



Wanjema v Kiambu Nyakinyua Farmers Company Ltd (Environment & Land Miscellaneous Case E006 of 2024) [2024] KEELC 13383 (KLR) (Environment and Land) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND MISCELLANEOUS CASE E006 OF 2024
MC OUNDO, J
NOVEMBER 21, 2024**

BETWEEN

WILLY NJOROGE WANJEMA APPLICANT

AND

KIAMBU NYAKINYUA FARMERS COMPANY LTD RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion Application dated 9th April, 2024 brought under the provisions of Section 3A of Civil Procedure Act, Order 40, 51 Rule 1 and 2 of the Civil Procedure Act (sic) and all other enabling provisions of the law, wherein the Applicant herein has sought for orders to compel the Defendant/Respondent issue him with clearance documents and any other necessary documents to enable him procure title deeds for the land parcels Nos. Kiambu Nyakinyua Farmers Co. Ltd Plot No. 594 and Kiambu Nyakinyua Farmers Co. Ltd Ballot No 2420 from Naivasha lands registry. That in default, the Land Registrar Naivasha does proceed to issue the said title deeds to the Applicant, within 30 days of service upon payment of requisite fees. He also sought for costs of the Application.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by the Applicant as the sole Administrator of the Estate of Sophia Nyiha Wanjema to the effect that his late mother (Deceased) was member of the Respondent herein with a Share Certificate Number was 554 and had procured two plots namely land parcel Nos. Kiambu Nyakinyua Farmers Co. Ltd Plot No. 594 and Kiambu Nyakinyua Farmers Co. Ltd Ballot No 2420.
3. That upon procuring a Grant on 30th November, 2023, he had proceeded to the Respondent's offices at Maai Mahiu where on several occasions they had asked him to back for which he had resorted to



- seek the intervention of the court. That his late mother had complied by paying all the requisite fees to enable transfer of the title deeds to her name wherein the Respondent had failed to do.
4. He thus sought that the Respondent be compelled to give him a clearance certificate and any other documents that would enable the land registrar the parcels of land and thereafter procure its title deeds.
 5. In response and in opposition to the Applicant's Application, the Respondent vide its Replying Affidavit dated 11th June, 2024 sworn by George Kagunya Muiro, the Respondent's Chairman deponed that the instant Application was frivolous, vexatious and an abuse of court's process as it did not bring forth the true facts to enable the court make an informed decision.
 6. That fact, the properties referred to as Kiambu Nyakinyua Farmers Company Limited Plot No. 594 and Ballots No. 2420 were not known to the Respondent thus it could not issue title deeds to the same. That in any case prior to the title deeds being issued, the Respondent's members must hold share certificates which demonstrates the members' rights to property held by the Respondent.
 7. That it had put a notice in the daily newspapers as had been directed by the court in Naivasha Judicial Review No. 6 of 2015 notifying members that it was in the process of finalizing allocation of plots as per the agreed mode of distribution. That subsequently, members had been informed to clear their allotment fees within 90 days from the date of the notice failure to which the shares would be deemed forfeited after the notice period.
 8. That indeed, upon lapse of the 90 days, there were shares that had been deemed as forfeited due to non-payment hence the Respondent had disposed the same to the new members. That accordingly, if the Applicant had a claim to shares that had purportedly been held by his mother, he should have approached the Respondent during the said period. That whereas the Applicant had alleged that his mother had complied by paying all the requisite fees to enable the transfer of the title to his name wherein he had annexed receipts to substantiate the said claim, the said receipts had been issued to the Applicant's mother in the years 2004, 2005 and 2006 while according to the letters of administration, the Applicant's mother had died on 24th June, 1985.
 9. That if indeed the Applicant believed and had evidence to prove that his mother had been a paid-up shareholder of the Respondent, he ought to have applied for administration over the shares and not parcels of land which had never been allotted to his mother. That further, the amounts that had been paid as per the said receipts added up to Kshs.21,825/= which was not even worth a share. That the Respondent had its internal systems of addressing the issues relating to ownership of land by its shareholders and that there had been a procedure for confirmation of whether a person had been a fully paid up shareholder before they could embark on the process of allotment of land. That it was thus in the interest of justice that the Application dated 9th April, 2024 be dismissed as it lacked merit.
 10. In a rejoinder, the Applicant via his Further Affidavit dated 14th June, 2024 deponed that the claim by the Respondent to the effect that they had put up a notice on the dailies about the allotment fees had not affected his mother's parcels of land since he had finalized making his payments in the year 2007. That however, the Respondent had never issued him with the clearance certificate for purposes of processing title deeds and which he had been seeking to date hence it had no authority to dispose off his late mother's parcels of land to new members.
 11. That after the demise of his mother in the year 1985, he had visited the Respondent's offices in the year 2005 and informed them that he had taken over his late mother's parcels of land wherein he had continued making payments to the said Respondent who had in return issued receipts in his late mother's name. He maintained that his late mother had been a fully paid up shareholder hence the Respondent had allocated her the said parcels of land which she had balloted for and had been



residing therein prior to her death and that he had lived there for the last 49 years. He explained that the amount that he had paid up had been for purposes of processing of title deed and other miscellaneous expenditures by the Respondents and not for buying of land or shares since his late mother had already paid up for the share. That the Respondent had not produced evidence to support their claim of cancelling the shares.

