



**Abdirazak Mohamed Ibrahim t/a Abdirazak & Co. Advocates v Salim Ali
Mwadumbo t/a Mwadumbo & Co. Advocates (Civil Case E362 of 2020)
[2021] KEHC 63 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 63 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E362 OF 2020
GWN MACHARIA, J
SEPTEMBER 23, 2021**

BETWEEN

**ABDIRAZAK MOHAMED IBRAHIM T/A ABDIRAZAK & CO.
ADVOCATES PLAINTIFF**

AND

SALIM ALI MWADUMBO T/A MWADUMBO & CO. ADVOCATES . PLAINTIFF

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 29th September, 2020 brought under Section 1, 1A, 1B, 3, 3A, 63(c) & (e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 20, Order 40 Rules 1, 2, 3, 4 & 8 and Order 51, Rule 1 of the *Civil Procedure Rules* of 2010 and all other enabling provisions of the Law. The Application seeks orders that:

1. Spent.
2. Spent.
3. An injunction to issue restraining the Defendant whether by himself, his employees, his clients, the transferor Fauz Mohamed Modhihiri, their associated companies, holding companies, subsidiaries, employees, servants, agents, proxies, partners in legal practice, associates in legal practice, consultants, Sponsors, benefactors or anyone else acting at his behest from entering upon, remaining upon, trespassing, transferring (in a manner contrary to the JV Agreement dated 16th June 2020) concluding any other Joint Venture Agent mortgaging, charging or otherwise interfering with the Plaintiff's quiet use, possession and construction activities on the parcel of



land registered in the Government Lands Registry as Volume 448 N.44 Folio 14/4 File 13552 L.R. No. 36/36/11, and known as L.R. No 38 NAIROBI MUNICIPALITY (EASTLEIGH) SECTION II pending the hearing and determination of the main suit.

4. An Order to issue compelling the Defendant to honour his professional undertaking dated 19th June, 2020 by releasing and delivering up to the Plaintiff the original title to the parcel of land registered in the Government Lands Registry as Volume 448 N.44 Folio 14/4 File 13552 L.R. No. 36/36/11, and known as LR. No. 36 NAIROBI MUNICIPALITY (EASTLEIGH) SECTION II free of all encumbrances pending the hearing and determination of the main suit.
 5. An Order to issue directing the OCPD, OCS, and DCIO Pangani Police Station to ensure enforcement and compliance with this Court's Orders.
 6. This Honourable Court be pleased to issue such other Orders as may appear to the Court to be just and convenient.
 7. The costs of this Application be borne by the Defendant.
2. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by ABDIRAZAK MOHAMED IBRAHIM, an Advocate of the High Court of Kenya practicing in the name and style of the Plaintiff herein. He deposed that on 16th June, 2020, he was instructed by Mohamed Abdi Gamey and Abdullahi Yussuf Jama (transferees) to act for it in a Joint Venture (JV) Agreement with Fauz Mohamed Modhihiri (transferor) for the construction of a mixed user block of apartments for sale and rental on parcel of land registered in the Government Lands Registry as Volume 448 N.44 Folio 14/4 File 13552 L.R. No. 36/36/11, and known as L.R. No. 36 NAIROBI MUNICIPALITY (EASTLEIGH) SECTION II (hereinafter the Property”).
3. The transferor represented himself as the registered owner of the Property at all material times and his Advocate for purposes of this transaction was the Defendant. It was expressly provided in the Joint Venture Agreement inter alia that: –
- a) The transferor would transfer the title to the Property to the transferees for the two (2) year duration of the construction.
 - b) The transferees would pay the transferor Kshs. 5,000,000 in exchange for transfer of the title as compensation for loss of rental income during the two (2) year duration of the construction;
 - c) The Defendant would provide the Plaintiff with a professional undertaking in terms of (a) and (b) above;
 - d) The transferees would be responsible for raising all capital and meeting all of the costs of engaging all the consultants for the construction project including architects; and
 - e) A special purpose vehicle (hereafter “SPV”) would be incorporated to manage the project throughout as well as the building itself after completion.
4. On 19th June, 2020, the Defendant issued him with an unequivocal professional undertaking to release the original title over the Property to him upon confirmation of receipt of the sum of Kshs. 5,000,000 stipulated in the Joint Venture Agreement. The Defendant's Professional Undertaking as issued to him was unambiguous, unequivocal and binding. Consequently, his clients transferred Kshs. 5,000,000 to the Defendant as per the terms of the Joint Venture Agreement. The Special Purpose



Vehicle anticipated in the Joint Venture Agreement between the transferor and the transferees was incorporated as “Ascent Realty Limited” at his clients (the transferees) sole expense. Thereafter, his clients took over vacant possession of the property and have already invested heavily and mobilized resources in preparing the ground for commencement of construction works.

