



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 568 OF 2012

VIRGINIA WANGUI MATHENGE

(as administratrix and beneficiary of the Estate of

GICHURU KIRERU MATHENGE (DECEASED)PLAINTIFF

VERSUS

1. AGNES WAIRIMU NJOROGE
2. WAWERU GUANDARU MATHENGEDEFENDANTS

R U L I N G

1. The Plaintiff's late husband, **GICHURU KIRERU MATHENGE** (hereinafter called the **Deceased**), was an advocate of this Court in private practice under the name and style of **Mathenge & Muchemi, Advocates**. His practice was in Nairobi. He died on 21st March 2011.
2. The Plaintiff is the administrator of the Deceased's estate by letters of administration *ad litem*. She is not an advocate.
3. The 1st Defendant is an advocate of this Court. At the time of the Deceased's death she was practicing law in the Deceased's firm; in what capacity (associate or partner) is in controversy. She continued to practice in the firm after the Deceased's death.
4. The 2nd Defendant is also an advocate of this Court. He is not in practice and works in the private sector. He is a son of the Plaintiff and the Deceased.
5. The Plaintiff's case as pleaded in the lengthy plaint dated 30th November 2012 is as follows. The Deceased legal practice is part of his estate. He was sole proprietor of that practice at his death.
6. On or about August 2010 when the Deceased was undergoing treatment for cancer on and off his then associate advocates in the practice resigned. He was then joined by the 1st Defendant. There was neither partnership deed nor agreement entered into between the Deceased and the 1st Defendant, and the Deceased remained the sole signatory to the firm's bank accounts.
7. It is further pleaded that as the Plaintiff did not have the professional capacity to manage the

law firm upon the Deceased's death, and there being various files still active, and some clients needing to be paid and other ongoing obligations needing to be met (including payment of staff salaries and rent), the Deceased's beneficiaries agreed that the two Defendants "would seek to manage the affairs of the firm in a caretaker capacity pending the appointment of an administrator". However, the **Law Society of Kenya** advised that this was not possible in light of the prevailing law, and the practice would have to be wound up.

8. Upon this development, it is further pleaded, the Defendants, "without any basis in law," applied to the **Registrar of Business Names** for their names to be included as partners in the firm, and an amended certificate of registration to that effect was subsequently issued. The 1st Defendant thereby became the *de facto* "Managing Partner" of the law firm, and the Defendants "took control of the firm to the exclusion of the Deceased's estate, the Plaintiff and other beneficiaries".

9. The Plaintiff's further case is that the 1st Defendant "took and continues to take advantage of (the) trust (bestowed upon her)" and despite request by the Plaintiff she has "absolutely refused to give the Plaintiff any details in respect of the law firm and the substantial profits therefrom which have been diverted through her personal business or otherwise".

10. It is further pleaded –

(i) That the 1st Defendant has manifested an intention to "forcefully take over the law firm".

(ii) That as a "constructive trustee" the 1st Defendant is liable to account to the Deceased's estate for the "gains and profits made attributable to the Deceased's property".

(iii) That the 1st Defendant is "controlling and benefitting from the Deceased's property to the exclusion of (his) estate".

(iv) That the 1st Defendant's actions have interfered with the conduct of a "full legal audit of the affairs of the firm".

(v) That the 1st Defendant "siphoned off and continues to divert substantial monies and profits (from the firm) into her control..." without any remittance to the Deceased's estate.

(vi) That the 1st Defendant has refused "to release to the Plaintiff the accounting and other information and records of the law firm's monies and assets, (and) the Plaintiff and other beneficiaries have been unable to ascertain the nature and quantum of the monies, assets and benefits wrongly denied them by the 1st Defendant".

(vii) That the Defendants are trustees and thus legally and generally bound to account to the Deceased's estate and to the Plaintiff and other beneficiaries the affairs of the law firm.

(viii) That the 1st Defendant is in breach of her duties and obligations as such trustee (particulars are pleaded).

11. The following main reliefs are sought in the plaint -

"(i) An order directing the Defendants to give full disclosure to the Plaintiff in writing of the details, documents and information relating to all the assets

in their possession, control or directions or otherwise known to hem to belong to the devolving to the /estate of the late Gichuru Kireru Mathenge (the Deceased) including but not limited to the legal and beneficial ownership or control of the law firm, its financial statements, certified bank account statements for the time period in which they were in control and vested with the Deceased's property, all trading transactions and inventory of the assets of the law firm.

