



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 232 OF 2019**

**NITIN JAY RAJANI.....1<sup>ST</sup> PLAINTIFF**

**RAMAGAURY JAYANTILAL RAJANI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SHAILESH JAYANTILAL RAJAN.....1<sup>ST</sup> DEFENDANT**

**SIMOUN TRAVEL LIMITED.....2<sup>ND</sup> DEFENDANT**

**JEREMY NJENGA, VICTORIA WAMBUA,**

**VIVIANNE WACHANGA & PHYLLIS KIRAGU**

**t/a J.M. NJENGA & CO ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are four applications for determination. The first application is the Notice of Motion dated 19<sup>th</sup> December, 2019 by the plaintiffs wherein they seek, inter alia, injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and or any 3<sup>rd</sup> parties restraining them jointly and/or severally from selling, leasing, licensing, transferring, charging, mortgaging, constructing on, developing and/or in any other manner whatsoever and howsoever disposing of, dealing with and/or interfering with all or any part of the suit premises known as PLOT NUMBER MN/I/588 pending the hearing and determination of this suit. The plaintiffs also seek orders directing the Commissioner of Lands and/or the Land Registrar to ensure that no further registrations and/or entries, transfers, leases, licenses, charges, mortgages and/or any other manner of dealings, transaction and/or disposals are effected on the suit premises pending further direction and orders of this court.

2. The application is based on the grounds thereon and supported by the affidavit of NITIN JANYANTILAL RAJAN sworn on 27<sup>th</sup> November, 2019. The plaintiffs have through their pleadings and affidavit averred, inter alia, that they are the legitimate legal, beneficial and registered owners of the suit premises having received the said property from the initial purchaser, the late Mr. Jayantilal Rajani who is the 1<sup>st</sup> plaintiff's father and the 2<sup>nd</sup> plaintiff's husband. That the deceased caused the suit premises to be transferred, for good consideration, to the plaintiffs several years prior to his death in the year 2001. That the deceased was, up until his passing, the Managing Director of Kenya United Steel Company Limited (hereinafter referred to as "KUSCO"), a Limited Liability Company based in Mombasa which in early 2000 or thereabouts was experiencing financial hardships which forced the deceased to seek an overdraft facility from Barclays Bank of Kenya, utilizing the suit premises as security. That various customers of KUSCO defaulted on their payments to Barclays Bank which resulted in the issuance of Legal Notices and the institution of legal proceedings against the defaulters who in turn sued KUSCO for non-delivery of the materials central to the arrangement. That at all times, the 1<sup>st</sup> defendant engaged in the management of companies and business and running the affairs of his and the 1<sup>st</sup> plaintiff's mutual deceased father and was in the process of attempting to regain control of the commercial entities and wrestling the same from the grip of the bank and in the course of which he requested the plaintiffs (who are his biological brother and biological mother respectively), to assist him by executing a deed of settlement demanded by Barclays Bank of Kenya Limited and who in furtherance of this goal forwarded a Deed of Settlement dated 29<sup>th</sup> December 2006 to the plaintiffs herein, which deed of settlement inter alia raised the liability of the plaintiff and their stake as guarantors in the transaction and set out the terms for the release and/or discharge of the suit premises from Barclays Bank. That because the plaintiffs wanted to help out the 1<sup>st</sup> defendant by reason of blood ties, so as to enable him to buy the extra time he needed to stabilize the businesses and repay the bank loans, they duly executed the said deed of settlement and returned the same to the 1<sup>st</sup> defendant herein for his further action, with a view of servicing the bank loan and discharge the suit premises, but learnt that this never happened. That the 1<sup>st</sup> defendant later informed the plaintiffs that the suit premises had been sold by public auction by Barclays Bank in exercise of their power of redemption and in an attempt to recover the outstanding amounts due to them.