12. He thus prayed that the instant Application be allowed with costs.
13. The Application dated 9th April, 2024 was canvassed by way of written submissions wherein the Applicant, vide his undated submissions summarized the factual background of the matter before framing his issues for determination as follows;
 - i. Whether the Applicant has a legal right as a member of Kiambu Nyakinyua Farmers to occupy and own the land.
 - ii. Whether the documents produced by the Applicant are genuine and issued by the Respondent.
 - iii. Whether the payment made after the death of Sophie Njiha was acknowledged by the Respondent.
 - iv. Whether there is another option.
14. On the first issue for determination, he submitted that he had proved beyond reasonable doubt that his mother had been a member of the Respondent by producing the payment receipts which had not been questioned by the Respondent. That he had also proved that he had obtained the requisite documents to represent his deceased mother or act on behalf of the deceased's estate hence the court should allow the application in totality.
15. On the second issue for determination as to whether his documents were genuine and issued by the Respondent, he reiterated that the Respondent had not challenged the authenticity of the documents presented in court. That subsequently, the Applicant had a right to the aforementioned property thus the Respondent should be compelled to issue him with the requisite documents to enable the transfer of the same to himself to facilitate the maximum use of the estate as an administrator.
16. As to whether the payment made after the death of Sophie Njiha had been acknowledged by the Respondent, he submitted in the affirmative to the effect that when issuing receipt, the Respondent had known that the original holder of the ballot had been deceased and was waiting for the family to bring succession documents from court.
17. Regarding whether there was another option to his 'mandamas' (sic), it was his submission that he had unsuccessfully tried an out of court settlement. He placed reliance on the requirement for issuance of an order of mandamus to submit that the court was expected to rely on the documents produced, facts and the evidence addressed to enable it reach a judicious decision. He thus prayed that his Application dated 9th April, 2024 be allowed as prayed with costs.
18. In response and in opposition, the Respondent via its submissions dated 30th September, 2024 framed two issues for determination as follows;
 - i. Whether the suit is properly before court.
 - ii. Whether the Plaintiff is entitled to any parcels of land from the Respondent.
19. On the first issue for determination as to whether the suit was properly before court, it submitted in the negative to the effect that the Applicant's case was fatally defective since it was a land case which had



been instituted vide a Notice of Motion. That whereas the provisions that had been cited on the face of the notice of motion were for issuance of temporary injunction at the interim stage in a properly filed case, the notice of motion as filed sought for final orders. Reliance was placed in the decided case of *Rajab Kosgei Magut v Nuru Jepleting Choge* [2020] eKLR in urging the court to hold that a Notice of Motion was not a pleading and could not commence a suit since it could only be filed within a properly instituted suit. Further reliance was placed in the decided case of *Kalyonge v Karanja* (Miscellaneous Application E070 of 2021) [2022] KEHC 16174 (KLR) (Commercial and Tax).

20. On the second issue for determination as to whether the Applicant was entitled to any parcels of land from the Respondent, it submitted in the negative to the effect that the Applicant was not known to the Respondent. That whereas the Applicant had filed in court a share certificate in the name of Sophie Njiha Wanjema who had died in the year 1985, the court should take judicial notice of the fact that shares in a company are assets just like any other tangible assets and ought to be distributed through a succession process. That however, in the instant case, no certificate of confirmation of grant had been produced in court to show who was entitled to the shares held under the share certificates hence the Applicant lacked the locus standi to claim for anything under the said shares. Its reliance was hinged on the decision in the case of *In re Estate of Francis Kinuthia Nderu (Deceased)* [2021] eKLR to urge the court to find that in the absence of a certificate of confirmation of grant allocating Sophia Njiha Wanjema's shares in the Respondent to the Applicant, the instant case had been prematurely filed.
21. Its further submission was that the Applicant had been dishonest with intentions to mislead the court as per the discrepancies in his documents. That whereas the said Applicant had stated that his mother had procured two plots from the Respondent, the said mother had died in the year 1985. That in his Further Affidavit he had claimed that he had completed payments in the year 2007 meaning that his mother had acquired plots which she had not paid for, something that was unheard of. That whilst the Applicant had claimed that his deceased mother had been a fully paid up shareholder, he had continued making payments up to the year 2007. That further, whereas the Applicant had in his supporting Affidavit alleged that his mother had complied with the Respondent by paying all the requisite fees to enable transfer of title deeds in her name, the Applicant still claimed to have made payments until the year 2007.
22. That the aforementioned discrepancies explained why the Applicant had chosen to file a Notice of Motion instead of properly commencing the suit and subjecting himself to cross-examination. That in any event, the Applicant had not produced before the court a Certificate of Search on the alleged plots which puts the court at the risk of issuing the Applicant with land that belongs to someone else. It was thus its submission that the Applicant had not substantiated his case before the court to the required standard, that is, on a balance of probabilities and the same should be dismissed.