5. In the intervening period and following a renegotiation of the terms of the Joint Venture Agreement in as far as the amount of compensation payable by the transferees to the transferor for loss of income is concerned, the parties agreed that the transferees would pay an additional Kshs. 5,000,000 in two tranches of Kshs. 2,500,000 immediately and the balance of Kshs. 2,500,000 at the completion of the project. The Addendum did not interfere with or amend the terms of the Defendant's professional undertaking in any way, shape or form. Subsequently, the transferees remitted to the transferor an additional Kshs. 3,500,000 which is over and above their obligations under the provisions of the Addendum regarding compensation for loss of rental income.
6. As at the date of this suit, and despite his several requests and notice, the Defendant had completely refused, failed and neglected to release the original title to the Property so as to facilitate a transfer to his clients as provided in the Joint Venture Agreement. As a consequence, the program of works and construction schedule have stagnated and is likely to grind to a halt due to the Defendant's default on mandatory terms of the contract. They (his client and him) are apprehensive that the Defendant and his client may have ulterior motives for failing to comply with the terms of the professional undertaking and the JV Agreement. The transferees' entire investment including capital, materials, labour, security Insurance, mobilization and professional fees is in jeopardy and there is good reason to believe that the Defendant Advocate is out to unjustly enrich himself at the transferees' expense.
7. The Defendant has a mandatory obligation in law to honour his professional undertaking to him and the same is capable of being enforced under the law. It was also his view that the Defendant has acted dishonorably and circumstances are fitting for the Court to act for the purposes of enforcing honorable conduct on the part of the its own officials (the Defendant). In the circumstances, the Defendant should be ordered to honour his professional undertaking within 7 days of the order of the court in default of which execution should issue to ensure enforcement.
8. In response, the Defendant filed two Replying Affidavits both of which were sworn on 22nd October, 2020. The first one was that of SALIM ALI MWADUMBO, an advocate of the High Court of Kenya practicing as such as a partner in the firm of Mwadumbo & Company Advocates, the Defendant herein. He averred that the application is frivolous, vexatious and a gross abuse of the court process only meant to derail/delay the course of justice and should therefore be dismissed with costs. He contended that the Plaintiff's supporting Affidavit is full of malicious falsehoods, misrepresentations and half-truths. He denied issuing a professional undertaking on the understanding that he would remit Kshs. 5,000,000/= on behalf of his client and averred that it is absurd for the Plaintiff to claim that he issued the undertaking dated 19th June 2020 upon receipt of Kshs. 5,000,000/= whereas the Plaintiff's own annexure "AMI 4" shows that he remitted Kshs. 4,600,000/= on 2nd July 2020. He stated that the terms of the professional undertaking were clear and unequivocal in that the Plaintiff was to remit Kshs. 5,000,000/= yet by his own admission, he remitted Kshs. 4,600,000/= which is less the agreed amount by Kshs. 400,000/=.
9. He averred that the Plaintiff has conveniently failed to mention that there is no subsisting Joint Venture Agreement between their clients since the one dated 16th June 2020 was rescinded on 29th July, 2020 on account of the failure by the Plaintiff and his client to honour the terms of the said agreement. That upon rescission of the Agreement, he proceeded to refund the monies that had been remitted to him by the Plaintiff being Kshs. 4,600,000/=. Further, that he is a stranger to the special purpose vehicle and was not involved in the registration of the same, neither did their clients agree on the shareholding as



there was no mention of such a thing in the rescinded Joint Venture Agreement dated 19th June, 2020. The Special Purpose Vehicle is a creation of the impugned Addendum dated 23rd July, 2020 which addendum he is also a stranger to and categorically denies its contents.

