



**Karumba & another v Albushra Real Estate Ltd; Public Trustees Office of the Attorney General (Intended Third Party) (Environment & Land Case E223 of 2021) [2024] KEELC 3620 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3620 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E223 OF 2021**

**OA ANGOTE, J  
APRIL 11, 2024**

**BETWEEN**

**JOHNSON MUCHAI KARUMBA ..... 1<sup>ST</sup> PLAINTIFF**

**CHRISTOPHER KARUMBA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALBUSHRA REAL ESTATE LTD ..... DEFENDANT**

**AND**

**THE PUBLIC TRUSTEES OFFICE OF THE ATTORNEY  
GENERAL ..... INTENDED THIRD PARTY**

**RULING**

1. Vide a Notice of Motion application dated 6<sup>th</sup> September, 2021 brought pursuant to the provisions of Section 3A of the *Civil Procedure Act* and Order 1 Rule 15(1)(c) of the *Civil Procedure Rules, 2010*, the Plaintiffs/Applicants seek the following reliefs;
  - i. That leave be granted to the Plaintiffs/Applicants to enjoin the Public Trustee, Office of the Attorney -General, Nairobi in the suit herein.
  - ii. That leave be granted to the Plaintiffs/Applicants to issue Third Party Notice to the Public Trustee, Office of the Attorney -General, Nairobi.
  - iii. That the costs of this Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Johnson Muchai Karumba, the 1<sup>st</sup> Plaintiff of an even date. He deponed the Affidavit on his own behalf and on behalf of the 2<sup>nd</sup> Plaintiff of an even date.



3. It is the Plaintiffs' case that the suit land was initially one of the properties of the late Kung'u Karumba (deceased); that the Public Trustee became the Administrator of the Estate vide Administration Cause No 445 of 1976; that the Public Trustee confirmed and ascertained the names of the heirs and widows as shown in the Grant dated 30<sup>th</sup> November, 1992 in Succession Cause No 138 of 1983 and that in breach of his professional mandate, and in a deliberate intention to defraud, the Public Trustee failed to transmit the property to themselves.
4. The 1<sup>st</sup> Plaintiff deposed that that they have learned from the Defendants' pleadings that the confirmed grant obtained by the Public Trustee was revoked; that there is however no evidence of the revocation; that it is their belief that the foregoing is a fabrication or as a result of misinformation, scheming and collusion by the parties intent to defraud them of their property and that to their knowledge, there has never been any revocation of the grant in HCSC No 138 of 1983, or HCSC No 2860 of 2012.
5. According to the 1<sup>st</sup> Plaintiff, the Public Trustee should be joined in the suit to shed light on the process especially when it failed to act on their requests to formalize the transmission of the land to themselves; that further, the suit property is not the only property owned by the Estate and the Public Trustee should inform them what became of the other properties and that the Public Trustee having failed in his fiduciary duty must be joined in this suit for the purposes of indemnity or contribution thereto.
6. In response to the application, Ms Regina Nderitu, the Assistant Public Trustee filed a Replying Affidavit in which she deposed that the Public Trustee was appointed as the Administrator of the Estate of Kung'u Karumba (deceased) vide the Grant of Letters of Administration issued by the High Court on 15<sup>th</sup> March 1983 in High Court Succession Cause No. 138 of 1983.
7. It is the Public Trustee's deposition that the Grant was confirmed on 30<sup>th</sup> November 1992 and that according to the certificate thereof, the Estate of the deceased was supposed to be shared equally among his three houses which translated to 33 1/3% for every widow and that the Public Trustee has been collecting rent from three income generating properties being House No. 107 Harambee Phase II, Nairobi, Title No. Dagoretti/Karandini/59 and LR No. 1/603 Wood Avenue.
8. Ms Nderitu deposed that sometime in 1994, upon agreement by all the parties, the Public Trustee handed over the management of the abovementioned income generating properties to the beneficiaries; that despite the foregoing, the beneficiaries could not agree on what constituted 33 1/3% of the Estate making it very difficult for the Public Trustee to transfer the assets of the deceased to the beneficiaries and finalize the administration of the Estate and that they held several meetings with the beneficiaries to mediate their differences without any success.
9. According to Ms Nderitu, after failed attempts to resolve their differences, the beneficiaries of the Estate made an application in the High court on 7<sup>th</sup> July 2018 for rectification and variation of the Grant issued to the Public Trustee; that to the best of her knowledge, all the beneficiaries of the Estate including the Plaintiffs were served with the summons for rectification/variation of the Grant and that the parties recorded a consent in which they agreed to share the Estate equally among the 18 children of the deceased and to substitute the Public Trustee with Michael Njoroge Kung'u, Rose Njeri, Kung'u and Hannah Wairimu Kung'u as the Administrators of the Estate representing each of the three houses.
10. It was deposed that the Public Trustee did not oppose the filing of the consent on distribution and change of administrators since section 66 of the [Law of Succession Act](#) provides that the Public Trustee is an Administrator of last resort and preference is given to the beneficiaries and that the Court issued a fresh Grant of Letters of Administration to Michael Njoroge Kung'u, Rose Njeri Ndung'u and Hannah Wairimu Kung'u in their capacities as representatives of each of the three houses on 4<sup>th</sup> June 2019.



