



REPUBLIC OF KENYA



KENYA LAW
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**Omar v Letshego Kenya Limited & 3 others (Cause 206 of 2021)
[2022] KEELC 3145 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CAUSE 206 OF 2021
LL NAIKUNI, J
MAY 18, 2022**

BETWEEN

MWANAHAMISI KHALFAN OMAR PLAINTIFF

AND

LETSHEGO KENYA LIMITED 1ST DEFENDANT

MOHAMED KHALFAN OMAR 2ND DEFENDANT

CHIEF LAND REGISTRAR MOMBASA 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

I. Introduction

1. Before the Honorable Court for its determination is the Notice of Motion application dated 7th October 2021 by the Plaintiff/Applicant. It is brought under the provisions of Order 40 Rules 1, 2, & 3 of the *Civil Procedure Rules*, 2010, Sections 3 & 3A of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant has sought for the following orders:-
 - a. Spend.
 - b. That the honorable court be pleased to issue a temporary prohibitory injunction to the 2nd defendant/respondent, its servants, employees, proxies, servants, agents and/or anybody acting on its behalf from selling, disposing, alienating, collecting rents and or dealing with Plot No. Mombasa/MN/Block 1/673 pending the hearing and determination of this application.



- c. That the honorable court be pleased to issue a temporary prohibitory injunction to the 2nd defendant/respondent, its servants, employees, proxies, servants, agents and/or anybody acting on its behalf from selling, disposing, alienating, collecting rents and or dealing with Plot No. Mombasa/MN/Block 1/673 pending the hearing and determination of this Originating Summons.
 - d. That costs of this application be provided for.
3. The application is based on the facts, testimony and grounds averred on the face of the 14 paragraphed Supporting affidavit of Mwanahamisi Khalfan Omar and five (5) annexures marked as “MKO – 1 to 5” annexed hereto. She averred that she was one of the heirs and beneficiaries of the Estate of the Khalfan Omar Mohamed (hereinafter referred to as “The Deceased”) and others heirs as listed in the consent dated 24th June, 2019 in the Family Appeal No. 21 of 2017 and adopted as a Judgement of Court. She informed Court that the said Consent was signed by all parties on 24th June, 2019 was clear on how the Estate of the deceased was to be distributed among the heirs including the 2nd Defendant herein. She indicated that the estate of the Deceased comprised of a story building within Plot No. Mombasa/Block/1/673 situated within Mikindani within the County of Mombasa. This property had not been distributed in accordance with the Islamic Laws of inheritance amongst the heirs as per the said consent signed by the parties in the above family Appeal and hence each party given their shares. She stated that, despite all this, the 2nd Defendant used the title deed for this property and fraudulently charged the Mombasa/Mainland North/Block 1/673 and obtained a loan facility for a sum of Kenya Shillings One Million (Kshs. 1, 200, 000.00) from the 1st Defendant/Respondent without the consent of the other heirs and beneficiaries. As a result, the 1st, 2nd and 3rd Defendants/Respondents have created a Charge against the said property notwithstanding that the said property does not belong to the 2nd Defendant/Respondent. She stated that as a result, her Advocate wrote her a letter informing her that she was not the registered owner to the said property and that the 1st Defendant/Respondent should follow her personally and not the heirs or beneficiaries of the estate. She claimed that the suit property belongs to the Estate of the late Khalfan Omar Mohamed, and was to be distributed to his heirs in accordance to Sharia law of succession. It is the Plaintiff’s case that on 24th June 2019, all the heirs of the Estate of the late Khalfan Omar Mohamed, who are (Leyla Ahmed Gaman, Omari Khalfan Omar, Majid Khalfan Omar, Ali Khalfan Omar, Aladita Khalfan Omari and Mwana Khalfan Omar) consented to withdraw Mombasa High Court Family Appeal No. 21 of 2017 on condition that the estate of the deceased to be distributed in accordance to Islamic law.
 4. It is the Plaintiff’s case that the 2nd Defendant is in the process of exercising its statutory power of sale since the 1st Defendant had defaulted in paying the loan. The court was urged to issue a prohibition order to restrain the 2nd Defendant from selling off the suit property to recover its loan and protect the interest of the heirs to the estate of Khalfan Omar Mohamed.

III. The 1st Defendant/Respondent’s Replying Affidavit

5. On 16th November, 2021, the 1st Defendant/Respondent responded to the application through a 26th Paragraphed Replying Affidavit sworn by Winnierohi Wafula, who is the Legal Officer of the 1st Defendant’s. She stated that on or about 7th October, 2020 the 2nd Defendant approached the 1st Defendant for an advancement of a loan of a sum of Kenya Shillings One Million Two Hundred (Kshs. 1,200,000/=). By an agreement contained in the letter of offer dated 30th November, 2020 the 2nd Defendant and the 1st Defendant entered into an agreement for the financial facility to the 2nd Defendant as requested. In exchange of granting financial accommodation to the 2nd Defendant, the 1st Defendant created a legal charge over Mombasa/MN/Block 1/673 following a charge agreement dated



18th December 2020. The 2nd Defendant intimated that she had already been in possession of the title deed of the suit land and indeed delivered an original title in his names to the 1st Defendant. As part of the due diligence, the 2nd Defendant availed to the 1st Defendant his national identity card and Kenya Revenue Authority PIN certificate which tallied with the title documents which bore the names of Mohamed Khalfan Omar. The deponent stated that conducted their due diligence and confirmed that the suit land was registered and belonged to the Mohamed Khalfan Omar, the 2nd Defendant. In fact the search indicated that he had initially already taken a financial loan from the Equity bank using the same property and there had been no issue at all. The deponent stated that it based on this background that the charge was created. She stated that the loan was to be repaid in monthly instalments of Kenya Shillings Thirty Nine Thousand Seven Eighty Eight Hundred and Five Cents (Kshs. 39, 788.05/=) for a period of 48 months, but the 2nd Defendant has since defaulted in payments and owes the 2nd Defendant, Kenya One Million One Fifty Nine One Eighty Four Thousand and Eighty One (Kshs. 1,159,184.81) as at 24th September 2021. That the 1st Defendant has issued the 2nd Defendant with the 90 day statutory notice to settle the outstanding sum, least the 1st Defendant exercises its statutory power of sale.

6. The deponent maintained that the title deed which has the name of the 2nd Defendant is prima facie evidence that he owns the suit property. Further she argued that there was no evidence of the death certificate of the alleged deceased Khalfan Omar Mohamed, who has similar names to the 2nd Defendant. The deponent contended that at all material times the suit property belonged to the 2nd Defendant and argued that there was no fraud on their part at the time the said charge was advanced to the 2nd Defendant. She argued that the 1st Defendant perfected the charge by following the legal procedure while creating the charge and is not privy to any omissions or commissions of the 2nd Defendant. She maintained that the application was immature as the statutory notice was yet to expire.
7. The 2nd Defendant, was represented by the firm of Nanjali & Kirui Advocates, thou they did not file any response to the application. While Mr. Makuto for the 3rd and 4th Defendants informed court that they will not participate in the application. In the long run, they urged court not to allow the application as it had failed to meet the requirements needed for a grant of a temporary injunction.

IV. Submissions

8. On 28th October, 2021 and 2nd December, 2021 while in the presence of all the parties in Court, Court directed that the said Notice of Motion Application dated 7th October 2021 be canvassed by way of written submissions. Thereafter, apart from the 3rd and 4th Defendant/Respondents who excused themselves from participating in the interlocutory application, only Plaintiff/Applicant and the 1st Defendant/Respondent fully complied. The 2nd Defendant/Respondent never complied. The Honorable Court reserved a date for the delivery of the ruling.

A. The Written Submission by the Plaintiff/Applicant

9. On 24th January, 2022, the Learned Counsel for the Plaintiff/Applicant, the Law firm of Messers. Okanga & Company Advocates filed their written submissions in support of the application. Mr. Okanga Advocate submitted that the application was based on the major grounds, firstly, that the charge created over parcel of the suit land by the 1st and 2nd Defendants/Respondents was based on fraud. He stated so as he claimed Mr. Mohamed Khalfan Omar was not the legal and absolute registered owner to the suit land. Instead he was only a beneficial heir to the estate of the deceased. He argued that the 2nd Defendant/Respondent took advantage of his names resembling those of his late father, who is the registered owner of the suit property, to fraudulently obtain a loan facility from the 1st Defendant/



Respondent. Secondly, the Learned Counsel submitted that the 2nd Defendant had never obtained the consent from the heirs of the estate of Khalfan Omar Mohamed and his actions of charging the suit property was intermeddling with an estate of the deceased. The 2nd Defendant/Respondent took advantage of the fact that his names resembled that of the deceased to fraudulently misrepresent facts to the 1st Defendant and obtained loan from them and without the legal authority of the estate as required by law.

10. Thirdly, the Counsel submitted that the suit land was not matrimonial property of Mohammed Khalfan Omar and Miriam Mpamkachia, as the 2nd Defendant made it to appear but belonged to the estate of Khalfan Omar Mohamed that was pending distribution as per Islamic Law. He opined that Miriam Mpamkachia was never been married to the 2nd Defendant to be in a position to give a Spousal Consent to this transaction. He observed that the 2nd, 3rd and 4th Defendants/Respondents had never opposed this application. Finally, the Learned Counsel urged court to allow the application, which the 2nd Defendant had not responded to despite serious allegations of fraud being leveled against him.

B. The Written Submission by the 1st Defendant/Respondent

11. On 27th January, 2022, the Learned Counsel for the 1st Defendant/Respondent, the Law firm of Messrs. Mulondo & Company Advocates filed their written submissions dated 26th January, 2022 in opposition of the application. M/s. Muhua Advocate submitted that the Plaintiff/Applicant had not fulfilled the conditions for an interlocutory injunction. While relying on the decisions of “*East Africa Development – Versus – Hydai Motors Kenya Limited*, Civil Appeal No. 194 of 2004 (2004) LLR, 6121”, and “*Mrao Limited – Versus – First American Bank of Kenya Limited & 2 Others* (2003) eKLR” she queried whether there was “a prima facie case’ with a probability of success. The Learned Counsel submitted that the allegation by the Plaintiff/Applicant that Mohamed Khalfan Omar, the deceased was the legal owner of the suit land and was not that of the 2nd Defendant/Respondent herein nor prove of his death had not been established by any documentations whatsoever. He argued that the Plaintiff/Applicant had failed to demonstrate the relationship between the 2nd Defendant and the deceased. The Learned Counsel argued that the 1st Defendant conducted due diligence that perfected the charge when they sought the identification of the 2nd Defendant/Respondent, being his national Identity card and the Kenya Revenue Authority PIN Certificate which all bore his names. Further, the Counsel insisted that at the time of creating the charge the suit land was in the names of the 2nd Defendant which was confirmed by conducting an official search, which confirmed the 2nd Defendant/Respondent was the registered owner. Additionally, the search had revealed that the 2nd Defendant/Respondent had previously charged the same suit property with the Equity bank and was advanced financial facilities without raising any issues at all. On this point, the Counsel relied on the provisions of Section 26 of the [Land registration Act](#) to back up the legal ownership of the 2nd Defendant/Respondent on the legal ownership to property and the efficacy of a title acquired legally unless challenged on grounds of having been acquired by omission, fraud or mistake or corrupt means.
12. The Counsel argued that the 2nd Defendant had always been in possession of the documents to the suit property. She asserted that despite all this the Plaintiff/Applicant had never challenged it in any court of law nor proved the fraud allegations. To support its point, she relied on the cases of “*Central Bank Limited – versus – Trust bank Limited & Others* (1996) eKLR” and “*Vijay Morjaria – Versus - Nansingh Masdusingh Darbar & Another* (2000)eKLR where the Court held that:- “fraud must be specifically pleaded and particulars of fraud alleged must be stated on the facts of the pleadings. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that those acts were done fraudulently. It is also settled law that the fraudulent conduct must be distinctly proved, and it is not allowable to leave fraud from the facts.”



13. On the whether the Plaintiff/Applicant would suffer irreparable injury which would not adequately be compensated by an award of damages, the Counsel insisted that at the time, the suit land was charged and a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1,200,000/=) was advanced to the 2nd Defendant/Respondent, the registered owner who had since defaulted in making payments. It then necessitated the 1st Defendant/Respondent to issue a statutory notice on 24th September 2021, which was followed by a further 40 day statutory notice of intention to sell the property. Counsel argued that the 2nd Defendant/Respondent had ample time to comply with Section 96 of the Land Act, failure to which would led the 1st Defendant/Respondent exercising its statutory power of sale. The Counsel argued that the Plaintiff/Applicant had failed to prove her interest in the suit land since she was neither the owner nor a party to the charge and as such seek protection of the provision of Section 99 of the Land Act. On balance of probabilities, the Counsel submitted that the 1st Defendant/Respondent had demonstrated that they carried out due diligence on the title before charging the suit land while the Plaintiff/Applicant had not proven the allegations of fraud. For that reason, court was urged to dismiss the application.

