Ndaka v Tekwara Services CoLtd & 2 others; Kerra (Interested Party) (Civil Suit E013 of 2022) [2024] KEHC 300 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL SUIT E013 OF 2022

FROO OLEL, J

JANUARY 24, 2024

BETWEEN

TITUS TITO NDAKA ..... APPLICANT

AND

TEKWARA SERVICES CO LTD ..... 1ST DEFENDANT

RICHARD OMBATI RATEMO ..... 2ND DEFENDANT

DUKE MOSES NYANGATE ..... 3RD DEFENDANT

AND

KERRA ..... INTERESTED PARTY

RULING

A. Introduction

1. Before court for determination is Notice of Motion application dated 15th March 2023 filed by the plaintiff/applicant. The said plaintiff/applicant seeks for orders that;

    a. That pending hearing and determination of the suit herein a conservatory order do issue freezing any further payments by the interested party herein to the respondents in respect of work done in Matuu-Ekalakala-Kanguku road project.

    b. That the costs of this application be provided for.

2. The said application is supported by grounds on the face of the said application and the supported affidavit of the applicant one Titus Tito Ndaka dated 15th March 2023. The Respondent did oppose this application by filling grounds of opposition dated 24th March 2023 and a replying affidavit of the 2nd defendant/respondent one Richard Ombati Ratemo dated 24th March 2023. The interested party did not file any documents as regards to this application and their counsel did indicate to the court that

they would not participate in the said application and would abide by the orders of the court either way upon determination of the said application.

B. Pleadings

The Application

3. The applicant did aver that he was approached by the Respondents to undertake the construction of Matuu-Ekalakala- Kanguku road project. Upon discussion it was agreed in writing that he would undertake the said works and used his finances/ resources to complete the road to the satisfaction of the Interested Party. For works done under this project they had already been paid Kenya Shillings Thirty-Seven Million (Ksh.37,000,000/-) by the interested party leaving a balance of about Kenya shillings forty-one million (Ksh.41,000,000/=).The parties had agreed to open a joint account where all payment related to this project would be channelled but midstream the respondents had secretly forged his signature and caused his removal as a mandatory bank account signatory and director of the 1st Respondent. This was done without his consent/knowledge and in contravention of the express terms of agreement obtaining as between the parties.

4. It was the applicant's contention that his matter had been reported to the police and the 2nd and 3rd respondent was being investigated for fraud, forgery and uttering a false document. Through these illegal acts, the respondents had been able to withdraw a sum of Kshs. Fourteen million (Ksh.14,000,000/=) from the bank without his knowledge and squandered it amongst themselves without paying him and other supplies of the project to his loss and determent.

5. The applicant pleaded that unless restrained, it was obvious that he would suffer serious loss and damage as he had single handedly sourced for Machinery and materials used in the project that had not been fully paid for. The balance of convenience thus weighted heavily in his favour and the orders sought ought to be granted or in the alternative the said amount payable to the parties herein be deposited in a joint interested earning account pending the determination of this suit.

The Replying Affidavit

6. This application was strenuously opposed by the respondents who deponed that the said application constituted an abuse of the process of the court as it was the sixth (6) application so far filed by the applicant before various courts with respect to the same subject matter. What the applicant was doing was to alter his cause of action midstream in order to avoid being caught up with the doctrine of Res judicata. The applicant was further faulted for amending his pleadings without leave of the court to including an interested party. His action offended provisions of order 1 Rule 10(2) of the Civil Procedure Rules.

7. The Respondents further averred that this application was Res judicata to an earlier application filed in, Kithimani Principal Magistrate Court Miscellaneous Application no. E006 of 2022. By this application the applicant was seeking to litigate over the same subject matter as filed in the previous suit where similar prayers were sought. That application filed at "Kithimani court" was dismissed by Justice G.V Odunga vide a ruling dated 5th October 2022.

8. This instant application too was incurably defective and fatally wanting for the reason that the applicant had wrongly included the interested party when no cause of action arose as against the said organization and the prayers sought only need to be as between the plaintiff and defendant to the exclusion of any other party joined in these proceedings, especially those improperly joined.

9. The Respondent further averred that the 1st Respondent was a going concern and the applicant had not demonstrated that he could reimburse the company for the loss suffered, if this claim was not successful. On the other hand, the applicants claim could be quantified and mitigated by an award of damaged in the unlikely event that his claim succeeds. The applicant also did not have any direct contract between him and the interested party which could be enforced.

10. The final issue raised by the respondent was that the applicant had failed to disclose to the court that he had since been paid Ksh.21,750,000/= as full settlement of his claim. The applicant had not demonstrated the damages he would suffer if the orders sought were not granted and even if successful the sums claimed could be quantified and paid. The application was thus made in bad faith and constituted an outright abuse of the courts process, calculated solely towards achieving an ulterior motive that does not further the interest of Justice. The Respondent therefore prayed for this application to be dismissed with costs.

C. Parties Submissions

Appellant's submissions

11. The applicant did submit that the main aim of the interim injunction and/or conservatory order was to preserve the subject suit matter pending hearing and determination of the main suit where the rights of both parties would be determined. This was an equitable order which the court at its discretion could grant. The facts in this case were not in dispute with regard to the written agreement between the parties herein. The only contention was on the amount of money due and payable to the applicant.

12. The respondents had illegally removed him as a director of the 1st Respondent Company and as a mandatory signatory in the specific account opened from purpose of receiving money from the interested party (herein) and as a result his interest had been fraudulently taken away to his loss and determent. There was thus real/ present danger and unless the orders sought were granted the plaintiff/ applicant would suffer irreparable loss and damage. Reliance was placed on Giella vrs Cassman Brown & Co. Ltd (1973) E.A 358. Batan Healthcare Int. Ltd versus Grace Mumbi Githaiga and 2 others (2016) eKLR and Mareva Compania Naviera SA versus International Bulk carries SA (1975) 2 Lloyd dis Rep 509.

13. The balance of convince too favoured the applicant as he was likely to suffer the most and be prejudiced should the orders sought not be granted. It was thus necessary to preserve the money as parties fought over their rights thereto. Reliance was placed on Central Bank of Kenya deposit protection fund board versus Uhuru Highway Development Ltd & 3 others, Nairobi Civil appeal no.91 of 1999 and Joseph Mugo Njuguna versus Veronica Wangui Njuguna HCC No. 142 of 2011.

14. The applicant also did file further submissions to respond to issues raised by the respondent. He did submit that the amendment of pleadings done was lawful and no leave to amend was needed for the reason that pleadings were not closed and that the defendants had not filed their statement of defence. Further there was nothing wrong in filing different application to defend his right, but it was also to be noted that the respondents had failed to point out that some of the applications referred to were filed by the police and other parties including the respondents themselves. In any event the said applications did not relate to the issues for determination before court and this present application had to be considered independently.

15. The applicant further denied that the issues raised herein were res judicata as no determination had been made by the court regarding the said issues. Even the application the respondent was referring to dated 2nd August 2022 was 'struck out' and not determined on merit. The said initial application had

also raised different issues, notably, it was seeking to restrain the 2nd & 3rd Respondents from signing any cheques and changing the composition and operation of the 1st respondent's bank account. None of those prayers had been sought herein. This application was thus not res judicata and should be determined on merits.

16. Finally the applicant did point out that the interested party had an advocate on record and the respondent could not argue their case. The said interested party had not objected to them being enjoined to these proceedings and they (the interested party) were therefore properly part of these proceedings. It was also pointed out that the respondent had filed Milimani CMCC E 4529 of 2022 and included the interested party in the said suit.

17. The applicant thus urged this court to allow his application dated 15th March 2023 with costs.

Respondent's Submissions

18. The Respondent vehemently opposed this application and stated that the issues for determination were whether the amendment to the plaint was properly effected, whether the interested party was properly enjoined without leave of court, whether the notice of motion application dated 15th March 2023 was Res judicata, and final whether the plaintiff had satisfied the threshold for granting of the injunctive orders.

19. It was the Respondents contention, that the amendment introduced by the applicants offends Order 2 Rule 13 and Order 8 Rule 1 the Civil Procedure Rules as the said amendment of the plaint was made after close of pleadings and without leave of the court. The Respondents averred that they had filed their statement of defence on 30th August 2022 and served the same upon the plaintiff counsel on 31st August 2022. The plaintiff did not file a reply to defence and pleadings by dint of Order 2 Rule 13 of the Civil Procedure Rules closed on 14th September 2022. After close of pleadings no amendment could be affected without leave of court and therefore the amendment to the plaint to introduce the interested party was unlawful, null and void abinitio. Reliance was placed on Communication Commission of Kenya and 3 others versus Royal media services ltd and 7 others Petition no. 15 of 2014 eKLR and Francis K Muruatetu & another versus Republic & 5 others (2016).

20. The Respondents further submitted that the application under consideration was Res judicata as the applicant had filed a similar notice of motion application dated 2nd August 2022 over the same subject matter and issues which application was dismissed with costs by Justice G.V Odunga (as he was then) by the Ruling dated 5th October 2022. Hence the present application was an attempt by the applicant to litigate by instalments to the grave detriment of the defendants. Reliance was placed on several citations; Independent Electoral & Boundaries commissions versus Maina Kiai & 5 others (2017)eKLR, Lotta vrs Teneki (2003) 2 EA 556, Apondi versus Canuald Metal Packaging (2005) IEA 12, Mburu Kinyua versus Gachini Tuti (1978) KLR69 and Nancy Mwangi T/A Worthline Marketers versus Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) and 2 others (2014)eKLR.

21. As regards the injunction orders sought, the respondent did state that there was no dispute at all that not all the monies under this project had been paid to the 1st respondent, nor was it in dispute that it was the 1st respondent who had a contract with (KERA)to build Matuu – Ekalakal-Kanguku road. The applicant was not a party to this contract and therefore the prayers sought by the applicant in the plaint could not legal hold in the manner sought. The applicant case prima facie had no chance of success and therefore should be dismissed. Reliance was placed on Kenya Women finance Trust versus Bernard Oyugi Jauko & 2 others (2018) eKLR, Chidhya (Kenya) Limited versus Africa Equipment & Engineering Power S.A (EAA Power S.A) (2020) eKLR and Civil Appeal no 206 of 2008 City council

of Nairobi & Wilfred Kamau Githua T/A Githua Associates versus Nairobi City water & Sewerages Co. Ltd.

22. The final issue raised by the 1st Respondent was that it was an ongoing concern, yet the applicant had not demonstrated that he was capable of reimbursing the company in the event his claim was not successful. On the other hand, the applicants claim could be quantified and mitigated by an award of damages in the unlikely event that he succeeds. The respondent too would be most prejudiced should the orders sought be granted as that would stop its day to day activities and payments such as Salaries and statutory deductions.

23. The Respondents prayed that this application be dismissed with costs.

D. Analysis and Determination

24. I have considered the Notice of motion application dated 15th March 2023, the affidavits made in support and in opposition to, the parties filed submissions and the authorities relied upon and set out the issues for determination as follows;

    a. Whether the amendment to the plaint was properly done so as to enjoin the interested party and if substantive orders can be made as against the said interested party.

    b. Whether the notice of motion under consideration herein is Res judicata.

    c. Whether the plaintiff/applicant has satisfied the threshold for granting injunctive orders.

I. Whether the amendment to the plaint was properly done so as to enjoin the Interested party and if substantive orders can be made as against the said interested party.

25. The plaintiff/Applicant did amend his plaint and filed it on 10th March 2023. The effect of the said amendment was to introduce the interested party herein as a party to this suit. The Respondents strenuously opposed this amendment on grounds that they had filed their statement of defence on 30th August 2022 and served it upon the plaintiff's counsel on 31st August 2022. The plaintiff did not file a reply to defence and pleadings closed fourteen (14) days after the said service as provided for under Order 2 Rule 13 of the civil procedure Rules. The Respondents further did contend that the applicant ought to have sought leave of court to amend his pleadings and since that was not done, the amendments effected were a nullity and no orders could be issued as against the interested party, who was not a proper party to these proceedings.

