



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 278 OF 2018

JULIUS IRUNGU KIMANI.....PLAINTIFF

VERSUS

MARY WAITHANGA KAIHU

EDWARD CHEGE (Sued as the

administrator of the estate of the late Kaihu Karugo)...DEFENDANTS

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 5th December 2018 was brought pursuant to the provisions of Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules (2010), Section 3A of the Civil Procedure Act and all enabling provisions of the Law. Prayer No 1 was spent. Prayer No (2) was partially spent. It sought the following prayers:-

1. Spent.

2. The court do grant a temporary injunction to restrain the defendants/respondents from receiving from Pinnacle Value Ltd or any other party the monies due on account of Kaihu Karugo (deceased) as partnership proceeds from Kenda Boarding and Lodging Business pending the hearing of this application *inter partes* and thereafter pending further orders of this Honourable Court.

3. The defendant/respondents be restrained by a further temporary injunction from receiving, managing, wasting or using, alienating, disposing of the shares in the name of Kaihu Karugo in KENDA BOARDING AND LODGING business until accounts are taken and the respective shareholding of Kaihu Karugo (deceased) and Kimani Gachau (deceased) in the said business is ascertained to the satisfaction of the plaintiff/applicant.

4. The cost of this application be granted to the plaintiff/applicant.

2. The Applicant's Written Submissions were dated 20th February 2019 and filed on 21st February 2019 while those of the Respondents were dated 4th March 2019 and filed on 6th March, 2019.

3. Parties asked this court to deliver its decision based on Written Submissions that they fully replied upon. The said Ruling is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The present application was supported by the Plaintiff's Affidavit that was sworn on 5th December 2018.

5. He stated that he was the administrator of the Estate of his father, Kimani Gachau (hereinafter referred to as "the deceased") who died in 1969. He said that his mother died in 1989 and he was the only surviving child of his parents and their sole heir.

6. He averred that the deceased was one of the partners in the business known as Kenda African Wholesalers and Retail Merchants that was

later re-named Kenda Boarding & Lodging. He had an initial six (6) shares.

7. He contended that in 1965, one of the partners left the partnership and his share was refunded to him. He added that after the deceased passed away, the remaining partners replaced him with one Kaihu Karogo to handle his shares. The said Kaihu Karogo was then registered as a partner of the company which was now renamed Kenda Boarding and Lodging.

8. He said that the said Kaihu Karogo paid his deceased mother all the proceeds from the deceased's shares until 1989 but that without cause of legal justification, he failed to cause him to be paid proceeds from the said shares between 1990 to 2004 and from 2011 to date.

9. He asserted that subsequently, he applied to be joined in **HCCC No 90 of 2010 (O.S.)** in which the said Kaihu Karogo had sought to have the partnership dissolved but that it was dismissed on the ground that he did not have letters of administration in respect of the deceased's estate.

10. It was his averment that the said Kaihu Karogo died and that the Defendants herein were appointed as the administrators of his estate. He stated that part of the monies due on account for the said Kaihu Kahoro had not been paid as confirmation of the grant of the High Court was yet to be issued.

11. He was apprehensive that M/S Pinnacle Valuers, court appointed agents, would proceed to release the monies to the Defendants herein without taking into account that the said Kaihu Karogo held shares both in his own account and on behalf of the estate of the deceased and his beneficiaries.

12. It was his contention that the matter was more urgent now as on 5th October 2018, the court had ordered for the dissolution of the partnership.

13. He sought that the accounts in respect of the deceased's and the said Kaihu Karogo be taken so that his estate does not swallow (**sic**) the shares of the deceased's estate.

14. In the Supplementary Affidavit that was sworn on 19th February 2019 and filed on even date, Joseph Kamau Njigua averred that he was one of the original partners of Kenda African Wholesalers and Retail Merchants that began around 1964 and was later renamed Kenda Boarding and Lodging and registered in 1969.

15. He stated that the deceased was an original partner of Kenda (**sic**) and that after he died, Kaihu Karogo stepped into his place in a representative capacity but that he also subsequently bought shares in his own name. He was emphatic that by the time the Partnership Agreement was being written, it was still understood that the said Kaihu Karogo continued to represent the deceased although it was not stated in the Agreement.

16. He contended that Kaihu Karogo was entrusted by Kenda (**sic**) to ensure payment was made to the deceased's beneficiaries. He was therefore emphatic that the Plaintiff was the sole heir of the deceased who was an original partner in Kenda business.

17. The Plaintiff therefore urged this court to allow his application as prayed.

THE DEFENDANT'S CASE

18. In response to the said application, on 15th February 2019, one of the Defendants, Edward Chege Kaihu swore a Replying Affidavit on his own behalf and that of his Co-Defendant. It was filed on 4th February, 2019.

19. He contended that the said application had been based on the wrong assumptions that the Plaintiff was a partner of Kenda Boarding & Lodging and that there was no evidence that he or the deceased were partners therein.

20. He stated that the said business was registered on 16th October 1969 with seven (7) members and that a Certificate of Registration of the same date did not show either the Plaintiff or the deceased as having been partners in the said business. He added that a Partnership Agreement dated 4th April 1984 consisting of the seven (7) members also showed that neither the Plaintiff nor the deceased were partners in the said business.

21. He pointed out that the documents annexed to the Plaintiff's application were not in a language of the court necessitating a Certificate of Translation and that in any event, the contents had no nexus whatsoever with the Kenda Partnership.

22. He was categorical that the question of whether or not the Plaintiff was a partner in the business was canvassed in **HCCC No 90 of 2010 (O.S.)** where it was determined that the Plaintiff was not a partner of Kenda Boarding and Lodging leading to the dismissal of his application seeking to be joined in the proceedings therein.

23. It was his contention that the said Ruling was still in force as the same had never been set aside and/or reviewed and that no appeal had been filed against it.

24. He was also categorical that the acknowledgement slip that had been attached to the Plaintiff's Affidavit was, in the aforesaid Ruling, found to have been a receipt of profit that did not make the Plaintiff a partner.

25. Further, he stated that the said Kaihu Karogo remitted monies to the Plaintiff through a special financial arrangement and not due to being a partner as was determined in the aforesaid case **HCCC No 90 of 2010**.

26. In addition, he averred that the fact that the Plaintiff obtained Letters of Administration in respect of the deceased's estate did not make him a partner in the partnership or prove the existence of a partnership in the first instance.

27. He therefore asked this court to dismiss the present application and the suit with costs.

LEGAL ANALYSIS

28. This court carefully analysed the Plaintiff's Written Submissions and noted his arguments relating to the circumstances under which an injunction can be granted and the cases of **Giella vs Cassman Brown (1973) E.A. 358, American**

Cyanamid Co vs Ethicon 1975 U KHL 1 and **Mbuthia vs Jimba Credit Finance Co Ltd (1988) KLR 1** that he relied upon.

29. It also noted the definition of *prima facie* case as was set out in the cases of **Nguruman Ltd vs Jan bonde Nielsen & 2 others [2014] eKLR** and **Mrao Ltd vs First American Bank Kenya Ltd & 2 others [2003] KLR 125** that he also referred to and also considered several other cases that he placed reliance upon to buttress his case.

30. Further, it observed that the Defendants also relied on some of the cases the Plaintiff had referred this court on the issue of an injunction. It was therefore not necessary to differentiate the said cases as they were both agreed as regards the circumstances under which an injunction can be granted.

31. Having said so, this court found that the pertinent question herein was whether or not the Plaintiff or the deceased held shares in Kenda Boarding and Lodging through Kaihu Karogo and thus become entitled to shares from his estate.

32. This court noted that the minutes the Plaintiff relied upon related to Kenda African Wholesalers & Retail Merchants while the Certificate of Registration that was furnished to this court by both the Plaintiff and the Defendants related to Kenda Boarding & Lodging.

33. The Plaintiff and Joseph Kamau Njigua asserted that the two (2) entities were not separate companies but that Kenda African Wholesalers & Retail Merchants was renamed Kenda Boarding & Lodging. Unfortunately, there was no evidence to that effect.

34. There was also no documentary evidence showing that the deceased was a partner in Kenda Boarding & Lodging. Indeed, the said Joseph Kamau Njigua stated that Kaihu Karogo continued to be a representative of the shares of the deceased **"even though it was not stated in the agreement"**

35. There was also no evidence to show that after the deceased died, his shares were to be managed by Kaihu Karogo or that the deceased's wife and Plaintiff received multiple payments to demonstrate that indeed Kaihu Karogo remitted monies regularly to them.

36. What was on record was an Acknowledgment from M/S Wambugu Muriithi & Co Advocates showing payment of rental proceeds from M/S Pinnacle Valuers for the quarter ended 31st September 2010 to the Plaintiff herein in the sum of Kshs 11,700/=. It had not been signed by the other recipients. It was also undated.

37. If indeed there were several payments that were made to the deceased's wife and the Plaintiff before 1989 and between 2005-2011 as the Plaintiff had been contended, nothing would have been easier than for him to have adduced evidence of such payments. This could perhaps have demonstrated a pattern or conduct by Kaihu Karogo towards the deceased's estate. It would also have been important to know what these payments related to.

38. All the aforementioned gaps pointed to a case where more evidence had to be presented before the court could grant an order for taking of accounts in Kenda Boarding & Lodging.

39. Notably, the Plaintiff's Plaint dated and filed on 5th December 2018 showed that he had sought the following reliefs:-

a. A declaration that Kenda African Wholesalers and Retail Merchants and Kenda Boarding & Lodging are one and the same business.

b. A declaration that Kaihu Karugo held shares in Kenda Boarding and Lodging on account of himself and Kimani Gachau's estate since 1969.

c. Payment of Kenda Boarding and Lodging business proceeds held by Kaihu Karugo on account of Kimani Gachau's estate from December 2011 to the present.

d. Accounts be taken to ascertain the respective shareholding of Kaihu Karugo and Kimani Gachau and/or their representatives in Kenda Boarding and Lodging business and their respective dues and the payment of the partnership dues on account of Kimani Gachau's estate to be made to the Plaintiff.

e. An injunction restraining the defendants from receiving payment from Pinnacle Valuers Limited or any other party, of

the business proceeds of Kenda Boarding and Lodging on account of Kaihu Karugo until the respective shareholding between Kaihu Karugo and Kimani Gachau are determined to the satisfaction of both parties.

f. Costs of the suit.

g. Interest at court rates.

h. Any other relief this court may deem just to grant.

40. This court took the considered view that findings would first have to be made in respect of Prayer Nos (a) & (b) before any other determination could be made. Indeed, accounts could not be taken until it had been first ascertained that Kenda African Wholesalers & Retail Merchants and Kenda Boarding and Lodging were one and the same business and that Kaihu Karugo held the deceased's shares in Kenda Boarding & Lodging since 1969 as had been averred by the Plaintiff herein.

41. The application herein therefore appeared to have been premature because an interlocutory injunction ought not to be granted to give an applicant time to ascertain his rights first. Rather, an interlocutory injunction ought to be granted to preserve his rights before a dispute between him and another can be resolved and/or be determined.

42. Indeed, in the case of Kenleb Con Ltd vs New Gatitu Service Station Ltd vs Another [1990] eKLR, it was held that:-

“To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all the relevant facts to the just determination of the application, but must also show he has a right, legal or equitable, which requires protection by injunction. He must also satisfy the three tests set out in the often cited case of Giella V Cassman Brown & Co Ltd, 1973 E.A. 358; for the grant of an interlocutory junction . . .”

43. Bearing in mind the case of Giella vs Cassman Brown & Co (Supra) that was relied upon by the parties herein, this court found and held that the Plaintiff had not demonstrated that he had met the criteria that was set out in the aforesaid case because there were facts that needed to be first ascertained and/or established in his favour.

44. This court was reluctant to state whether or not the deceased held shares in Kenda Boarding & Lodging in the manner that was contended by the Plaintiff as that was a matter of fact to be determined during trial.

DISPOSITION

45. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated and filed on 5th December 2018 was not merited and the same is hereby dismissed with costs to the Defendants.

46. For the avoidance of doubt, the *status quo* order issued herein is hereby vacated and/or discharged.

47. It is so ordered

DATED and DELIVERED at NAIROBI this 16th day of July 2019

J. KAMAU

JUDGE