



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CIVIL SUIT NO. 122 OF 2014

NEDIM MOHAMED IBRAHIM.....PLAINTIFF

VERSUS

ANCIENT INLAND SEAS LIMITED.....1ST DEFENDANT

ABDULBASIT SALEH MUHSIN.....2ND DEFENDANT

ABDUKARIM SALEH MUHSIN.....3RD DEFENDANT

RULING

1. The plaintiff filed an application dated 6th October, 2014 under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 rules 1, 2, 3 of the Civil Procedure Rules, 2010, seeking the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) A temporary injunction be granted to restrain the 2nd defendant whether by himself or proxy from selling, transferring, assigning, charging, or exercising the voting rights accruing from shares held in trust for the plaintiff without the express written consent of the plaintiff pending the hearing and determination of this suit;

(v) A temporary injunction be granted to restrain the 1st, 2nd and 3rd defendants whether by themselves, agents, servants or employees from selling, transferring, charging, leasing or in any other manner parting with immovable properties registered in the name of the 1st defendant without the express written consent of the plaintiff obtained in a duly convened Directors' meeting pending the hearing and determination of this suit; and

(vi) Costs be provided for.

2. The application is anchored on the grounds on the face of it and the affidavit of the plaintiff, Nedim Mohamed Ibrahim, sworn on 6th October, 2014. On 17th December, 2014, the 1st, 2nd and 3rd defendants filed an affidavit sworn by the 2nd Defendant, with the authority of the 1st and 3rd defendants, to oppose the application. The defendants also filed grounds of opposition on the same date.

3. Although the affidavit filed by the defendants addresses the issues raised in the applications dated 6th October, 2014 and 11th November, 2014, the application that is under consideration is the one dated 6th October, 2014. I will therefore restrict this ruling to the said application.

4. On 12th October, 2016 this court ordered Mr. Sumba, Learned Counsel for the plaintiff to avail a copy of his written submissions as the same was not in the court file. The said submissions were not availed until after this case was mentioned in court on 25th January, 2019. It took the intervention of Mr. Tebino, Learned Counsel for the defendants to have the plaintiff's Counsel avail his submissions. The delay in delivery of this ruling has thus been occasioned due to non-availability of the said submissions.

5. The Plaintiff's submissions are largely drawn from his affidavit in support of this application. The said submissions are to the effect that

the plaintiff, the 2nd and 3rd defendants have had a long standing business association in real estate going back to the year 1999, which was grounded on mutual trust and confidence. He further states that as a result of mutual trust and confidence, he and the 2nd defendant had a profit sharing agreement in 1999 related to plot No. 1482/II/MN, in which the plaintiff held the 2nd defendant's beneficial interest in trust through the plaintiff's investment company Zum Zum Investments Limited.

6. The submissions further indicate that the plaintiff and the 3rd defendant acquired the 1st defendant, Ancient Inland Seas Limited jointly, but because the plaintiff held the 3rd defendant's beneficial interest in the profits to be gained from the subdivision and subsequent sale of plot No. 1482/II/MN in trust through Zum Zum Investments Limited, it was agreed between the plaintiff and the 3rd defendant that the plaintiff's 50% share in Ancient Inland Seas Limited would be held in trust for him by the 2nd defendant, who is a brother to the 3rd defendant.

7. The plaintiff's submissions are to the effect that on the above understating, the original shareholders of the 1st defendant, Boniface Kamande Waweru and Simon Githae Waweru, transferred their single shares to the 2nd defendant on the following terms:-

(i) 1 share representing 50% shares in Ancient Inland Seas Limited to Abdulkarim Saleh Muhsin, the 3rd defendant; and

(ii) 1 share representing 50% shares in Ancient Inland Seas Limited to Abdulbasit Saleh Muhsin, the 2nd defendant, to hold in trust for the plaintiff.

8. The said submissions further state that subsequent to the understanding and agreement, the plaintiff and the 3rd defendant jointly, acquired a considerable number of properties which were registered in the name of the 1st defendant. The value of the properties is said to run into tens of millions of shillings.

9. It was submitted for the plaintiff that on 3rd December, 2018 the 2nd defendant swore a declaration confirming that he held 1 share, representing 50% of the shares in the 1st defendant, in trust on behalf of the plaintiff. A copy of the said declaration is attached to the plaintiff's affidavit.

10. It was further submitted that the validity of the declaration of trust made/or issued on 3rd December, 2008 is confirmed by the sworn declaration of Mr. Paul Wamuti Ndegwa, Advocate through his witness statement/sworn affidavit. It was stated that the 2nd defendant's declaration was signed before the said Advocate.

