REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 306 OF 2019

MOIZ GULAMHUSSEIN NURBHAI...................................... PLAINTIFF

=VERSUS=

BURHAN GULAMHUSSEIN NOORBHAI ....DEFENDANT

RULING

Introduction

1.The plaintiff and the defendant are siblings. Their other siblings were the late Zakiyuddin Gulamhusein who died on 7/2/1987 and the late Noordin Gulamhussein Noorbhai who died on 11/1/2009. On 8/11/1971, the four brothers were registered as proprietors, as tenants-in-common in equal shares, of **Land Reference Number 209/346/44 (Original Number 209/346/35/9/2)** comprised in **Grant Number IR 8185** (hereinafter referred to as "**the suit property**"). The suit property is located on Riverside Drive, Chiromo, Nairobi. The defendant contends that there are four residential homes on the suit property and he resides in one of the four residential homes. He has rented out to tenants the other three residential homes. He receives rental income from the tenants. There is common ground between the two parties to this suit that, upon the demise of their two siblings, the shares of the two deceased siblings vested in the two parties to this

suit in equal shares.

2.A copy of Grant Number IR 8185 which was exhibited by the plaintiff only bears 26 entries. However, a copy of the Vesting Assent dated 25/7/2014 exhibited by the defendant, relating to the one quarter share of the late Noordin Gulamhussein Noorbhai, indicates that it was registered as Entry Number 29. If indeed the Vesting Assent was registered as Entry Number 29 it would appear parties to this suit have not exhibited a true copy of the Title bearing all the entries.

Plaintiff's Case

3.Through a plaint dated 18/9/2019, the plaintiff contends that he co-owns the suit property with the defendant as tenants-in-common in equal shares. On the suit property are rental units whose income the defendant has been collecting since 2009 but has failed and/or refused to account to the plaintiff or remit to the plaintiff his net share of the rental income. It is the case of the plaintiff that the defendant is in blatant violation of his property ownership rights. Consequently, the plaintiff brought this suit seeking the following verbatim orders against the defendant:

> ***a)An order directed against the defendant, to execute within a period of time fixed by this honourable court, the form prescribed under Section 94(1) of the Land Registration Act, No of 2012, consenting to partition of the property known as LR No 209/346/44 (Original Number 209/346/9/2 situated along Riverside Drive of Chiromo Area in the County of Nairobi in equal shares between the plaintiff and the defendant or in the defendant's default thereof, the Registrar of the High Court of Kenya be directed to execute***
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> ***the said consent in the defendant's stead.***
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> ***b)An order directed against the defendant to remit to the plaintiff, the plaintiff's net share in rent income, found due and owing, collected by the defendant from the property known as Land Reference Number 209/346/44 (Original Number 209/346/9/2) situated along Riverside Drive of Chiromo Area in the County of Nairobi from January 2009 until the date of judgment herein. Upon the defendant's compliance with an order of accounts(sic).***
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> ***c)Costs of the suit.***
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> ***d)Any such and further relief as this honourable court may deem fit to grant.***

Defendant's Case

4.Through a defence and counter-claim dated 24/10/2019, the defendant contends that in 1970s, the plaintiff migrated from Kenya to Canada and took with him GBP 35,000 from a joint bank account held in the names of all the four brothers, to enable him start up his new life in Canada. He adds that his late brother, Noordin, informed him that this was done on the understanding that the plaintiff had sold his quarter share to the remaining three brothers. The plaintiff subsequently returned to Kenya and lived in Kenya up to 1986 when he returned to Canada. It is the case of the defendant that, consequently, the remaining three brothers (excluding the plaintiff) became tenants-in- common in equal shares. It is the defendant's further case that pursuant to the Wills and Grants of Probate relating to the estates of their two deceased siblings, the shares of their two deceased siblings vested in the parties to this suit in equal shares. He adds that, in the circumstances, the plaintiff owns only one third of the suit property and the developments thereon, while he (the defendant) owns two thirds.

5.It is the defendant's further case that since he took over management of the suit property in 2009, he has incurred expenses totaling Kshs 9,785,624. He seeks a re-imbursement of the said expenses by the plaintiff.

6.Consequently, he makes a counter-claim against the plaintiff in terms of the following verbatim prayers.

> ***a)A declaration that the defendant's distinct share of the property known as LR Number 209/346/44 (Original Number 209/346/35/9/2) is two thirds of the whole.***
>
> ***b)Reimbursement of expenses incurred by the defendant for maintenance, management and improvements as set out in paragraph 27 above in the proportion representing the plaintiff's share of the property known as LR Number 209/346/44 (Original Number 209/35/9/2).***
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> ***c)Interest on (b) above from the date of filling suit.***
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> ***d)Costs of this suit***

The Applications

7.Together with the plaint, the plaintiff brought a chamber summons application dated 18/9/2019 seeking the following verbatim interlocutory reliefs:

> ***1)That this honourable court be pleased to direct the defendant/respondent to deposit all rental income derived from all rental concerns located within L R Number 209/346/44 (Original Number 209/346/9/2) Riverside Drive at Chiromo Area of Nairobi County in a joint interest earning bank account under the names of the advocates for the applicant and the respondent pending the hearing and determination of the suit herein.***
>
> ***2)That the defendant be compelled to render/furnish full detailed accounts of all the rental income collected and expended from all rental concerns situated on property known as LR Number 209/346/44 (Original Number 209/346/9/2) Riverside Drive at Chiromo Area of Nairobi County between January 2009 till the date of determination of the application herein.***
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> ***3)That the costs of this application be provided for.***

8.The said application was supported by the plaintiff's affidavit sworn on 6/9/2019. The application is one of the two applications falling for determination in this ruling.

9.The second application falling for determination is the notice of motion dated 24/10/2019 brought by the defendant seeking the following orders:

> ***1)The plaintiff do provide Kshs 10,000,000 as security for the defendant's costs by depositing this amount in a joint interest earning bank account with a reputable bank in Kenya in the names of the advocates of the parties herein within 14 days of the date of the order issued herein.***
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> ***2)In default of number 1 above, the plaintiff's suit be dismissed with costs to the defendant***
>
> ***3)The costs of this application be paid by the plaintiff to the defendant.***

Plaintiff's Submissions

10. The two applications were canvassed through written submissions. The plaintiff filed written submissions dated 27/8/2020 and supplementary submissions dated 18/11/2020. On the defendant's plea for an order of security for costs, counsel for the plaintiff submitted that **Order 26 rule 1** of the **Civil Procedure Rules** conferred discretion upon the court and the said discretion was to be exercised reasonably and judiciously. Counsel added that the defendant had deposed at paragraph 12 of his affidavit that the plaintiff was a co-owner of the suit property, hence the plea for an order of security for costs was unmerited. Relying on the decisions in: ***(i) Marco Toools & Explosives Ltd v Mamujee Brothers Ltd (1988) KLR 730;*** *(ii)* ***Guff Engineering (East Africa) Ltd v Amrik Sighn Kalji;*** *(iii)* ***Metal K Trading Ltd v More Than Conquerors company Ltd & 2 others (2020) eKLR*** *and (iv)* ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others, CA No 38 of 2013 [2014] eKLR***, among others, counsel urged the court to reject the plea for an order of security for costs.

11. On the prayers in his application, the plaintiff submitted that the defendant had collected rental income from the suit property since 2009 but had failed to account for it. Citing the framework in **Section 2** of the Land Act which defines "joint tenancy" and "tenancy-in- common" and **Article 40** of the Constitution which protects the right to property, the plaintiff submitted that the defendant's failure to give him his share of the rental income or account for it was unlawful. Counsel added that the defendant had not produced documents such as receipts and invoices to support his counter-claim. Lastly, the plaintiff submitted that his claim related to recovery of land hence the applicable limitation period was 12 years from 2009.

Defendant's Submissions

12. The defendant filed written submissions dated 19/8/2020 and supplementary submissions dated 27/10/2020. The defendant submitted that under **Order 26 rule 1 of the Civil Procedure Rules** the court had discretion to make an order requiring a party to furnish security for costs. Counsel argued that because the plaintiff had migrated to Canada in 1986 and did not have known assets in Kenya, there was merit in requiring him to provide security for costs. Counsel added that the suit property would not be utilized to satisfy costs because one of the issues to be determined by this court is the plaintiff's share in the suit property. The defendant further argued that the figure of Kshs 10,000,000 was an estimate based on the location of the suit property. Urging the court to grant the order for security for costs in this suit, the defendant cited, among others, the decisions in: (i) ***Shah & 2 others v Shah & 2 others [1982] eKLR****; (ii)* ***Pancras T Swai v Kenya Breweries Ltd [2004] eKLR****; and (iii)* ***Patrick Ngeta Kimanzi v Marcus Mutua Muturi & 2 others [2013] eKLR.***

13. Lastly, counsel for the defendant submitted that the plaintiff's plea for accounts was statute-barred under Section 4(3) of the Limitation of Actions Act. The plaintiff relied on the decision in (i) ***Joseph Mungai Wanene v Housing Finance Company of Kenya Ltd [2017] eKLR****; and (ii)* ***Kennneth Ouma Wasike v Mumias Outgrowers Sacco Society Ltd t/a Nitumize Sacco Society Ltd (2017) eKLR***.

