



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.216 OF 2013

KULWANT SINGH SIHRA.....1ST PLAINTIFF

SIHRA ENGINEERING LTD.....2ND PLAINTIFF

-VERSUS-

JAGJEET SINGH SIHRA.....1ST DEFENDANT

GURDIAL KAUR SIHRA..... 2ND DEFENDANT

RULING

The Plaintiffs have moved the court by way of a Notice of Motion dated 5th December 2012 brought under Order 40 Rule 1 of the Civil Procedure Rules and article 50(1) of the Constitution. They are seeking an order to restrain the 1st Defendant from using a power of attorney dated 28.10.05 pending determination of the suit, an order to restrain the 2nd Defendant from transferring all or continuing the transfer of all or any of the properties registered in her name and that of the Plaintiff's deceased's father to the 1st Defendant or anyone else pending the determination of the suit as well as an order that a trust bank account be opened by all the parties where rental income from all the 14 properties will be paid less drawings for reasonable provision for the 2nd Defendant until the suit is determined. The application is supported by the grounds set out on the face of the application and which have been canvassed in the affidavit sworn in support of the application.

The application is supported by the 1st Plaintiff's affidavit sworn on 5th December 2012. It is deponed that in the year 2000, the 1st Plaintiff together with his late father and late brother ran the 2nd Plaintiff with a shareholding ratio of 60%, 20% and 20% respectively. The 1st Plaintiff has stated that through his initiative, the 2nd Plaintiff acquired and built 14 properties which were registered in the names of his parents in trust for the Sihra family. It is the 1st Plaintiff's case that the 1st Defendant who joined the 2nd Plaintiff as an employee in 1993, connived to selfishly seize control of all the 14 properties and began collecting rent which stood at Kshs 900,000.00 in the year 2005, to the exclusion of everyone else. The 1st Plaintiff attributes the 1st Defendant's actions on a power of attorney allegedly donated by the 2nd Defendant at a time when her health raised concerns and the 1st Plaintiff is challenging the 2nd

Defendant's capacity to execute a power of attorney. Further, the 1st Plaintiff has stated that the power of attorney may not have been registered and that therefore, that the legitimacy of the power is questionable. The 1st Plaintiff has attached as evidence an undated medical report from Dr. Luke M. Musau which states that Mrs. Gurdial Kaur Sirha was unwell as well as a power of attorney dated 28th October 2005.

The 1st Plaintiff filed a supplementary affidavit sworn on 5th February 2013 where he attached evidence of minutes of meetings held on 22nd August 1971 and 22nd June 1976 where he was appointed as a director of the 2nd Plaintiff and where he attended the meeting as a director respectively. According to the 1st Plaintiff, HCCC No. 2382 of 1998 was never determined as the Plaintiffs therein were incapable of disproving his directorship before the court. While disputing the 1st Defendant's directorship to the 2nd Plaintiff, the 1st Plaintiff stated that the meeting held to purportedly hand the position to the 1st Defendant was irregular since Mr. Shah, who had resigned from the 2nd Plaintiff over 10 years prior to the meeting, was in attendance and therefore that the meeting was incapable of rendering valid resolutions. Further, the 1st Plaintiff denied fraudulently obtaining payments meant for the 2nd Plaintiff in addition to swindling company funds. The 1st Plaintiff has faulted the 2nd Defendant's authorization to the 1st Defendant to manage the 2nd Plaintiff stating that the 2nd Defendant has never been a director, shareholder or employee of the 2nd Plaintiff. It is the 1st Plaintiff's case that a fiduciary relationship exists in the present circumstances thereby constituting valid limitations on the right of a proprietor of land.

The 1st Plaintiff filed submissions dated 26th February 2013 where counsel reiterated the facts and relied on the case of **Hamm Helmut -vs- Farida Riziki HCCC No. 27 of 2010**, **Josephat Githundi -vs- Kingitha Muniu Nakuru HCCC No. 120 of 2005** and **Westdeutsche Landesbank Girozentrale -vs- Islington London Borough Council, 96 AC 669**. It was argued for the 1st Plaintiff that article (h) of the 2nd Plaintiff's Memorandum of Association empowered the company to acquire properties for commercial purposes, which properties were acquired by the 2nd Plaintiff and registered in the names of Mehar Singh Sihra and the 2nd Defendant to hold in trust for the entire Sihra family. Evidence to support this assertion is lacking and/or has not been furnished.