11. Counsel for the plaintiff made reference to a pending suit, namely, Mombasa HCCC NO. 25 of 2015, Abdulkarim Saleh Muhsin vs Nedim Mohamed Ibrahim, Zum Zum Investments and Another, which arises from profit sharing in a business relationship of the plaintiff herein and the 2nd and 3rd defendants in Plot No. 1482/II/MN registered in the name of Zum Zum Investments Limited.

12. In applying the law to the facts, Mr. Sumba cited the case of **Giella vs Cassman Brown and Company Limited** [1973] EA 358 to augment his submissions that he had satisfied the 3 principles required for grant of orders of an interlocutory injunction.

13. It was argued for the plaintiff that he had established a *prima facie* case with a probability of success guided by the declaration sworn by the 2nd defendant sworn on 3rd December, 2008 confirming that he held 1 share representing 50% shares in the 1st defendant, in trust for the plaintiff. It was asserted that the foregoing was confirmed by the affidavit/statement of Mr. Wamuti Ndegwa Advocate, before whom the 2nd defendant signed the said declaration of trust.

14. Mr. Sumba challenged the veracity of the specimen signatures that were provided by the 2nd defendant to the Criminal Investigations Department (CID) after the filing of the suit with a view of establishing that his signature on the said declaration was a forgery. Counsel for the plaintiff contended that the said specimen signatures were materially altered by the 2nd defendant, rendering the entire report the product of an illegality by providing Police with false information. He submitted that the possibility of false specimen signatures having been submitted to the CID was compounded by the fact that the plaintiff and Mr. Paul Wamuti Ndegwa Advocate had not been charged with any criminal offences since October, 2014.

15. It was further submitted that the declaration of the 2nd defendant cannot be impeached at an interlocutory stage on the basis of a rather dubious report of the CID as a determination of the probity of the purported investigation report can only be done at an evidentiary and substantive hearing where the plaintiff's evidence and that of Paul Wamuti Ndegwa Advocate can be weighed against that of the alleged forensic examiner through cross-examination.

16. On the second principle of irreparable harm, it was submitted for the plaintiff that unless he is granted injunctive orders to preserve the company and his investments, there is a real likelihood that he will suffer irreparable pecuniary harm, which would not adequately be compensated by an award of damages, for the following reasons:-

(i) The contention by the plaintiff that the investment in the properties registered in the name of Ancient Inland Seas Limited is substantial, has not been denied or controverted by the 2nd and 3rd defendants;

(ii) The 2nd and 3rd defendants have in paragraph 11 of the replying affidavit asserted that the plaintiff will not suffer any loss, whether substantial or otherwise, if pending the hearing and determination of the suit, they dispose of the shares or properties which are the subject matter of the suit;

(iii) The 2nd and 3rd defendants have already indicated in paragraph 12 of their replying affidavit that as the current directors and shareholders of Ancient Inland Seas Limited they cannot, in any way whatsoever, be prevented from dealing with its property as they wish as they do not recognize the plaintiff;

(iv) There is not a single averment or evidentiary showing by the 2nd and 3rd defendants, whether on their own behalf or on behalf of the nominal 1st defendant, that they have not encumbered or intend to encumber the 1st defendant's properties and assets with a view to stealing a march on the plaintiff; and

(v) There is not a single averment or evidentiary showing by the 2nd and 3rd defendants, whether on their own behalf or on behalf of the nominal 1st defendant that they have sufficient assets and finances capable of paying substantial damages and interest thereon running into millions of shillings, in the event that pending the hearing and determination of the suit, they dispose of the shares or properties which are the subject matter of the suit, and the plaintiff ultimately succeeds in the suit.

17. The plaintiff's Counsel therefore submitted that the plaintiff suffers the substantial risk of irreparable harm that cannot be adequately compensated by an award of damages if an order for an injunction is not granted.

18. In closing his submissions, Mr. Sumba stated that the balance of convenience, equity and the wider public interest overwhelmingly weigh in favour of granting the injunction pending the hearing and determination of the suit. He stated that public interest in the administration of justice calls for an injunction to be granted so that the court's ultimate decision is not rendered purely academic or nugatory. He indicated that the foregoing outweighs the harm that would result if an injunction was denied.

19. In his view, the defendants could not be irreparably harmed by the interlocutory injunction as there is no averment or any evidence of any harm that they stand to suffer set out in the replying affidavit. In addition, the defendants can seek leave of the court on a case by case basis and with the participation of the plaintiff, to be permitted to dispose of any of the 1st defendant's immovable properties, where the court and the plaintiff can consider the reasons for doing so and how the proceeds therefrom can be secured pending the hearing and determination of the suit, such that if the plaintiff is ultimately successful, he cannot suffer irreparable pecuniary loss.

