



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NUMBER 106 OF 2021

RUKIYA AHMED

HASSANALI NOORBHAI.....PLAINTIFF/APPLICANT

- VERSUS -

ZAIN AHMED HASSANALI

NOORBHAI.....DEFENDANT/RESPONDENT

RULING

I. PRELIMINARIES.

1. The Notice of Motion application before this Honorable Court for its determination is the one dated 11th May 2021 and filed on 8th June, 2021 by the Plaintiff/Applicant herein. It is brought under the provisions of Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21 and Order 40 Rule 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought for the following orders:-

a) Spent.

b) Spent.

c) THAT this Honourable court be pleased to issue temporary orders of injunction restraining the Defendant/Respondent herein either by himself,, his agent and/or any person working under him from collecting rent, utilizing the proceeds thereof or in any way dealing with the tenants of Mombasa/Block XII/95 and in place an independent agent be appointed and the rent be deposited in a joint interest earning account in the name of the parties Advocates pending the hearing and determination of this suit.

d) Spent.

e) THAT costs of this application be provided for.

3. The Plaintiff/Applicant's application is based on the grounds, testimony and the averments founded on the 13 Paragraphed Supporting Affidavit of RUKIYA AHMED HASSANALI NOORBHAI sworn and dated 11th May, 2021 and four (4) annexures marked as "RAHN – 1 to 4" annexed thereto.

She deposed that she was female adult of sound mind and understanding and conversant with the matters pertaining to this case herein. She stated that the Plaintiff/Applicant and Defendant/Respondent were both the absolute and legal registered proprietors in common with equal shares to all that parcel of land known as Land Reference Numbers Mombasa/Block XII/95, (hereinafter referred to as "The Suit Property"). They held a joint account at the Bank of India - Kenya account number 0011XXXXXXXXXXXX where they collect the rent collected from the suit property. She deposed that the Defendant/Respondent was managing the suit property in exclusion of the Plaintiff/Applicant.

4. This happened after he took advantage of the Defendant/Respondent sickness and imposed a Memorandum of Understanding on her. The Plaintiff/Applicant through her counsel has since notified of her revocation of the Memorandum of Understanding but the

Defendant/Respondent has blatantly refused to give her equal share of the rent proceeds. The Plaintiff/Applicant had never had access to the joint account since the joint account was opened. It is the Respondent who solely managed it to her detriment which has caused her to suffer great loss and prejudice.

5. She deponed that the joint account was opened for depositing of the rent collected and distributed to the Applicant but the Respondent had been solely used the money in the account. The Respondent also failed to involve her in the management of the suit property. She stated that although she used to reside in one of the flats but decided to relocate and rent out another flat elsewhere as the Respondent frustrated and denied her peaceful use and occupation of the said flat. She prayed for the application to be allowed.

III. The Defendant/Respondent's case

6. On 20th September, 2021, while opposing the application, the Defendant/Respondent filed a 24 Paragraphed Replying Affidavit dated 15th September, 2021 affirmed by ZAINUDDIN AHMED HASSANALI NOORBHAI, the Defendant herein. He averred that it's the Plaintiff and him who were the current registered proprietor of the suit land. He informed court that the Plaintiff was his biological sister. He stated that the original and erstwhile proprietor to the suit property was their late father Ahmed Hassanali Noorbhai. He died testate having left a Probate Will. His late father appointed his two wives Fatima Bint Gulamabbas, who is the mother to the parties herein and Aisha Bint Abdalla as his executors, and bequeathed the suit property to Fatima for the benefit of her children.

7. The Respondent stated that the suit property though registered in his name and that of the Plaintiff/Applicant, it's meant to benefit all his other siblings namely; Salma, Raziya and Rozmin. He claimed that the said joint account was to receive the rent that would be utilized by all the siblings inclusive of the Plaintiff/Applicant. He stated that on 30th December 2015 the Memorandum of understanding was entered into by all the siblings distributed the units amongst themselves, in order for each sibling to possess and manage their own unit independently. Since then, the Respondent stated that there had been no money received to be shared among the siblings and that he had used the account for his own independent businesses. For clarity sake, he stated that since 31st December 2017, all the monies he had withdrawn solely belonged to him.

8. The deponent denied taking advantage of the Plaintiff/Applicant's sickness, and stated that she was of sound mind when she entered into the memorandum of understanding which had been in force since 2015 till date and could not purport to unilaterally revoke it. He denied locking the Plaintiff/Applicant out of the account which he claimed that since it's a joint account she had the liberty of accessing it. He urged court to dismiss the application which he alleged lacked merit with costs.

IV. THE SUBMISSIONS

9. On 21st September, 2021 in the presence of all the parties, this Court directed that the Notice of Motion application dated 11th May, 2021 by the Plaintiff/Applicant herein be canvassed by way of written submission. All parties obliged and a ruling date was reserved accordingly.

A. The Plaintiff/Applicant written Submissions

10. On 18th October 2021, the Learned Counsel for the Plaintiff/Applicant, the law firm of Messrs. Marende Necheza & Company Advocates filed their written submissions in support of the application. Counsel submitted that the applicant has fulfilled the requirements in **Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358**, which are; the existence of a prima facie case with high chances of success, and that he will suffer irreparable damage which cannot be adequately compensated by an award of damages if the injunction is not granted and further, that the balance of convenience tilts in his favor. On prima facie the Counsel submitted that the Plaintiff/Applicant is a proprietor in common to the suit property with equal shares as evidenced by the title. Since the ownership has not been disputed and the respondent has admitted to withdrawing cash from the joint account, counsel submitted that the applicant has established a prima facie case.

11. The Plaintiff/Applicant was said to have suffered irreparable damage following the actions of the respondent of using the funds in the account to the exclusion of the Plaintiff/Applicant since year 2015. The Learned Counsel argued that the applicant has lost both financially and has not benefited from the suit property where she has equal shares. On the balance of probability counsel maintained is in favour of the applicant and relied on the case of **Ann Ngina Mutisya – Versus - Sammy Ngugi Ngina (2017)eKLR** to argue that court ought to issue the temporary injunction orders sought in order to protect the interest of the Plaintiff/Applicant's interest in the joint tenancy.

B. The Defendant/Respondent Written Submissions

12. The Learned Counsel for the Defendant/Respondent, the law firm of Messrs. N.A Ali & Company Advocates filed their written submissions on 12th November 2021. They relied on the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 to submit that the key issue for consideration is that an imminent danger has to be established. The Learned Counsel submitted that the Plaintiff/Applicant's case was in a nutshell

that she sought for injunction orders to bar the Defendant from dealing with the suit property. It was her contention that she was a joint registered proprietor to the property and on that basis she was entitled to half share of the proceeds therefrom. According to the Advocates, she admitted that there was a memorandum of Understanding on the apportionment of the units on the suit property amongst all her siblings.

13. The Learned Counsel submitted that the Plaintiff/Applicant never disown the same and insinuated that the Defendant took advantage of her illness and state of mind to lead to her signing it had failed to establish prima facie case of how she was taken advantage of when signing a memorandum of understanding, which had been in existence for the past seven years ago and subdivided the units among the siblings. The Learned Counsel submitted that though the Plaintiff/Applicant and Defendant were the registered proprietors of the suit property, there existed a memorandum of understanding that allowed all the siblings to benefit from the proceeds thereof. The Learned Counsel maintained that understanding was signed in the year 2015 and had been operational for seven years, therefore the Plaintiff/Applicant has not established a prima facie case since she did not raise any issue when they were all signing it.

14. The Learned Counsel further submitted that no medical evidence had been placed before court to show her mental status that would diminish her capability to enter into the agreement, and that the treatment report did not link her illness to her capacity to enter into agreement. The Learned Counsel urged that the Plaintiff had not shown the irreparable loss she stands to suffer if the said orders are not granted since the state of affairs have been going on for seven years. On balance of convenience, counsel urged court to find that if the said orders were granted, the Defendant/Respondent and other siblings would be blocked from dealing with the suit property. The Learned Counsel urged court to find that there were no imminent danger to warrant the sought orders and dismiss the application with costs.

15. To buttress their case they relied on the following cases:-

“Christopher Kitur Kipwambok – Versus – Vipul Ratilal Dodhia & 3 Others (2013) eKLR; and Grace Wanjiru Munyinyi & Another – Versus – Gedion Waweru Githunguri & 5 Others (2011) eKLR;

V. ANALYSIS AND DETERMINATION

16. I have considered all the issues raised in the pleadings and the application, supporting documents and the written submissions made by the parties and the relevant provisions of the law.

The issue before court is clear and has been submitted upon by both parties is:-

a) Whether the Plaintiff/Applicant through its Notice of Motion application dated 11th May 2021 has met the threshold for a grant of temporary injunction against the Defendant/Respondent.

b) Who will bear the costs of the application.

ISSUE a). Whether the Plaintiff/Applicant through its Notice of Motion application dated 11th May 2021 has met the threshold for a grant of temporary injunction against the Defendant/Respondent.

The principles for granting an interlocutory injunction are well settled in the now famous case of **“Giella – Versus - Cassman Brown & Co Limited (1973) EA 358**, into law:-

- a) the applicant must show a prima facie case with high chances of success,
- b) the applicant stands to suffer irreparable damage which cannot be adequately compensated by an award of damages,
- c) if the court is in doubt, it will decide the application on the balance of convenience.

17. A prima facie case was defined in **MRAO LIMITED – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125, inter alia:-**

‘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 would 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.