3. The plaintiffs aver that it was not until the year 2017 that they discovered that in fact the 1<sup>st</sup> defendant illegally and fraudulently transferred the suit premises to the 2<sup>nd</sup> defendant. That the defendants have fraudulently transferred the suit premises to the 2<sup>nd</sup> defendant with the result that they have illegally taken over the same from and defrauded the plaintiffs. That the suit premises are in danger of being wasted, irreparably damaged, alienated and/or wrongfully sold by the 2<sup>nd</sup> defendant to whom the title was fraudulently transferred by reason of collusion and unlawful conduct on the part of and between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants in conjunction with unknown third parties have illegally, unlawfully and improperly purported to act for and on behalf of the plaintiffs with respect to the suit premises and have proceeded to illegally transfer the suit premises to the 2<sup>nd</sup> defendant who now holds itself out to be the legal and registered owner. The plaintiffs state that they face an imminent and real risk of wholly losing the suit premises to the illegal and fraudulent acts of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who have illegally, in collaboration with unknown third parties, clandestinely 'grabbed' or stolen the suit premises from the plaintiffs who are its rightful, legal and true owners. The plaintiff further stated that the defendants herein are highly likely to proceed with their illegal actions and further illegally transfer the suit premises to other third parties therefore multiplying the complications of the case and unnecessarily increase the number of litigants and persons who will be involved in or affected by these proceedings all of which will lead to the failure to expedite the resolution of this dispute and further add to the costs of doing so, contrary to the objectives of the law. The plaintiffs aver that the 2<sup>nd</sup> defendant has already registered encumbrances in the form of a principal charge and a third-party charge on the suit premises amounting to Kshs.65,000,000/= and may proceed with such prejudicial, detrimental and wholly improper acts if not stopped from doing so by an order of this court. The plaintiffs state that they have never at any material time past or present intended to and or actually either sold, leased, let, licensed, sub-divided, and/or in any other manner whatsoever disposed of any of their interest in the suit premises to the defendants and/or any one of them and deny ever having authorized any disposal of their interest in the suit premises whether by means of their own actions or through any agents and/or representatives. It is the plaintiffs' contention that the defendants are committing an open and blatant illegality and are without any colour of right whatsoever attempting to permanently dispose of the plaintiffs of the suit premises contrary to the law and justice and which action if allowed will, inter alia, cause irreversible and irreparable harm not capable of compensation by way of damages to the plaintiffs primarily because, according to them, the 2<sup>nd</sup> defendant is a shell company that is being used as a front in the scheme to defraud the plaintiffs, adding that the said company has already charged the suit premises for a sum in excess of Kshs.65 million plus interest and cost and has no intention of repaying or clearing the same but to eventually have the bank take over the suit premises and exercise its statutory right of sale by public auction. That the conduct of the defendants is fraudulent, illegal, unlawful and reprehensible and ought to be stopped and punished by the law. The plaintiffs aver that they are willing to issue an undertaking as to damages for any loss the defendants or any of them may suffer if orders are issued as prayed.

4. The plaintiffs submitted that they have a prima facie case with a reasonable probability of success, that they stand to suffer irreparable injury which cannot adequately be compensated for by an award of damages (as neither the defendants and/or their companies have any known and traceable assets) and that the balance of convenience tilts in the plaintiffs' favour.

5. In opposing the plaintiffs' notice of motion dated 19<sup>th</sup> December, 2019, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 9<sup>th</sup> November, 2020 in which he has averred, inter alia, that the plaintiffs are aware that the 2<sup>nd</sup> defendant acquired title of the suit property through a transfer effected through a power of attorney dated 30<sup>th</sup> May 2006 in which the plaintiffs appointed the 1<sup>st</sup> defendant as their attorney and agent and giving the 1<sup>st</sup> defendant authority to do, inter alia, the following on the plaintiffs' behalf; to deal with whatsoever manner with the suit property, to exercise and execute all powers the plaintiffs were entitled to as proprietors of the suit property, to sign all such transfers and other instruments in respect of the suit property, and do all things necessary or expedient for carrying out the power of attorney. It is the 1<sup>st</sup> defendant's contention that the plaintiffs' application is incompetent, fatally defective, made in bad faith and without merit. That the irrevocable power of attorney dated 15<sup>th</sup> February, 2017 annexed to the affidavit in support of the application is invalid and without legal effect for want of verification and/or registration and for being given during the subsistence of power of attorney dated 30<sup>th</sup> May 2006 given by the plaintiffs to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant accuses the plaintiffs of fleeing from the country to Nigeria where they continue to reside to date to escape the immense pressure of the creditors on the family business, including Barclays Bank's imminent exercise of its statutory power of sale of the suit property to recover the outstanding loan amount owed by KUSCO.