Counsel for the 1st Plaintiff argued that the power of attorney donated to the 1st Defendant by the 2nd Defendant is not legally justifiable as the instrument was allegedly drawn at a period when the 2nd Defendant was in mourning following the death of her husband, Mehar Singh Sihra in addition to the 2nd Defendant having been diagnosed with depression and blood pressure by Dr. Musau. Further, the 1st Plaintiff argued that since he was the majority shareholder of the 2nd Plaintiff his presence could not be dispensed with in the meeting of 1st August 2000 where the 1st Defendant was allegedly appointed as a director, and therefore, that the said meeting was invalid. Lastly, counsel relied on the case of **Giella -vs- Cassman Brown and Teresia Wangeci Macharia & others -vs- Mbugua Thiga HCCC No. 913 of 2002** for the submission that the balance of convenience lies in favour of the 1st Plaintiff.

While responding to the Defendants' submissions, the 1st Plaintiff filed a reply dated 19th April 2013 where counsel argued that the instant suit is not res judicata since none of the Defendants in the instant suit were parties to HCCC No. 2382 of 1998, civil case No. 21 of 2001 and HCCC No. 1764 of 2001 and further, that none of the central issues herein were under consideration in the aforesaid suits. Counsel for the 1st Plaintiff further stated that Order 40 Rule 1 does not make it mandatory that a prayer for a temporary injunction must have a corresponding prayer for a permanent injunction in the main suit. In support of this submission, the Plaintiff relied on the case of **Lucas Njuguna -vs- Consolidated Bank** where the court held that there was no merit in the submission that an interlocutory application should have been dismissed on the grounds that it was at variance with the prayers in the Plaint. While arguing that the 1st Plaintiff is properly before the court, the 1st Plaintiff stated that being a 60% shareholder and since the Defendants have not proved membership or directorship, he has authority to institute this case in the 2nd Plaintiff's name.

The application is opposed by the Defendants who filed grounds of opposition and a replying affidavit sworn by the 1st Defendant on 22nd January 2013. It is the Defendants' case that the 1st Plaintiff has never been appointed as a director or shareholder of the 2nd Plaintiff and the Defendants have annexed as evidence a search and receipt from the Registrar general dated 6th June 1971 showing that the appointment of the 1st Plaintiff as a shareholder was not filed with the Registrar. The Defendants claim that having irregularly appointed himself as a secretary, the 1st Plaintiff incurred various personal expenses from the company account without authorization in addition to interfering with the operations of the 2nd Plaintiff prompting the late Mehar Singh and Tarlok Singh Sihra (deceased) to institute HCCC No. 2382 of 1998.

The 1st Defendant has stated that he was appointed as a director of the 2nd Plaintiff through a board resolution passed on 1st August 2000 and has annexed a copy of the minutes of the meeting held on 1st August 2000 as evidence. While stating that he is the sole custodian of the company seal, the 1st Defendant has contended that the 1st Plaintiff has no authority whatsoever to institute the suit against the Defendants. According to the Defendants, the late Mehar Singh Sihra and the 2nd Defendant jointly acquired 13 properties without any contribution from the 1st Plaintiff and copies of the title deeds have been annexed as evidence. The 1st Defendant has contended that the 2nd Defendant has provided him with full authority to manage the various properties by executing a power of attorney while in full control of her faculties. The Defendants have contended that the 1st Plaintiff has approached the court with unclean hands alleging that the suit herein is intended to interfere with the operations of the 2nd Plaintiff.

The Defendants filed submissions dated 4th April 2013 where it was argued that the suit was res judicata since the dispute between the 1st Plaintiff, 2nd Plaintiff and other parties who are now deceased have been to several courts for determination which have been finalized on merit. It was submitted for the Defendants that the Plaintiffs have not met the conditions laid out in **Giella -vs- Cassman Brown(1973)EA 358** to have a temporary injunction issued against the Defendants. The Defendants submitted that since they have been in occupation of the suit premises prior to the filing of the suit and still continue to occupy the same and since the Defendants have not indicated and/or demonstrated that they may waste or dispose the properties, the Plaintiffs have not shown a probable case against them. Further, the Defendants contended that no loss would be suffered by the 1st Plaintiff which cannot be compensated for in damages.

The Defendants argued that for an injunction to issue under Order 40 Rule 2, there must be a prayer in the Plaint seeking a permanent injunction which is not the case herein and therefore, that the application ought to fail. While submitting that the 1st Plaintiff lacked authority to institute the suit in the name of the 2nd Plaintiff, the Defendants through their counsel submitted that a company has a distinct and separate personality from its shareholders and directors and relied on the case of **Salomon -vs- Salomon & Co. Ltd(1897)AC 22**. Reliance was placed on the case of **Assia Pharmaceutical -vs- Nairobi Veterinary Centre Ltd Nairobi HCCC No. 391 of 2000** as well **M. Muthama & others -vs- GP Waithaka & anor Nairobi No. HCCC 576 of 1991**.

