



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRAL DIVISION

HCCC NO. 408 OF 2011

JANE GATHONI MUNENE 1ST PLAINTIFF/RESPONDENT

JOAN MUGURE MUNENE 2ND PLAINTIFF/RESPONDENT

VERSUS

GEORGE GITAU MUNENE 1ST DEFENDANT/APPLICANT

IAN MUKORA MUNENE 2ND DEFENDANT/APPLICANT

MUNENE ESTATES LIMITED 3RD DEFENDANT/APPLICANT

RULING

1. Brought under Certificate of Urgency, the Defendants' Application before this Court dated 28th February 2014 is grounded on the provisions of **sections 1A and 3A** of the *Civil Procedure Act* as well as **Order** 51 rule 1 of the *Civil Procedure Rules*. The Application asks of this Court to approve expenditure in the amount of Shs. 11,417,662.00, or such other sum as may be necessary, for the running of the third Defendant, Munene Estates Ltd., for the period 1st February 2014 to 30th September 2014. That figure is as shown in a Cash Flow statement submitted by the current managers of the estate being Coffee Management Services Ltd. (hereinafter "CMS"). The Application further requested that this Court do order that the said amount of Shs. 11,417,662.00 be secured against the proceeds of coffee sales from the estate and/or the proceeds of sale of a portion of the company's property as provided for under clause 10 of the Consent Decree entered into between the parties hereto dated 11th March 2013.
2. The said Application was based on the following grounds:

"1. That the Defendants have retained the services of Coffee Management Services Limited (CMS) who are experts in coffee production and marketing, to manage coffee farming on the suit lands aforesaid on behalf of the 3rd Defendant.

2. That clause 20 of the Consent Decree Provided inter-alia, termination of all engagements of the 3rd Defendant with its employees and to terminate the services of CMS latest by 1st June 2013.

3. That clause 10 of the said Decree provide inter-alia that the parties will sell part of the company owned land to inter-alia settle liabilities owed to 3rd parties.

- 4. That the deadline of 1st June 2013 could not be achieved and parties extended the same twice by consent up to 31st January 2014 to allow for selling of the suit lands to generate funds required to pay liabilities including workers' terminal dues.**
 - 5. That though offers have been made to purchase a portion of the property, no sale has been concluded yet.**
 - 6. That parties have therefore by consent extended the Management period of CMS to 30th September 2014 to allow for more time to sell a portion of the property, subject however to approval of cash flow projections for the period.**
 - 7. That the Respondents have refused to approve the financial projections furnished by CMS as a consequence of which CMS has been unable to execute its mandate.**
 - 8. That consequently electric power to the farm has been disconnected and security services withdrawn leaving the company exposed to calamitous losses.**
 - 9. That this Honourable Court has power to intervene and order extension of the Contract as well as approval of the budget to avoid a crisis including possible industrial action by workers.**
 - 10. That it is just and equitable that the orders sought herein be granted".**
3. The Application was supported by the Affidavit of the first Defendant **George Gitau Munene**. The deponent averred that the third Defendant Company was a going concern engaged in the business of coffee farming and had contracts of employment with employees as well as a management contract for the estate with CMS. He further noted that clauses 10 and 20 of the said Consent Decree required that a maximum of 27 acres of land belonging to the third Defendant should be excised and offered for sale to third parties in order to obtain funds to pay liabilities and professional fees owed by the third Defendant, as well as terminating the services of both the employees of the third Defendant company as well as CMS. There had been efforts made by the advocates for the parties to market and sell the said land but although offers had been received, no sale had been concluded. Deadlines had come and gone but no sale had yet been achieved. In the circumstances, the parties hereto had agreed to extend the management contract of CMS confirmed by letter as between the parties' advocates dated 19 February 2014. As a result of the Cash Flow and budgetary estimates provided by CMS to the parties for the period up to 30th September 2014, the Plaintiffs by their advocates' letter dated 26th February 2014 had withdrawn their approval maintaining that the budgeted expenditure was excessive and unreasonable. As a result, CMS had been unable to execute its mandate. The deponent went on to note that the electricity to the estate had been disconnected and security services withdrawn as a vacuum had been created as regards the management of the estate.
 4. The Plaintiffs responded to the Application by filing Grounds of Opposition as well as a Notice of Preliminary Objection both dated 7th March 2014. The said Grounds of Opposition covered 27 paragraphs which made a number of allegations including the fact that the Application was wrongly before the Commercial Division as the estate was being supervised through the Family Division of this Court. The Plaintiffs accuse the Defendants of acting in collusion with CMS to obstruct and delay the process of subdividing and distribution of the deceased estates' properties. They had also colluded to manipulate the bank accounts, finances, proceeds of coffee sales and other assets of the estate, with impunity. The Plaintiffs noted that, in the said Cash Flow, the first and second Defendants have projected fees for themselves during the accounting period of Shs. 2,880,000/-. The first and second Defendants were also accused of doctoring accounts in order to release all the cash available in the estate's bank accounts. Having recorded the criminal proceedings as brought against the Defendants, the Plaintiffs noted that a comprehensive consent Order had been recorded and adopted by the Family Division of this Court in *Succession Causes P & A No.1151 of 2007* as consolidated with *P & A No. 846 of 2003*. The Plaintiffs maintained

