



**Bakamoyo Limited v Nathoo (Environment & Land Case 43 of 2021)
[2022] KEELC 14841 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 43 OF 2021
LL NAIKUNI, J
NOVEMBER 14, 2022**

BETWEEN

BAKAMOYO LIMITED APPLICANT

AND

TAJDIN ALIBHAI NATHOO RESPONDENT

RULING

I. Introduction

1. The Plaintiff/Applicant, a company incorporated by limited guarantee under the *Companies Act*, Cap. 486, trading in the names and style of “Bakamoyo Limited – moved this Honorable Court through filing of a Chamber Summons Application dated 12th April, 2022 and filed on 13th April, 2022. The application was brought to court by dint of the the Plaintiff/Applicant seeking an injunction against the Defendant/Respondent herein.
2. The said application was instituted under the provisions of the Judicature Act cap 8, the High Court (Practice and Procedure Rules, (Part1 Rule 30), sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law.

II. The Plaintiff/Applicant’s case

3. The Plaintiff/Applicant herein sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application this Honorable Court be pleased to issue an order of injunction restraining the Defendant/Respondent whether by himself, his agents, servants, employees or whomsoever from wasting, alienating, selling,



charging, transferring, leasing, destroying and/or interfering in any manner with Land Reference Number L.R. No. MN/V/2620.

- d. That pending the hearing and determination of the suit filed herein on 20th March 2021, this Honorable Court be pleased to issue an order of injunction restraining the Defendant/ Respondent whether by himself, his agents, servants, employees or whomsoever from wasting, alienating, selling, charging, transferring, leasing, destroying and/or interfering in any manner with Land Reference Number L.R. No. MN/V/2620.
 - e. That this Honorable Court be at liberty to make other orders that it deems fit in the interest of justice.
 - f. That the costs of this Application be borne by the Defendant/Respondent.
4. The said application is based on the grounds adduced thereof and the averments contained in Supporting Affidavit of Mohamed Ahmed Anwar sworn on 12th April 2022 and filed on 13th April 2022 and the annexures attached thereof. From the said supporting affidavit, he deponed being that he was one of the shareholders of the Plaintiff/Applicant herein. He had and has the power of attorney to appear on behalf of the Plaintiff/Applicant. A copy of the said Power of Attorney was annexed to the said application and marked 'MAA – 1'.
 5. He deponed that the Defendant/Respondent was also a shareholder of the Plaintiff/Applicant. The Defendant/ Respondent without the consent of the other shareholders, had connived and fraudulently transferred the suit property, Land Reference Number L.R. No. MN/V/2620 (Hereinafter referred as "The Suit Property") measuring 4.60 Ha (approximately 11.37 Acres) located in Miritini, Mombasa, to the Defendant/Respondent for a value of a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) to one of the Plaintiff/Applicant's directors called Hadi Bahadurali Hasham, but now deceased (hereinafter referred to as "The Deceased"), by reversionary interest for a value of Kenya Shillings One Thousand (Kshs. 1,000/-) only on 5th July 2016. In support of this claim, a copy of the Plaintiff/Applicant's Directors and Shareholders from the Companies Registry was annexed to the application and Marked as "MAA – 2".
 6. Based on the supporting affidavit, he averred that the deceased later on fraudulently transferred the entire suit property, on 29th June 2017 as a consideration of a past debt between them. A copy of the title of the suit property was annexed to the application and marked "MAA – 3".
 7. Furthermore, he deponed that the fraudulent transfers done by the deceased and the Defendant/ Respondent were not brought to the attention of the other directors/shareholders and there were no minutes for the meeting that led to the transfer of the suit property to the deceased and the latter transfer to the Defendant/Respondent. He further asserted that the advocates who allegedly conducted the transfer process in 2017 had passed on as early as 2002 when the transfer was been done. In support of his claim, a copy of a letter from the Law Society of Kenya on the advocate purported to conduct the transfer is annexed and marked "MAA – 4".
 8. In conclusion, the Deponent claimed that the Plaintiff/Applicant only recently learnt of the fraudulent transfers and was apprehensive that the Defendant/Respondent was in the process of disposing the suit property, which would not only be prejudicial to the other shareholders but also occasion irreparable loss if the Honorable Court failed to preserve the suit property pending the hearing and determination of the main suit.
 9. On 19th April 2022, the court issued an order to preserve the status quo of the property until this application was heard on 18th of May, 2022. However, the Defendant/Respondent filed a Notice of



Change of Advocates on 17th May 2022 and when the matter came up on 18th May 2022 for hearing of the application, the court granted leave to the parties to file and serve replies and submissions.

III. Replying Affidavit by the Defendant/Respondent

10. On 23rd June 2022, the Defendant/Respondent's filed an 18 Paragraphed Replying Affidavit sworn and dated on 21st June 2022 by the Defendant/Respondent herein, Tajdin Alibhai Nathoo. He deponed that the said application by the Plaintiff/Applicant was frivolous, vexatious and an abuse of the Court process. He held being the majority shareholder of the Plaintiff/Applicant and that Mohamed Ahmed Anwar had no capacity to bring a suit or make averments on behalf of the Plaintiff/Applicant. He further went on to state that he was the registered owner of the suit property, having legally acquired the same from its previous owner free of all claims or defects on the title.
11. He further deponed that the deceased had transferred the suit property to him and the attention of Hadi Bahdurali Hasham or the directors and shareholders of the suit property was not a requirement for the sale of the land transaction to occur. Based on the contents of the Replying Affidavit, the Defendant/Respondent denied the allegations of fraud put forward in the Plaintiff/Applicant's application dated 12th April 2022 claiming that they were baseless and intended to prejudice his position before the court as he is not privy to the details averred in the Plaintiff/Applicant's supporting affidavit. Indeed, he informed Court having held the suit land for the past five (5) years as such there was no imminent danger or threat that he intended to dispose it as alleged.
12. Additionally, he deponed that the application dated 12th April 2022 was frivolous, vexatious, an afterthought having been brought after an unreasonably long time and an abuse of court process. He stated that the Plaintiff/Applicant had filed a similar application in the past and its sole intention was to delay the conclusion of this matter and cause him unnecessary expenses defending the applications.

IV. Submissions

13. The matter came up for mention on 7th July 2022 for confirmation of filing of the submissions. The Counsel for the Plaintiff/Applicant was present and stated that they had been served with the Replying Affidavit by the Defendant/Respondent at a late date due to the Defendants ailment. The Honorable Court extended time for filing of submissions by both parties by seven (7) more days and set the ruling date for the application on 1st November 2022.
14. I have perused the file and noted that despite the court's orders on diverse dates of 18th May 2022 and 7th July 2022, neither party eventually filed submissions after all. Therefore, the Honorable Court has proceeded with analysis and determination of this matter on facts evidence presented from the pleadings.

V. Analysis and Determination

15. I have keenly read the pleadings herein with regard to the Notice of Motion Application dated 12th April, 2022 by the Plaintiff/Applicant herein, the appropriate and applicable provisions of [*the Constitution*](#) of Kenya, 2010 and the Law.
16. In order to reach an informed, fair and just decision, the Honorable Court has framed the following issues for determination: -
 - a. Whether the Plaintiffs/Applicants through their filed Notice of Motion application dated 12th April, 2022 meets the laid - down threshold for granting of orders of temporary injunction.
 - b. Who will bear the Costs of the application?



Issue No. a). Whether the Plaintiffs/Applicants' application dated 12th April 2022 meets the threshold for granting of orders of temporary injunction.

17. The main purpose for injunctions are primarily to preserve the suit property in the meantime awaiting an outcome of the hearing of either the application or the suit. The provision of order 40 rule 1 of the Civil Procedure Rules, 2010 provide for temporary injunctions: -

1. Temporary injunction may be granted where in any suit it is proved by affidavit or otherwise—
 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

18. Additionally, the principles of granting orders for temporary injunctions were set out in the well-known cases of: -

- a. The famous case of:- '*Giella – Versus - Cassman Brown & Co Ltd* (1973) EA 358, where it was stated: - “First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience

And in the Court of Appeal case of:-

- b. *Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court held:-

“There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since the *Giella* case (supra) they could neither be questioned nor be elaborated in detailed research. In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favor.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.....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. 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 stage. 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".

19. It is therefore very clear from the precedence above that all the three (3) pre - conditions must be met by the Plaintiff/Applicant for the Honorable Court to be persuaded to exercise its discretion in granting an order of temporary injunction.
20. On the 1st condition, I am guided by the case of "*Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 in which the Court of Appeal defined "a Prima facie" case:-

"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 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..... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."
21. In summary, the present application filed by the Plaintiff/Applicant is supported by and affidavit of Mohamed Ahmed Anwar sworn on 12th April 2022 where he deponed that he is one of the shareholders of the Plaintiff/Applicant herein and has the power of attorney to appear on behalf of the Plaintiff/Applicant. He deponed that the Defendant/Respondent is also a shareholder of the Plaintiff/Applicant, who, without the consent of the other shareholders, had connived and fraudulently transferred the suit property to one of the Plaintiff/Applicant's directors Hadi Bahadurali Hasham, now deceased by reversionary interest for a value of a sum of Kenya Shillings One Thousand (Kshs. 1,000/-) only on 5th July 2016. He further averred that the deceased later on fraudulently transferred the entire suit property located in Miritini, Mombasa, to the Defendant/Respondent for a value of Kenya Shillings Fourty Thousand (Kshs. 4, 000, 000/-) on 29th June 2017 as a consideration of a past debt between them.
22. In response, the Defendant/Respondent, through his Replying Affidavit sworn on 21st June 2022 deponed that he was the majority shareholder of the Plaintiff/Applicant and that he was the registered owner of Land Registration Number L.R. NO. MN/V/2620, the suit property, having legally acquired the same from its previous owner free of all claims or defects on the title. He further averred that Mohamed Ahmed Anwar has no capacity to bring a suit or make averments on behalf of the Plaintiff/Applicant.
23. Although this Court reserves matters of evidence to the full trial, but for purposes of this application, there if need to establish whether the Plaintiff/Applicant has a "Prima Facie case" herein. To do so, I have had to quickly perused the pleadings and found a copy of the CR – 12 Form generated from Companies Registry, marked as "MAA – 1" of the annextures whose contents indicates that indeed the Plaintiff/Applicant's assertions that the Defendant/Respondent is indeed a shareholder of the Bakamoyo Company Limited, the Plaintiff/Applicant's company is true. Additionally, I have also confirmed that the Plaintiff/Applicant's deponent's capacity through the annexture marked as "MAA -1", a duly executed and stamped Power of Attorney between the Plaintiff/Applicant and



Mohamed Ahmed Anwar dated 15th May 2018. I however note with concern that the director/ shareholder that executed the Power of Attorney on behalf of the Plaintiff/Applicant is Hadi Bahadurali Hasham(deceased), who, as per the Plaintiff/Applicant's claims, fraudulently transferred the suit property to the Defendant/Respondent.

24. The Plaintiff/Applicant's claim that the deceased, Hadi Bahadurali Hasham transferred the property to the Defendant/Respondent is also clear from the Transfer Instrument, dated 23rd June, 2017 annexed copy of title marked "MAA – 3". Furthermore, the Plaintiff/Applicant has also provided a copy of a letter marked "MAA – 4" from the Law Society of Kenya on the advocate purported to conduct the transfer, showing that the said advocate was deceased at the time of transfer and that he did not turnover his practice to another Counsel. The Defendant/Respondent has not provided any evidence to controvert the Plaintiff/Applicant's assertions.
25. The court is not blind to the fact that this is an interlocutory application and the dispute between the parties is still outstanding. But it is quite evident that the evidence provided by the Plaintiff/Applicant raises serious questions of fraud and ownership of the suit property. Based on all these facts, the Honorable Court as guided by the "MRAO Case as quoted above is fully satisfied that the Plaintiff/Applicant herein has "a Prima facie case" with a high chance of succeeding and the evidence shows the infringement of its rights.
26. On the 2nd condition of irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, the Court of Appeal in the case of: "*Nguruman Limited* (supra), held that: -

