU (deceased).

9. One can sketch the background to the dispute from the uncontroverted material placed before this Court. I say uncontroverted because a substantial amount of that material was contained in the supporting affidavit of the Plaintiff sworn on 11th January 2018 and whose contents were not disputed in the Repling Affidavit of the 1st Defendant sworn and filed on 24th January 2018.

10. Kangari left a Will made on 22nd July 1986. After making specific bequests to his wife, children and one Samuel Muhu Ruringi, he declared,

“I direct that all the other properties or shares of my properties registered in my name or jointly in my name and in the name of my children or my wife, which is held in trust for me, save the property requited under clause (2) and (3) hereof, and all other movable property and businesses be transferred to Muhu Holdings Limited which shall manage the same”.

In the same Will, he gave his wife (the 2nd Defendant), Muhu and his four Daughters one share each in the Company and directed that each be appointed as Directors thereof.

11. In a Declaration of Trust made on 31st January 1995 which partly effectuated the directive of Kangari, some properties and businesses of his Estate were transferred to Muhu Holdings Limited.

12. Another significant development was the Special Resolution reached on 15th January 1995 which, inter alia, made some amendments to the Articles of Association. The amendments shall be discussed in greater detail later in this decision as they may have a bearing on the outcome of the matter at hand.

13. A search at the Registrar of Companies dated 27th February 2013 reveals the following shareholding of the Company:-

<u>Name</u>	<u>Share</u>
Sera Mweru Muhu	20
Joseph Kangari Muhu	4
Gachiku Kangari	1
Waithera Kangari	1
Wanjiru Muhu	1
Estate of Wambui Janda.....	1

Other than the Estate of Wambui Janda the others were Directors of the Company. But of course at the time of the search Muhu had died, having passed on 14th October 2012.

14. When this matter came up for hearing on 14th February 2019, Mr. Kimathi for the Plaintiff told Court that he would be relying on his written submissions of 5th October 2018 and oral arguments made on 25th January 2018. Mr. Ndurumo for the Defendants sought to rely only on the oral arguments made on behalf

of his clients on 25th January 2018. To be noted is that the arguments made on 25th January 2018 were very substantially in respect to the preliminary objection of 24th January 2018 raised by the Defendants and on which the Court gave a decision on 20th April 2018.

15. An observation needs to be made as the Court turns to determine the application. The first is that prayers (6) (7) (8) and (9) of the application before Court are literally the same as prayers (2),(3) and (4) of the Plaint. In that sense many of the prayers sought in the Motion are of mandatory nature as to grant them will be to practically determine the main suit. But the law is that, absent special circumstances, an order of mandatory injunction will not be granted at an interlocutory stage. It will only be granted in clearest of cases and where, inter alia, the Court is satisfied that the matter ought to be decided at once. The Court must be satisfied that the case is unusually strong and clear. See Tom Onyango vs. Mimosa Investments Ltd [2017] eKLR where the Court of Appeal after setting out the principles for grant of a mandatory injunction at the interlocutory stage, stated,

“In exceptional case, the Court has discretion to grant an Interim relief although it amounts to granting the final relief itself prayed in the suit”.

16. The evidence available is that upto the time of his death, Muhu held 4 shares in the Company. Further evidence is that the Plaintiff and Sarah Wangari Kangari (Muhu’s wife) are co-administrators of the Estate of the Deceased. The special resolution of 15th January 1995 made significant changes to Article 14 of the Articles of Association of the Company which relates to the Transfer and Transmission of shares.

17. Of relevance to the matter at hand is the new Article 14(b) which reads;-

“On the death of any shareholder, the sons and/or daughters of the deceased shall inherit the share(s) of the deceased PROVIDED that the Executors or Administrators of such Estates, shall not have the right to vote in respect of such shares”.

18. It being a family Company Kangari the subscriber and founder, was keen to keep the ownership of the property within his lineage and so to accord with the wishes expressed in his Will the following Article was introduced:-

“Article 14(a). No share or part thereof shall be transferred to any person other than SERAH MWERU MUHU who is not a descendant of JAMES MAHU KANGARI (Deceased)”.

Sarah Mweru Muhu (the 2nd Defendant) is the wife of Kangari and could not be his descendant hence exemption.

19. It is not disputed that the Plaintiff is the son of Muhu who was the son of Kangari and so the Plaintiff is a descendant of Kangari. The Plaintiff has one sister and one surviving brother. It would therefore seem that the Plaintiff, his brother Timothy, his sister Sally and the lineage of his late brother Joel are entitled to inherit the 4 shares of Muhu in the Company (on so far as they are descendants of Kangari).

20. Article 14(e) is then instructive on the role of Directors in terms of registering any transfer of share and it provides,

“(e) The Directors may refuse to register any transfer of share (1) where the Company has a lien on the share, or (2) where they are not satisfied that the proposed transferee is SERAH MWERU MUHU or a descendant of James Muhu Kangari”.

