



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 721 OF 2017

SHILPAN PATEL.....PLAINTIFF

(suing as executor of the estate of Nataverbhai Prabhudas Vallabhai Patel)

VERSUS

DEVIKA SHAILESHKUMAR PATEL.....1ST DEFENDANT

SHAILESHKUMAR NATAVERBHAI PATEL.....2ND DEFENANT

SHANIL VIRAJ PATEL.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

1. Coming up are two applications; the plaintiff's notice of motion dated 22nd November 2017 and the 1st -3rd defendants notice of motion dated 3rd July 2018.
2. The notice of motion dated 22nd November 2017 is brought under order 40 rule 1, 2 and 20 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act (Cap 21) and the inherent powers of the court.
3. It seeks orders:-
 - (1) Spent
 - (2) Spent
 - (3) *Pending the hearing and determination of this suit an interlocutory injunction be issued restraining the defendants whether by themselves, employees, servants and/or agents from transferring, leasing, subletting, interfering and/or otherwise dealing with the suit property being L.R Number 15005/33 (IR 184167) formerly known as 15005/5 (IR 68597/1) situate in Spring Valley, ("the suit property") or in any other manner howsoever interfering with the suit property.*
 - (4) Spent.
 - (5) *Pending the hearing and determination of this suit, an interlocutory injunction be issued restraining the fourth defendant whether by themselves, employees, servants and/or agents from registering any transactions over the suit property being LR Number 15005/33 (IR 184167) formerly known as L.R No. 15005/5 (IR 68597/1) situate in Spring Valley , (the suit property)".*
 - (6) *Costs of this application be provided for.*
 - (7) *Any other order that this court may deem just to grant in the circumstances.*
4. The grounds are on the face of the application and are set out in paragraphs 1 to 13.

5. The application is supported by the affidavit of Shilpan Patel the plaintiff/applicant herein sworn on the 10th November 2017, a further affidavit sworn on 4th April 2018 and an affidavit of Ushma Patel sworn on the 5th September 2018.

6. The application is opposed. There is a replying affidavit sworn by Devika Shaileshkumar Patel the 1st defendant/respondent sworn on the 22nd January 2018 and a supplementary affidavit sworn on the 8th September 2018. There is also a replying affidavit sworn by Edwin Munoko Wafula a Senior Land Registration Officer in the office of the Chief Land Registrar sworn on the 5th March 2018.

7. In response to the plaintiff's notice of motion date 22nd November 2017 the 1st – 3rd defendants also filed a notice of preliminary objection dated 27th December 2017.

8. The 1st – 3rd Defendants also filed a notice of motion dated 3rd July 2018 brought under order 26 rules 1 and 4 of the Civil Procedure Rules 2010. Rule 9 of the Advocates' (Practice Rules). It seeks orders:-

(1) That the plaintiff does give security for the 1st, 2nd, and 3rd defendants' costs of defending the suit in the sum of Kshs. 20,000,000 or such other sum as the court may deem sufficient.

(2) That this honourable court do order and/or direct that the firm of Hamilton Harrison & Mathews Advocates (HHM) ceases to appear in this matter for the plaintiff.

(3) That the honourable court does issue such or other consequential orders as it may deem fit.

(4) That the costs of this application borne by the plaintiff/respondent.

9. The grounds are on the face of the application and are set out in paragraphs 1 to 11.

10. The application is supported by the affidavit of Devika Shaileshkumar Patel sworn on the 3rd July 2018.

11. The application is opposed. There is a replying affidavit sworn by Shilpan Patel the plaintiff herein sworn on the 5th September 2018. There is also a replying affidavit sworn by Lorna Mainnah Advocate sworn on the 10th September 2018.

12. On the 17th September 2018, the court directed that the two applications be heard and determined together. The court further directed that they be canvassed by way of written submissions.

The plaintiff's submissions

13. It is not in dispute that the suit property initially belonged to the deceased. The dispute arises because the 1st – 3rd defendants allege that the deceased transferred the suit property to the 1st defendant on the 18th April 2011. The plaintiff alleges this is a forgery. In the forged transfer the consideration for the transfer is allegedly 'natural love and affection'. The affidavits of the plaintiff and other family members dispute this.

14. The deceased left a written will dated 6th July 2013 in which he indicated specifically that the suit was to be shared equally between his six (6) grandchildren. The plaintiff who is the executor of the will read the contents of the will of the deceased to the family members where the 2nd and 3rd defendants were present in New York on 31st May 2014. The deceased purchased the suit property with his own funds.