10. He noted that a close scrutiny of the impugned Addendum reveals that his client's signature is not witnessed as required by law. It also does not mention the fact that his client, one Fauz Mohamed Modhihiri, was represented by Counsel throughout the transaction. Further, he averred that the Plaintiff's clients never took up possession of the suit property as alleged. That in fact, the Plaintiff's client filed a suit contemporaneously with an application in the Chief Magistrate's Court being MCOMMSU E452 of 2020 Mohamed Abdi Gacamey & Another v Fauz Mohamed Modhihiri whereby one of the prayers sought was vacant possession of the suit property and the application was dismissed in a ruling delivered on 16th October, 2020.
11. He averred that it is absurd for the Plaintiff to claim that he paid his client over Kshs. 3,500,000/- in cash, yet the first tranche of payment was made via RTGS to the Defendant's bank account. That a scrutiny of the alleged acknowledgement note for receipt Kshs. 2,500,000/= by his client reveals that it has been witnessed by the Plaintiff who claims to have issued the money yet the deponent is the Advocate on record for Mr. Fauz Mohamed Modhihiri. Further, that the Plaintiff alleges to have remitted to his client Kshs. 3,500,000/= over and above the Plaintiff's client's obligations yet the annexed acknowledgement note refers to Kshs. 2,500,000/=.
12. Further, that in any event, his client categorically denies receiving any funds in cash either from the Plaintiff or his clients. That since the JVA was rescinded and all the funds remitted have been refunded, there is no basis for the Defendant's client to hand over the title to the suit property to the Plaintiff. In addition, he averred that there is no 'program of works' or 'construction schedule' that has stalled neither has the Plaintiff's clients made any investment including capital, materials, labour or mobilization since the Defendant has refunded all the funds that he received on behalf of his client. In his view, it is the Plaintiff who is seeking to unjustly enrich himself at the expense of the Defendant's client since he aims to hoodwink this court into issuing orders whose effect will be to gift his client the suit property without any consideration.
13. The second Replying Affidavit was that of the Defendant's client, FAUZ MOHAMED MODHIHIRI. He reiterated the averments made by his advocate hereinabove and confirmed that there is no joint venture agreement between him and the Plaintiff's clients since the agreement was rescinded vide a letter dated 29th July, 2020. He stated that he is a stranger to the special purpose vehicle and was not involved in its registration and neither did they agree on its shareholding. That it is a creation of the impugned addendum dated 23rd July 2020 which he is also a stranger to and categorically deny its contents. Further, he stated that he only received Kshs. 4,600,000/= which sum has since been refunded by way of depositing in the account of the Plaintiff's advocate and there was no outstanding amount as at the time of filing this suit.
14. Additionally, he averred that neither him nor his advocates on record signed or executed the impugned addendum and thus his signature on annexure "AMI 6" can only be a forgery. Further, that it is not well executed as agreed upon in Clause 11 of the Joint Venture Agreement being that his advocates on record have not witnessed his signature. He also noted that he is not aware of any further amounts of cash paid to him as claimed by the Plaintiff. That he is a stranger to the acknowledgement note produced by the Plaintiff and the same must be a forgery as it is only witnessed by the Plaintiff. Further, he averred that throughout the said transaction, it was clear as per clause 1 of the Joint Venture Agreement that he would be represented by the Defendant and therefore, he would not swear any affidavit in their



absence. In his view, it is clear that the Plaintiff is trying to use the court process to prejudice him to the extent of forging documents and signatures to get orders from this Honourable court.

15. Finally, he also averred that contrary to the Plaintiff's allegations, there is no program of works' or 'construction schedule that has stalled and neither have the Plaintiff's clients made any investment including wing capital, materials, labour. He noted that in fact, the Plaintiff has maliciously damaged the suit property and if this application is not dismissed, irreparable damage will be occasioned to him instead.

Analysis and Determination

16. I have carefully considered the application and the affidavits of the respective parties. I have also considered the parties' respective submissions and authorities cited. The only issue for determination at this point is whether the court should grant the injunctive orders sought.
17. The law on granting of interlocutory injunction is set out under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provide as follows: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

18. The principles governing the grant of temporary injunctions are well settled and were initially laid down in the case of *Giella vs Cassman Brown & Company Limited*, where the court stated as follows: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

Whether the Plaintiff has established a prima facie case with a probability of success

19. On this, the Plaintiff submitted reiterated that his clients entered into an Agreement with the Defendant's client for the transfer of the suit property but the Defendant has refused to abide by the terms of his professional undertaking despite receiving a total of Kshs. 8,500,000/= paid to him in cash by the Plaintiffs clients as stated in the grounds in support of his application. The Plaintiff argued that this has imperiled his client's planned investment of approximately Kshs. 305,000,000/= on the property. He relied on the definition of a prima facie case as set out in the case of *Julius Mogaka Gekonde T/A E-Smart Technical College v Ouru Power Limited & Another* being, one in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which



has apparently been infringed by the opposite party to call for an explanation or rebuttal from the other.

20. As for the Defendant, he reiterated the facts of the case as per the Affidavits filed in response to the Plaintiff's application. He submitted that clauses 15 and 11 of the Joint Venture Agreement required that all variations or amendments be signed in the same manner as the Agreement. He argued that even if his client was a party to the Addendum, the fact that alleged his signature thereon is not witnessed invalidates the entire addendum by virtue of Section 38 of the *Land Act* which requires that the signature of each signing party in contracts for disposition of any interest in land be attested to by a witness who is present when the contract is being signed by such party.
21. He argued that it is absurd for the Plaintiff to allude to paying a further Kshs. 1,000,000/= as a "gesture of good will" and "commitment fee" to an undisclosed person on an undisclosed date allegedly after the Joint Venture Agreement had already been executed. As regards the further cash payment of Kshs. 2,500,000/= to his client, he urged the court to take cognizance of the fact that there are regulations governing handling of cash in excess of Kshs. 1,000,000/=. Further, he submitted that the Joint Venture Agreement was rescinded for the simple reason that the Plaintiff's clients failed to show proof of funds and capacity to complete the project. He also noted that the Plaintiff has not denied the fact he refunded the moneys that had been paid to him which means that there is no consideration.
22. He relied on the case of Trustees of the *National Security Intelligence Staff Superannuation Scheme v Runda Gardens Development Limited* where Gacheru J dismissed a claim for specific performance where a refund had been accepted. Reliance was also placed on the case of *Magdalene Wambui Mbugua Mubia & 2 Others v Charles King Kigwe & 3 others* where the court stated a sale agreement was not enforceable where the same had been terminated. The Defendant further argued that since an injunction is a discretionary remedy, it is granted on the basis of evidence and sound legal principles. In his view therefore, the Plaintiff has not established a prima facie case with a probability of success.
23. A prima facie case was defined by the Court of Appeal in the case of *Mrao v First American Bank of Kenya Limited & 2 others* as follows: -

“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
24. It is also important to note that the court will not venture into considering the merits of the case when considering whether or not a prima facie case has been established. In this regard, am guided by the Court of Appeal's sentiments in the *Nguruman Limited v Jan Bonde Nielsen & 2 Others* that:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.”
25. In the instant case, the question as to whether the Plaintiff has a prima facie case with a probability of success turns on the nature of his interest in the suit property. The Plaintiff has to demonstrate that



he has a right to the suit property which is likely to be violated by the Defendant and his client the Transferor. From the manner in which the Prayer 3 of the instant application is framed, I hold no doubt that the Plaintiff has no interest whatsoever in the suit property because he was only acting for his clients who were the Transferees in the Joint Venture Agreement. He was not a party to the said agreement and therefore cannot be seen to be asking the court to protect his interest therein. Be that as it may, this being a court of justice and with my understanding of circumstances surrounding the matter before me, I will proceed to determine what interest, if any, the Plaintiff's clients have in the property on the basis of the material placed before the court by both parties.

26. It is not disputed that the Defendant's client, the Transferor, is the registered owner of the suit property whilst the Plaintiff's clients, the Transferees, were intent on developing the property and the parties entered into a Joint Venture Agreement in that respect on 16th June 2020. Subsequently, on 19th June 2020, the Defendant issued the Plaintiff with a Professional Undertaking to release to him the Original Indenture in respect of the suit Property upon receipt of Kshs. 5,000,000/= which was to serve as compensation for loss of rental income for the two (2) year duration of the construction. The Plaintiff has produced a bank transfer note indicating that the sum of Kshs. 4,600,000/= was remitted to the Defendant's bank account on 2nd July 2020 for the said purpose. However, the Defendant has annexed a letter dated 29th June 2020 indicating that the Transferor rescinded the Joint Venture Agreement since the payment made was less than the agreed sum and as a consequence, the Defendant refunded the sum of Kshs. 4,600,000/=. The Plaintiff has not denied this fact meaning that the Transferees accepted the refund.
27. The Plaintiff has however annexed an acknowledgement note dated 23rd July, 2020 showing that the Transferor received a further Kshs. 2,500,000/= in cash from the Plaintiff. The Transferor has denied any such receipt and alleges that his signature thereon is a forgery. These are issues which cannot be ascertained at this interlocutory stage because they require evidence which must be tested through cross-examination at the main trial and not through affidavit evidence. In that case therefore, I find that the Plaintiff has not established that his clients, the Transferees, have any proprietary interest over the suit property that would defeat the Transferor's ownership of the same. In addition, I find that the Plaintiff has not demonstrated that the Defendant has breached his Professional Undertaking dated 19th June 2020 to convince the court to issue an order compelling the latter to honour the same at this stage. The upshot is that I am not persuaded that the Plaintiff has established a prima facie case with probability of success.

Whether damages are an adequate remedy

28. On this, the Plaintiff submitted that the Defendant has aided his client to breach the terms of the terms of the Joint Venture Agreement by entering into third party agreements during the pendency of the Agreement to the detriment of his client whose entire investment including capital, materials, labour, security insurance, mobilization and professional fees is in jeopardy. He reiterated that as a consequence of the Defendants actions, the program of works and construction schedule have stagnated and is likely to grind to a halt. He argued that in the circumstances, his clients stand to suffer irreparable harm and injury which cannot be compensated in damages unless the injunction sought is granted.
29. On his part, the Defendant submitted that the Plaintiff has not demonstrated what loss they stand to suffer should the injunction not be granted. He reiterated that the Plaintiff's clients only paid the Defendant Kshs. 4,600,000/= which amount has been refunded and the refund accepted. Further, he argued that it is evident that this is a money dispute and not one regarding the suit property. It was also his contention that the Plaintiff has not claimed any sentimental attachment, or any particular attachment to the suit property, all his clients had were plans and dreams over the suit property which



cannot be the basis for the issuance of an injunction. In his view therefore, damages are also an adequate remedy in this case.

30. Irreparable harm must be such that the damage caused to the applicant cannot be remedied by damages. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court stated as follows in this regard:

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy

31. In the instant application, I note that the Plaintiff has computed his client’s total exposure under the Joint Valuation Agreement. Further, one of the reliefs being sought under Prayer 5 of the Originating Summons filed herein by the Plaintiff is “damages for breach of a professional undertaking”. In my view, this is a clear acknowledgement by the Plaintiff that damages are quantifiable and would indeed be an adequate remedy in this case. In any event, the Plaintiff has not shown that the Defendant may not be in a position to pay damages if they become due. I therefore find that the Plaintiff has not demonstrated that his clients risk suffering irreparable harm which cannot be compensated by way of damages if the injunction sought is not granted.

In whose favour does the balance of convenience lie?

32. On this, the Plaintiff submitted that considering all the circumstances of the case, the balance of convenience lies in favour of granting the injunction sought since his clients stand to suffer greater prejudice in the absence of the same.
33. As for the Defendant, he submitted that the balance of convenience lies in the application being dismissed with costs to him for various reasons. Firstly, that as at the time the Defendants client rescinded the JVA, the only action that had been taken by the Plaintiff’s client was payment of KShs. 4,600,000/= which money has since been refunded. Secondly, the suit property had not been transferred to the Plaintiff’s client, neither had there been any intention of that being done since completion documents had not been released to the Plaintiff. Thirdly, the Plaintiff’s clients had not taken possession of the suit property and implementation of the project had not yet commenced. Lastly, the property has already been registered in favour of a third party who has not been enjoined to this suit.
34. Since I do not entertain any doubt as to whether or not the Plaintiff has established a prima facie case and/or whether or not damages would be an adequate remedy in this case, I will not proceed to consider where the balance of convenience lies.

Deposition

35. The upshot is that the Plaintiff’s Notice of Motion dated 29th September, 2020 lacks merit and the same is dismissed with costs to the Defendant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD SEPTEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE



1. Mrs. Mwandumbo for the Defendant/Respondent.
 2. N/A for Mr. Osundwa for the Plaintiff/Applicant.
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