



REPUBLIC OF KENYA



Nurani & another (Suing as administrators of the Estate of the Late Sadrudin Shamsudin Nurani) v Glitter Venture Limited & 23 others (Environment & Land Case E10 of 2020) [2024] KEELC 6557 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6557 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E10 OF 2020
FM NJOROGE, J
OCTOBER 8, 2024

BETWEEN

FEIZAL SADRUDIN NURAN & FARAH SADRUDIN NURANI PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE SADRUDIN
SHAMSUDIN NURANI

AND

GLITTER VENTURE LIMITED 1ST DEFENDANT
GILBERTTO PEZZOTTA 2ND DEFENDANT
BRUNO PEZZOTTA 3RD DEFENDANT
KILIFI LAND REGISTRAR 4TH DEFENDANT
SUSANNA BRACCO 5TH DEFENDANT
GIANFRANCO BARBA 6TH DEFENDANT
TINA GARLO 7TH DEFENDANT
GINO PALETTI 8TH DEFENDANT
ENZO CARELLA 9TH DEFENDANT
LUCIANO SHEIKHA 10TH DEFENDANT
MARIA ROSA REBUSSI 11TH DEFENDANT
BRUNO NESPOLI 12TH DEFENDANT
GIULIANO FRANZOT 13TH DEFENDANT
GIULIANO VISENTIN 14TH DEFENDANT
ROSARIA LAMPERTI 15TH DEFENDANT



ALLE PICOZZI	16TH DEFENDANT
PIERANGELO ONGARO	17TH DEFENDANT
CARLO MINZONI	18TH DEFENDANT
LUIGINA GIUDICI	19TH DEFENDANT
OSVALDO COLOMBO	20TH DEFENDANT
EMANUELA PITTANA	21ST DEFENDANT
MARIA TERESA SANSOTTA	22ND DEFENDANT
EORNOLTI CORRADO	23RD DEFENDANT
MAWIMBI RESORT LIMITED	24TH DEFENDANT

RULING

1. The notice of motion dated 7/12/2022 has been brought by the plaintiffs. They seek a raft of order therein including:
 - a. An order compelling the Director of Immigration services to furnish the court with the immigration status of the 2nd and 3rd defendants and the 1st -19th interested parties;
 - b. An order joining the 1st -20th proposed interested parties to the suit;
 - c. An order citing for contempt numerous persons listed therein;
 - d. An order of committal of those persons to civil jail or condemning them to a fine of Kshs 20,000,000/- pursuant to section 29 of the [Environment and Land Court Act](#);
 - e. That in the alternative the said persons be compelled to furnish security for satisfaction of the plaintiff's claim;
 - f. That the costs of the application be borne by the contemnors.

2. In support of the application is the affidavit sworn on the even date by Feizal Sadrudin Nurani which reiterates the grounds set out at the foot of the application. The deponent states as follows: the court issued injunctive orders on 18/11/2021 against the 1st 2nd and 3rd defendants which were duly served on them by way of their official electronic mail addresses; that despite the order the defendants have brazenly been running a hotel and have created third party rights through sub-leasing and have put up structures on the suit property; that though it is apparent from the immigration offices that the 1st -19th interested parties have only been in the country on tourist or visitors' visa the 2nd defendant has admitted to the act of leasing and has allowed the proposed interested parties to collect rents from condominiums located on the suit property; the 2nd and 3rd defendants and the 1st -19th proposed interested parties are foreigners without work permits or business permits and their actions are contrary to the [Kenya Citizenship and Immigration Act](#) 2012; the 2nd and 3rd defendants have stayed away from Kenya since the filing of the suit; that the proposed interested parties have advertised to the public the availability of hotel accommodation and derived profits from the suit property without tax or licence compliances; that the exhibits to the application show that the 1st -20th proposed IPs have a recognizable interest in the suit property and stand to be affected by the judgment in this case. It is stated that all the alleged contemnors had constructive knowledge of the order in question.



3. Attached to the application is a copy of the order issued on 18/11/2021, a copy of an email communication to at least 2 email addresses dated 4/11/2020 apparently attaching various documents one of which is labelled as an “order”, a letter dated 29/11/2021 addressed to the 2nd respondent warning against any further interference with the suit property; a copy of an electronic mail communication from the 2nd defendants to the plaintiff’s advocates and copied to numerous persons directing the law firm to desist from addressing email communications to uninvolved third parties but instead to deliver the communications to the defendant’s lawyers, a letter to the 1st defendant, the occupants and the landlords of Chembe/Kibabamshe/367, and Mawimbi Resort Management dated 28/11/2022 informing them of the injunctive orders issued by this court on 12/11/2021 in this case and demanding that they cease and desist from operating the hotel lest they be sued for contempt.
4. The 1st 2nd and 3rd defendants filed their grounds of opposition to the application on 20/11/2022 giving the following grounds: that it is an abuse of process; that it offends Section 5(1) of the *Judicature Act*; that the defendants have not breached the order in any way; that the plaintiff has not demonstrated breach by way of evidence; that the 1st defendant owns the suit property and its tenants are not necessary parties to this suit; that joinder of such tenants will convolute the matter and embarrass the trial of the suit; that the 1st defendant is a company incorporated in Kenya; that this court lacks the jurisdiction to hear and determine matters tax and immigration; the doctrine of exhaustion has not been observed by the applicant hence this court lacks jurisdiction; that the application is an intimidation and delay tactic arising from the applicant’s securing of an injunctive order.
5. An order dated 8/3/2023 was issued in this matter in the following terms:
 - a. That the plaintiff hereby abandons prayers 2,3,4,5 & 6 of the application dated 7/12/2022;
 - b. That the proposed interested parties be and are hereby joined as defendants
 - c. That the plaintiff to amend the plaint within 14 days of the date hereof;
 - d. That the defendants to file responses within 14 days upon service; that mention on 12th June 2023.
6. It is clear then that the application was disposed of on 8/3/23 save for the issue of furnishing of security in satisfaction of the plaintiff’s claim as sought in prayer no 7 thereof. The applicants filed a supplementary affidavit of the 1st applicant on 19/6/2023. In that affidavit the deponent expressed his reservations concerning the 2nd -3rd, 5th – 23rd defendants’ willingness ability or bona fides in settling any decree that may be passed against them owing to their nationality and their full residency in Italy. He further pointed out that the 1st defendant though registered in Kenya is wholly owned by Italian nationals who usually reside in Italy, and that the 1st defendant through the 2nd defendant has been offering for sale condominiums on the suit premises in a bid to alienate all the suit land to third parties.
7. Muli & Ole Kina filed grounds of opposition to the application on behalf of the 5th 15th and 16th defendants stating as follows: that the application offends the provisions of Order 39 CPR as read with Section 12 (a) –(d) CPA; that the plaintiff has not justified the prayer for security; that the plaintiff’s case is a nullity by virtue of Section 7 CPA and the doctrine of res judicata (this ground was after the filing of these grounds disposed of and disallowed in a ruling dated 6/3/2024).
8. Binyenya Thurania & Co filed grounds of opposition on behalf of the 6th 7th -8th, 10th -12th, 17th -19th and the 21st defendants stating as follows: that the defendants have a recognizable interest in Chembe/ Kibabamshe /367 having purchased the same in good faith; that some of their leases are already registered and the 6th 7th -11th, 12th, 14th 17th and 18th are in possession of the units; that the 6th 7th



-11th, 12th, 14th 17th and 18th defendants have good and indefeasible titles to their respective apartments and that it would be unjust and inequitable to condemn them to furnish any form of security; that there is no pending decree against 6th 7th -8th, 10th -12th, 17th -19th and the 21st defendants and Prayer No 7 is based on an anticipatory decree against them and that the applicant has failed to demonstrate that the defendants are unable to satisfy any decree that this court may issue. It is further stated that this court has not yet heard the suit and that it lacks any basis for calculating the amount of security if any were to be ordered.