6. The 1<sup>st</sup> defendant has also moved this court by way of an application dated 21<sup>st</sup> April 2020 seeking for orders that the plaintiffs do provide security for the 1<sup>st</sup> defendant's costs in the sum of Kshs.3,500,000/= or such sum as the court may order within thirty days of the order or such period as the court may order, and that the security be deposited in an interest earning account in the joint names of the parties' advocates or in court, and in default of the security being provided, the plaintiffs' suit be dismissed with costs. The application is supported by the affidavit of the 2<sup>nd</sup> defendant sworn on 21<sup>st</sup> April 2020 and is premised on the grounds inter alia, that the plaintiffs are residents of the Federal Republic of Nigeria and have no known assets or income generating activity in Kenya. That the 1<sup>st</sup> defendant has a bona fide defence and a conservative estimate of legal costs for defending the suit over the suit property which the plaintiffs have placed a market value of Kshs.185 million is Kshs.3,500,000/=. The 1<sup>st</sup> defendant is apprehensive that he will not recover the costs he will incur in defending the suit and that he stands to suffer prejudice unless security for costs is ordered for to protect him from incurring expenses in this litigation that he may never recover.

7. In opposing the plaintiffs' application, the 2<sup>nd</sup> defendant filed a replying affidavit sworn by Sukhminder Kaur Chima on 26<sup>th</sup> March, 2020. The 2<sup>nd</sup> defendant also filed an application dated 29<sup>th</sup> September, 2020 seeking to have the plaintiffs to deposit within thirty days Kshs.10,500,000/= or such other security for costs as may be sufficient to cover the 2<sup>nd</sup> defendant's costs in the suit, in an interest earning account in the joint names of the respective parties' advocates, in default, that the plaintiffs' suit be dismissed with costs. The 2<sup>nd</sup> defendant's case is that it is the legitimate legal and registered owner of the suit property having acquired the same for valuable consideration. The 2<sup>nd</sup> defendant has denied any fraud, illegality, malicious dealing, conspiracy or collusion in the process of acquisition of the suit property. The 2<sup>nd</sup> defendant accuses the plaintiffs of being guilty of laches, adding that the suit is fatally defective for want of jurisdiction. That the plaintiffs have revealed that their primary place of residence is Kano state in the Federal Republic of Nigeria and do not have a place of residence in Kenya. That the value of the subject matter is Kshs. 100 million and the plaintiffs having indicated their willingness to issue an undertaking as to damages for any loss the defendants may suffer if orders are issued as prayed, and the suit attracts party and party costs in excess of Kshs.3,500,000/=. The 2<sup>nd</sup> defendant avers that it has raised a bona fide defence against the plaintiffs' suit, and since the plaintiffs are not resident in the Republic of Kenya, enforcement of costs, if awarded against the plaintiffs, will be difficult to recover from the plaintiffs. That it is the general rule that security for costs is required for plaintiffs residing outside of the jurisdiction.

8. On their part, the 3<sup>rd</sup> defendant filed grounds of opposition dated 3<sup>rd</sup> December, 2020 in response to the plaintiffs' application dated 19<sup>th</sup> December, 2019 in which they aver that the application does not meet the laid down principles for grant of the prayers sought as set out in the celebrated case of **Giella –v- Cassman Brown**. That the suit by the plaintiffs is legally untenable and statute barred under the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya and is bad in law. That the application is frivolous, vexatious, bad in law and an abuse of court process and ought to be disallowed.

9. The 3<sup>rd</sup> defendant also filed an application dated 30<sup>th</sup> April 2020 seeking to have the plaintiffs' suit against the defendants struck out for disclosing no reasonable cause of action against the defendants. That in the alternative, the plaintiffs be ordered to furnish security for the 3<sup>rd</sup> defendant's costs of defending the suit in the sum of Kshs.3,500,000/= or such other reasonable sum and within such reasonable time as the court may deem sufficient. The 3<sup>rd</sup> defendant's application is supported by the affidavit sworn on 30<sup>th</sup> April 2020.