(ii) An order appointing an independent Auditor approved by the Court to re-audit the accounts for the years 2011 and 2012 up to date at the costs of the Defendants taking into account transactions which ought to have properly been for the benefit of the Deceased's Estate.

(iii) Pending the hearing and determination of this suit or until further orders of this Honourable court, an injunction be issued restraining the 1st Defendant whether by herself, her agents, employees, assigns, servants or otherwise howsoever and any persons whatsoever from –

- a. Selling, disposing of, charging, pledging, diluting, dealing, interfering with and/or intermeddling in any manner whatsoever with the shares, assets, ownership rights and other rights belonging to and devolving in the Estate of the Deceased.**
- b. Disposing of, transferring, interfering with, altering, deleting or otherwise putting beyond reach of or making unavailable to the Plaintiff all details, records, information and documents concerning the Deceased's law firm.**

(iv) A permanent injunction restraining the 1st Defendant whether by herself, her agents, employees, assigns, servants or otherwise howsoever and through any persons whatsoever from interfering with, alienating, selling, diluting, charging, pledging, intermeddling or in an adverse manner whatsoever dealing or transacting with the law firm and from engaging in any restructuring or change in ownership of the said law firm.

(v) An order directing the Defendants to account to the Plaintiff on behalf of the estate and the Foreign Estate of all assets, monies, benefits and privileges which accrued or ought to have accrued to the Deceased's estate in respect of the law firm and the assets and monies which are in the control of the Defendants and in which the Deceased had or ought to have had an interest.

(vi) A declaration that any benefits accruing to the Defendants from the law firm and/or with any other entity whatsoever which have been held and continue to be held in constructive trust for the estate of the Deceased.

(vii) An order directing the 1st Defendant to –

- a. render in writing a full, just and accurate account of the administration of the estate property from the commencement to date;**
- b. forthwith transfer all the assets, properties, money and benefits in the estate to the Plaintiff as the Plaintiff may as Administratrix and residuary beneficiary reasonably direct;**

(viii) An award of general damages, exemplary and punitive damages against the 1st Defendant for loss and damage suffered by the Deceased's estate, the Plaintiff and the other beneficiaries.

(ix) Special damages to be computed and pleaded, including substantial expenses such as legal costs and other professional costs incurred by the Plaintiff in connection with pursuing this matter.”

12. The plaintiff pleads lots of evidence contrary to rules of procedure and is as a result unnecessarily long and rather rumbling.

13. Together with the plaint the Plaintiff filed **notice of motion dated 30th November 2012** which is equally unnecessarily lengthy. It is expressed to be brought under **Order 40, Rules 1, 2 and 3** of the **Civil Procedure Rules, 2010** (the **Rules**), and also under the inherent jurisdiction of the court. That application is the subject of this ruling.

14. In addition to seeking an **“Anton Piller Order”**, the application also seeks temporary restraining and mandatory injunctive orders in the nature of the reliefs sought in the plaint. The application is supported by the annexed affidavit of the Plaintiff which gives the factual basis for the application. Various documents are exhibited in the affidavit.

15. The matter was placed before me *ex parte* on 4th December 2012. I declined to grant the “Anton Piller Order” sought for reasons I recorded. Such order will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant. See the English case of ***Anton Piller KG -vs- Manufacturing Processes Ltd & Others [1975] EWCA Civ 12.***

16. It was held in that case that an “Anton Piller Order” can be made by a Judge *ex parte*, but only where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and where, if the defendant were forewarned, there was grave danger that vital evidence would be destroyed, lost or hidden or taken beyond jurisdiction of the court, and thereby defeat the ends of justice; and where inspection would do no real harm to the defendant or his case.

17. It was further held in that case that there were **three essential pre-conditions** for the making of an “Anton Piller Order” –

(i) There must be an extremely strong *prima facie* case.

(ii) The damage, potential or actual, must be very serious for the applicant.

(iii) There must be clear evidence that the defendant has in his possession incriminating documents, etc, and there is a real possibility that he may destroy such material before any application *inter partes* can be made.

18. The English ***Court of Appeal (Civil Division)*** further held that

“the overriding consideration in the exercise of this salutary jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available.”

19. I was not persuaded that this drastic order was in the interests of justice in the circumstances of this case.

20. The application was then served upon the Defendants. The 2nd Defendant has not opposed it and supports the orders sought by the Plaintiff. Its replying affidavit filed on 7th March 2013 makes this plain.