9. The application was canvassed by way of written submissions. The applicant filed submissions dated 19/10 /23. Citing Order 39(1) & (2) and quoting the case of Indar Singh Ltd Vs Star Times Media Co Ltd 2021 eKLR as well as a Ugandan case –Makubuya V Songdoh Films (U) Ltd & Another the applicants submitted that their application ought to be allowed. They raised specific issues as follows:
 - a. That the respondents are all Italian citizens and are outside this court’s jurisdiction;
 - b. That the defendants failed to file affidavits to show their abodes;
 - c. That the failure to show their abodes should lead to the inference that they did so to avoid obstruct or delay the execution of any decree that may be passed against them; The applicants also relied on the decision in Bangrauf Grain Millers Vs Bread Kenya Ltd 2005 eKLR regarding proof of intention.
 - d. That there is evidence that the 2nd defendant was in Kenya recently and oversaw the disposal of some properties;
 - e. That the 1st and 2nd defendants have been offering for sale condominiums on the suit property in order to alienate the suit land to third parties;
 - f. That the only known property that the defendants have is Chembe/Kibabamshe/367, the subject matter of the suit, whose title is amenable to cancellation.
10. Muli & Ole Kina filed submissions dated 16/8/24. It is urged in those submissions that the suit is for declaration of ownership of land, voiding of transactions in land and damages for trespass and no order for security can thus issue. They cited International Air Transport Association Vs Akarim Agencies Co Ltd & 2 Others 2014 eKLR, Potgieter Vs Stumberg 1967 EA 609 and Order 39 Rules 1 & 2 CPR and stated that the plaintiff is supposed to satisfy the court that the suit does not fall under the categories in Section 12(a) – (d) of the CPA. It is further urged that save for alleging that the defendants are Italian nationals working in Kenya without work permits the plaintiffs have not made any allegations contemplated by Order 39 Rule 1 and 2 CPR and so the motion ought to be dismissed.
11. Khaminwa & Khaminwa advocates filed their submissions dated 30/7/2024. Their argument is similar to that raised by the 5th 15th and 16th defendants.
12. There are no submissions from the other parties.

DETERMINATION.

13. I have considered the application, the grounds of opposition and the submissions of the parties. The issue for determination is whether the respondents ought to be ordered to furnish security for the satisfaction of the decree in the plaintiffs’ case.
14. Order 39 Rules 1 & 2 CPR sets out the circumstances under which a respondent may be called upon to furnish security and it provides as follows:



1. Where defendant may be called upon to furnish security for appearance [Order 39, rule 1]
Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

- (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
 - (i) has absconded or left the local limits of the jurisdiction of the court; or
 - (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
 - (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- (b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

2. Security [Order 39, rule 2]

- (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.
- (2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.”

15. Counsel for the respondents nos. 5, 15 and 16 have correctly submitted that the court is supposed to be satisfied by way of affidavit evidence that the suit in which the application for security is being made is not one of the suits specified in Section 12 (a) –(d) of the *Civil Procedure Act*. That section provides as follows:

12. Suit to be instituted where subject matter situate Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property, with or without rent or profits;
- (b) for the partition of immovable property;
- (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- (d) for the determination of any other right to or interest in immovable property;



- (e) for compensation for wrong to immovable property;
- (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”