Analysis and Determination

14.I have considered the two applications; the responses thereto; the parties' respective submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key questions falling for determination in the two applications. Because the defendant's application dated 24/10/2019 sought, among other prayers, an order dismissing the plaintiff's suit, I will dispose it first. If the plea for a dismissal order succeeds, the plaintiff's application will be spent. Secondly, at this interlocutory stage, the court does not make definitive or conclusive pronouncements on the key issues in the suit.

15. The following two questions fall for determination in the defendant's application dated 24/10/2019: (i) whether the defendant has satisfied the criteria upon which this court exercises discretionary jurisdiction to grant an order of security for costs; and (ii) whether the plaintiff's suit is statute-barred. I will make brief sequential pronouncements on the two questions in the above order.

16. Jurisdiction to issue an order requiring a party to provide security for costs is anchored on **Order 26 rule 1** of the **Civil Procedure Rules** which provides as follows:

> ***"26 (1) In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party"***

17. It is now a settled principle of law that the court's discretionary jurisdiction to issue an order of security for costs is exercised reasonably and judiciously, taking into account relevant factors such as absence of known assets of the respondent within the jurisdiction of the court; absence of known address of business or residence of the respondent within the jurisdiction of the court; insolvency or general financial standing of the respondent; *bonafides* of the respondent's claim or defence; general conduct of the respondent; and any other relevant factor. Secondly, when exercising this jurisdiction, the court is obligated to balance the constitutional right of the respondent to access justice *vis-a-vis* any prejudice which may be occasioned upon the applicant in the event the respondent were to fail to pay the applicant's costs of the suit.

18. The Court of Appeal summed up the guiding criteria in this regard in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR** in the following words:

> ***"In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs ... It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven"***

19. The defendant who is the applicant in the application under consideration contends that the plaintiff should be ordered to provide security for costs because he resides in Canada. I have looked at the pleadings and the evidential materials placed before me. The applicant filed a defence and counter-claim in which he made the following averments at paragraph 13:

> ***"13. Following the purchase of the plaintiff's initial quarter share of the suit property and the death of the defendant's 2 late brothers (Zakiyuddin and Noordin) whose shares in the suit property devolved to the defendant and the plaintiff in equal shares, the***
>
> ***defendant's distinct share in the suit property is two***
>
> ***thirds of the whole."***

20. Similarly, the defendant made the following depositions in paragraph 12 of his replying affidavit sworn on 24/10/2019:

> ***"12. Following the purchase of the plaintiff's initial quarter share of the suit property and the death of my 2 brothers whose shares in the suit property devolved to the plaintiff and I in equal shares, the plaintiff's distinct share in the suit property is one third and my share is two thirds."***

21. Besides the foregoing, there is evidential materials that indicate the plaintiff is a registered co-owner of the suit property which is located on Riverside Drive, Chiromo, Nairobi. Developed on the suit property are four residential homes. The plaintiff co-owns the suit property with the defendant as tenants-in-common. He is not the impecunious foreign litigant or the foreign man of straw projected by the defendant.

22. What therefore emerges from the totality of the pleadings and evidence before court at this interlocutory stage is that the plaintiff is not an impecunious foreigner with no known assets within the jurisdiction of this court. He is a co-owner of the suit property. Were his claim to fail and the defendant is ultimately awarded costs of this suit, the plaintiff's share in the suit property will be available for liquidation to satisfy the award relating to costs. I therefore find no merit in the defendant's plea for an order requiring the plaintiff to provide security for costs.

23. The second question falling for determination in the defendant's application dated 24/10/2019 is whether the plaintiff's suit is statute-barred. Not much was said by the defendant regarding this limb of the application. The defendant merely argued that the plaintiff's suit was statute-barred under **Section 4(3)** of the Limitation of Actions Act.

24. Parties to this suit own the suit property as tenants-in-common. The defendant admitted that he resides in one of the four homes developed on the suit property and he has rented out the other three. He also admitted the plaintiff's co-ownership of the suit property. What the defendant contested was the plaintiff's claim of ownership of one half share in the suit property

25.I have carefully examined the plaint containing the plaintiff's suit. The first limb of the plaintiff's suit is a plea for an order of partition in terms of **Section 94** of the **Land Registration Act**. The second limb is a claim for his share of the accrued rent from 2009. Without making any definitive pronouncements on the issues in the main suit, what emerges from the pleadings and from the evidence before me is that the defendant's position is that of a co-owner who manages the suit property and receives rental income on his own behalf and on behalf of the other co-owner of the suit property. The defendant is in a fiduciary position. The plaintiff is the other co-owner. It does therefore emerge from the pleadings and from the evidence placed before court at this interlocutory stage that the defendant is, through the substantive suit, being called upon to surrender trust property [land and rental income] to the beneficiary thereof. The applicable limitation legal framework in the circumstances is **Section 20** of the Limitation of Actions Act which provides as follows:

> ***1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—***
>
> > ***a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or***
> >
> > ***b)to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.***
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> ***2)Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.***
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> ***3)A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence***.