15. The plaintiff has established a prima facie case with a probability of success. He has put forward the cases of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The plaintiff has brought this suit as the executor of the will of the deceased. He has no personal interest in the matter, save as executing the wishes of the deceased on transferring the property to the names of the six grandchildren of the deceased. He has put forward the case of **Paul Gitanga Wanjau vs Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR**.

If the property is transferred or dealt with in any manner by the 1st – 3rd defendants the beneficiaries of the estate of the deceased will have no remedy. If an injunction is not granted by the court, the 1st – 3rd defendants will, in all likelihood continue in their fraudulent conduct and transfer and deal in the suit property. No amount of damages can remedy this situation. The plaintiff has demonstrated irreparable harm if the orders are not granted.

16. The balance of convenience tilts in favour of the orders of injunction being granted. He prays that the application be allowed.

17. In respect of the notice of motion dated 3rd July 2018. It is the plaintiff's further submissions that this application is misconceived. The plaintiff has brought this suit as the executor of the will of the deceased. He has no personal interest on the matter. Section 82(a) of the Law of Succession Act provides that the personal representative of the estate has the power to enforce, by suit or otherwise all causes of action, which by virtue of any law, survive the deceased arising out of his death for his personal representative.

The suit herein was brought to collect and preserve the assets of the estate. Whatever costs that may be awarded, in the unlikely event the suit is dismissed will be paid from the estate of the deceased. The application for security of costs lacks merit and is an attempt to hinder the plaintiff from discharging his duties to the same.

18. The firm of HH & M represented the vendor Mr. Tirlochan Singh Sahota in the transaction which the deceased was represented by the firm of M/S Oriaro & Company advocates. He has put forward the cases of **British American Investments Co (K) Ltd vs Njomaita Investments Ltd & Another [2014] eKLR; Kenya Commercial Bank Ltd vs Mukeshkumar Kantilal Patel & Another [2015] eKLR** among others.

No valid reason has been demonstrated by the defendants to justify the firm of HH&M to cease acting for the plaintiff. He urges that the application be dismissed with costs.

The 1st – 3rd defendants' submissions

19. In respect of the preliminary objection, they submit that, affidavits having sworn in the USA are not admissible in Kenyan court as a right. They have put forward the cases of **Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001] KLR 470; Pastificio Lucio Garofalo SPA vs Security & Fire Equipment Co. & Another [2001] eKLR.**

If the two affidavits are rejected, the plaint would be without a verifying affidavit contrary to order 4 rule (1) (2) of the Civil Procedure Rules. They have also relied on the case of **James Francis Kariuki & Another vs United Insurance Co. Ltd HCCC 1450 of 2000.**

20. In respect of the plaintiff's notice of motion dated 22nd November 2017. It is the 1st – 3rd defendants' submission that the plaintiff has not established a prima facie case with a probability of success at the trial as espoused in the Mrao Ltd Case. the 1st – 3rd defendants further submit that the registration of the suit property in the deceased's name was agreed between the defendants and the deceased. The suit property was purchased with proceeds from a joint account held by the 1st and 2nd defendants. The validity of the transfer executed by the deceased in favour of the 1st defendant as trustee for the 2nd and 3rd defendant has not been challenged. It has not been alleged that the deceased did not sign the transfer. The validity of the will is hotly contested and has been challenged.

21. The plaintiff does not stand to suffer irreparable injury. He stated that he filed the suit in his capacity as executor of the deceased will. The value of the suit property can easily be quantified by valuation. It will be easy to compensate the beneficiaries for any injuries suffered by way of damages. The plaintiff has failed to demonstrate the inconvenience the beneficiaries stand to suffer if the injunction is not granted. They have put forward the cases of **Pius Kipchirchir Koga vs Frank Kimeli Tenai [2018] eKLR.** The balance of convenience tilts in favour of the 1st – 3rd defendants who have shown that they acquired the suit property through purchase from the initial owner.

22. In respect of the notice of motion dated 3rd July 2018, the 1st to 3rd defendants submit that the plaintiff is not a Kenyan. He has no assets that can be attached in execution of costs. They have put forward the case of **Shah vs Shah [1982] KLR 95.** The 1st – 3rd defendants have demonstrated they have a bonafide defence. Also see **Alice Aloo Betty Were Thompson vs Said Mohamed Said & 2 others [2014] eKLR.**

There is no assets belonging to the deceased estate from which costs may be defrayed.