16. Other than establish that the suit does not fall under such categories the applicant is also supposed to establish that the respondent:
- a. has absconded or left the local limits of the jurisdiction of the court; or
 - b. is about to abscond or leave the local limits of the jurisdiction of the court; or
 - c. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
 - d. is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.
17. If the applicant establishes the foregoing criteria, the court may issue a warrant for the arrest the respondent and his presentation before the court to show cause why he should not furnish security for his appearance. The warrant may specify the amount of security required of him as would be sufficient to satisfy the plaintiff’s claim. The respondent would not be arrested if he surrendered that specified sum in the form of security. However, where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, and sureties for the satisfaction of the decree may also be required of him.
18. Have the applicants proved by evidence the suit is not of such category in Section 12 CPA? The respondents think otherwise. I have perused the supporting affidavit and the supplementary affidavit relied upon by the applicant and I find that other than advert to the respondents’ conduct and place of residence, there is no reference therein to Section 12(a) and (d) CPA, or even any attempt to show that the suit does not fall under those stated categories.

Is the finding above fatal to the present application?

19. It is the observation of this court that applications for security were not meant to be made idly hence the express provision that would call upon an applicant to scrutinize the pleadings carefully before he presented his application. This must have been intended to eliminate the need for a multiplicity of such applications even in suits that were not deserving. However, I do not think that the default is fatal to the application for the reasons that first the pleadings in this matter are right before the court’s eyes and it can refer to them for a determination of the issue as to whether it falls under any of the categories in Section 12 CPA. Secondly, exclusion from Section 12 is not the only criterion; there are other criteria



that this court is required by law to examine the applicant's affidavit evidence for. Upon making that finding I must examine whether the applicants deserve the security sought.

20. In the International Air Transport Association case (supra) an order was sought, inter alia, in the following terms:

"A warrant of arrest against the 2nd and 3rd defendants to show cause why they should not furnish security for full payment of the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06 and their appearance in court."

21. In the case there was no dispute that all ticket sales and proceeds thereof were held by the 1st defendant in trust for 1st plaintiff or that the 1st defendant was required by contractual terms to keep records and accounts together with supporting documents and avail to the 1st plaintiff all such documents and records on sales. Between the months of September and October, 2013, tickets were sold by 1st plaintiff in the amount set out in the plaint in that suit i.e. the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06. Notification was given for immediate remittances but to no avail, which prompted issuance of demand on default and termination of contract. None of these processes elicited any response or explanation from the defendants hence that suit. The plaintiffs set out in their claim particulars of breach of contract and fraud. The plaintiff in that case was not aware of any property of the defendants. They sought security in the event their case succeeds. The court in that case stated as follows:

(23) Order 39 rule 1 and 5 of the CPR is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondent may be arrested or he may be called upon to show-cause why he should not give security for his appearance or satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent. I think, in my own view, it applies in desperate cases where the person has absconded or is on the verge of leaving the jurisdiction of the court or has sold or removed his property from the jurisdiction of the court, such that there is no time to issue a notice to show-cause why he should not furnish security...But both of these rules share two common things, namely; 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of *GIELLA v CASSMAN* i.e. establish prima facie case of the conditions set out in the particular rule....

(24) From the record and affidavits filed by the applicants, there is no concrete evidence that the respondents have absconded or are about to abscond or have disposed of or removed their property from the jurisdiction of the court. The two rules require cogent evidence to be produced to demonstrate absconding or disposal of property or real possibility of absconding or disposing of property. The property to which has been disposed of or is about to be disposed of or removed from the jurisdiction must also be specified if an order is to issue under those two rules. Order 39 especially rule 1 is not an easy and will not be satisfied by mere allegations without evidence."

22. Noting that what the applicants were seeking under Order 39 Rules 5 and 6 was rather a Mareva injunction, the threshold for which is distinct from those attendant to a temporary injunction as set out in *GIELLA v CASSMAN BROWN*, the court in the International Air Transport Association case (supra) issued a freezing order restraining the defendants from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with their properties including any shares held in any company, cash held in bank accounts in any bank within Kenya and land owned by the defendants



within the Republic of Kenya to the amount of Kshs. 350,000,000 which would be sufficient to satisfy any judgment that may be obtained against the defendants.

23. In *Regency Co-Operative Savings & Credit Society Limited v Libyan Arab African Investments Co. Kenya Ltd. & 4 others* [2022] eKLR the dispute arose from the fact that members of the plaintiff in that case who worked for the 4th respondent had their contributions to the plaintiff totalling to Kshs. 14,233,542/70 for the period between January 2018 to March 2020 deducted from their salaries but the said deductions were not remitted to the plaintiff. It was further submitted that the respondents are both non-citizens and non-residents and the 4th respondent has closed shop; that the applicant was apprehensive that the defendants were likely to lease/alienate/dissipate and/or remove their properties from the jurisdiction of this court thereby defeating the applicant's interest. It was argued that the circumstances of the case called for the grant of an order calling upon the defendants to furnish security. The defendant did not dispute that the hotel business had closed down and that the money was deducted from the members of the Sacco. The defendants had expressed their willingness to immediately settle the principal sum. There was no evidence currently that the defendant's property was being sold or was about to be leased to a Third Party. The court declined the application for the furnishing of security but ordered the defendants/respondents to pay to the plaintiff the principal sum of Kshs. (Kshs. 14,233,542/70) within thirty (30) days in view of the fact that the application had sought any other relief the court may deem just.
24. Back to the present suit, this court has examined the amended plaint dated 22/3/2023 and found that besides declarations and injunctions it also seeks the following orders:
 - a. General damages for trespass as against the 1st -24th defendants
 - b. Interest on the mesne profits and general damages at court rates.
25. It is obvious that in contrast to the liquidated sums claimed in *International Air Transport Association* case (supra) and *Regency Co-Operative Savings & Credit Society Limited* (supra) the principal prayers in the present suit relate to the proclamation of the plaintiffs as owners and cancellation of title. The claims for general damages are not stand-alone liquidated claims but are pecuniary reliefs whose award will be predicated on the court's finding on the principal prayers; besides, they are not liquidated claims but the quantum thereof shall be assessed on the basis of the evidence supplied by the parties.
26. Section 12 (a) excludes suits in which recovery of land is sought alongside some pecuniary remedies such as rents or mesne profits; thus, an appropriate interpretation of that section as read with Order 39 rules 1 and 2 CPR automatically excludes the applicants' in this suit from obtaining security. Besides, even if that interpretation were incorrect, it is a strong submission that counsel Muli Ole Kina appearing for a section of the respondents has raised to the effect that this court has not yet heard the suit and that it lacks any basis for computing the amount of security if any were to be ordered. That submission goes hand in hand with the observation by this court that even in the present motion there is no specific security claimed and there is no evidence placed before this court that would have enabled it to assess what would amount to sufficient security. Thirdly, it behoves this court to jealously guard against the weaponisation of an order of security whether of costs or of the performance of the decree to the disadvantage of any party to the suit while the provisions of Article 50 of *the Constitution* of Kenya have liberally provided for fair and public hearing before courts and quasi-judicial bodies by any person who has a dispute that he desires to be determined by application of law. Fourthly, the applicants are already enjoying express injunctive orders from this court preserving the suit subject matter and from the documents referred to in this application it is clear that the defendants herein are aware of those orders. Some of the defendants are already defending the suit and its existence must be taken to be a matter of general notoriety among the community living in or claiming to have an interest in any part



of the suit land. The applicability of the doctrine of lis pendens should thus liberate the applicants from much worry and anxiety and, many of the parties herein having filed their bundles of documents in compliance, it is time the matter was given a hearing date. I think it now behoves the defendants to prove that they are not out to scuttle the plaintiff's attempts to have the present suit expeditiously heard and determined, and we shall see whether this is the position very soon.

27. For the foregoing reasons I find that the application dated 28/8/2022 lacks merit and the same is hereby dismissed. The costs thereof shall be in the cause. All parties having been granted a chance to file their documents before the hearing of the application, this matter shall be listed for a mention for the fixing of an early hearing date on 14/11/2024.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 8TH DAY OF OCTOBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