20. The defendants filed submissions on 22nd July, 2015. Mr. Tebino, Learned Counsel for the defendants highlighted the same. He stated that the application in issue and the entire suit is premised on an affidavit allegedly deposed to, by the 2nd defendant on or about 3rd December, 2008, which the said defendant had denied ever deposing to and ever appearing before one Wamuti Ndegwa Advocate to execute the said affidavit. Counsel cited the provisions of Rule 7 of the Oaths and Statutory Declarations Act which requires a Commissioner for oaths before administering an oath to satisfy himself that the person named as the deponent and the person before him are the same and that such person is outwardly in a fit state to understand what he is doing. It was submitted that failure to adhere to the said provisions renders the affidavit herein defective and void as the same does not fall within the meaning of an oath as contemplated by the said Act.

21. Counsel for the defendants indicated that the 2nd defendant lodged a complaint with the CID after the filing of this suit, whose Forensic Examiner through a report dated 6th November, 2014 confirmed that the signature on the affidavit sworn on 3rd December, 2008, was made by a different person.

22. The defendant's Counsel disputed submissions made with regard to the statement of Wamuti Ndegwa Advocate save for the fact that he was the Commissioner for oaths who attested and commissioned the affidavit. Counsel pointed out that the said statement is however silent on whether the 2nd defendant ever appeared before the said Advocate or executed the said affidavit in the Advocate's presence as is the mandatory requirement under the Oaths and Statutory Declarations Act.

23. It was submitted that the authenticity of the Forensic Document Examiner's Report could not be challenged through submissions as no affidavit had been filed to challenge the same.

24. With regard to the plaintiff's contention that he was a shareholder/member of the 1st defendant, it was submitted that no evidence was tendered before this court to prove that the plaintiff subscribed for shares in the 1st defendant save for the allegation of a bare trust agreement between the plaintiff and the 2nd defendant, which was not produced before this court.

25. It was argued that the plaintiff had failed to produce any shred of evidence of the alleged substantial investments in real properties that are registered in the names of the 1st defendant.

26. It was contended that the copies of title deeds attached to the plaintiff's affidavit are not proof of his proprietary interest in the property owned by the 1st defendant.

27. The defendant's Counsel submitted that the plaintiff had not established a *prima facie* case with a probability of success. He cited the cases of **Mrao Ltd vs First American Bank of Kenya Limited and 2 Others** [2005] KLR 125 and **Nguruman Limited vs Jan Bonde Nelsen and 2 Others** [2014] eKLR which outline what a *prima facie* case is.

28. In elaborating that the plaintiff had failed to establish a *prima facie* case, Mr. Tebino explained that the alleged bare trust that the plaintiff is relying on was not produced before this court. Secondly, that the instant application and entire suit are premised on a defective/invalid affidavit purportedly confirming an alleged bare trust between the plaintiff and the 2nd defendant. Thirdly, the 2nd defendant had presented a CID Document Examiner's report confirming that the signature on the affidavit dated 3rd December, 2008 was executed by someone else other than the 2nd defendant. Fourthly, the CID report stands unchallenged by the plaintiff to date save for mere flimsy unsupported allegations. Fifthly, that no iota of evidence has been tabled before this court of the alleged substantial investments made in the properties of the 1st defendant company.

29. On the principle of irreparable loss, it was submitted for the defendants that the plaintiff had failed to demonstrate the same as no evidence had been presented before this court to indicate that the plaintiff is a shareholder of the 1st defendant or that he made any investments in the properties owned by the 1st defendant. Mr. Tebino, therefore contended that no loss can ensue as alleged by the plaintiff. Counsel submitted that the injustice that would be caused to the defendants if the plaintiff was to be granted an injunction and later failed in the trial, would heavily outweigh the injustice that would be caused to the plaintiff if the injunction was to be refused but succeeded at the end of the trial. With regard to the said principle of injunction, Counsel relied on the case of **Corn Products Kenya Limited and Another** [2014] eKLR and **Films Rover International Ltd and Others vs Cannon Film Sales** [1986] 23 ALL ER 772.

30. The defendants' Counsel's view was that if at all the plaintiff had made substantial investments in the 1st defendant, which was denied, and if they exist, the said investments can be quantified hence this is not a proper case for grant of an interlocutory injunction. He stated that the plaintiff had failed to demonstrate any possibility of irreparable loss.

31. With regard to the third principle for grant of an injunction, it was submitted that having failed to satisfy the first two limbs, this court would have no doubt in holding either that it does not need to consider the third limb or that the balance of convenience tilts in favour of the defendants.

ANALYSIS AND DETERMINATION

The issue for determination is if the plaintiff has made out a case for grant of a temporary injunctive relief.

