



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 192 of 2006

MOHAMED S. BAKHRESA.....PLAINTIFF

VERSUS

NASRA ABDULWAHAB AHMED.....DEFENDANT

RULING

This is an application for a temporary injunction pending the hearing and final determination of this suit. It has, inexplicably, attracted considerable publicity. It has vigorously been fought by both parties with counsel on both sides, with admirable industry, citing several authorities. It has vigorously been fought, I suppose, because of the legal issues that arise in the case some of which are novel. As far as I am concerned, however, having considered the whole matter, it is, like many others that regularly come before us, a simple application for injunction.

Having not heard evidence in the matter I am not required to make any definitive findings at this stage. All that I am required to do is to determine whether or not, on the age old principles in **Giella – Vs – Cassam Brown & Company Limited [1973] EA 358**, the plaintiff is entitled to the injunction sought.

The parties are former husband and wife. They married on 9th January 2002 in accordance with Islamic law at a ceremony held in Mombasa. For what the plaintiff calls irreconcilable differences, he on the 19th June 2006, gave the defendant *talak*.

The plaintiff's claim as pleaded in the plaint and in his two affidavits in support of the application is that due to his business commitments out of the country he, on the *benami* principle, entrusted to the defendant, whose trust he never doubted, funds to acquire various properties, invest and open accounts in various banks on his behalf. In the alternative the plaintiff claims that the funds were entrusted to the defendant to acquire properties and generally invest in trust for him. He has listed several properties both in the plaint and the affidavits that the defendant acquired on the *benami* transaction or principle and or in trust for him.

The plaintiff further states that immediately prior to the dissolution of their marriage the defendant and her brother, one Hussein Abdulwahab Ahmed, who was in his employment, with intent to defraud him, took off with title deeds, sale agreements, bank statements and files containing vital documents relating to the investments that were made on the plaintiff's behalf.

After dissolution of their marriage, in the mistaken belief that the defendant had disclosed to him all the details of the investments he, on the 21st June 2006, signed before Nabani Swaleh Advocate an agreement

in settlement of the matrimonial properties between him and the defendant.

Subsequently the plaintiff realized that he had been duped into signing that agreement when he discovered several other properties the defendant had acquired during coverture which she had not disclosed to him. He further claimed that the defendant had or was in the process of concealing those properties by transferring some of the funds to her personal accounts and some properties to third parties. He therefore filed this suit and prayed for a declaration that the settlement agreement is null and void or alternatively that the same be varied to include all the properties listed in paragraph 13 of the plaint; a declaration that all the properties listed in paragraph 13 of the plaint are held by the defendant on *benami* for the plaintiff or in the alternative in trust for him; a permanent injunction to restrain the defendant from disposing of any of those properties and restraining further transfers of those properties by third parties to whom they may have been transferred; various orders to annul and cancel any fraudulent transfers of those properties and reconstitute them to him and an order for accounts of the income derived from those investments.

Contemporaneously with the filing of this suit on the 28th August 2006 the plaintiff also filed this application for injunction seeking preservative orders and orders of injunction to restrain the defendant from alienating the properties until this suit is heard and determined as well as orders of inspection of the bank accounts held by the defendant in various banks.

In response the defendant, in addition to her defence, has sworn and filed two replying affidavits. She denies the existence of any *benami* transaction between her and the plaintiff or holding any of the assets in trust for the plaintiff and states that the properties in her name are solely hers, she having “contributed directly and indirectly” to their acquisition.

The defendant further states that due to the plaintiff’s business engagements out of the country, and contrary to the plaintiff’s allegations, she was gratuitously, involved in the day to day running of the business affairs of the defendant’s company known as Bakhresa Food Products (K) Limited. In appreciation of her services the plaintiff gave her gifts including the Mercedes Benz KAU 001Z. Regarding the Barclays Bank Account No. 6003210 into which the plaintiff claimed he remitted the funds for investments, she said it was for her sole benefit and that whatever properties she acquired with proceeds therefrom are solely hers and are not held in trust for the plaintiff.

In response to the allegation that she concealed from the plaintiff details of other properties acquired with his funds, the defendant said that the properties contained in the agreement signed before Mr. Naban Swaleh Advocate on 21st June 2006 are the only ones the plaintiff was interested in. The others earned peanuts and the plaintiff was not interested in them.

With regard to the property on Barracks Road known as plot No. MN/1/4205 which had been acquired in the defendant’s brother’s name and later transferred to her the defendant said the plaintiff bought it for her as a wedding gift and he should therefore not be heard to lay claim on it.

Counsel for the parties presented their respective clients’ cases along their respective clients’ averments as summarized herein above. Mr. Buti teaming up with messrs Munyithya, Khatib and Ngugi for the plaintiff submitted the marriage and divorce of the parties is not in dispute and so is the source of the funds with which the properties in dispute were acquired. What the defendant is disputing, he said, is that she holds the properties *benami* or alternatively in trust for the plaintiff. According to him the plaintiff has made out a *prima facie* case for the grant of the orders of injunction sought in the application. He contended that the parties being Muslims who married and divorced under Islamic law the principle of *benami* transaction applies to them. He said it is not in doubt that the *benami* principle is part of the Kenyan law having been recognized and applied to Kenyans in the case of **Bishen Singh Chadha – Vs – Mohinder Singh & Another (1956), 29 KLR 20** which was followed in **Shallo – Vs – Maryam [1967] EA 409**.

Regarding the Agreement that the parties executed before Mr. Swaleh on 21st June 2006, Mr. Buti submitted that the same is void or voidable for misrepresentation. If the properties including the

Mercedes Benz KAU 001Z were gifts to the defendant as she claimed, he said, they could not have formed the subject of that agreement. He took issue with the defendant's assertion that she contributed to the acquisition of the suit properties and wondered how she was able to do that being unemployed with no disclosed source of income. Mr. Buti was confident that at the end of the day the suit properties, will go to the plaintiff as happened in **Benger – Vs – Kitti HCCCNo. 40 of 1999** and urged me to grant preservative orders as was done in that case.

Mr. Asige teaming up with Mr. Mwakireti and M. Mwangi for the defendant submitted at length that this suit has no legal basis. He started with the prayers in the application the framing of which he described as mischievous and misleading as they are not available under Order 39 of the Civil Procedure Rules. He said the orders for inspection and freezing the defendant's accounts should on that account not have been granted and having been granted especially the one of inspection, they cannot be re-called.

Mr. Asige further submitted that the *benami* transaction applies where one purchases property in the name of another. In this case it does not apply as the plaintiff did not purchase any property in the name of the defendant. The defendant purchased all the properties in her name. In any case, he further submitted, the *benami* principle having been outlawed in India from where it originated by the Indian Benami Transactions (Prohibition) Act of 1988 and the two cases of **Chadha – Vs – Singh** and **Shallo – Vs – Maryam** cited by Mr. Buti having been decided before that Act as read together with the case of **Yogendra Patel – Vs – Pascale Patel & Others Nairobi HCCC No. 617 of 1995** it does not apply to Kenya. He also said its invocation by the plaintiff alongside the doctrine of trust defeats his case as the two are mutually exclusive. He contended that what the pleadings show is a clear case of the presumption of advancement in favour of the defendant and as the properties are registered in her name her title to them is indefeasible.

Reverting to the facts of the case Mr. Asige submitted that the plaintiff's allegations of fraud and misrepresentation have no basis. He pointed out details which he said show that contrary to these allegations the plaintiff was, on or before signing the agreement of 21st June 2006, aware of the properties he claims were concealed from him. In the circumstances he urged me to dismiss the application with costs.

In his riposte Mr. Khatib for the plaintiff submitted that orders for the freezing of the defendant's accounts being preservative in nature fall within the purview of Order 39 of the Civil Procedure Rules. And the circumstances of this case require that the *status quo* should be maintained otherwise the properties will be disposed of and the plaintiff will suffer irreparable loss.

On the *benami* principle Mr. Khatib submitted that the Indian Benami Transactions (Prohibition) Act 1988 does not apply to Kenya. He disagreed with Mr. Asige that in **Yogendra Patel – Vs – Pascale Patel** Justice Githinji stated that the *benami* principle is not applicable to Kenya. He said the case is at any rate distinguishable as the dispute there was between brothers as opposed to the one in this case where the dispute is between a former husband and wife. He also said that the distinction Mr. Asige attempted to draw between Muslims and Mohamedans is illusory.

I have considered these rival submissions alongside the pleadings and the annexures to the parties' affidavits. I have also considered the authorities cited by counsel in this application.

It appears to me that two main legal points arise for determination in this case. The first one is whether the *benami* principle or transaction is applicable to Kenyan Muslims, and if it is whether it applies to the parties to this suit. If the two questions are answered in the affirmative the court will then determine whether or not the principle actually applies to the circumstances of this case.