11. It is the Public Trustee's case that subsequent thereto, the Public Trustee handed over administration of the deceased Estate to the newly appointed administrators and that at the point of handing over of the Estate, the Court appointed Administrators absolutely discharged and undertook to keep indemnified the Public Trustee of Kenya, its servants, agents, successors and assigns against any claims, actions, demands, suits and costs of whatever nature incidental thereto consequent to the handing over of the estate to them for administration.
12. It was deponed that the Plaintiffs were appointed by the High Court as the Administrators of the Estate of Tabitha Muthoni Kung'u, the first widow of Kung'u Karumba under High Court Succession Cause No. 2860 of 2012 and that on the 18<sup>th</sup> August 2020, the Plaintiffs made an application to the High Court contesting the change of administrators in the Estate of Kung'u Karumba from Public Trustee to Michael Njoroge Kung'u, Rose Njeri Ndung'u and Hannah Wairimu Kung'u.
13. It was deposed that by stating that they are unaware of the substitution of the of the Public Trustee as Administrators, the Plaintiffs have approached the Court with unclean hands, are withholding information and are deliberately misleading the Court with a view to defeat the ends of justice.
14. Ms Nderitu urged that the Plaintiffs ought to have prosecuted the present application in the matter of the Estate of Kung'u Karumba instead of filing a new matter herein as the Public Trustee is functus officio in relation to the deceased's estate and that the Plaintiffs have sued Albushra Real Estate Ltd, to give the impression that this is a new course of action but in reality the matter herein relate to the same parties and subject matter in the Estate of Kung'u Karumba under High Court Succession Cause No. 138 of 1983 which is still ongoing.
15. The 1<sup>st</sup> Plaintiff filed a Further Affidavit in which he deponed that the Public Trustee's Replying Affidavit contains convoluted facts and bare denials; that the Defendants' illegal eviction of the Plaintiffs was substantially caused by the Public Trustee and that contrary to the Public Trustees' averment, the Court determined what constituted 33 1/3 of the Estate.
16. According to the Plaintiffs, the participation of the Public Trustee, ought to have been in tandem with the confirmed grant of 30<sup>th</sup> November, 1992; that instead, they acted contrary thereto and unlawfully administered the deceased property by way of imposing management on the property and that the Public Trustee must be joined in these proceedings to compensate them for the loss and damage to the investment on the suit property.
17. The Defendant and Interested Parties did not participate in the application. The parties filed submissions and authorities which I have considered.

### **Analysis and Determination**

18. Having considered the Motion, Affidavits in support and in opposition thereto and submissions, the sole issue that arise for determination is whether the Public Trustee should be joined in these proceedings as a Third Party
19. The legal foundation of a Third Party Notice is to be found under Order 1 Rule 15 (a) (b) and (c) of the [\*Civil Procedure Rules\*](#) which states as follows:

“ 15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) –

- a. That he is entitled to contribution or indemnity; or



- b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them

Shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.”

20. The rationale for Third Party proceedings was discussed by the Court in *Wilfred Kamau Githua T/ A Githua & Associates vs City Council Of Nairobi* [2013]eKLR, relying on the exposition by the Canadian Court of Appeal in *Dilcon Constructors Ltd vs ANC Developments* 1994 ABCA 245, where the learned Judge referred to the decision of the Second Circuit Court of Appeal case of *Dery vs Wyer* (1959) Ca2 N.Y., 265 F2d 804, in which it was held, *inter alia*, that the general purpose of third party proceedings is;

“...to avoid two actions which should be tried together to save the time and cost of reduplication [sic] of evidence, to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant.”