10. In opposing the Defendants' applications, the plaintiffs filed grounds of opposition dated 3<sup>rd</sup> June, 2020, grounds of opposition dated 8<sup>th</sup> September, 2020 and grounds of opposition dated 20<sup>th</sup> October, 2020. It is the plaintiffs contention *inter alia*, that the applications do not meet the requirements as set out in order 26 Rule 3 of the Civil Procedure Rules, and in the requirements set out by the Court of Appeal in **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR** and that the ground that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs reside and work in Nigeria is no sufficient ground to grant the security order as per the finding of the Court of Appeal in **Kenya Educational Trust Limited –v- Katherine S.M Whitton (2011)eKLR**. That there is no legal basis upon which the court may make any orders to strike out Victoria Wambua, Vivianne W. Wachanga, Phylis Kiragu and or the 3<sup>rd</sup> defendant out of these proceedings nor dismiss the suit as against the 3<sup>rd</sup> defendant, adding that the 3<sup>rd</sup> defendant are guilty of and colluded with the 1<sup>st</sup> and 2<sup>nd</sup> defendants and defrauded the plaintiffs of their property the subject of this suit. It is the plaintiffs contention that no evidence to support the prayers for security for costs has been placed before the court, and that the applications are made mala files and in abuse of the process of the court and have no merit and should be dismissed with costs.

11. I have considered the applications and the rival submissions. Having done so, I take the following view of the matters. The application dated 19<sup>th</sup> December, 2019 by the plaintiffs is for injunctive orders which are equitable reliefs granted at the discretion of the court.

12. In accordance with the authority of **Giella –v- Cassman Brown (1973)EA 358**, the plaintiffs must demonstrate that they have a prima facie case with a probability of success and that they would suffer irreparable loss if the interim injunction sought is not granted and that if the court is in doubt, the balance of convenience is in their favour. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicants are deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her rights have been infringed.

13. The question that then arises is whether the plaintiffs have made out a prima facie case with a probability or success. In the case of **Mrao Ltd –v – American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described as follows:

**“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.”**

14. In this case, it is not in dispute that the suit property is now registered in the 2<sup>nd</sup> defendants' name. It is also not disputed that the plaintiffs were previously registered as legal owners of the suit property whilst the late Jayantilal Rajani, the father of the 1<sup>st</sup> defendant and the 1<sup>st</sup> plaintiff and husband of the 2<sup>nd</sup> plaintiff was also a beneficial owner until his death in the year 2001. While the 1<sup>st</sup> defendant contends that the 2<sup>nd</sup> defendant acquired the suit property for valuable consideration through a valid transfer dated 31<sup>st</sup> October, 2007, the plaintiff's accuse the 1<sup>st</sup> defendant of dispossessing them of their rights of ownership and colluded and fraudulently transferred the suit premises to the 2<sup>nd</sup> defendant. In my view, the orders sought by the plaintiffs are designed to secure and preserve the subject matter of the suit, pending the hearing and determination. The court has noted that the suit property is now registered in the 2<sup>nd</sup> defendant's name. The court is also aware of the principle of title under the Land Registration Act which provides that the registration of title under Section 26 gives an indefeasible title to the proprietor which can only be challenged on the grounds of fraud or misrepresentation to which he is shown to be a party.

15. In this case, the plaintiffs are challenging the 2<sup>nd</sup> defendant's title on the grounds, inter alia, that the transfer and registration was obtained fraudulently and illegally. Order 40 rules 1 and 2 of the civil procedure rules provides that:

**“1. Where in any suit it is proved by affidavit or otherwise-**

**(a) That any property 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 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 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.**

2(1) –

**(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the**

**injunction, keeping an account, giving security or otherwise, as the court deems fit.”**

16. Given the above position, and in particular the plaintiffs’ assertion of fraud on the defendants part, and the same being serious allegations, I find that the plaintiffs have established a prima facie case with a probability of success. Further, the plaintiffs certainly stand to suffer irreparable loss if the suit property is alienated.

17. Given the above discourse, I do allow the plaintiffs’ application for injunction in terms of prayers 3, 4, 5 and 6 of the motion dated 19<sup>th</sup> December, 2019.