21. Although the 2nd Defendant takes the position that the Plaintiff is not a shareholder or director of the Company she is silent as to whether or not the Plaintiff is a descendant of Kangari. This Court takes the view that on the material before it, the Plaintiff not only being the administrator of the Estate of Muhu but also a descendant of Kangari is, along with his siblings who are descendants of Kangari, entitled to a

transfer of shares of Muhu in the Company and has an identifiable interest therein. The Court cannot help but note that in the Extraordinary General Meeting of the Company of 15th of January 1995, it was resolved that the shares of the late Wambui Muhu who was a daughter to Kangari would be transferred to be held jointly by her 3 children. It is not clear to this Court why the children of Muhu should not be treated in like manner.

22. One of the complaints by the Plaintiff is that the Defendants have failed to disclose the assets and liabilities of the Company and to avail the accounts of the Company to the Estate of Muhu. This failure is not disputed in the reply filed by the Defendants. Counsel for the Plaintiff submits that under the provisions of section 114(3) of the Companies Act (Act No.17 of 2015), a member of a Company has a right to a copy of the Company's annual financial statement and reports. That really is the position. In the matter at hand, the shares of Muhu have not been transferred or transmitted to the Plaintiff and technically the Plaintiff is yet to be a member of the company. That said, so far as one of the grievances of the Plaintiff is that the Defendants have failed to transfer those shares to the beneficiaries of Muhu and there is fairly strong evidence that he is entitled to be a member, the Court holds that the Plaintiff is entitled to the financial statements and reports for the Company even at this interlocutory stage. The Plaintiff is entitled to audited accounts of the Company and a disclosure of the assets and liabilities of the Company. This is information that does not have to await the hearing of this matter as it is information that the Plaintiff may need to prove his case against the Defendants.

23. As to whether this Court can direct the 1st Respondent to include the administrators of the Estate of Muhu or any other family member of their choice as a Director to replace Joseph Kangari Muhu, the answer would have to be found in the manner in which the Articles of the Company provide for the election or appointment of Directors.

24. At the time of his demise, Muhu was a Director of the Company. The Articles of the Company on Directors do not provide that upon the demise of a Director, a person taking his shares automatically becomes a Director in place of the deceased Director. The Articles of the Company however saves the application of Article 91 to 97 of Table "A" of the Repealed Companies Act (Cap 486) to the affairs of the Company. Articles 95 and 97 of Table "A" have provisions of filling a casual vacancy. Although a casual vacancy is not defined, it is a vacancy due to an unexpected event and a vacancy on account of death may well be a casual vacancy. Article 95 reads:-

"95. The directors shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at such meeting".

While 97 reads:

"97. The company may by ordinary resolution appoint another person in place of a director removed from office under regulation 96, and, without prejudice to the powers of the directors under regulation 95, the company in general meeting may appoint any person to be a director either to fill a casual vacancy or as an additional director. A person appointed in place of a director so removed or to fill such a vacancy shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director".

25. It seems to this Court, and this is a tentative view taken on account of the material available, that the vacancy left by Muhu could be filled by appointment by the remaining Directors or through an election in a General meeting of the Company. This Court is not certain therefore that it should or can direct the Company to include the administrators of the Estate of Muhu or any family member of their choice as a Director thereof.

26. I turn now to the prayer that this Court suspends any further operations, management and activities of the Company until the hearing and determination of the main suit. This is a very drastic order to make. To grant it would be to halt the operations of the Company. The business of a Court is not to interfere with the internal management of a Company unless there is clear and cogent evidence of mismanagement or fraud. Although the Plaintiff alleges mismanagement, he does not give any specifics nor provides proof. That order will not be granted.

27. In respect to the prayer that all rents and proceeds collected from the Estate be deposited in Court until further orders, this Court considers that an order of account would help reveal if the rental income has been misapplied or misused. The manner in which rent is been collected currently and applied has been subsisting since the death of Muhu in 2012 and it is not explained why the Plaintiff took about 6 years to seek the change.

28. Prayer 9 seeks as follows:-

“(9)THAT the Honourable Court do order the 1st Respondent to pay the Estate of JOSEPH KANGARI MUHU all his entitled dues and salaries due to the said JOSEPH KANGARI MUHU”.

This clearly is an order that can only be made after full hearing and when the Plaintiff has proved that some monies and salaries are due to the Estate of Muhu.

29. The upshot is the Court allows prayers 5 and 8 only of the Notice of Motion of 11th January 2018. For clarity the disclosure and accounts shall be in respect to all property in the name of and under the management of the 1st Defendant and the business of the 1st Defendant. The report and accounts to be filed and served upon the Plaintiff within 60 days of this Order. As there is only part success on the part of the Plaintiff, each side shall bear its own costs on the application.

Dated, Signed and Delivered in Court at Nairobi this 5th day of April, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Kihenjo h/b Kimathi for Plaintiff

Ndummo for Respondents

Nixon - Court Assistant