23. The firm of Hamilton Harrison & Mathews made contact with the 1st defendant during the purchase of the suit property. The source of funds that were used to purchase the property is an issue for determination. They have relied on Rule 9 of the Advocates (Practice) Rules. They have also put forward the cases of **Dorothy Seyanoi Moschion vs Andrew Stuart & Another [2014] eKLR.** The firm of Hamilton, Harrison & Mathews is a potential witness in these proceedings. They urge that the prayers in the notice of motion be granted.

The 4th Defendant's submissions

24. The plaintiff has not established a prima facie case with probabilities of success hence should not be granted the injunctive reliefs sought. He has not established that the suit property does not belong to the 1st and 2nd defendants. They have put forward the cases of **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR; Central Kenya Ltd vs Trust Bank Limited & 4 Others [1996] Eklr; American Cyanamid vs Ethicon Limited [1975] AC 396.**

25. The plaintiff has not established that he would suffer irreparable harm if the injunction is not granted. They have put forward the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR.** There is no indication that damages would not be an adequate remedy. The value of the suit property can be computed. The balance of convenience tilts in favour of not issuing the injunction. The balance of convenience tilts in favour of the 1st – 3rd defendants. They have put forward the case of **Kipseba Chumba vs Chairman Board of Management Kaberisus Primary School [2017] eKLR.** They pray that the application for injunction be dismissed.

26. With respect to the notice of motion dated 3rd July 2018, the 4th defendant submitted that issues of security of costs are discretionary. They have put forward the cases of **Mama Ngina Kenyatta & Another vs Mahira Housing Company [2005] eKLR; Partirck Ngeta Kimanzi vs Marcus Mutua Muluvi & 2 others [2013] eKLR; Moses Wachira vs Niels Bruel & 2 others [2015] eKLR.**

27. Where there is a conflict of interest, an advocate or firm of advocates should cease acting. The main reason for ceasing to act is because one of the parties may be placed in a disadvantaged position as a result of the confidential information acquired by the advocate during his employment. They have also relied on the case of **King Woolen Mills Ltd & Another vs Kaplan & Straton Advocates [1993] ekLR** among others.

28. I have considered the pleadings, the notice of motion dated 22nd November 2017, the affidavits in support and the annexures. I have also considered the preliminary objections, the affidavits in reply and the annexures. I have considered the notice of motion dated 3rd July 2018, the affidavit in support and the annexures, the affidavits in reply the written submissions of counsel and the authorities cited. The issues for

determination are:-

- (i) *Whether or not the preliminary objection is merited.*
- (ii) *Whether or not the plaintiff's application meets the threshold for grant of temporary injunction.*
- (iii) *Whether or not the defendant's notice of motion dated 3rd July 2018 is merited.*
- (iv) *Who should bear costs?*

29. The preliminary objection dated 27th December 2017 is based on the grounds that the affidavits sworn in the USA have not been authenticated. I have gone through the said affidavits. They were sworn before a notary public. There is a stamp and seal of the notary public. I find that these affidavits notarised in the USA are properly on record and are admissible. In the case of **Peeray General Trading & Contracting Company Limited Kenya & Another vs Mumias Sugar Company Limited [2016] Eklr** where it was held that:

“Indeed, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Court of Justice are admissible in Kenyan courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 40 rule 12 of the Rules of the Supreme Court, affidavit taken in commonwealth countries are admissible in evidence without proof of the stamp seal, or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of the documents made outside the commonwealth. It follows that the affidavit in the instant case which was taken in Dubai, in the United Arabs Emirates would have to be proved by affidavit or otherwise to have been taken by a notary public in UAE and that he signature and seal of attestation affixed thereto was that of such notary public. There is proof herein that this was done. The stamp of Ahmed Tamin is affixed on the affidavit as well as a stamp from the Dubai court notary public dated 16th April 2015. It may very well be that in Dubai such stamps are sufficient to show that such a document has been authenticated. In deed the verifying affidavit is equally translated into Arabic, which is the official language of the High Court of UAE. In the result it is my finding the verifying affidavit of Pramit Verma is valid and admissible in evidence as the same has been notarised accordingly.....”

The above authority is very clear, I find that the preliminary objection herein lacks merit and the same is dismissed.

30. Let me now turn to the notice of motion dated 22nd November 2017. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358. In the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

31. It is not in dispute that the suit property initially belonged to the deceased. The deceased left a will dated 6th July 2013 in which he indicated specifically that the suit property was to be shared equally between his six grandchildren. The said will was read in the presence of all family members. The 1st – 3rd defendants on the other hand claim they purchased the using their own funds. Further that the will is the subject of challenge in the Family Court.

32. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am satisfied that the plaintiff/applicant deserves this kind of protection.

33. The plaintiff has brought this suit as the executor of the will of the deceased. He has a duty to execute the wishes of the deceased. That is to transfer the suit property to the beneficiaries. I find that he has established a prima facie case with a probability of success at the trial.

34. If the property is transferred or is dealt with by the 1st - 3rd defendants in any manner the beneficiaries of the deceased will suffer irreparable loss. There is a high likelihood that the 1st – 3rd defendants may transfer the suit property to third parties. I find that the plaintiff has demonstrated that that he is likely to suffer irreparable loss which cannot be compensated by an award of damages if the orders of injunction are not granted.

35. I am of the view that the balance of convenience tilts in favour granting the injunction. In the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR**. It was held by Mativo J that:

“the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on one hand would suffer. If the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injury was refused and he should turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.”

36. I am of the view that the plaintiff/applicant has discharged the burden to the required standard. The 1st – 3rd defendants will suffer no prejudice as they are in occupation of the suit property. I find merit in this application and it is allowed.

37. Let me now turn to the notice of motion dated 3rd July 2018. It is the 1st – 3rd defendants contention that the plaintiff is not a Kenyan. He has no assets that can be attached on execution of costs. Further that there is no asset belonging to the deceased estate from which costs may be defrayed. The plaintiff on the other hand states that he has no personal interest on the suit property. That the suit is brought to collect and preserve the estate of the deceased. That whatever costs may be awarded will be paid from the estate of the deceased. Order 26 rule (1) of the Civil Procedure Rules states:-

“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”.

It is clear that the issue of security of costs is discretionary.

38. In the case of **Mama Ngina Kenyatta & Another vs Mahira Housing Company [2005] eKLR** the Court of Appeal in emphasizing on the discretion of the court to order for security of costs held as follows:-

“The fact that a company is insolvent and unable to pay costs or is even in liquidation is not decisive. The court has still a complete discretion whether or not to order security for costs”

In **Moses Wachira vs Niels Bruel & 2 others [2015] eKLR**, the Court of Appeal held that:-

“The fact that the 1st respondent resides out of the jurisdiction this court is a factor to consider but not the only one that is considered by the court”.

I am guided by the above authorities.

39. I have considered the circumstances prevailing in the instant case. This is a dispute between family members. The plaintiff has maintained that he has no personal interest on the suit property. He is the executor of the deceased’s will. I agree with the plaintiff’s counsel submission that this application for security of costs lacks merit and is an attempt to hinder the plaintiff from discharging his duties.

40. I have considered the other limb of this application that the firm of HH&M ought to cease acting for the plaintiff as they are potential witnesses. Miss Lorna Mainnah who is a partner in the said firm has sworn an affidavit. She told the court that she represented the vendor in the sale of the suit property. The deceased was represented by the firm of M/S Oriaro & Co. Advocates. In the Case of **Delphis Bank Limited vs Chart & 6 Others [2005] eKLR** the court held that:

“There is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human possibilities result”

41. The upshot of the matter is that no sufficient evidence has been brought by the 1st – 3rd defendants to demonstrate a conflict of interest exists to justify the firm of HH&M to cease acting for the plaintiff. In conclusion I find not merit in the notice of motion dated 3rd July 2018 and the same is dismissed. The costs do abide the outcome of the main suit.

42. As I stated earlier, I find merit in the notice of motion dated 22nd November 2017. There is need to preserve the suit property pending the hearing and determination of the suit herein. I therefore grant the orders namely:-

(a) That an interlocutory injunction be and is hereby issued restraining the 1st – 3rd defendants whether by themselves, employees, servants and/or agents from transferring, leasing, subletting and/or otherwise dealing with the suit property being LR NO. 15005/33 (IR 184167) formerly known as 15005/5 (LR 68597/1) situate in Spring Valley (“the suit property”) or in any other manner howsoever interfering with the suit property pending the hearing and determination of this suit.

(b) That an interlocutory injunction be and is hereby issued restraining the 4th defendant whether by themselves, employees, servants and/or agents from registering any transactions over the suit property being LR NO. 15005/33 (IR 184167) formerly known as LR NO. 15005/5 (IR 68597/1) situate in Spring Valley, (“the suit property”).

(c) That costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 2ND day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwihuri Advocate for the Plaintiff

Mr. Juma Advocate for the 1st -3rd Defendants

No appearance for Advocate for the 4th defendant

Kajuju - Court Assistant