18. The applications by the defendants seek to have the suit struck out and for security for costs. Whereas the court retains the jurisdiction to strike out pleadings in deserving cases, each case must be viewed on its own peculiar facts and circumstances. The law is that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and the hearing involves the parties in a trial of affidavits, it is not plain and obvious case on its face. In this case, allegations of fraud have been raised. To determine all these issues, I am afraid, would amount to making determination of this case based on affidavit evidence. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating the plaintiffs’ suit against the defendants or any of them at this stage. Under Article 50 (1) of the constitution, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. Whereas I agree that the form of a hearing does not necessarily connote adducing of oral evidence, and that in appropriate cases, hearing may take the form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain case. I therefore decline to strike out the plaintiffs’ suit as urged by the defendants.

19. The other issue for determination is the prayer for security for costs sought by the defendants. Both the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant each want the plaintiffs ordered to deposit the sum of Kshs.3,500,000/= as security for costs for defending the suit while the 2<sup>nd</sup> defendant is asking for a sum of Kshs.10,500,000/=. The applicable law in application for security for costs is Order 26 Rule 1 of the Civil Procedure which provides as follows:

**“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.”**

20. The main reason given by the defendants for seeking orders directing the plaintiffs to furnish security is because the plaintiffs have stated that their primary place of residence is Kano State in Nigeria. The grant for orders sought herein is a matter of judicial discretion. The test in an application for security for costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bona fide defence. This was the holding in the case of **Shah –v- Sheti Civil Appeal No.34 of 1981**. The same principle were espoused in the case of **Jayesh Hashmuh Shah –v- Narin Haira & Another (2015) eKLR** in which the court held:

**“It is now settled law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account. ”**

21. In the instant case, it is not denied that the plaintiffs left the country sometime back and are now resident in Nigeria. It is not in dispute that the plaintiffs had given the 1<sup>st</sup> defendant a power of attorney over the suit premises. The defendants have argued that the plaintiffs have no known assets in Kenya. This argument has not been rebutted or challenged by the plaintiffs. In the case of **Gatirau Peter Munya (supra)**, the Court of Appeal held that it was imperative in consideration of an application for security for costs for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. In the circumstances of this case, I find the applications by the defendants for security for costs bona fide.

22. In order not to stifle the plaintiffs’ right of prosecuting the suit, I hereby order that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs deposit Kshs.1,000,000/= each as security for costs. Therefore, the 1<sup>st</sup> defendant’s notice of motion dated 21<sup>st</sup> April 2020, the 2<sup>nd</sup> defendant’s Notice of Motion dated 29<sup>th</sup> September, 2020 and the 3<sup>rd</sup> defendant’s notice of motion dated 20<sup>th</sup> April 2020 are allowed as varied hereinabove in terms of the amount of security. For the avoidance of doubt, the total amount to be deposited by the plaintiffs’ is kshs.3,000,000/= as security for costs.

23. In a synopsis, the following are the orders granted by this court in relation to the following applications:

**(1) The plaintiffs’ notice of motion dated 19<sup>th</sup> December, 2019 is allowed in terms of prayers 3, 4, 5 and 6 thereof.**

**(2) The 1<sup>st</sup> defendant’s notice of motion dated 21<sup>st</sup> April, 2020, the 2<sup>nd</sup> defendant’s notice of motion dated 29<sup>th</sup> September, 2020 and the 3<sup>rd</sup> defendant’s notice of motion dated 30<sup>th</sup> April, 2020 are allowed to the extent that the plaintiffs’ shall provide security to the amount of Kshs.1,000,000/= each to the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and to the 3<sup>rd</sup> defendant respectively within a period of sixty (60) days from the date hereof.**

**(3) Such security may be in the form of a cash deposit in court or a joint account in the names of the respective advocates or in the form of a Bank guarantee from a reputable bank agreed upon by the parties.**

**(4) In default of compliance with the provisions of such security, the plaintiffs’ claim shall be struck out with costs to the defendants.**

**(5) Each party to bear their own costs.**

23. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 23<sup>rd</sup> day of February, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant