



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 10 OF 2020 (COMPLEX)

SALAMA BEACH HOTEL LIMITED.....1ST PLAINTIFF/APPLICANT

ISAAC RODROT..... 2ND PLAINTIFF/ APPLICANT

STEFANO UCCELLI3RD PLAINTIFF/ APPLICAN

MARIO SCOTTI CAMUZZI.....4TH PLAINTIFF/ APPLICANT

-VERSUS-

DR. ARCURI IGNAZIO.....1ST DEFENDANT/ RESPONDENT

D.SSA DAL MORIO MADDALENA.....2ND DEFENDANT/ RESPONDENT

AVV. DE CESARI PATRIZIA3RD DEFENDANT/ RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Munyithya Mutugi Umara & Muzna Advocates for the Applicants

Respondents appearing in person

RULING

The extant proceedings relate to a Complaint dated 18th May 2020 and filed on the same day contemporaneously with the Notice of Motion dated 18th May 2020, brought under Certificate of Urgency, and premised on Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010, Section 1A and 1B and Articles 35 and 159 (2) of the Constitution. In the plaintiffs'/applicants' Motion, to which this Ruling relates, the following Orders are sought:

a) THAT this application be certified urgent and service be dispensed with at the first instance.

b) THAT an Order of temporary injunction restraining the defendants by themselves, their successors in title, agents or otherwise while in Italy, Kenya or otherwise from disposing their interests (if any), properties, shares and or other assets in Salama Beach Hotel Limited, the 1st Applicant, pending the hearing and determination of this Application interpartes.

c) THAT an Order of temporary injunction restraining the Respondents/Defendants by themselves, their successors in title, agents or otherwise while in Italy, Kenya or otherwise from disposing their interests (if any), properties, shares and or other assets in Salama Beach Hotel Limited, the 1st Applicant, pending the hearing and determination of this suit.

d) THAT a mandatory order be issued summoning the Defendants: Dr. Arcuri Ignazio, D.Ssa Dal Moro Maddalena and Avv. De Cesari Patrizia to appear in court for oral examination to confirm the status of the alleged receivership proceedings in Italy and the relevance of the receivership of proceedings to the identity and property of the Plaintiff.

e) THAT the costs of the application be provided for.

The application is buttressed by the grounds espoused therein as well as by those set out in the supporting affidavit of **Isaac Rodrot**, the 2nd Applicant.

After a hearing on 18th May 2020, this Court certified the applicants' motion as urgent and directed that it be served upon the respondents. Additionally, the Court directed that the issue of temporary injunction be canvassed interpartes through a video link platform. To this end, the incharge Civil and ICT officer was mandated to facilitate the parties' address the Court upon their filing of the respective court process service. Replies were to be done electronically as provided by the Judiciary COVID-19 Guidelines. The Court further directed an interpartes hearing of the Application and set it for 22nd May 2020.

Subsequently, having served the respondents' through email and via a courier service, when the matter came up in Court on 9th June 2020, the applicants' Counsel sought a determination from the Court on the application. An issue arose as to the manner of service and in its Ruling of 25th June 2020, this Court directed that the Respondents' be accorded an opportunity to be heard in person or through legal counsel with due regard being paid to the requirements of Order 25 and 26 of the Civil Procedure Rules as applicable to the plaintiffs' suit. The Court therefore declined to grant the order of temporary injunction pending the hearing and determination of the suit.

In compliance with the Court's directions of 25th June 2020, the Applicants, through a Motion dated 29th June 2020, sought to regularize service to the Respondents by way of substituted service and requested an early hearing for the Motion dated 18th May 2020. In its Order dated 6th July 2020, this Court granted leave to serve the Court processes outside the Republic of Kenya to the Respondents who are not residents of Kenya. The Court further directed that the matter be mentioned before the Deputy Registrar to confirm effective service and thereafter the file be placed before this Court for case management directions.

The Applicants' Case

The 2nd applicant avers that he is competent to depone on his own behalf and on behalf of the other applicants and to this end annexes copies of the Certificate of Incorporation and CR12 of the 1st plaintiff/applicant as well as a Board resolution of 1st plaintiff/applicant and a letter of Authority signed by the 3rd and 4th applicants granting him said authority.

It is the applicants' deposition that they have filed suit seeking substantive Orders in the nature of:

a) A mandatory order compelling the respondents/defendants to personally appear in court for oral examination to establish the interests of Ventaglio International SA relating to the 1st defendant,

b) A permanent order of injunction restraining the respondents/defendants and their successors in title or their agents from auctioning, selling and or disposing any share, asset and or property of the 1st plaintiff either in Italy or elsewhere.

c) A declaration that the alleged receivership proceedings in Italy against Ventaglio International SA cannot be enforced against the assets of the 1st Plaintiff.

d) A declaration that the respondents/defendants have acted ultra vires their power act excessively negligent and procedurally fraudulent in their dealings as receivers against the Plaintiffs.

e) A declaration that any attempt to auction and or sale by private treaty of an asset and or interests by the respondents/defendants as receivers of Ventaglio International SA in Italy or elsewhere is unconstitutional, null and void.

f) Any other order the court may deem expedient to grant.

g) Costs of the suit

It is averred that the 1st applicant is the registered proprietor of all that land known as Grant No.11576 and Plot No. 9890 Watamu and the premises constructed thereon known as **Temple Point**, the "Suit Property". Per the Applicants, the assertion that the respondents/defendants are the Trustees in Bankruptcy of **Ventaglio International SA** pursuant to alleged Bankruptcy Proceedings in Italy is alien to them and will be put to strict proof.

It is further deponed that the directorship and shareholding of the 1st applicant is comprised of the 2nd, 3rd and 4th applicants wherein the 2nd applicant, **Isaac Rodrot**, holds 90,000 shares with the 3rd and 4th applicants being non-shareholding directors. It is the deponent's averment that he holds these shares for himself and as a trustee/sole agent of the 3rd and the 4th applicants pending completion of certain regulatory requirements by the Business Registration Service.

As the applicants' case goes, **HCCC NO. 118 OF 2009 – MALINDI** was filed in this court against the 1st applicant in which its shares, the management and control of its assets were alienated to third parties by a court order issued on 22nd January 2010. That this order was subsequently challenged and on 30th April 2015, the High Court nullified the 22nd January 2010 order and directed that the shares, assets, management and control of all the assets and affairs of the 1st applicant to revert to the control and management of the 1st, 2nd and 3rd Applicants.

The applicants aver that the third parties who had taken management and control of the suit property filed numerous cases/applications/appeals among them:

a) Court of Appeal Civil Appeal No. 36 of 2015 Malindi where the 2nd and the 3rd Plaintiffs were parties as 2nd and 1st

Respondents respectively. This Appeal was dismissed by the Court of Appeal on 15th December 2017 and the orders of 30th April 2015 confirmed.

b) Court of Appeal Civil Application No. 19 of 2015-Malindi which was an application by the Appellant in Civil Appeal No. 36 of 2015 to file a supplementary Record of Appeal.

c) An application to review the orders of 30th April 2015 was filed by the third parties in HCCC NO. 118 of 2009- Malindi at the High Court but the same was dismissed on 21st March 2018. This dismissal was appealed against in Court of Appeal Civil Appeal No 43 of 2018. This appeal was dismissed on 21st August 2019. Upon dismissal of Civil Appeal No. 43 of 2018- Malindi, the Appellants filed an application under Article 163(4)(b) of the Constitution for certification and leave to appeal to the Supreme court. The Application was dated 24th July, 2018. It was heard and on 24th April 2020 and dismissed with costs.

d) In 2018 other third parties filed HCCC No. 8 of 2018 - Mombasa in which the 1st and 2nd Plaintiffs are the 5th and 6th Defendants respectively. The 1st, 2nd and 3rd Defendants herein are enjoined as the 2nd, 3rd and 4th Defendants respectively. This suit is still pending. On 19th October, 2018 the High Court allowed an application for joinder of a party in HCCC NO. 8 OF 2018 MOMBASA.

e) The 2nd Plaintiff filed Court of Appeal Civil Appeal No. 3 of 2018 Mombasa and the 3rd Plaintiff filed Court of Appeal Civil Appeal No. 2 of 2018- Mombasa. These were consolidated and a Judgment delivered on 19th October, 2018 in which the orders of the High Court in HCCC NO. 8 OF 2018 MOMBASA issued on were set aside.

The applicants contend that in defense of the interests of the 1st applicant, they appointed several law firms to act on their behalf. That each of these law firms charged fees some of which is still pending.

It is further contended that prior to 30th April, 2015 the 2nd applicant was the sole agent of **Ventaglio International SA**. That pursuant to the Court Order issued on 30th April 2015 in **HCCC NO. 118 OF 2009 – MALINDI**, the 2nd and 3rd applicants herein are the bonafide and the only shareholders of the 1st applicant. That together with the 4th applicant, they are the only officers and owners of the 1st applicant who have taken both administrative and all defensive actions since 2010 to date by instituting and or defending the suits.

The applicants make reference to a document of 18th July, 2018 in Mombasa **HCCC NO. 8 OF 2018** which they posit confirms that the Respondents are the trustees in bankruptcy of **Ventaglio International SA**, have never made decisions regarding the management of **Salama Beach Hotel Ltd**, do not know who managed it, have never brought any legal actions in Kenya and are unable to determine the validity of a document transferring 40% of the shares of **Salama Beach Hotel Ltd** to **Isaac Rodrot**, the 2nd applicant and deponent herein. It is then contended that because of the applicants' protests, this document was withdrawn and substituted with another document filed in court on 10th January, 2019. Per this document, it is contended, the respondents formally withdrew the document dated 15th May, 2018. Furthermore, that they recognized the validity of the order of 30th April, 2015 in **HCC NO. 118 OF 2009** as well as the validity of the decision of the **Court of Appeal in Civil Appeal No. 36 of 2015**. That the respondents agreed that the ownership, management, and control of the 1st applicant can only be adjudicated between parties who were owners of the 1st applicant/plaintiff as at 14th December, 2009.

The applicants contend that they have now established through their reliable contacts in Italy that the respondents are in the process of auctioning what they term as their rights and interests as receivers of **Ventaglio International SA** in **Salama Beach Hotel Ltd** pursuant to the Court Order of 30th April, 2015 in **HCCC NO. 118 OF 2009 MALINDI** in accordance with the Italian Law. In this regard, it is averred, the applicants are apprehensive that the respondents will proceed to sale through auction all the shares of the 1st applicant before the main suit is heard.

It is contended that the alleged ongoing receivership in Italy for **Ventaglio International SA** being conducted by the Respondents has never been registered in Kenya hence the Kenyan market has not been given an opportunity to bring forward any liability or claim that could be existing between the Kenyan market and the plaintiff or its principals. That the assets associated with the 1st applicant including claims the it could be having against third parties have not been evaluated and presented before the receivers in Italy. That the 1st applicant, being a Limited liability company registered in Kenya is subject to the Constitution of Kenya, the rules of receivership in Kenya and other relevant legislations. That any attempt to dispose off the assets of the 1st applicant outside the jurisdiction of this court would deny all potential creditors against the 1st applicant, including the 2nd and 3rd applicants, the opportunity to present and prove their claims.

The applicants aver that they require information surrounding the alleged receivership proceedings in Italy against the **Ventaglio International SA** and its relationship with the assets of the 1st plaintiff pursuant to Article 35 of the Constitution.

The deponent states that as a sole agent, he filed suits and defended suits filed against the 1st applicant all along the way until the Order of 30th April, 2015 which conferred on him proprietary interests in the 1st applicant. That from then, he acted both as an agent and a shareholder together with the 3rd and 4th applicants.

The applicants contend that they took over the physical possession of the 1st applicant on 21st February, 2020. As at the time of taking over there were guests residing in the hotel, **Temple Point** and they did not want to interrupt the business flow. For this reason, they continued with the business by retaining some key staff from the previous employment by third parties and injecting some capital to pay bills and purchase some essentials for the operations.

It is averred that as at the time of the takeover, the business of the 1st plaintiff was a going concern in that there were paying guests in the property on the date of takeover, there were staff members running the business and there were pending bills to be settled particularly those relating to electricity and water. That they are still spending their own resources to keep the operations going on. It is further averred that as a result of a current tourism slump, the ongoing issue around the corona virus scourge and the current economic slump in the country, it will take a long time before the 1st applicant is able to settle any of the pending bills. Accordingly, the 1st applicant must negotiate with the suppliers and the debtors for more time.