Determination.

23. I have considered the Applicant's man made application and submissions wherein he seeks that as an administrator of his late mother's estate, that the Respondent furnishes him with clearance documents and any other necessary documents to enable him procure title deeds for the land parcels Nos. Kiambu Nyakinyua Farmers Co. Ltd Plot No. 594 and Kiambu Nyakinyua Farmers Co. Ltd Ballot No 2420 from the Naivasha lands registry.
24. That his deceased mother Sophia Nyiha Wanjema was a member of the Respondent and that she had Share Certificate Number was 554 for the two plots. That his late mother had been a fully paid up shareholder wherein the Respondent had allocated her the said parcels of land which she had balloted for and had been residing therein prior to her death, and land on which he had lived on for the last 49 years and had continued making payments to the Respondent for the purposes of processing of title



- deed and other miscellaneous expenditures by the Respondents. That despite his numerous visits to the Respondent's office, they had refused to indulge him.
25. The Application was opposed for reasons that the properties referred to as Kiambu Nyakinyua Farmers Company Limited Plot No. 594 and Ballots No. 2420 were not known to the Respondent thus it could not issue title deeds to the same. That in any case prior to the title deeds being issued, the Respondent's members must hold share certificates which demonstrates the members' rights to property held by the Respondent.
 26. That pursuant to Naivasha Judicial Review No. 6 of 2015, they had put out notice after which some of its members shares had been forfeited due to non-payment and which shares had been disposed off to new members.
 27. That accordingly, if the Applicant had a claim to shares that had purportedly been held by his mother, he should have approached the Respondent during the said period.
 28. That receipts herein annexed by the Applicant had been for payments made after the death of his mother whom he claimed had paid all the requisite fees.
 29. That further, the Applicant ought to have applied for administration over the shares and not parcels of land which had never been allotted to his mother. That the Respondent had its internal systems of addressing the issues relating to ownership of land by its shareholders and that there had been a procedure for confirmation of whether a person had been a fully paid up shareholder before they could embark on the process of allotment of land. That in the absence of a certificate of confirmation of grant allocating Sophia Njiha Wanjema's shares in the Respondent to the Applicant, the instant case had been prematurely filed. The Respondent sought for the application to be dismissed.
 30. I find the matter that then arises herein for determination in the first instance is whether the application is properly before the court.
 31. The provisions of Section 19 of the Civil Procedure Act provide that : -

“Every suit shall be instituted in such manner as may be prescribed by Rules.”
 32. Order 3 Rule 1 of the Civil Procedure Rules 2010 provides that: -

“Every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed.
 33. It is trite that an application is not the best way to institute a suit. For example in the case of *Abdulkarim v Mulla & 3 others (Miscellaneous Application E31 of 2024)* [2024] KEHC 13987 (KLR) (12 November 2024) (Ruling) the court had observed that:

The Respondents filed submissions dated 25th July 2024 and argued that the law on preliminary objection is set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. That in the case of *Proto Energy Limited v Hashi Energy Limited* (2019) eKLR the court held “Order 3 Rule (i) (ii) provide that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, petition or originating summons. A notice of motion is not legally recognized as an originating process. A notice of motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective.”



34. The Notice of Motion before court is not anchored on a Plaint which is contrary to the general rule of how a suit should be instituted to wit that a Notice of Motion application can only be filed within a properly instituted suit. I thus find that the application is not properly before this court.
35. Secondly in the present case, the Applicant has sought for final orders of the issuance of clearance documents and any other necessary documents to enable him procure title deeds to the shares held by his mother over land parcels Nos. Kiambu Nyakinyua Farmers Co. Ltd Plot No. 594 and Kiambu Nyakinyua Farmers Co. Ltd Ballot No 2420 from the Naivasha lands registry.
36. The question to ask is whether this court has jurisdiction over shares in a limited liability company asset. In the case of *Re Estate of Gitete Kahura & Another (Both deceased)* [2018] eKLR the court stated thus: -

“The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company for their sole interest in the company was with the shares. It is the said shares that were available for distribution herein amongst the survivors of the deceased....The jurisdiction of the Probate Court lies in the distribution of the shares, but not in the liquidation of the company or the distribution of its assets.”

37. From the above holding it clear that the jurisdiction of the Probate Court lies in the distribution of the shares and so in agreement with the Respondent herein, unless Applicant had obtained a certificate of confirmation of grant allocating Sophia Njiha Wanjema’s shares in the Respondent to the Applicant, the instant case is prematurely filed.
38. In essence therefore, this application lacks merit and the same is struck out with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 21ST DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