For the plaintiff Messrs Buti and Khatib argued that the principle applies to the Kenya Muslims and is specifically applicable to the circumstances of this case. Mr. Asige for the defendant on the other hand was firm that if the principle was applicable to Kenyan Muslims at all it is no longer good law for the reasons already given and should therefore be discarded.

In India before the enactment of the Benami Transactions (Prohibition) Act of 1988, both among Hindus and Muslims the practice of purchasing property in the names of others was quite frequent. Those transactions were called *benami* (i.e. “without name” or “fictitious name”) transactions. The person in whose name the property was purchased was known as the *benamidar*. The result of a *benami* purchase was analogous to the English doctrine of a resulting trust except that the presumption of advancement where the *benami* purchase was in the name of one’s son or wife did not apply in India.

In **Bishen Singh Chadha – Vs – Mohinder Singh & Another (1956) 29 KLR 20** O’Connor, C.J. held that the *benami* principle is applicable to the Indian communities in Kenya as, he said, they, with few exceptions, “notoriously cling to the Indian ways of life, being little affected in their family life and social relations by English and African ideas and conceptions.” He further held that when it is proved that the purchase money was paid by one but the property registered in another a rebuttable presumption arises that the suit property was purchased *benami* and the burden of proof lies with the person claiming the property as his. This authority was followed in **Shallo – Vs – Maryam [1967] EA 409**.

As already stated Mr. Asige contended that the *benami* principle having been outlawed by statute in India from where it originated it is *ipso facto* no longer good law in Kenya.

I cannot accept that contention for the simple reason that the Indian Benami Transactions (Prohibition) Act 1988 does not apply to Kenya. To the best of my knowledge, the decisions in **Bishen Singh Chadha – Vs – Mohinder Singh & Another** and **Shallo – Vs – Maryam** which applied the principle to Kenyans have not been overturned and I do not read Justice Githinji’s decision in **Yogendra Patel – Vs – Pascale Patel & Others, Nairobi HCCC No. 617 of 1995** as casting any aspersions on them. Though not binding on me, these authorities are quite persuasive and I see no reason for departing from them. To overturn or depart from those decisions, cogent evidence will be required to show that the *benami* principle is no longer part of the personal law of the Muslims in Kenya. I leave that to the trial Judge who will also have to determine whether or not the funds for the purchase of all or some of the properties in dispute were provided by the plaintiff on the *benami* principle. For now I hold that the principle applies to Kenyan Muslims.

The other legal point raised is the doctrine of trust. Mr. Asige argued that *benami* and trust are mutually exclusive. It is, however, clear from the plaintiff’s pleadings that the plaintiff has raised the doctrine of trust in the alternative. If the *benami* principle does not apply the trial court will have to decide whether or not the doctrine of trust does and whether it is affected by the presumption of advancement as the parties were at the material time husband and wife. Evidence will be required to determine these points.

In the course of his submissions Mr. Asige conceded that the plaintiff remitted into the defendant’s Barclays Bank Account No. 6003210 Sh. 49,120,000/=. The defendant herself stated in her affidavit sworn on the 5th September 2006 that the plaintiff bought for her the Mercedes Benz KAU 001Z and the Barracks Road property known as plot No. MN/I/4205 as gifts, a fact that the plaintiff seriously disputes. She, however, did not give the sources of the funds for the acquisition of the other properties in her name which the plaintiff claims were acquired with his funds.

Taking all these factors and the plaintiff’s allegations of fraud and misrepresentation into account and the legal issues raised it cannot be said that the plaintiff’s claim is frivolous or without foundation as contended by counsel for the defendant. To the contrary I think the plaintiff has made out a prima facie case with a probability of success. As some of the properties are moveables and money in bank accounts the plaintiff’s fears of the defendant disposing of them are not without foundation. If they are disposed of the plaintiff is likely to suffer irreparable loss. A preservative order is therefore called for.

In the circumstances and for the reasons already stated I grant the plaintiff a temporary injunction in terms of prayer 3 of the plaintiff’s chamber summons dated 25th August 2006. The other prayers in the application were not urged and I do not think I could have granted them even if they were as they sought orders against people who are not parties to this.

The costs of this application shall be in cause.

DATED and delivered this 31st day of October 2006.

D. K. MARAGA

JUDGE