



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO 469 OF 2014**

**IN THE MATTER OF THE COMPANIES ACT CAP 486**

**LAWS OF KENYA**

**AND IN THE MATTER OF MENGO FARM LIMITED**

**AND IN THE MATTER OF THE RECTIFICATION OF THE COMPANY REGISTER**

**ABDIKADIR AHMED SHEIKH .....1<sup>ST</sup> APPLICANT**

**MOHAMED ABDI FARAH .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EUNAH WAMUYU KARIUKI .....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF COMPANIES .....2<sup>ND</sup> RESPONDENT**

**AND**

**CHARITY NDUTA NJOROGE.....INTENDED INTERESTED PARTY**

**R U L I N G**

1. The Court has before it an Application by a Charity Nduta Njoroje to be joined as in interested party in the main application. The Main Application was filed on 26<sup>th</sup> September 2014. It sought orders for rectification of the Register pursuant to a Judgment in HCC 34 of 1998. That Judgment resolved the issue of ownership of shares in Mengo Farm Limited (Incorporation Certificate No 5563).

2. The first time the matter was before this Court, the Respondents did not participate. The Applicant’s Counsel sought leave to serve by alternative service namely, in the press. Once the 1<sup>st</sup> Respondent was served, her first response was to file Grounds of Opposition challenging the locus of the Applicants. It should be mentioned they were parties to the earlier suit and therefore had knowledge of the facts and matters. That issue was resolved in favour of the Applicants. The Applicant’s Counsel again sought leave to inform – by advertisement – any other persons who may be claiming an interest in the shares. His conduct demonstrates that he and his clients wanted the matter resolved once and for all in an open forum. That advertisement elicited a response from a Charity Nduta Njoroje who filed a Replying Affidavit. The is no formal written application for joinder on the Court file. Ms Noroje claims to be the Wife of William

Tom Njoroge Mboche was passed on in 1999. A certificate of Death and a Certificate of Marriage are exhibits. She claims that he late husband had an interest in the Company known as Mengo Farm Limited and the land held by that company. She says she knows this from “information that has come to my knowledge over time and obtained from meetings attended in Kitale”. That statement is surprisingly vague. At CNN-8 she exhibits a CR 12 dated 27<sup>th</sup> April 1989 (which she calls “an official document from the Companies Registrar. It states that the shareholders of the Company were Rahama Elmi w/o Ahmed Sheik (1 share), Eunah Wamuyu Kariuki (1 share) and William Tom Mboche(1 share). That document and the claim that it gives rise to ownership of shares is res judicata the Judgment in HCC 34 of 1998. The document existed. Why was it not brought to the Court’s attention before?

3. Nevertheless Ms Njoroge claims to be the heir of the Late William Tom Njoroge Mboche and that she has been entered as a non-shareholder director, which act am advised by my lawyers on record, which advice I verily believe to be true that it is not offensive to the law as such or at all. She refers to litigation which she says her husband won. She claims the Police confiscated important documents from Euneah and Ton Mboche. She states that she is “informed by Euneah Wamuyu Kariuki, shareholder and director of Mengo Farm Limited which information I verily believe to be true that the documents confiscated by the police ...include the sale agreement between Euneah, Mboche and Rehema Elmi.”. She refers to various Court Orders and proceedings but there are no exhibits that verify those claims. However what she does exhibit (CNN-11) shows that he late husband was charged with forgery with intent to deceive a **notification of change of Directors and Secretaries from 203** between 27<sup>th</sup> June 1989 and 19<sup>th</sup> July 1989. Although the Court found there was insufficient evidence and the charge did not match the dates of the use of the Registry stamp, it does demonstrate striking proximity to the CR-12 now being put forward by Ms Njoroge as a true reflection of the shareholding. It is surprising she did not seek to join the suit in **HCC34 of 1998**. CNN-12 is the Minutes of the Meeting of the Trans Nzoia District Security Committee Meeting held on 7<sup>th</sup> June 2011 where the persons claiming to have an interest in Mengo Farm were present. That bears no mention of any William Thomas Mboche.