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or 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."
27. The Deponent for the Plaintiff/Applicant averred that they had just recently learnt of the fraudulent transfers and was apprehensive that the Defendant/Respondent was in the process of disposing the suit property, which would not only be prejudicial to the other shareholders but also occasion irreparable loss if the court fails to preserve the suit property pending the hearing and determination of the main suit.
28. In response the Defendant/Applicant deponed that the application dated 12th April 2022 was frivolous, vexatious, an afterthought brought after an unreasonably long time and an abuse of court process. He stated that the Plaintiff/Applicant had filed a similar application for temporary injunction in the past and its sole intention was to delay the conclusion of this matter and cause him unnecessary expenses defending the applications.
29. The court is cognizant to the fact that the Plaintiff/Applicant has not presented any evidence that would suggest that damages could not have been an adequate remedy as per the case of "*Nguruman Limited* (supra) where the Court of Appeal emphasizes that there must be more than an unfounded fear or apprehension on the part of the applicant. In fact, the Plaintiff/Applicant's exact phrase as per the content made out under Paragraph 8 of the Chamber Summons and the contents made out



under Paragraph 9 of the Supporting Affidavit, both filed on 13th April 2022, were and I quote, “..... that the Plaintiff/Applicant just recently learnt of the fraudulent transfers and is apprehensive that the Defendant/Respondent is in the process of disposing the suit property.”

30. However, it is the Court’s view that, the value of the suit property is easily quantifiable. For avoidance of speculator injury and fulfilment of the 2nd condition of irreparable injury by the Plaintiff/Applicant, it is demonstrated in the strength of the evidence in support of the present Application. The Plaintiff/Applicant produced a copy of a Certificate of title marked as “MAA – 3” to show that the Defendant/Respondent was registered owner of the suit property. Indeed, the Plaintiff/Applicant through the application was only seeking for preservation of the suit property until the determination of the main cause herein. Under this circumstances, the Court finds that the Plaintiff/Applicant has satisfied the 2nd condition on proving irreparable injury.
31. On the 3rd condition of balance of convenience. I am of the view that it tilts in favor of the Plaintiff/Applicant who has provided evidence to raise such weighty questions of fraud having occurred and the ownership of the suit property. Thus, It’s in the interest of justice and for both parties, to have the Honorable Court secure and preserve the suit land from any interference during the pendency of the case and also based on the “Doctrine of Lis Pendens” as provided for under the provision of Section 52 of the Transfer of Land Act, until the case is heard and determined on merit. I proceed to grant the orders as prayed.

ISSUE No. b). Who will bear the Costs of the application?

32. It is trite law that the issue of Costs is the discretion of the Court. Costs mean any award that is granted to a successful party in any legal action, process or proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Act, cap. 21 provides that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings in any litigation.
33. In the instant case, the Plaintiff/Applicant has succeeded in demonstrating that they have fulfilled all the three (3) ingredients required to warrant by granted the temporary injunctive orders pending the hearing and determination of this suit. Therefore, it follows, that the Defendant/Respondent will bear the costs of the Notice of Motion Application dated 12th March, 2022 hereof.

VI. Conclusion & Disposition

34. Upon considering all the framed issues herein, this Honorable Court on preponderance of probability, I proceed to make the following findings:-
- a. That the Notice of Motion Application dated 12th April 2022 by the Plaintiff/Applicant is meritorious and thus be and is hereby allowed.
 - b. That a temporary order of injunction do issue restraining the Defendant/Respondent by himself, his agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from trespassing, interfering with and/or dealing in any manner with Land Reference Number L.R. NO. MN/V/2620 pending the hearing and final determination of the suit herein.
 - c. That for expediency sake, this suit should be heard and determined within the next one hundred and eighty (180) days from this date hereof. There shall be a Mention on 14TH February, 2023 for the Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and therefore parties are advised to fully comply with the law.
 - d. That the case fixed for full trial on 11th April, 2023 by the consensus of the parties herein.



e. That the costs of the application be awarded to the Plaintiff/Applicant herein.

35. it is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 14TH DAY OF NOVEMBER 2022.

HON. MR JUSTICE L. L. NAIKUNI, JUDGE

ENVIROMNENT AND LAND COURT AT

MOMBASA

a. In the presence of:-

b. M/s. Yumna, the Court Assistant.

c. M/s. Awuor Advocate for the Plaintiff/Applicant.

d. No Appearance Advocate for the Defendant/Respondent.

