



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 53 of 2009

GEETA MAGON (Suing on her behalf and as an administratrix Of the estate of the late Remesh Magon) PLAINTIFF/APPLICANT

VERSUS

- ASHISH MAGON 1ST DEFENANT**
- MAGNEEL INVESTMENTS LTD 2ND DEFENDANT**
- MAGVILLAS INVESTMENTS LTD 3RD DEFENDANT**
- BORNE-IN PROEPRTY LTD 4TH DEFENDANT**
- HIRD EYE INVESTMENTS LTD. 5TH DEFENDANT**
- RASKA INVESTMENTS LTD 6TH DEFENDANT**

RULING

The plaintiff suing on her own behalf and as the administratrix of the estate of the late Ramesh Magon instituted this suit against the defendants. The 1st defendant is her brother in law and the 2nd to the 6th defendants are companies that she claims the 1st defendant irregularly took over their control and management. Simultaneously with the filing of the suit, the plaintiff also filed a chamber summons applications under order XXXIX Rules 1 and 2 of the Civil Procedure Rules.

The applicant is seeking for an interim order of injunction to restrain the 1st defendant his agents or servants from demanding receiving or collecting rent or in any way dealing with the premises known as; **C.R.NO.9418/9, L.R NO. 1870/X/77, L.R. NO.209/2455/12, L.R. NO.209/3837, L.R. NO.906/1 and L.R. NO.330/506**. The applicant also sought for an order that the 1st defendant be restrained from acting under his authority or instructions from withdrawing or dealing with monies held in bank accounts operated on behalf of the companies until determination of the suit. The court is also asked to appoint a receiver manager over the 2nd to the 6th defendants to manage the properties described as C.R. NO.9418/9, L.R. NO.1870/X/77, L.R. NO.209/2455/12, L.R. NO.209/3837, L.R. NO.906/1 and L.R. 330/506 until the determination of this suit.

This application is supported by the affidavits sworn by the plaintiff on 1^{4th} January 2009 and 25th February 2009. The matters deposed thereto can be summarized as follows; the plaintiff’s husband, the late Ramesh Magon passed away in January, 2005, he is survived by the plaintiff and minor children. According to the plaintiff, between, 1991 – 1996 she with her late husband incorporated various

companies including the 2nd and 6th defendants. The Memorandums and Articles of Association of those companies show that the plaintiff and her late husband were the original subscribers to those companies and were registered as directors and shareholders thereto.

The plaintiff with her late husband purchased various landed properties including but not limited to C.R. NO.9418/9, L.R. NO.1870/X/77, L.R. NO.209/2455/12, L.R. NO.209/3837, L.R. NO.906/1 and L.R. 330/506. The plaintiff contends that she and her husband paid the initial deposits towards the purchase price of those properties. They obtained loans from various financial institutions, to pay the balance of the purchase price. Although the loans were taken out by the companies, the plaintiff with her late husband acted as guarantors. The companies as incorporated, did not have their own independent source of income, thus the plaintiff and her husband repaid the loans advanced to the companies.

The plaintiff further contends that they constructed commercial and residential premises which were subsequently let out to tenants. The plaintiff's husband passed away on 22nd January 2005 and she was left with two minor children who entirely depend on her for their livelihood and education. The plaintiff used to get rent income from the suit premises. Upon her husband's death, the 1st defendant who is her brother in law started interfering with the plaintiff and evicted her from the company premises. The 1st defendant unilaterally abrogated himself the role of collecting rent from the suit properties while alleging that he is the owner of the companies by virtue of share transfer by the plaintiff's husband.

The plaintiff is challenging any transfer of shares during the lifetime of her late husband because a transfer of shares in a company is supposed to be transacted according to the Memorandum and Articles of Association of the company. Counsel for the plaintiff submitted that any transfer of shares in the 2nd to 6th defendants could not have been effected without having a formal valuation to determine the market value of the shares. In so far as the transfer of shares was for a nominal value by her late husband, to the 1st defendant, the transfer did not pass any ownership but the 1st defendant became a trustee of plaintiff's husband.

The 2nd – 6th defendant's constitutive documents also contained a pre-emptive clause giving existing share holders the first option to purchase the shares. That being the condition precedent to any company, the plaintiff contends that up to the time her husband died, she was not aware that he had transferred any shares to the 1st defendant. The plaintiff also denied having signed any transfer of shares in the 2nd- 6th defendants infavor of the 1st defendant, and if there was any transfer, or sale of shares, it was null and void and in contravention of the Companies Constitutive Documents. No shares could have vested in the 1st defendant without the authority of the plaintiff.

Counsel for the plaintiff made reference to a persuasive authority in the English case of ***Lyle & Scot Ltd vs. Scotts Trustees 1959 2 All ER***. The procedure of how a share holder desirous of disposing his shares is well articulated in that decision. The other share holders are given the option to purchase the shares and if they do not wish to purchase the shares, that is when the shares may be sold according to the value ascertained on. This position is further reiterated in the case of ***Green v Green & Others 1949 ALL ER 167 and Russel Northern Bank Development & Others 1992 3 ALL ER 161***.

Regarding the prima facie basis of the plaintiff's suit, it is not at all in dispute that the properties are registered in the names of the 2nd to 6th defendants. The properties are therefore owned by the companies as registered proprietors. The plaintiff is a share holder and director of the 2nd to 6th defendants in her own right and she is also the administrator of the estate of her late husband who co- founded the companies. She is therefore an undisputable and substantial owner of the companies.

The 1st defendant claims to be a shareholder by virtue of the share transfer which the plaintiff is disputing. Both the plaintiff and the defendant have not held a shareholders or directors meeting. There has not been any meeting of directors since 2005 due to serious disagreement between the plaintiff and the 1st defendant. Counsel for the plaintiff argued that the only way the affairs of the company can be run effectively, is through the appointment of a neutral party to manage companies for the benefit of both

the plaintiff and the 1st defendant until the court determines the validity of the shares held by the 1st defendant.

Counsel made reference to the case of ***Abdul Aziz vs. Chatembe Estates limited winding up cause No.1 of 2005. In which Sergon J*** granted an injunction because the company was being controlled by persons who were not directors or shareholders. The court ordered the revenue due to the company and its assets be secured and accounted for through an interim liquidator. It was further pointed out that the plaintiff pleaded matters of fraud and irregularities against the 1st defendant who has deliberately avoided responding to the allegations of improper conduct.

Thus it will be in the interest of both parties that the income and the assets of the companies be preserved by a neutral party. The 1st defendant has been leasing the companies' properties and the income has not been accounted for. The 1st defendant has also purported to appoint his own wife as a director of one of the companies and unless he is restrained, he is likely to tamper with all the companies. Counsel urged the court to be guided by the decision in the case of ***Murri v Murri [1988] LLR 2796 (CAK)*** where the Court of Appeal held as follows:-

“If the orders prayed for here are not granted and if the appeal succeeds, it may turn out to be an empty victory. The family owning the property is at loggerheads and it would be quit simple for the person in charge of the day –to-day running of the company to sell the assets of the company. When brothers fall out the battle becomes more vengeful. Paolo fears that Murri would have the opportunity to transfer all assets of the company to himself or his other companies. He said Murri did so in regard to another family company in Liechtenstein. In our view, it would be prudent to retain the status quo as at now rather than let the company be run by one of the contestants, namely Murri ...”

On the balance of the convenience the balance tilts in favour of the orders sought. The applicants are currently denied the income from the properties of the company. She has minor children who are going to school and she is paying a mortgage in respect of another property.

This application was opposed by the 1st defendant. He relied on two affidavits, the date when the 1st affidavit was sworn is not indicated but it was filed on 10th February 2009, the second affidavit is sworn on 18th February 2009. The 1st defendant also filed written submissions. According to the matters deposed thereto, the shares in the 2nd to 6th defendants companies were legitimately transferred to him by his late brother who held the properties in those companies in trust of the Magon family. The 1st defendant claims that the properties in those companies belong to the family of their late father who died in London in 1993 after acquiring several properties in London and Kenya.

According to the 1st defendant, his late father entrusted all the family estate to the plaintiffs' husband as the eldest son in the family and this is in accordance with the Hindu culture of owning joint family property. The defendant's mother was the administratrix of his father's estate. His mother subsequently appointed the plaintiffs' husband as the trustee of the properties. The properties therefore belong to all the children of the 1st defendant's late father. It is for instance alleged that the property known as LR NO.906/SEC/1M/M Mombasa is registered in the name of the 2nd defendant company although it was bought by the 1st defendant's father. The 1st defendant further contended that the plaintiff and her late husband did not have any gainful employment thus they had no income to purchase property and all the properties originated from Magon family which passed on to the plaintiffs husband but he held it in trust in accordance with the Hindu joint family property ownership.

As regards the allegations of fraud, the 1st defendant contends that the plaintiff gave him a power of attorney which she only revoked in the year 2008, after the present disagreement. The plaintiff has also been collecting rent from several properties in England and also in Kenya in disregard of the rest of the Magon family. Counsel for the 1st defendant argued that the plaintiff has also withheld material information regarding the background of this matter, and the source of the company assets. He submitted that the matter is weighty and cannot be resolved without calling evidence to resolve the issues of the

Hindu joint family property; The issue of share holding and directorship of the 1st defendant.

Counsel for the 1st defendant further submitted that the application of the company law is not appropriate in this case where the properties can be traced to the Magon which property was held in trust. The veil of the company must be lifted to unmask the plaintiff and her intentions to dispossess the family of the 1st defendant. The plaintiff has therefore not established a prima facie case and the conditions set out in the case of ***Giella v Cassman Brown Co. Ltd.*** He urged the court to dismiss the plaintiff's application with costs.

Having set out albeit in summary, the background of this matter and the rival arguments, the principles of granting an interim order of injunction are well settled in the oft cited case of ***Giella v Cassman Brown Co. Ltd.*** The conditions are that the applicant must establish a prima facie case with a probability of success. Secondly irreparable harm which would not be compensated for in damages would arise, and if in doubt the court would determine the matter on a balance of convenience. Applying those conditions to the present case; it is not in dispute that the 2nd to 6th defendants companies were registered by the plaintiff with her husband as the subscribers and first directors. The plaintiff's husband passed away in January 2005 and the plaintiff is the legal representative of his estate.

There is a disagreement between the plaintiff and the 1st defendant regarding the management of the affairs of the 2nd to the 6th defendants companies. There is also income that is generated from the properties registered in the 2nd to 6th defendants. It is evident that the 2nd to the 6th defendants companies are the registered proprietors of suit properties. While noting that a company has a separate personality from its share holders and it is distinct from the share holders. It is trite that the directors of a company have no proprietorship rights over the company's property apart from the shares they own. Therefore none of the directors herein has a right in their own capacity to claim ownership of the suit properties.

It is also determinable from the evidence before this court that there is acrimony between the plaintiff and the 1st defendant. No directors meeting have been held since 2005. The 2nd defendant contends that he is a bona fide share holder, a director of the 2nd and 6th defendants having been appointed by his late brother and the plaintiff (a fact that is denied by the plaintiff) which matter will probably be resolved at the hearing. While noting that a company though an independent entity has no mind or feeling of its own, it must be directed and its affairs managed somehow, the two directors have fallen out and the two cannot make decisions. It therefore follows that an independent manager should be appointed.

The 1st defendant put up formidable opposition to the granting of the order of injunction as well as the appointment of a receiver manager on the grounds that the suit properties were registered in the names of the companies in trust of the family of Magon. The plaintiffs' husband did not own the assets but held them in trust and for the benefit of the entire family in line with the Hindu joint family property ownership. This is another ground that cannot be exhausted at an interlocutory stage, as it is; the properties are registered in the names of the companies.

A registered proprietor of land is in law, deemed to be the absolute owner of that land except if there are over ridding interests. The 1st defendant did not provide any evidence to prove the trust under the Hindu Law and with tremendous respect; the 1st defendant is mistaking the issues of inheritance and the law of succession with matters pertaining to company law. In any event, the 1st defendant did not support his claim with any written statute, document or authority to show the existence of the so called Hindu joint family property ownership.

Based on the above evidence, the plaintiff has established a prima facie case with a probability of success. In the case of ***Mlao Ltd v first American Bank of Kenya Ltd & 2 Others 2003 KLR page 125*** the Court of Appeal has defined what is a prima facie case.

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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”.

Applying the above principles the plaintiff's case against the 1st defendant raises fundamental issues which should go on trial to establish whether or not the 1st defendant is a bona fide share holder of the 2nd to 6th defendants. The issues raised by the 1st defendant on whether the shares in the company are held by the plaintiffs in trust of Magon family are also other triable issues. At the moment what is clear is the plaintiff is a share holder and director of the 2nd to the 6th defendants. The 2nd defendant also contends that he is a shareholder and director of the 2nd to 6th defendants companies.

These two cannot hold a directors or shareholders meeting to direct the affairs of the company because of the acrimony demonstrated in the pleadings. Since the company cannot direct itself, and it is also distinct from the shareholders it is in the interest of all the parties herein that an independent neutral party is appointed to collect the revenue and manage the assets of the company until the dispute is determined. The plaintiff proposes the appointment of certain entities to be appointed as interim receivers of the companies. The 1st defendant is however opposed to any appointment of a receiver. He however has not given any cogent reasons why the properties of the companies where the plaintiff shareholding and directorship is not disputed should not be accounted for, and the assets are preserved for the benefit of the rightful parties.

Going by the material before this court I am satisfied that it is in the interest of justice that the 1st defendant is restrained by an order of injunction from dealing with the properties of the 2nd to the 6th defendants namely, the C.R. NO.9418/9, L.R. NO.1870/X/77, L.R. NO.209/2455/12, L.R. NO.209/3837, L.R. NO.906/1 and L.R. 330/506 until the hearing and the determination of this suit. An independent interim official receiver is to be appointed by both the plaintiff and the 1st defendant to collect the income and manage the assets and render accounts regularly as will be directed. If the parties cannot agree on one independent receiver manager, they are at liberty to submit two names each for the appointment by the court within the next 14 days from the date hereof.

RULING READ AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2009.

M.K.KOOME

JUDGE