5. Charity Nduta Njoroge also filed Grounds of Opposition to the Application for Rectification. She did so on 27<sup>th</sup> August 2015, in other words before the question of joinder had been resolved. Her Grounds of Opposition raise issues that were addressed and resolved in **HCC 34 of 1998** and therefore are res judicata. The Applicants filed a Reply to the Affidavit and a Preliminary Objection to the participation of Charity Nduta Njoroge as an interested party. In summary they are that she has no locus in law. In terms it is said;

*“Insofar as the said **Charity Nduta Njoroge** seeks to participate in these proceedings as an Interested party ostensibly for the purposes of advancing or protecting interests that allegedly accrued to one **William Tom Njoroge Mboche** whom she states died in the year 1999, 17 years ago, she cannot in law participate in these proceedings or make any prayers on behalf of the Estate of the said deceased since she admits at paragraph 14 of the Affidavit filed herein, that she does not possess any Letters of Administration of the Estate of the deceased. Accordingly, she lacks to locus to participate or in these proceedings (sic)”*

6. The Court must deal with the PO first. To quote: to the common wisdom of the Court of Appeal in **Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989]** KLR 1 in which the late Mr. Justice Nyarangi had applied memorable phraseology, thus:

*“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings....A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”* The Court heard oral argument. The Applicants assert she has no locus whatsoever. The Respondent and Counsel for Ms Njoroge assert that she claims through her husband. On the fact of this case that raises a very straightforward exercise. On behalf of the Intended Interested Party is that she has a right to join these proceedings because “she was invited to join” by the Notice. Mr Kurgat on her behalf also told the Court that she is not seeking to gain rights. She is trying to adjust or help. She has not done anything illegal. She is trying to protect the

interest of the Company.”. Filing Grounds of Opposition is an active step in proceedings, much more than the passive idea of lending assistance.

7. The first thing is that the Court has to be satisfied that the Late Husband had a valid legally enforceable claim. On the evidence before the Court does not make that finding even on a prima facie basis. The documents produced are superseded by later events and therefore are not conclusive. Even if she overcame that hurdle she would have to prove to the Court that she is entitled to act for or on behalf of the Estate. Of her own admission she has not obtained letters of administration since August 1999. That is about 16 years earlier than her Affidavit. Furthermore she has not even sought or obtained Letters of Administration ad litem or collegianda bona for the purposes of these proceedings. Those are straightforward applications that can be dealt with quite quickly. In the circumstances, the Court finds that she has not demonstrated any locus to interfere with these proceedings.

#### Locus

8. **Section 66 of the Succession Act** provides; “When a deceased has died intestate, the court shall, save as otherwise provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference- (a) surviving spouse or spouses....” Therefore the Intended Interest Party was in a good position to get letters of administration but has not bothered to do so. **Section 45** of the same Act provides;

#### **“45. Intermeddling with property of the deceased**

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall-*

*(a) Be guilty of an offence and [be] liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment ...”*

Shares are property. They are a chose in action. In the event that they were owned by the Deceased they have not vested automatically in the widow. She needs to get the authority of letters of administration to deal with them. That includes legal proceedings.

#### **Overriding Objective**

9. In addition it is in contravention of the Overriding Objective as set out in **Sections 1A, 1B of the Civil Procedure Act (Cap 21 Laws of Kenya)**. They provide:

“Section 1A:

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A Party to civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

Section 1B:

(1) For the purpose of furthering the overriding objective specified in section 11A the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings,

(b) The efficient disposal of the business of the Court,

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings, in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology”.

“The Parties were required to bear in mind the provisions of Section 1A and 1B of the Civil Procedure Act relating to the overriding objective of the court. The parties were required to assist the court to attain the following aims:-

(a) the just determination of the proceedings

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources;

(d) the timely disposal of proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and

(e) the use of suitable technology”

per A O Muchelule J in; Sultan Hardware Ltd v William Murithi Kimani and Charles Adongo Civil Appeal No 150 of 2012, High Court of Kenya at Kisumu.

10. The age of this matter and the underlying issues dictate that the matter be resolved without distraction to side issues that have been litigated previously. The Intended Interested Party may have an interest – she is yet to prove that. In the circumstances, the Notice in the Press was proper and properly responded to. However without letters of administration of any shape or form, she has no locus and therefore cannot properly be added as a party.

11. However in the interests of justice it is ordered that her “Replying Affidavit” remain on the Court file for the purposes of any questions that need to be asked of the Registrar of Companies relating to the file.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Dated 9<sup>th</sup> February 2017**

**Signed And Delivered at Nairobi this 3<sup>rd</sup> day of March 2017**

In the Presence of:

Clerk: James and Wangechi

Applicant: Mr Wahenge Holding Brief for Mr Wadanda

First Respondent : Mr Wachira

Intended Interested Party: N/A