



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 125 OF 2015**

**ALBERT KIGERA KARUME .....1<sup>ST</sup>.PLAINTIFF**  
**SAMUEL WANJEMA KARUME.....2<sup>ND</sup> PLAINTIFF**  
**LUCY WANJIRU KARUME.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KUNG’U GATABAKI &MARGARET NDUTA KAMITHI**

**(sued as trustees of the Njenga Karume Trust.....1<sup>ST</sup> DEFENDANT**

**THE NJENGA KARUME TRUST REGISTERED TRUSTEED.....2<sup>ND</sup> DEFENDANT**

**AND**

**GRACE NJOKI NJENGA KARUME.....1<sup>ST</sup> INTERESTED PARTY**

**JANE MUKUHI MATU.....2<sup>ND</sup> INTERESTED PARTY**

**TERESIA NJERI KARUME .....3<sup>RD</sup> INTERESTED PARTY**

**DR. FRANSISCA WANJIKU KAHIU.....4<sup>TH</sup> INTERESTED PARTY**

**COURT DIRECTIONS**

This matter was referred to me by the Presiding Judge of the High Court Division and the same was mentioned on 24<sup>th</sup> November 2015 for directions on how to proceed in view of the many/ a multiplicity of applications on record, all requiring disposal in one way or the other to facilitate the hearing and determination of the suit herein which was instituted by way of Originating Summons dated 25<sup>th</sup> March 2015 on the same day. Simultaneous with the filing of the Originating Summons the plaintiff/applicants also filed an application dated 25<sup>th</sup> March 2015 under certificate of urgency seeking various prohibitory and mandatory orders to prevent alleged wastage of trust properties.

The main Originating Summons seeks for removal of the defendants as trustees of the Njenga Karume

Trust. There are interim orders in place following the ruling dated 17<sup>th</sup> September 2015 by Honourable Mabeya J. In place are also two applications for contempt of court orders, application for disqualification of an advocate from representing some parties on record, an application by interested parties for injunction, another application to strike out the application for injunction and a preliminary objection .

On 24<sup>th</sup> November 2015 this court received various representations on the mode of proceeding with this matter to its logical conclusion in view of the multiple applications and counter applications on record as mentioned above.

In the view of Senior Counsel Mr Oraro representing the 1<sup>st</sup> defendant, the court should direct that the main Originating Summons be heard expeditiously since the subsequent application that seek dependency provision is not part of the Originating Summons and it diverts the court's attention from the main issues raised in the Originating Summons by inviting other parties to come in and administer the trust and hence the preliminary objection raised by the 1<sup>st</sup> defendant so that the court can determine whether or not the interested parties have locus in this matter. Senior Counsel urged the court to economically dispose of the matter herein by avoiding collateral proceedings. Further, that the proceedings with interlocutory issues must comply with the law not because the issues are emotive and attract the court's attention.

The submission by Mr Oraro Senior Counsel were echoed by Mr Musyoka counsel for the plaintiffs who submitted and urged the court to direct that all parties who had not filed their reply to the Originating Summons should be given timelines to file such responses and the Originating Summons be made ready for hearing. Further, that the plaintiffs would be ready to abandon their application including the application for contempt of court if the interim orders remained in place.

Mr Musyoka also proposed that the application by the interested parties is important and that the plaintiffs preference is that it be heard together with Mr Macharia -2<sup>nd</sup> defendant's counsel application seeking to strike out the interested parties' application with the latter application being treated as a response to the 3<sup>rd</sup> and 8<sup>th</sup> interested parties' application.

Mr Macharia counsel for the 2<sup>nd</sup> defendant proposed that his client preferred to have the main Originating Summons heard since the issues raised by the plaintiff's application for interim orders and those raised by Mr Kingara's client's -the 3<sup>rd</sup> and 8<sup>th</sup> interested parties are all sub issues to the Originating Summons . Counsel however submitted that if that does not work then the preliminary objection by the 1<sup>st</sup> defendant and the application by the 2<sup>nd</sup> defendant should be disposed of first since the 2<sup>nd</sup> defendant's application raise issues of whether Mr Kingara's application on behalf of the 3<sup>rd</sup> and 8<sup>th</sup> interested parties can be heard at all. Mr Macharia also contended that his client's application for contempt of court can be conveniently disposed of together with the preliminary objection and application to strike out the 3<sup>rd</sup> and 8<sup>th</sup> interested parties' application.