- that they had introduced a serious buyer for the agreed portion of land to be excised, as above, but that the Defendants had deliberately delayed approval and/or execution of the proposed agreement for sale thereof.
5. More seriously as far as the Application before Court is concerned, the Plaintiffs maintained that CMS had ceased all farming activities of the estate and were preparing to hand over the same to the parties pointing to a notice issued to them dated 31st January 2014. The first and second Defendants had been hesitant and/or are unwilling to take to take back possession of the estate. Further, CMS' coffee farming activities had ceased as long ago as March 2013 pending the subdivision and distribution of the estate/farm. The Plaintiffs allege that CMS had informed the parties that it was uneconomic for it to be contracted to manage a lesser acreage than the whole of the 364 acres of the coffee farm. In any event, the CMS coffee sales accounts reflected nil profit. The Plaintiffs further noted that the list of employees for termination, as submitted by CMS to the parties, detailed 10 permanent workers and less than 50 seasonal workers. All these employees were covered by a Collective Bargaining Agreement with the Kenya Plantation and Agricultural Workers Union. However, the Plaintiffs maintained that some of the employees listed were ghost workers. The Plaintiffs went on to say that the Orders sought by the Defendants contradicted numerous other Court Orders which had been made and adopted by the Family Division of this Court. As a result, the Orders sought by the Defendants would result in a gross miscarriage of justice causing irreparable damage and loss to innocent parties and their families who have waited for many years to get their rightful shares of the inheritance.
 6. When counsel appeared before Court on 14th March 2014, Miss Thongori for the Defendants outlined the object of the Application pointing to the Grounds in support thereof. Counsel explained that unless this Court extended the term of CMS as regards the management of the estate, a vacuum would be created dangerous to the interests of all the parties hereto. CMS had indicated that it would be prepared to finance the estate expenditure through to the 30th September 2014 on the understanding that it would reimburse itself either from proceeds of coffee sales or out of the monies to be received from the sale of the proposed excision of the 27 acre portion of the estate's land. Counsel informed Court that 10 acres had already been disposed of to a third party who was now interested in purchasing the balance of 16 acres which had been set aside and was adjoining the land already purchased. A price of Shs. 17 million per acre had been agreed which would result in a sale price of Shs. 272 million. Miss Thongori pointed out that the Shs. 11 million required to run the estate through to the end of September 2014 was just over half of the price being paid for 1 acre of the estate's land. She requested this Court to grant the Orders prayed for, in order for the status quo on the ground to be maintained.
 7. In his turn, Mr. Gatheru submitted that the first and second Defendants were dragging their feet as regards the subdivision of the estate and the selling off of the excised portion of 27 acres. He also maintained that the first and second Defendants were in league with CMS to delay such subdivision and sale as the latter had indicated that they required the full 364 acres of estate land to operate as a coffee farm. His clients considered that Shs. 11 million was excessive and part thereof was going to line the pockets of the first and second Defendants. He maintained that CMS had stopped all farming activities on the estate since March 2013 and, as such, there was no point in continuing that firm's management of the estate. Counsel also pointed out that under paragraph 8 of the Consent Order entered into by the parties on 24th January 2014, there would be a mention of matters as between the parties on a monthly basis before the Probate Judge to monitor progress of the implementation of the Court's Orders. He did not consider any Orders made by this Court would have any other effect than interference/meddling with an already existing agreed process.
 8. At that stage of the submissions before Court, I felt it necessary to ask counsel to go into closed session so that the differences between the parties could be aired and understood. In my view, matters would be best taken forward through negotiation between the parties and their respective advocates. As a result of lengthy discussion, it was agreed between counsel that the said amount of Shs. 11,417,662.00 would be approved as expenditure for the running of the third Defendant company for the period 1st February 2014 to 30th September 2014. However, every effort would be made for this amount to be reduced over the period. As far as the Plaintiffs were concerned, they agreed to share the liability for expenditure for the said period up to a maximum of Shs. 8 million. On their part, the first and second Defendants would undertake to cover any balance of expenditure over Shs. 8 million up to and including Shs. 11,417,662.00 as aforesaid. Orders

accordingly by consent. Costs in the cause.

DATED and delivered at Nairobi this 17th day of March, 2014.

J. B. HAVELOCK

JUDGE