18. The ownership of the suit property, MSA/Block XII/95 has not been denied by either party. The suit property is registered in the names of the Plaintiff/Applicant and Defendant/Respondent as seen from the title deed dated 20th June 2001, who are siblings. While the Plaintiff/Applicant is silent on who bestowed title upon them, the Defendant/Respondent in his replying affidavit has annexed the will of Ahmed Hassanali Noorbhai dated 30th November 1991. In the will, the suit property is given to Fatima Bint Gulamabbas and her children. The suit property was later transferred to the parties herein vide a deed of transfer dated 31st May 2001. The plaintiff and defendant as together with their siblings (Salma, Raziya and Rozmin) entered into a memorandum of understanding on 30th December 2015. The agreement was on apportionment of the ownership of the suit property, each sibling would receive income from the allocated flat and would share costs of repairs and other maintenances.

19. The Plaintiff/Applicant has in my view satisfied court she has an arguable case, from the evidence produced it appears that she has a good probability of success at the trial. The Plaintiff/Applicant as the registered owner as well as a party to the memorandum of understanding, demonstrates to court that she has a prima facie case, which ought to be argued at trial.

20. The Plaintiff/Applicant claim to have given the Defendant/ Respondent a Notice of Revocation of the Memorandum of Understanding on 15th July 2019. The Plaintiff/Applicant demanded for an equal share of the units on the suit property, which the defendant was said to have taken the lion share to her detriment. The Plaintiff/Applicant further claims that the Defendant/Respondent took advantage of her mental status to deceive her into executing the memorandum of understanding. The Plaintiff/Applicant further urged court to find that the Defendant/Respondent's action of denying her access to the bank accounts that has the rental income and the defendant's actions of neglecting to involve her in the management of the suit property was causing her to suffer great loss and prejudice. The Plaintiff/Applicant has not adduced evidence of her presumed mental status, if anything she has affirmed the supporting affidavit, which leads to court to presume that she is of sound mind. Under Section 109 of the Evidence Act, Cap. 80 places the burden of proof on the person who alleges the existence of a particular fact hence the saying, he who alleges must prove. More to that, the mental status of a person does not deny them the legal capacity to enter into contracts or agreement unless its proven that they are prevented from understanding the issues herein, reference is made to the provisions of Section 125 of the Evidence Act, cap. 80 of the Laws of Kenya.

21. Neither has the Plaintiff/Applicant demonstrated to court how the Defendant/Respondent failed to involve her in the management of the suit property nor has she presented psychosocial and medical reports that would enable court a determination as to her legal capacity at the time of executing the memorandum of understanding in the year 2005. This Court is of the view that the Plaintiff/Applicant has not proved to court the irreparable or serious injury she stands to suffer that cannot be quantified and compensated by monetary value. If anything, the Plaintiff/Applicant's claim revolves around the rental income made from the suit property that can be and has been qualified in terms of an award of damages, if the Plaintiff/Applicant would be successful at trial.

22. In **MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others CACA 39 of 2002**, the court in dismissing the appeal for injunctive orders stated, ***“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal.”***

23. I hold that the apprehended injury is quantifiable in this dispute, the case of **Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others (2014)eKLR**, it was held that ***“speculative injury will not do; there must be more than an unfounded fear of apprehension on the part of the applicant. 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.”***

24. Where damages recoverable in law is an adequate remedy, as it in this case and the defendant is capable of paying, this court will not exercise its discretion to issue interlocutory orders of injunction. In the case of Nguruman case (supra), it was held that ***“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...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.”***

25. The balance of convenience, is considered where the court is in doubt as to the adequacy of the respective remedies in damages available to either party. However, I have no doubt that an award of damages will be sufficient and hence no inconvenience will be occasioned to the Plaintiff/Applicant.

VI. DETERMINATION.

26. In the long run, I am satisfied that although the Plaintiff/Applicant has ***“a prima facie”*** case, she has failed to demonstrate how she stands to suffer irreparable injury that cannot be adequately compensated by an award of damages. I do find that an award of damages can be adequate compensation on a preponderance of probability. In the given circumstances, I proceed to order as follows:-

- a) **THAT** the issue of the interlocutory injunction sought in the Notice of Motion dated 11th May 2021 is declined. Thus to that extent, the application be and is hereby dismissed with no order to costs, since the parties are siblings.
- b) **THAT** for expediency sake this matter be fixed for hearing within the next **Ninety (90) days** from the date of this ruling.
- c) **THAT** there be a mention on 25th April, 2022 for purposes of holding a Pre – Trial Conference direction under the provisions of Order 11 of the Civil Procedure Rules, 2010 and taking an appropriate hearing date for the full trial thereof.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF FEBRUARY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

- a) M/s. Yumna Hassan, Court Assistant
- b) Non – Appearance for the Plaintiff/Applicant.
- c) Mr. Hassan Advocate for the Defendant/Respondent.