21. The 1st Defendant has opposed the application by her replying affidavit filed on 11th February

2013. She also filed a further replying affidavit on 26th April 2013. Grounds of opposition apparent from the two affidavits include –

- (i) That she is a partner in the law firm in dispute.
- (ii) That the suit as filed is defective.
 - (iii) That there is collusion between the Plaintiff and 2nd Defendant to “harass” the 1st Defendant.
 - (iv) That the suit is frivolous, vexatious and an abuse of the process of the court.
 - (v) That the Plaintiff has no standing to bring the suit “as she has no interest or right over the firm...”
 - (vi) That there is no relationship between the 1st Defendant and the Plaintiff, whether as trustee, contractual or otherwise.
 - (vii) That the law firm is separate and distinct from the estate of the Deceased and does not form part of his estate.
 - (viii) That the application is without merit.
 - (ix) That in any event the 1st Defendant has now ceased to practice under the name and style of ***Mathenge & Muchemi, Advocates*** and is practicing in her own name.

22. The application was canvassed orally on 30th May 2013. I have considered the submissions of the learned counsels appearing, including the cases cited.

23. At this interlocutory stage I must refrain from making definite findings upon contested issues of both law and fact that are best left to trial of the action. But the following issues cannot be in dispute –

- (i) The Deceased died intestate on 21st March 2011.
 - (ii) At the time of his death he was practicing law in the firm of ***Mathenge and Muchemi, Advocates***.
 - (iii) Sometime in the year 2010 the 1st Defendant joined the firm to practice law. It is in contention whether she joined as a partner or as an associate.
 - (iv) There is not amongst the material now before the court any partnership deed or agreement between the Deceased and the 1st Defendant in respect to the law firm.
 - (v) At the time of his death the Deceased was the sole signatory to the bank accounts of the law firm.
 - (vi) On 21st March 2011 (the very day of the Deceased’s death) a **Certificate of Registration of a Change of Particulars** of the business of ***Mathenge &***

Muchemi, Advocates was issued. The change of particulars was that the 2nd and 1st Defendants were now registered as carrying on business under the said business name of Mathenge & Muchemi, Advocates.

It will probably be in contention which event occurred first, the death of the Deceased or the registration of change of particulars. But the 2nd Defendant states that his incorporation as a partner was after the Deceased's death.

(vii) Though now practicing in her own name, having ceased to practice under the name of style of **Mathenge & Muchemi, Advocates** during the pendency of this suit, it appears that the 1st Defendant is occupying the chambers formerly occupied by the aforesaid firm and might be using its assets. She has stated that she is now acting for most of that firm's former clients.

(viii) There was some kind of audit done of the firm's status after the death of the Deceased. But it appears to have been a preliminary, not a full, audit.

24. The law firm of an advocate practicing as a sole partner and who dies intestate forms part of his estate. See the case of **Maxwell Ombogo –vs- Standard Chartered Bank of Kenya Ltd. [2000] EA 475.**

25. Where there is a partnership the death of a partner will dissolve the partnership, and the deceased partner's interest in the partnership assets will form part of his estate. See **sections 32 and 37(1) of the Partnership Act, Cap 29.**

26. Whether the Deceased at the time of his death was a sole practitioner or in partnership with the 1st Defendant in the firm Mathenge & Muchemi Advocates is not momentous. In either event (and the issue will be properly canvassed and decided at the trial of the action) his interest in the firm at the time of his death forms part of his estate. That interest would extend to any valuables then held by the firm, including money in the bank, accrued but not yet recovered fees and other debts owed to it, furniture, equipment, etc. If a sole proprietorship his estate would be entitled to all of it. If a partnership (dissolved by the death!) his estate would be entitled to its proper share.

27. With regard to client's money and other debts owed to clients at the time of his death, the Deceased's estate is accountable to such clients.

28. Whatever the case therefore, it is necessary that a proper audit and account be taken of the status of the firm at the time of the Deceased's death, particularly in the circumstances of this case where the administrator of the estate, not being an advocate, is not in a position to run the practice!

29. I will therefore allow the application in the following terms –

- (i) An audit of the firm of **Mathenge & Muchemi, Advocates** at the time of his death shall be taken forthwith. Such audit must of necessity include a list of assets (including any accrued but not yet recovered fees for work already done). It must also include the debts of the firm (including monies owed to clients).
- (ii) The audit shall be taken by an Accountant to be agreed by the parties or in the absence of such agreement to be appointed by the court.
- (iii) The Audit Report shall be filed in court within thirty (30) days of the day the Accountant is appointed.
- (iv) The audit fees shall be paid equally by the three parties, but the same shall be recovered from the estate of the Deceased.

(v) Costs of the application shall be in the cause.

30. Those shall be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 4th DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2013