On the submission by Counsel for the Defendant that this suit is resjudicata my view is that a decision on that issue would be inappropriate at this stage and would need to be canvassed at the trial when the issues have been agreed and/or as a substantive issue for determination in an application made in that regard. As to whether or not a prayer for injunction can be granted under Order 40 Rule 2 if there is no prayer in the plaint seeking a permanent injunction my view is that the wording of order 40 rules 1 and 2 is not restrictive and envisages situations that suits could be commenced and along the way matters arise that could make it necessary for a party to seek a restrictive or injunctive order to prevent the wasting, damaging alienating or disposition of property or to prevent the commission of a breach of contract at any time after the commencement of the suit. I therefore I am of the view that a plaint need not carry a prayer seeking a permanent injunction for a party to seek an injunctive relief in an interlocutory application.

The pertinent issue for determination in this application is whether the 2nd Defendant should be restrained

from transferring the properties registered in her name and that of the Plaintiff's deceased's father. I now proceed to make that determination upon evaluation of the rival submissions and the evidence tendered and adduced by the parties.

It is not disputed that the 2nd Defendant is the owner of the suit properties and the Defendants have brought evidence of ownership. The rights of a registered proprietor are provided for in section 26 of the Land Registration Act 2012 which provides that title of the registered proprietor can only be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate has been acquired illegally, un-procedurally or through a corrupt scheme. None of these allegations have been made against the 2nd Defendant and her title to the disputed properties can therefore not be defeated. Although the 1st Plaintiff has alleged that the 2nd Defendant is holding the suit properties in trust for the family, which has been denied by the Defendants, there is no evidence that the properties were acquired by the 2nd Plaintiff and registered in the name of the 2nd Defendant and the late Mehar Singh Sihra. The court of appeal in the case of **Muriuki Marigi -vs- Richard Marigi Muriuki & anor Nyeri CA No. 189 of 1996** and **Mukangu -vs- Mbui Nyeri CA No. 281 of 2000** re-affirmed the rights of a registered proprietor under section 27 and 28 of the repealed Registered Land Act Cap 300 Laws of Kenya which is akin to section 25 and 26 of the Land Registration Act 2012 and stated that as long as the registered proprietor was alive, his property was not available for subdivision and distribution among his wives and children except on his own free will. Similarly, in the case of **Joseph Kaburu -vs- M'ithinji M'mburugu [2005] Eklr**, the court declined to injunct a registered proprietor stating that being the registered owner whose title had no proven overriding interests, the Defendant could deal with the suit property as he deemed fit.

The 1st Plaintiff has also sought an order to restrain the 1st Defendant from using the power of attorney dated 28.10.05 alleging that the power is invalid. In my opinion, the issue of the validity of the power of attorney cannot be determined at this stage. Evidence will need to be adduced to prove that the instrument was executed when the 2nd Defendant's mental fitness was impaired. It has not been demonstrated what injury the plaintiffs suffer and/or that the injury or loss suffered cannot be compensated by an award of damages. In any event, the 1st Plaintiff is challenging a power of attorney which has been in force for more than 7 years having been executed on 28th October 2005. The 2nd Defendant in whose name the suit properties are registered is still alive and as was held in the case of **Joseph Kaburu vs. M'ithinji M'mburugu's Case (Supra)** there cannot be any basis to injunct her and/or her duly constituted attorney from carrying out lawful activities or duties attaching to the suit properties. Equally the plaintiffs have not shown and/or demonstrated that the power of attorney donated to the 1st Defendant by the 2nd Defendant was not valid and/or was fraudulently obtained. The allegation that the 2nd Defendant did not have mental capacity at the time she gave the power of attorney is not substantiated.

I have considered all the material placed before the court including the submissions by counsel and the authorities referred to me and I am not satisfied that the plaintiffs have demonstrated they have a prima facie case with a probability of success and neither has it been demonstrated that any damage the plaintiffs may suffer if the injunction is not granted is such that the same cannot be compensated in damages.

The balance of convenience does not in the circumstances of this case tilt in favour of the plaintiff.

The upshot therefore is that I find the plaintiffs Notice of Motion dated 5th December, 2012 is devoid of merit and I order the same to be dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants