



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 68 OF 2019(O.S)

PETER MUTUA KING'OO.....APPLICANT

VERSUS

JOHN WAMBUA NGALYUKA.....RESPONDENT

JUDGMENT

This suit was brought by Mary Mutinda Kilonzo and Gladys Muendi King'oo as the applicants on 21st February, 2019 through Originating Summons (hereinafter only referred to only as “the Summons”) of the same date. When they brought the Summons, Mary Mutinda Kilonzo and Gladys Muendi King'oo were the legal representatives of Francis King'oo Kilonzo, deceased (hereinafter referred to only as “the deceased”). The deceased and the respondent were at all material times registered as proprietors of all that parcel of land known as L.R No. 37/254/6 I.R No. 12626 (hereinafter referred to only as “the suit property”). They were registered as the proprietors of the suit property on 6th May, 1982. The deceased and the respondent held the suit property as tenants in common in equal shares for a term of 99 years with effect from 1st April, 1955. The suit property is situated along Kisauni Road, Nairobi West, Nairobi County and the same is developed with a double storey building comprising of; 3 units of 3 bedrooms each, 1 unit of 1 bedroom and an office.

The deceased died on 27th September, 1999 and it was not until 2005 that the beneficiaries of his estate applied for grant of letters of administration in respect of his estate. The grant of letters of administration was issued by the court to the said beneficiaries of the estate of the deceased on 18th April, 2005 and confirmed on 7th April, 2014.

In the Originating Summons (Summons), the applicants sought the following orders;

1. That the respondent be compelled to account for all the rents received from the tenants on the suit property within 15 days from the date of the order.
2. That the respondent does pay the applicants as the administrators of the estate of the deceased a fair share of rent from September 2009 to date.
3. That all the rent collected from the suit property be shared equally between the applicants and the respondent.
4. That the suit property be valued by an independent valuer with a view to ascertaining the exact share of each owner or their representative and for selling and sharing or buying out by the parties.
5. That the costs of the application be provided for.
6. Any other relief the court may deem fit to grant.

The Summons was supported by an affidavit of Mary Mutinda Kilonzo sworn on 21st February, 2019. In the affidavit, Mary Mutinda Kilonzo stated that the deceased and the respondent owned the suit property in equal shares. She stated that after the death of the deceased on 27th September, 1999, the respondent took over the management of the suit property. She stated that the respondent had since then refused to provide information regarding the management and income from the suit property. Mary Mutinda Kilonzo stated that she learnt that the respondent and the deceased had a bank account on which they used to deposit the rent from the suit property and that the account was closed by the respondent after the death of the deceased. She stated that the respondent had failed to disclose the rent that he was receiving from the suit property and that he was giving her handouts of between Kshs. 10,000/- and Kshs. 26,000/-. She stated that the respondent had declined her request to have the proper rent assessed.

The respondent opposed the Summons through a replying affidavit sworn on 26th August, 2019. The respondent averred that the applicants and he were managing the suit property jointly before they filed this suit. The respondent averred that all the rental income from the suit property was shared with the applicants. The respondent denied that she had excluded the applicants from the management of the suit property. The respondent averred that he had nothing to hide from the applicants and that they had all along managed the suit property together. The respondent averred that rent from the suit property was collected and shared at source and that the applicants had never demanded any accounts from him. The respondent averred that she was not obliged to render any accounts to the applicants since the rent was collected and shared equally. The respondent stated that it was only when the applicants were not in Nairobi that he used to either take their share of rent to them or send the same to them through M-pesa. The respondent averred that the application was an afterthought. The respondent averred that the applicants did not require his permission to value the suit property. The respondents averred that it was dishonest for the applicants to demand rent accounts while they knew that they used to get their share of rent in cash. The respondent averred that if the allegations in the applicants' application were true, they would have moved the court earlier. The respondent averred that he had no objection to the suit property being valued and sold.

On 17th September, 2019, the Originating Summons (Summons) was amended and the original applicants, Mary Mutinda Kilonzo and Gladys Muendi King'oo were substituted with Peter Mutua King'oo who became the sole applicant. The new applicant, Peter Mutua King'oo filed a further affidavit on 19th September, 2019 sworn by him on 17th September, 2019. In the affidavit, he stated that he was a co-administrator of the estate of the deceased. He reiterated that the respondent had been solely in possession of the suit property since the death of the deceased on 27th September, 1999 and was the one collecting rent from the property. Peter Mutua King'oo stated that the estate of the deceased did not know any of the tenants in the suit property neither did it have any tenancy agreements with them. He stated that the respondent was occasionally sending money to Mary Mutinda Kilonzo but whatever was being sent had no justification hence the present suit for accounts. He stated that it was important that the respondent gives a true statement of account of the rent from the suit property so that the former administrators of the estate of the deceased, Mary Mutinda Kilonzo and Gladys Muendi King'oo could give an account to the beneficiaries of the estate of the deceased of the rental income that they had received from the suit property.

The Summons was heard by way of affidavit evidence and oral submissions. During the hearing of the Summons, Ms. Mwinzi appeared for the applicant while Mr. Mutisya appeared for the respondent. In her submission in support of the application, Ms. Mwinzi reiterated the contents of the affidavits filed in support of the application by Mary Mutinda Kilonzo and Peter Mutua King'oo. Ms. Mwinzi submitted that after the death of the deceased, the respondent took sole control of the suit property and that the rent that was being collected from the suit property was not known to the estate of the deceased. She submitted that the estate of the deceased received varied amounts from the respondent intermittently and that the respondent had refused to render an account of the rent being collected from the suit property. Ms. Mwinzi submitted that even after the filing of this suit, the respondent had failed to disclose the names of the tenants on the suit property and the rent paid by each.

In his submission in reply, Mr. Mutisya reiterated the contents of the respondent's replying affidavit. He submitted that the Summons before the court was filed 20 years after the death of the deceased. Mr. Mutisya submitted that up to the time of the filing of this suit, the estate of the deceased had never raised any complaint regarding the rent from the suit property. He submitted that the administrators of the estate of the deceased must have been satisfied with the information that they had regarding the rent that was being collected from the suit property. Mr. Mutisya submitted that the estate of the deceased did not enter into any agreement with the respondent that he will collect rent for them from the tenants on the suit property. He reiterated the respondent's contention that the parties were collecting rent together. Mr. Mutisya submitted that the applicant had not given an account of what he received from the respondent in terms of rent and what he did not receive. Mr. Mutisya submitted that the supplication before the court was an afterthought and bad in law in that the same was time barred.

I have considered the Originating Summons together with the supporting affidavits. I have also considered the affidavit filed in response thereto. Finally, I have considered the submissions by the advocates for the parties. The following is my view on the matter. The Summons was brought under Order 37 rules 1 and 2 of the Civil Procedure Rules. In my view, the claim herein should have been brought by way of a normal suit for accounts followed by an application under Order 20 of the Civil Procedure Rules. The issues raised by the applicant do not fall for consideration under Order 37 rules 1 and 2 of the Civil Procedure Rules. Since no objection was raised to the form of the application, I will ignore the irregularity for the sake of substantive justice. In Article 159(2)(d) of the Constitution, the court is enjoined to administer justice without undue regard to procedural technicalities. In the Indian case of Triloki Nath Dhar v Dharmarth Counsel, Srinagar and others, AIR 1975 J and K76, the court stated as follows on the nature of suits for accounts:

“The defendant did not stand in any fiduciary capacity so as to impose upon him a legal obligation to render accounts to the plaintiff, the relation being only that of a contractor and contractee/promisor and promisee...The scope of suit for accounts is limited to a certain number of cases for instance between one partner against another, between the beneficiary against the executor or administrator, between mortgagor against a mortgagee, between a cestui que trust against a trustee and between principal against an agent. But no suit for accounts can be maintained by a promisee against a promisor or as between two contacting parties.”

It is common ground that the deceased and the respondent owned the suit property as tenants in common. It is also common ground that the deceased died on 27th September, 1999. I am of the view that the relationship that the deceased had with the respondent in relation to the suit property placed the respondent in a fiduciary position as concerns his dealings with the suit property. From the evidence before the court, I am satisfied that after the death of the deceased, the respondent managed the suit property alone. It is common ground that the suit property has on it a mixed development comprising of residential and office premises. The applicant contended that the estate of the deceased had no information as to the names of the tenants on the suit property and the rent that was being paid by them.

Due to the fiduciary relationship that existed between the respondent and the deceased, the respondent had an obligation to render accounts to the estate of the deceased on his dealings with the income realised from the suit property which he owned with the deceased as tenants in common. From the evidence placed before the court, I am satisfied that it was the respondent who was collecting rent from the suit property and disbursing the same. The evidence before the court shows that the respondent paid out to the estate of the deceased varied amounts from time to time. There is no evidence placed before the court as to the basis on which the said amounts were being paid to the estate of the deceased. I am satisfied that the applicant has made out a case for the accounts sought.

The applicant has sought accounts from September, 1999 when the deceased died. I am in agreement with the respondent that the claim is time barred to the extent that it seeks accounts going back 20 years. Section 4(3) of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that suits for accounts cannot be brought after the expiry of 6 years. Due to the foregoing, this court can only order accounts going back 6 years from the time the suit was filed. The applicant has also sought an order that the suit property be valued and sold. Again, this relief which is seeking severance of the joint tenancy should not have been brought by way of Originating Summons. In his replying affidavit, the respondent stated that he had no objection to this order sought by the applicant. In the circumstances, I will ignore the irregularity in the form in which the relief has been sought.

In conclusion, it is my finding that the applicant has proved his claim on a balance of probabilities. I therefore enter judgment for the applicant against the respondent on the following terms;

1. The respondent shall furnish the applicant within a period of 45 days from the date hereof with a comprehensive account of the rent received by the respondent from the tenants on L.R No. 37/254/6 I.R No. 12626 (the suit property) which account shall include, the names of the tenants, the duration of occupation, the premises occupied, the rent paid and how the rent was disbursed or spent;
2. The account referred to in paragraph 1 above shall be for the period between 1st March, 2013 and 1st May, 2020 and the respondent shall pay to the applicant any amount found due to the applicant after the furnishing of the said accounts;
3. A reputable valuer to be agreed upon by the parties within 30 days from the date hereof, and failing agreement, such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya shall carry out valuation of L.R No. 37/254/6 I.R No. 12626 for the purposes of ascertaining its current market value and a reserve price in the event of a forced sale. The valuation costs shall be shared between the applicant and the respondent equally.
4. Following such valuation, the respondent shall be at liberty to pay to the applicant and one, Loise Faith Mutheu jointly as administrators of the estate of Francis King'oo Kilonzo, 50% of the assessed market value of the suit property within 60 days from the date of the valuation, failing which L.R No. 37/254/6 I.R No. 12626 shall be sold subject to the reserve price fixed by the valuer aforesaid and the proceeds thereof less any expenses incurred in the sale shall be shared between the applicant and the said administrators of the estate of Francis King'oo Kilonzo equally.
5. In the event that any of the parties fail to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document that may be necessary to facilitate the sale of L.R No. 37/254/6 I.R No. 12626 and the distribution of the proceeds thereof in accordance with the orders made herein.
6. Until the applicant is paid 50% of the market value of the suit property by the respondent or the property is sold and 50% of the proceeds thereof less expenses paid to the applicant as aforesaid, the rent paid by the tenants occupying the suit property less expenses if any shall be shared by the respondent, and the applicant and one, Loise Faith Mutheu jointly as administrators of the estate of Francis King'oo Kilonzo in equal shares;
7. Each party shall bear its own costs of the suit;
8. Either party shall be at liberty to apply limited to the issues that may arise with regard to the sale of the suit property.

Delivered and Dated at Nairobi this 4th Day of June 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Mr. Mulekyo for the Applicant

N/A for the Respondent

Ms. C. Nyokabi-Court Assistant