26. Secondly, even if this court were to invoke the framework in **Section 4(3)** of the **Limitation of Actions Act**, the plaintiff's claim for accrued rental income can be properly tabulated, based on the time when the rental income was received by the defendant and when the plaintiff's right to receive the rental income accrued. Any rental income which may be found to be statute-barred can properly be severed from the rest of the rental income.

27. Without saying much, in the circumstances, I do not think the defendant has demonstrated a proper legal basis to warrant a finding that the plaintiff's suit is wholly statute-barred. My finding on the second question in the defendant's application therefore is that the plaintiff's claim is not wholly statute-barred. I now turn to the plaintiff's application dated 18/9/2019.

28. Two questions fall for determination in the plaintiff's application dated 18/9/2019. The first question is whether a proper basis has been laid to warrant grant of an order requiring the defendant to deposit rental income relating to the suit property in a joint interest earning bank account in the names of the advocates for the parties to this suit. The second question is whether the defendant should be ordered to render full accounts of all rental income collected and expended from 2009. I will make brief sequential pronouncements on the two questions in the above order.

29. Firstly, the plaintiff/applicant is a co-owner of the suit property. He seeks an order preserving the rental income from the suit property for the ultimate benefit of the property co-owners. Indeed, in in paragraph 14 of his defence, the defendant averred as follows:

> ***" 14. Save that, in addition to the defendant's home, there are 3 other residential homes on the suit property which are rented out to tenants (hereinafter collectively referred to as the <u>Rental Units</u>), paragraph 4 of the plaintiff is denied and the plaint put to***

strict proof thereof.”

30. Secondly, the defendant admits that the plaintiff is a co-owner of the suit property. What he contests is the plaintiff’s assertion that he owns one half share of the suit property. Through pleadings and affidavit, the defendant contends that the plaintiff owns only one third of the suit property.

31. Thirdly, the defendant has not controverted the plaintiff’s contention that from 2009 to-date, he has been receiving rental income relating to the suit property and he has not accounted to the plaintiff or given the plaintiff his net share of the rental income. The defendant has through sworn evidence admitted that he has rented three out of the four residential homes. He stays in one.

32. Fourthly, from the pleadings and the evidence placed before court, it does emerge that notwithstanding the fact that the defendant has been receiving rental income relating to the three residential homes without accounting for it, he seeks a reimbursement of management expenses of Kshs 9,745,624 from the plaintiff.

33. Based on the above facts, there is, in the circumstances, founded apprehension that the rental income will continue to disappear and the plaintiff will stand exposed to more loss and further claims of reimbursement.

34. In the circumstances, there is a proper basis for invoking the jurisdiction of the court under **Order 40 rule 1** of the **Civil Procedure Rules** by preserving the rental income as sought by the plaintiff.

35. The second question in the plaintiff’s application relates to the plea for accounts at this interlocutory stage. I have taken into account the fiduciary status of the defendant and the fact that he has admitted renting out three out of the four residential homes on the suit property. I have also taken into account the fact that the defendant has not rendered accounts in the past but seeks a reimbursement of over Kshs 9.7 Million from the plaintiff as management expenses. Against the above background, it is my view that the plaintiff is justified in demanding accounts from the defendant at this interlocutory stage. Indeed, the plaintiff will need the accounts for effective preparation for the hearing of his claim and for the hearing of the defendant’s counter-claim. It is therefore my finding that there is merit in the plaintiff’s plea for accounts at this interlocutory stage.

Disposal Orders

36. In light of the above findings, the plaintiff’s application dated 18/9/2019 and the defendant’s application dated 24/10/2010 are disposed in the following terms:

a)The defendant’s application dated 24/10/2019 is dismissed for lack of merit

b)The defendant is directed to deposit all rental income from the developments on Land Reference Number 209/346/44 (Original Number 209/346/9/2) Riverside Drive, Chiromo, Nairobi (“the suit property”) in a joint interest earning account to be opened within 30 days in the names of the Advocates of the two parties to this suit, pending the hearing and determination of this suit.

c)The defendant is directed to, within sixty (60) days from today, file in court and serve upon the plaintiff’s advocates a full statement of accounts relating to all rental income and all expenses relating to the suit property from January 2009 to the date when the joint

interest earning account is opened and operationalized.

d)Both parties will file and serve their bound, paginated and indexed bundles containing pleadings, written statements and documentary evidence within 90 days to facilitate fast-racked hearing and determination of this suit.

e)The defendant shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Amayo for the Defendant

Court Assistant: June Nafula