21. In this case, the Plaintiff seeks the issuance of a Third Party Notice to the Public Trustee-Office of the Attorney General. The Public Trustee asserts that this cannot lie because the provisions of Order 1 Rule 15 is with respect to Defendants. In answer to this, the Plaintiffs cite Order 1 Rule 15 (c) and contend that the same disabuses the notion that only a Defendant can seek joinder of a Third Party.
22. Indeed, subsection Order 1 Rule 15 (c) foresees that issues may arise not only between a Third Party and the Defendant but between all the three parties in the suit viz the Plaintiff, Defendant and Third Party or between any and either of them. However, this should not be read in isolation. Order 1 Rule 15 makes specific reference to Defendants, as parties who may seek inclusion of Third Parties.
23. This is so because generally speaking, a Plaintiff has no limit on whom they can institute a suit against provided they believe that a right accrues against them in respect of the same act or omissions complained against. Indeed, Order 1 Rule 3 of the *Civil Procedure Rules* reads;

“... All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise..”

24. It is apparent that the provision relied on by the Plaintiffs cannot come to their aid. Further, still, the Defendant does not claim any contribution and/or indemnity as against the Public Trustee.
25. The Public Trustee contends that the Plaintiffs’ misapprehension warrants the application’s dismissal. However, the Court will take a more holistic approach and invoke its jurisdiction under Order 1



Rule 10(2) to determine whether the Public Trustee, is a necessary party to this suit. The said section provides as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

26. The Court of Appeal discussed the import of Order 1 Rule 10(2) in *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR thus;

“..... the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”

27. By way of a brief background, the Plaintiff instituted this suit against the Defendant seeking inter-alia permanent injunctive and eviction orders against the Defendant as well as general damages and mesne profits.

28. It is the Plaintiffs' case that they have a life interest and are the sole beneficiaries of the suit property, LR No 1/63, Wood Avenue, Nairobi; that they are further the lawful and legitimate registered owners of the suit property and that sometime on 16<sup>th</sup> -18<sup>th</sup> April, 2021, the Defendant entered into the suit property and has refused to vacate therefrom thus dispossessing the Plaintiff.

29. The Defendant stated in response that he is the lawful lessee of the suit property by virtue of a lease from the Administrators of the Estate of Kung'u Karumba to wit Peter Muchai Kung'u, Rose Njeri Ndung'u and Hannah Wairimu Kung'u.

30. According to the Plaintiffs, the Public Trustee was the Administrator of the Estate of the late Kung'u Karumba; that as Administrator aforesaid, he ascertained the names of the heirs and widows of the Estate; that despite the foregoing, he failed to transmit the property to them; that the Public Trustee colluded to have the Interested Parties made Administrators of the suit property and as Administrator thereof, he leased the property to the Defendant.

31. In view of the foregoing, the Plaintiffs want the Public Trustee joined in these proceedings to “shed light on the process especially when it failed to act on their requests to formalize the transmission to themselves...in spite of written requests and correspondences, and that having failed in its fiduciary duty, must be enjoined for purposes of indemnity or contribution thereto.

32. The Public Trustee, while conceding to have been an Administrator for the Estate of the late Kung'u Karumba, maintains that it is now functus officio, the Grant having been revoked and by consent, a Grant confirmed in the names of Peter Muchai Kung'u, Rose Njeri Ndung'u and Hannah Wairimu Kung'u. The Public Trustee adduced the Grant of Letters of Administration issued to the aforesaid new Administrators on 4<sup>th</sup> June, 2019.



33. The dispute herein regards the legality of the Lease held by the Defendant, pursuant to the lease agreement between itself and Peter Muchai Kung’u, Rose Njeri Ndung’u and Hannah Wairimu Kung’u as Administrators of the Estate of the late Kung’u Karamba. The Public Trustee is not a party to the Lease, the subject herein.
34. What the Plaintiffs seek from the Public Trustee is an explanation as to how the suit properties were vested in Peter Muchai Kung’u, Rose Njeri Ndung’u and Hannah Wairimu Kung’u as Administrators of the Estate. They contest the revocation of Grant as alleged by the Public Trustee and in so doing are questioning the validity of the Grant held by the new Administrators.
35. The Plaintiffs seek from the Public Trustee, an account of the other properties belonging to the Estate of the Late Kung’u Karumba which they administered. These are disputes concerning Administration of the Estate over which this Court has no jurisdiction.
36. In distinguishing between matters within the ambit of the succession Court and those that fall outside, the Court in In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR persuasively stated thus;

“...The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

37. In view of the foregoing, the Court is not convinced that the Public Trustee is a necessary party to these proceedings. If the Plaintiffs are contesting the manner in which the Public Trustee exited from the scene of administering the Estate of the deceased, they should move the succession court appropriately.
38. For those reasons, the Court finds the application to be unmerited and proceeds to dismiss it with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Kabaiko for 1<sup>st</sup> and 2<sup>nd</sup> Interested Party

Mr. Ngari for Plaintiff/Applicant

Ms Musyoka for Public Trustee



Court Assistant: Tracy