It is deponed that as at the 10th of March 2020, the business of the 1st applicant was fully operational and the applicants intended to inject more resources, improve, and renovate the existing infrastructure of the premises to aid in a successful business.

The view taken by the applicants is that the actions of the respondents are procedurally fraudulent and excessively negligent in that being aware that since 2009, adverse claims had been advanced against the 1st applicant in **HCCC NO. 118 OF 2009 MALINDI, CIVIL APPEAL NO. 36 OF 2015 MALINDI, HC WINDING UP CASE NO. 2 OF 2010 MALINDI, COURT OF APPEAL NO. 2 OF 2019, CA NO. 43 OF 2018 MALINDI** and others, they showed no interest or concern even though the said cases had the ability, without a defence to permanently transfer the shares, ownership and control of the assets of the 1st applicant. Moreover, being aware that third parties using a fraudulent court order issued in Milan Italy did nothing to move the court in Milan to correct the record. That notwithstanding their roles as receivers, the respondents have never come to Kenya to see the condition of the assets of the 1st applicant. That when they respondents did come to Kenya in 2018, they filed documents in **HCCC NO. 8 OF 2018 MOMBASA**, which had the potential of fully compromising the interest of the 1st applicant and by extension those of **Ventaglio International SA**; ignoring the sole agents of **Ventaglio International SA** in Kenya, the 2nd applicant and 2 other Directors. That the respondents failed to register the receivership proceedings in Kenya.

According to the applicants, the Court Order of 30th April, 2015 created proprietary interests in their favour in relation to the assets, shares, management, and control of the 1st applicant. As a result of this, any disposal by way of private treaty or public auction in Italy or elsewhere of the shares and or any other assets including land belonging to the 1st applicant would be an arbitrary disposal of a right to property and contrary to the provisions of Article 40 of the Constitution. Further, the order of 30th April, 2015 fundamentally changed the ownership structure of the 1st applicant to the extent that **Ventaglio International SA** has no proprietary interests enforceable in Italy or elsewhere in receivership proceedings against the plaintiff.

It is the applicants' view that bar the intervention of this court, the respondents will dispose all the applicants' interests in the 1st applicant to the detriment of the applicants and they shall suffer irreparable loss and damage. It is averred that the applicants are in both legal and physical possession of the 1st applicant and the balance of convenience tilts in their favour. In closing, it is deponed that the instant Application is urgent and merited.

Analysis and Determination

I have apprised myself of the applicants' arguments as put forth by **Mr. Munyithya**, their advocate. I am also cognizant of the fact that despite proper service having been effected to the respondents', they have failed or neglected to file a response to the applicants' Motion dated 18th May 2020 or at all. In the circumstances, I find that the issue for determination is whether the applicants' are entitled to a temporary injunction in the terms sought in prayer (c) of the Notice of Motion dated 18th May 2020.

Order 40 Rule 1(a) of the Civil Procedure Rules 2010 delineates the law on temporary injunctions thus:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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 orders."

Considerations for the grant of interlocutory injunctions were laid down in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** where the Court opined:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."

The Court of Appeal elucidated in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** that for an application for temporary injunctive relief to succeed, the conditions set out in the **Giella case (supra)** need not only have been met but also that they ought to be met sequentially. This is to say, the applicant must first establish a prima facie case; only then will the Court look at whether irreparable injury will be occasioned and if it finds in the affirmative, consider whether the balance of convenience tilts in their favour. The superior court in that instance stated:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted,

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

In **Pine Court Malindi Limited & another v Imperial Bank of Kenya (Under Receivership) & 2 others [2019] eKLR** the Court restated these principles as follows:

"It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted."

A rumination of the foregoing jurisprudence directs the Court to address the question of whether the Applicants herein have established a prima facie case. **Per Bosire, JA in Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, a prima facie case is as follows:

"So what is a prima facie case? I would say that in civil cases it is a case 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 as to call for an explanation or rebuttal from the latter."