V. Analysis and determination

14. I have put into consideration the pleadings filed by all the parties being the Plaintiff/Applicant and the 1st Defendant/Respondent being both the supporting and Replying affidavit, written submissions and the citations with reference to the Notice of Motion application dated 7th October, 2021, the relevant provisions of the Constitution of Kenya, 2010 and the relevant provisions of the law.
- a. In order to arrive at an informed, just and fair decision on the matters in question hereof, the Honorable Court has framed the following three (3) issues for its determination. These are:-
 - a. Whether the Plaintiff/Applicant herein through its Notice of Motion application dated 7th October, 2021 has fulfilled the established threshold of granting interim and/or injunction orders as founded under the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and precedents.
 - b. Whether the parties herein are entitled to the reliefs sought.
 - c. Who will meet the Costs of the Application.

Issue No. a). Whether the Plaintiff/Applicant herein through its Notice of Motion application dated 7th October, 2021 has fulfilled the established threshold of granting interim and/or injunction orders as founded under the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and precedents.

15. The Plaintiff/Applicant is seeking the equitable remedy of interlocutory injunctive orders. The principles for granting an interlocutory injunction are well settled into law; the applicant must show ‘a prima facie case’ with high chances of success, the applicant stands to suffer irreparable damage which cannot be adequately compensated by an award of damages, and if the court is in doubt, it will decide the application on the balance of convenience.
16. A prima facie case a prima facie case was defined in “Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR 125 - “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.”



17. A prima facie case is more than an arguable case, the Plaintiff/Applicant must adduce evidence to show an infringement of the right and the probability of success of the Applicant's case at trial. The Plaintiff/Applicant has argued that the suit property belongs to her father who acquired a sublease from the now County Government of Mombasa on 29th December 2009 and was issued with a certificate of lease on 6th January 2012. She claimed that the 2nd Defendant/Respondent, who is her brother took advantage of being the custodian of the certificate of lease and the fact that his name is identical to that of his father, to fraudulently charge the suit property.
18. The Consent marked "MKO - 1" is dated 24th June 2019, it outlined the heirs of the Khalfan Omar Mohamed, who consent to withdraw a case pending before court, Mombasa High Court Family Appeal No. 21 of 2017 on condition that the deceased estate would be distributed according to Islamic law. It should be noted that the Plaintiff/Applicant has not demonstrated to court that the same was duly recorded and approved by court. In short, the applicant has not established to the satisfaction of court that the consent dated 24th June 2019 became the order of court having been adopted by court. Consequently, though the order was recorded by consent, it remains an agreement between the children of Mohamed Khalfan Omar and not an order of the court.
19. The allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. At this interlocutory stage, all the Plaintiff/Applicant has to demonstrate to court, on the count of fraud, is that there are contradictions and inconsistencies that ought not to be overlooked by court even at an interlocutory stage. I have examined the evidence presented by the Plaintiff/Applicant and I do note some inconsistencies that indicate there is some explanation needed by the 2nd Defendant/Respondent.
20. The annexure marked as "MKO - 2" is a sub - lease agreement between Mohamed Khalfan Omar and the then Municipal Council of Mombasa dated 29th December 2009. On the execution part, it has been signed by Mohamed Khalfan Omar of ID No. xxxx and a Certificate of lease was issued to the same person, Mohamed Khalfan Omar on 6th January 2012 as entry No. 1. The charge agreement dated 18th December 2020 is marked as "MKO - 5" was between Mohamed Khalfan Omar and Letshego Kenya Limited. On the execution part, it has been executed by the chargor, Mohamed Khalfan Omar of ID No. xxxx. From the execution parts of the sublease and charge, it is clear to court that there are two different individuals with the exact name- Mohamed Khalfan Omar. Going back to "MKO - 1", the court notes that the 2nd Defendant/Respondent was not listed among the rightful heirs of the estate of the deceased, however he was a Respondent in the suit. He was named as person to be entrusted with the original title document to the suit land upon release by Equity Bank, Digo road.
21. Upon perusing the Part C of the Certificate of title, Entry No. 1 and 2 indicate that there was a charge previously created over the suit property in favour of Equity Bank on 11th April 2012 and a further charge dated 26th September 2012. The said entries were discharged by Entry No. 4 entered on 22nd December 2020 and on the same day Entry No. 5 was a registration of the charge in favour of the 1st Defendant/Respondent for a sum of Kenya Shillings One Million Two Hundred (Kshs 1,200,000/=). From these entries, it is clear to court that the 1st Defendant in the course of their due diligence could have certainly discovered, which of the two Mohamed Khalfan Omar had charged the suit property to equity. The court will need the 4th Defendant/Respondent, who is tasked with making entries to the certificate of lease, to demonstrate to court, which of the two Mohamed Khalfan Omar, discharged the charge advanced to Equity Bank to pave way for the registration of the charge in question. All these contradictions and ambiguities in the creation of the charge, inclines court to find that the applicant has a case against the respondents and the same ought to rebut the allegations of fraud levelled against them.



This Honorable Court finds that the evidence tabled before it, is persuasive the Plaintiff/Applicant has a prima facie case with a high chance of success.

22. On the second limb, the Plaintiff/Applicant must prove by way of evidence that she stands to suffer irreparable damage which cannot be adequately compensated by an award of damages. The Plaintiff/Applicant has claimed to be an heir to the estate of Mohamed Khalfan Omar the registered owner of the suit property. Other than the consent, the Plaintiff/Applicant has not produced such as the Certificate of death of the deceased - Mohamed Khalfan Omar, neither has she annexed a Letters of administration to the estate of the deceased to demonstrate to court that indeed she is one of the heirs of the said estate with the legal authority to sue on behalf of the estate. The consent that the Plaintiff/Applicant is using to link herself to the suit property, as I had said before has not been adopted by court, it only bears the stamp of the court and that does not make it an order of court.
23. In the given circumstances, therefore, it would be an uphill task for the court to find that the Plaintiff/Applicant stands to suffer irreparable injury which cannot be compensated by an award of damages. In the case where the Plaintiff/Applicant is successful in her case, the suit property can be assessed, quantified and compensated by an award of damages. In the case of "*Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others* (2014) eKLR the Court of Appeal held that, "If the applicant establishes a prima facie case that alone cannot be 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 state. 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."

Issue No. b). Whether the parties herein are entitled to the reliefs sought.

24. Under this sub heading and in relation to the above analysis, I conclude that the Plaintiff/Applicant has fallen short in demonstrating to court that she stands to suffer irreparable injury, even where it could have been proved that she is indeed one of the beneficiary of the estate of Mohamed Khalfan Omar, her claim is capable of being qualified and hence damages would be sufficient compensation. In the case of "Nguruman Limited (supra), it was further held that, "Speculative injury will not do; there must be more than an unfounded fear or apprehension on 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."
25. For these reasons, I hold that a temporary injunction ought not to be issued where an action for an award for damages can adequately compensate the injuries anticipated. Though the Plaintiff/Applicant has a prima facie case, she has failed persuade court that the damages she stands to suffer are incapable of being compensated by monetary means as stipulated in the case of Nguruman. Thus, she is not entitled to the relief sought from this application.

V. Conclusion & Disposition

26. Based on the indepth analysis herein, the Honorable Court on the preponderance of probability, makes the following findings. These are:-



- a. That the Notice of Motion application dated 7th October 2021 is unmerited and hence be and is hereby dismissed with no order as to costs.
- b. That for expediency sake, this matter be fixed for hearing within the next Ninety (90) days from this date. The matter to be mentioned on 11th July, 2022 for Pre trial conference pursuant to Order 11 and taking direction to the Originating Summons dated 7th October, 2021 under Order 37 Rules, 16, 17, 18 and 19 of the Civil procedure Rules, 2010 and fixing of a hearing date.
- c. That each party to bear its own costs.

27. It is Ordered Accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In presence of:-

M/s. Yumna :- Court Assistant

Mr. Okanga Advocate for the Plaintiff/Applicant.

Non Appearance Advocates for the 1st, 2nd, 3rd and 4th Defendants/Respondents.

