



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.320 OF 2013

BENSON W.K. MUIGAI & 4 OTHERSPLAINTIFFS

VERSUS

PHILOMENA NDANGA KARANJA.....DEFENDANT

KARANGI COFTEA LIMITED.....GARNISHEE

RULING

[1] The Notice of Motion dated **27 November 2017** was filed herein on **6 December 2017** by Plaintiff/Decree Holders under **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Order 40** and **Order 51 Rule 1** of the **Civil Procedure Rules** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] That the Court be pleased to order that the deceased Defendant, **Philomena Ndanga Karanja**, be substituted with her sons, namely: **Lawrence Kibe Karanja** and **Thomas Kiarie Karanja**, who are also the directors of the **Garnishee, Karangi Coftea Limited**, for purposes of the proceedings herein and the payment of the balance of the decretal amount as per the decree in this suit;

[c] That the said directors of **Karangi Coftea Limited**, the Garnishee herein do appear in Court for purposes of making payment proposal for the balance of the decretal amount;

[d] That the costs of this application be in the cause.

[2] The application was premised on the grounds that the Defendant has since passed away; and that she died prior to payment of the entire decretal amount amounting to over **Kshs. 27 million**. That, having exhausted other modes of execution, the Plaintiffs/Decree-Holders applied for and obtained a Garnishee Order *Nisi* on **13 May 2014**. They now seek for the joinder of the sons of the Deceased as directors of the Garnishee and for them to be compelled to pay the balance of the decretal sum. The application was premised on the Supporting Affidavit of **Pauline Wanjiru Muigai**, sworn on **6 November 2017**, wherein it was averred that the Decree-Holders risk suffering great loss and prejudice unless the said **Lawrence Kibe Karanja** and **Thomas Kiarie Karanja** are compelled to pay the decretal amount through the Garnishee herein. It was further averred that the Decree-Holders have exhausted other modes of execution herein, including an order for the committal to civil jail of the Defendant; but that she died before fully paying the decretal sum. The Supporting Affidavit had, annexed to it, a bundle of documents marked **Annexure PWK1**.

[3] The Garnishee along with **Thomas Kiarie Karanja** and **Lawrence Kibe Karanja**, opposed the application relying on the Grounds of Opposition dated **15 January 2018**. Those Grounds are that:

[a] The Garnishee proceedings are still pending hearing and determination, and therefore the instant application amounts to abuse of the process of the Court;

[b] The application is incompetent as substitution of a defendant does not lie at this stage of the proceedings;

[c] The application goes against the law of corporate and separate legal entity and the law of succession and should therefore be dismissed *in limine*;

[d] The directors of the Garnishee are not parties to these proceedings and no orders can be granted against them through the present application as sought;

[e] The application is bad in law and is an abuse of the court process and ought to be dismissed with costs.

[4] The aforesaid grounds were buttressed by the Replying Affidavit of **Thomas Kiarie Karanja**, sworn on **15 January 2018**, in which it was averred that neither the deponent nor **Lawrence Kibe Karanja** are personal representatives of the deceased Defendant; and therefore have no authority to be enjoined herein as such.

[5] The application was urged before me on the **30 January 2018**. For the Plaintiff, **Mr. Kurauka** submitted that deceased Defendant was a shareholder of the Garnishee and therefore that it is necessary to have the surviving directors, who are the sons of the deceased, brought on board in this matter to enable the Court do justice to the Plaintiffs.

[6] **Mr. Njuguna**, on the other hand, was of the posturing that the application is misconceived in that it has been filed under **Order 40** of the **Civil Procedure Rules**, which has no relevance thereto. He argued that the relevant provisions are **Section 37** of the **Civil Procedure Act**, and **Order 24** of the **Civil Procedure Rules**. **Mr. Njuguna** further submitted that the debt herein was personal to the deceased, and not a debt incurred by the Garnishee; and therefore that it cannot be enforced against the Company just because the Deceased was a director of the Company.

[7] While it is true that **Order 40** of the **Civil Procedure Rules** has no relevance to this application, it is a cardinal principle that an application ought not to be dismissed simply because the wrong provision of the law was cited. **Order 51 Rule 10** of the **Civil Procedure Rule** provides thus in this regard:

"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

[8] There is no dispute that the Defendant has since died. An extract from the Daily Nation newspaper of **7 September 2017** was annexed to the Supporting Affidavit of **Pauline Wanjiru Muigai** in proof of this fact. It is also not in dispute that, as of **30 August** when the Defendant died, she had not fully paid the debt herein. Accordingly, the Plaintiff had the option to move the Court under **Section 37** to have the Decree enforced against the Deceased Defendant's Personal Representative. The provision reads:

(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.

(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[9] Clearly, the application has not been fashioned for purposes of execution against the legal representative of the deceased under the aforesaid provision of the law. Instead, it seeks orders that the deceased Defendant, **Philomena Ndanga Karanja**, be substituted with her sons, namely: **Lawrence KibeKaranja** and **Thomas KiarieKaranja**, who are also the directors of the **Garnishee, Karangi Coftea Limited**, for purposes of the proceedings herein and the payment of the balance of the decretal amount as per the decree in this suit. To my mind, it is not the law that a person be compelled to pay the debts of a deceased person simply on the basis of consanguinity; but rather on the basis of a legally recognized relationship, in respect of which **Order 24 Rule 4(1) of the Civil Procedure Rules** provides thus:

Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

[10] Thus, in addition to being sons of the Deceased Defendant, which appears to be uncontroverted, it was incumbent upon the Plaintiff to demonstrate that **Lawrence Kibe Karanja** and **Thomas Kiarie Karanja** are the deceased's legal representatives; and the phrase "**legal representative**" is a term of art, defined for purposes of the **Civil Procedure Act** in **Section 2** thereof to mean:

"...a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom he estate devolves on the death of the party so suing or sued."

[11] Thus such a person would be sued or enjoined on the basis that he is, in law, vested with the responsibility of managing the estate of the deceased judgment debtor. There is no proof that either **Lawrence Kibe Karanja** or **Thomas Kiarie Karanja** have been vested with such powers as the Deceased's legal representative.

[12] As for the Garnishee proceedings, it has been conceded that since the Order *Nisi* was issued on **13 May 2014**, the Plaintiff has not prosecuted the application to conclusion in the manner envisaged by **Order 23 Rules 1 and 5** of the **Civil Procedure Rules**. It is trite that

before the corporate veil can be pierced, the Plaintiff must demonstrate to the satisfaction of the Court that the Garnishee is indebted to or holds monies on account of the Deceased which can be attached and applied towards the payment of this debt. It must also be shown that the Company as a separate entity is unable to discharge its obligations in law before individual directors, such as **Lawrence Kibe Karanja** or **Thomas Kiarie Karanja**, can be called upon to personally settle the debt. In the same vein, there is nothing to show that an attempt has been made to attach the Garnishee's property as provided for in **Order 23 Rule 4** of the **Civil Procedure Rules**.

[13] In the premises, it is my finding that the Plaintiff's application is totally lacking in merit. The same fails and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2018

OLGA SEWE

JUDGE