Mr Cohen representing the 1<sup>st</sup> interested party and holding brief for Mr Ahmed Nasir Senior Counsel submitted that the Originating Summons should take precedence since the applications pending are subjecting the interested parties as beneficiaries to untold suffering due to the injunctive orders which are in force.

On his part, Mr Wena Counsel for the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties submitted that since they had not filed any application on record, they urged that the whole suit be heard expeditiously but that pending the hearing and determination of the originating Summons an order for provision of dependants should be made.

Mr Kamau Karori counsel for the 4<sup>th</sup> interested party submitted that his client does not support an application for provision since those issues are also raised in the Originating Summons and which matters require evidence since parties cannot access the benefits under the trust due to the pending

interlocutory motions and that the court should not give preference to any applications as there are no special motions. He urged the court to give an early hearing date to have the Originating Summons heard and determined on merits.

Finally, and last but not least was Mr Kingara's submissions on behalf of the 3<sup>rd</sup> and 8<sup>th</sup> interested parties who submitted that he had filed the application on behalf of 7 beneficiaries who had not received anything from the trust and that one of the beneficiaries is diabetic. He urged the court to look at the main purpose of the trust and that trustees appear not to be interested in the welfare of the beneficiaries while they (trustees and employees) are catered for to the exclusion of the actual beneficiaries. Mr Kingara urged that the application for provision for dependants be addressed urgently and if possible the interested parties be allowed to collect rental income as it is the most urgent issue involving medical and school fees requirements and that the hearing of the Originating Summons might take longer. He was also of the view that the Preliminary Objection by the 1<sup>st</sup> defendant can also be heard together with the application by his clients.

I have carefully and anxiously considered all the able submissions by counsels for the parties regarding how the many interlocutory applications and preliminary objections should be considered by the court vis a vis the substantive Originating Summons.

The Originating Summons seeks for declarations for removal of the defendants as trustees of the Njenga Karume trust and their replacement for reasons that they are not administering the trust in accordance with the trust instrument which in effect is not serving the interest of the plaintiffs and other beneficiaries of the trust. The originating Summons also seeks for an order of account, assessment of the loss and damages suffered by the trust out of the alleged acts of wastage of the trust and for indemnity for such losses and damage.

The 1<sup>st</sup> defendant raised a Preliminary Objection dated 1<sup>st</sup> April 2015 which Preliminary Objection was disposed of by Honourable Mabeya J on 17<sup>th</sup> September 2015 together with the motion dated 2<sup>nd</sup> April 2015 which sought to vacate the interim orders obtained ex parte in the first instance on 27<sup>th</sup> March 2015. The Learned Judge also varied the orders of 27<sup>th</sup> March 2015.

On 17<sup>th</sup> April 2015 the 8<sup>th</sup> interested party Maurice Wagachira Karume was enjoined to the proceedings. As at 4<sup>th</sup> November 2015, counsel for the 3<sup>rd</sup> and 8<sup>th</sup> interested parties was indicating to court that he would still be filing an application for joinder although on 9<sup>th</sup> April 2015 Honourable Sergon J directed the joining of all legitimate parties by 17<sup>th</sup> April 2015. Nonetheless, no court of law would decline to allow the joining of legitimate and or necessary parties to suits at an appropriate time.

The court also notes that not only are there on record applications counter applications but also preliminary objection notices as well as notices to cross examine deponents of some affidavits filed on record as well as applications for contempt of court. It therefore follows that with each party seeking to be heard on their own interlocutory applications, this court will no doubt take a considerable period of time hearing each party separately and delivering rulings on each of the applications which applications all carry sufficient weight to be considered on their own merits although it is conceded that in some instances some of the applications could be merged and heard together and others abandoned in the interest of expedition.

The court further notes that apart from the Originating Summons all the other applications are interlocutory and are not likely to resolve the weighty issues which are raised in the substantive Originating Summons which issues also generate several ancillary questions that nonetheless must be considered while determining the merits of the Originating Summons. In other words, the interlocutory applications and preliminary objections on record cannot effectually, effectively and completely determine all the issues raised in the dispute herein.

This court also takes note that the interests of beneficiaries to the trust form the substratum of the objectives of the Njenga Karume Trust and it is for that very reason that this dispute was instituted in

court and several interested parties enjoined to bring to an end the dispute between the Registered Trustees and the beneficiaries of the Trust.

The court observes that indeed, albeit the 3<sup>rd</sup> and 8<sup>th</sup> interested parties application seeks for provision, their interests and the interests of all other interested parties, beneficiaries as well as the interest of the plaintiffs who instituted this suit are akin. In other words, the interests of the plaintiffs and those of the interested parties are not adverse to each other and in as much as the said parties are variously referred to as plaintiffs and or interested parties, their main goal is common, that of having the defendants/registered trustees removed and replaced, and the trust being administered in accordance with its primary objectives. It therefore follows that when directions on the mode of hearing of the Originating Summons are given, most likely, all interested parties shall team up with the plaintiffs.

The court does appreciate the fact that some beneficiaries claim that they are in dire need of school fees and medical care and attention and therefore they would require interim orders for provision to meet those basic yet fundamental needs and rights, although there are serious objections raised as to the capacity of those interested parties to be heard in this suit.

I reiterate that the nature of litigation displayed in this suit cannot be under estimated. But to attempt to hear each and every application singularly or even collectively in view of the varied issues that each application raises is to allow litigate by installments and thereby delay the fair, just, expeditious and proportionate disposal of disputes which is counter the overriding objectives contemplated by Sections 1A and 1B of the Civil Procedure Act which enact that:

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, seeks to give effect to the overriding objective specified in Sub Section (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 objectives of the Act, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court

1B (1) for the purposes of furthering the overriding objectives specified in Section 1A, the court shall handle all matters presented before it for the purposes 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.

This court is duty bound to apply the above principles of law in determining how this dispute has to be resolved. Since the initial objections to the main Originating Summons have not succeeded, it follows that the Originating Summons as instituted is technically sound save that 'pleadings' have not closed and therefore there is room for amendments thereof if need be.

I am also alive to the Constitutional provisions of Article 159 2 (b) of the Constitution which oblige this court to administer justice without delay, while of course, ensuing that expedition is balanced with fairness, justice and the right to a fair hearing, to adequate facilities and opportunity for each party to prepare for the hearing and ultimately to facilitate access justice for all.

I must clarify that in my view, an application for provision or to preserve the trust property which is suspected to be undergoing wastage is not a waste of judicial time. Equally, neither are the applications by the other parties or preliminary objections frivolous on the face of it. However, it is clear from the submissions by nearly all the parties advocates on record that the parties are desirous of having the Originating Summons herein determined on priority basis and that is the reason why majority of the

parties are willing to abandon their respective applications counter applications and preliminary objections including contempt of court applications in favour of an expeditious hearing and therefore urged the court to direct that parties who had not filed responses to the Originating Summons be given timelines to comply to facilitate expeditious hearing and disposal of the Originating Summons.

The general rule is that where there is an application for contempt of court then the court must first determine that application before hearing any other application or preliminary objections, and application to strike out pleadings. However, the court can direct that the Preliminary Objection or counter application shall be heard together, with preliminary objection forming responses to the application.(see Order 51 Rule 14 of the Civil procedure Rules).

In the instant case, and taking into account the submissions by learned counsels for the parties, I hold the view that the best interest of all parties to this suit shall be well served if I make the following directives.

1. That to avoid litigation by installments and hence embarking on mini trials that will not resolve the very emotive issues raised by each of the parties to these proceedings and to effectually, completely and expeditiously determine this suit:-
  - a. All interlocutory applications and preliminary objections be and are hereby dispensed with;
  - b. All parties to this suit who wish to respond to the Originating Summons do file and serve on all the other parties replying affidavits and documents intended to be relied upon at the hearing within the next 14 days from the date hereof .
  - c. That this matter be mentioned on 17<sup>th</sup> December 2015 for pre-trial directions and for giving of directions on the mode of disposal of the Originating Summons upon which a hearing date on priority basis shall be fixed and in any event not later than 2 months from 17<sup>th</sup> December 2015.
  - d. That the interim orders issued and extended by the court on the application by the plaintiffs shall remain in force until the suit is heard and determined on priority basis as directed above.

**Those are the directions of this court given at Nairobi in open court this 3<sup>rd</sup> day of December, 2015.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Musyoka and Mr Munge advocates for the plaintiffs

Senior Counsel Mr Oraro with Miss Barasa for the 1<sup>st</sup> defendant

Mr Waweru Gatonye for 2<sup>nd</sup> Defendant

Mr Odari h/b for Mr Kamau Karori for the 4<sup>th</sup> Interested Party

Miss Kimere h/b for Mr Gichuki Kingara for the 3<sup>rd</sup> and 8<sup>th</sup> Interested Parties

Mr Cohen H/B for Ahmednasir SC for the 1<sup>st</sup> Interested Party

Mr Mumbia h/b for Mr Wena for the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Parties

Court Assistant: Samuel

**R.E. ABURILI**

**JUDGE**

**3/12/2015**