32. The principles to be considered in an application of this nature were well spelt out in the case of **Giella vs Cassman Brown** (supra) as follows:-

“(i) That a prima facie case with a probability of success has been established by the applicant;

(ii) An interlocutory injunction will not be granted unless the applicants will suffer irreparable injury, which would not be adequately compensated by an award of damages; and

(iii) If the court is in doubt, it will decide the application on a balance of convenience.”

33. As deduced from the depositions and annexures attached to the plaintiff's affidavit, he claims to have bought a share in the 1st defendant company from the original shareholders. He states that his name is not reflected in the said company's documents that he is a shareholder, as he nominated the 2nd defendant to hold his share in trust for him through an oral agreement. He asserted that there was deep trust between him and the 2nd defendant as a result of a previous business transaction between the plaintiff and the 3rd defendant, in Zum Zum Investments Limited and that the said defendant is a brother of the 2nd defendant.

34. The plaintiff also claims to have invested a substantial amount of money in various properties whose titles are registered in the names of the 1st defendant.

35. The plaintiff exhibited a statutory declaration sworn by the 2nd defendant on 3rd December, 2008 in which he deposes in paragraphs 2 and 5 that even though he is one of the registered Directors in the company known as Ancient Inland Seas Limited, he holds the share in trust and as a nominee of the plaintiff.

36. In paragraph 6 thereof he avers that the plaintiff is a Director of the aforesaid company by virtue of him being his nominee even though the plaintiff is not registered directly as a Director.

37. In paragraph 7 of the said affidavit, he states that he had sworn the said affidavit in confirmation of the fact that the said Nedim Mohamed Ibrahim is a Director.

38. The 2nd defendant disputed ever signing the said statutory declaration and in his affidavit he rubbished it as a work of forgery. The signature on the said declaration was subjected to forensic analysis by a Document Examiner on the request of the 2nd Defendant. A report thereof dated 6th November, 2014 indicates that the signature on the said declaration did not match with known signatures of the 2nd defendant and his sample signatures that were submitted for analysis. In the Document Examiner's opinion, the signatures were made by different authors.

39. As was submitted by Mr. Tebino for the 2nd defendant, the Document Examiner's report was not controverted by the plaintiff in a supplementary affidavit. It was only questioned during submissions. In **Daniel Toroitich Arap Moi and Another vs Mwangi Stephen Muriithi and Another** [2004] eKLR, the Court of Appeal held thus on facts that are introduced at submission stage but did not form part of the evidence adduced at the hearing of a matter:-

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

40. With regard to the declaration sworn on 3rd December, 2008, the plaintiff intends to call Mr. Wamuti Ndegwa Advocate as his witness to

testify that he attested it. The issue of whether the 2nd defendant appeared before the said Advocate and signed the declaration before him, is a matter of evidence and so is the issue of the alleged forgery of the 2nd defendant's signature. The foregoing issues which have been raised at the interim stage are meant to guide the court in determining if the principles set out in the case of **Giella vs Cassaman Brown** (supra) have been satisfied.

41. In **Mrao Ltd vs First American Bank of Kenya Limited and 2 Others** [2003] KLR 125, the Court of Appeal held thus on what constitutes a prima facie case:-

“I would say that in civil cases it is a case in which on 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.”

42. The definition of a prima facie case was expounded further by the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen and 2 Others** [2014] eKLR where the court stated as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the rights has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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.....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 that proof 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.”

43. In the present case and going by the facts and documentation availed to this court by either party, the plaintiff has failed to establish a prima facie case with a probability of success as his averment that the 2nd defendant holds a share in the 1st defendant was controverted by the 2nd defendant through the Document Examiner's report.

44. Even though the plaintiff states that he stands to suffer irreparable harm if the properties the 2nd defendant holds in trust for him are disposed of, each of the said properties has a value attached to it. It is my finding that in the event that at the end of the hearing of the case herein, it turns out that the plaintiff's claim is valid, an award of damages will compensate him for any loss he will have suffered.

45. In the case of **Nguruman Limited vs Jan Bonde Nielsen** (supra) the Court of Appeal proceeded to state that:-

“A temporary injunction should never issue when an action for an award of damages would adequately compensate the injuries threatened or caused in conclusion, we stress that it must be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of the irreparable injury, the inadequacy of pecuniary compensation and the prevention of a multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

46. The analysis of the facts of the application herein establish that balance of convenience tilts in favour of the 2nd defendant. The application dated 6th October, 2014 is hereby dismissed. Costs are awarded to the 2nd defendant.

DELIVERED, DATED and SIGNED at MOMBASA on this 15th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Sumba for the plaintiff

Mr. Tebino for the defendants

Mr. Oliver Musundi - Court Assistant