In its rendition on what amounts to a prima facie case, the Court of Appeal in **Nguruman (Supra)** made succinct remarks to wit:

"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 does 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. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

So, does the case as presented by the applicants meet the test of a prima facie case? Condensed, the applicants' gravamen is that on the strength of a Ruling by **Chitembwe J in Malindi HCCC No. 118 of 2009** delivered on 30th April 2015 and subsequently upheld by the **Court of Appeal in Malindi Civil Appeal No. 36 of 2015** delivered on 15th December 2017, the shares, management and control of the assets of the suit property (1st applicant) was put in the hands of the 2nd, 3rd and 4th applicants. It is their case that through their reliable contacts in Italy, they have established that the Respondents are in the process of auctioning what they term as their rights and interests as receivers of **Ventaglio International SA in Salama Beach Hotel Ltd** pursuant to the Court Order of 30th April, 2015 in **HCCC NO. 118 OF 2009 MALINDI** in accordance with the Italian Law. The applicants' maintain that the respondents are strangers who have no interest in the suit property.

The applicants are adamant that the alleged ongoing receivership in Italy for **Ventaglio International SA** being conducted by the respondents has never been registered in Kenya hence the Kenyan market has not been given an opportunity to bring forward any liability or claim that could be existing between the Kenyan market and the plaintiff or its principals. That the assets associated with the 1st applicant including claims the it could be having against third parties have not been evaluated and presented before the receivers in Italy. That the 1st applicant, being a Limited liability company registered in Kenya is subject to the Constitution of Kenya, the rules of receivership in Kenya and other relevant legislations. That any attempt to dispose off the assets of the 1st applicant outside the jurisdiction of this court would deny all potential creditors against the 1st applicant, including the 2nd and 3rd applicants, the opportunity to present and prove their claims. Over and above the foregoing, the applicants aver that they require information surrounding the alleged receivership proceedings in Italy against the **Ventaglio International SA** and its relationship with the assets of the 1st Plaintiff pursuant to Article 35 of the Constitution.

Juxtaposing the applicants' claims above against the description of a prima facie case in the preceding excerpts of judicial authority, the applicants' case meets the required threshold. A judgement of this Court, confirmed on appeal no less, has given them the proprietary interests over the suit property. These interests are clearly threatened by the alleged ongoing auction proceedings in Italy. As such, this Court is convinced and so holds that indeed, they have established a prima facie case.

The next issue is whether irreparable injury, incapable of being assuaged by an award of damages, will be occasioned on the applicants should conservatory relief be denied. To start us off is a definition of irreparable injury attributable to **Halsbury's Laws of England, 3rd Edition volume 21, paragraph 739 page 352:**

"Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly

be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.”

This court associates itself with the remarks on irreparable injury made in **Marple Brooks Projects Company Limited & another v I & M Bank Limited [2019] eKLR** to wit:

“The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207 was that “No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

Per the applicants’ whom I am inclined to believe in the absence of any rebuttal from the respondents, auction proceedings relating to the 1st applicant are underway in Italy. This is outside the jurisdiction of the Republic of Kenya. The financial position of the respondents, cannot be ascertained. As such and in the eyes of this Court, irreparable injury would be occasioned on the applicants’ should their prayer for temporary injunctive relief be denied.

Finally, as the exposition above reveals, the balance of convenience tilts in favour of the applicants. They have a court Judgement in their favour. The alleged auction proceedings by the respondents are in Italy. The respondents have thus far not tendered any response to the suit. This circumstance lays bare that if the orders sought herein were not granted and the respondents were left to proceed with the auction of the suit property, were the applicants’ to succeed in the main suit their Orders would be purely academic.

The upshot is that having elaborated the principles for the to grant of an interlocutory injunction and considering the equitable nature of the reliefs sought by the applicants’ this Court is inclined to exercise its discretion and grant the applicants’ a temporary injunction.

As a result, the notice of motion dated 18th May 2020 succeeds in terms of prayer (c) in favour of the applicants’ as against the respondents. The applicants shall also have the costs of the application to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST 2020

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R NYAKUNDI

JUDGE

In the presence of

1. Mr. Munyithya for the applicants