26. Order 2 rule 13 of the civil procedure rules does provide that

> "Pleadings in a suit shall close fourteen days after service of the reply to defence to counterclaim or, if neither is served, fourteen days after service of the defense, notwithstanding that any order or request for particulars has been made but not complied with."

27. Order 8 rule 1 of the civil procedure rules on the other hand provides that;

> "A party may, without the leave of court, amend any of his pleadings once at any time before the pleadings are closed."

28. The court record indeed confirms that the Defendants/Respondents did file their joint statement of defence on 30th August 2022 and no Reply to defence was thereafter filed. It is obvious that the pleadings closed 14 days after service of the said statement of defence. Therefore, for any amendment

to be effected by either party herein, they had to seek leave of the court to amend any of their pleadings. The plaintiff/applicant thus could no proceed as the so did, to amended the plaint to enjoin the interested party. The said amendment was done contrary to law and is a nullity abinitio. The Amended plaint dated 10th March 2023 and filed on the said date is thus struck out.

29. As to whether the orders sought can still be made in the absence of the "interested party", I do find that the primary dispute herein is between the plaintiff and defendants and the facts are not disputed. what is disputed is how much is owned to the plaintiff, if at all and/or conversely, if the respondents have honoured the agreement entered into with the plaintiff and do not owe him under the said agreement.

30. The orders sought only seeks to freeze further payment, but the party to be affected by the said "freeze order" is the Respondents, thus the primary party who must be heard. It should also be noted that, the interested parties advocate did intimate to court that they would not participate in these proceedings and would abide by any direction given by court. The interested parties' absence thus is not fatal as they are not a necessary party whose presence is necessary before court for the dispute to be resolved, their lack of participation notwithstanding. This court therefore competently can determine this application in their absence.

II. Whether the notice of motion under consideration herein is Res judicata.

31. The respondents further averred that this application is res judicata to the previous application dated 2nd August 2022, which sought similar prayers. The same was heard and dismissed by Justice G.V Odunga (As he was then) vide his ruling dated 5th October 2022. The applicant on the other hand submitted that, the prayers sought herein were different from the prayers sought under the previous application, and the said initial application was not heard on merit but struck out for being an abuse of the process of the court. This application was thus properly before this court for determination.

32. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

33. It is now old hat that the said doctrine applies to both suits and applications as was held in Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata there must be:

(i). a previous suit in which the matter was in issue;

(ii). the parties were the same or litigating under the same title;

(iii). a competent court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

34. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded

by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

35. Under the previous application filed dated 2nd August 2022 the applicant sought to restrain the respondents from signing cheque books and transferring/withdrawing funds from KCB Bank, Muranga Branch Account Number 1295164159 and for the said account to be frozen. The applicant further sought to have the respondents stopped from changing composition of the signatories of the said account.

36. The plaintiff's notice of motion was not heard and/or determined on merit as a similar application had been filed at Kithimani law court being Kithimani Misc Application No E006 of 2022. The Judge did find that the high court application had been filed while the "lower court case" was still in existence, (though later withdrawn) and that constituted an abuse of the process of the court. The notice of motion dated 2nd August 2022 was stuck off on that basis.

37. From the analysis of the record, no determination has been made with regard to the prayers sought herein, nor did the previous application dated 2nd August 2022 seek similar orders. The application before this court is thus not res judicata by any stretch of imagination and a determination on merit can be made by this court

III. Whether the plaintiff/applicant has satisfied the threshold for granting injunctive orders.

38. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. Establish his case only at a prima facie level,
>
> b. demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is

not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

39. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

> "...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

40. While reiterating the injunction principles, Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR) where it was stated:

> "....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein..."

41. It is not in dispute that there exists a valid and enforceable contract between the plaintiff and the defendants herein. What is in in dispute is the amounts due to each party under the contract. The applicant alleges that he respondent unlawfully removed him as a director of the 1st respondent company and further went ahead and changes signatories at the common bank account held at KCB Murang'a Account Number 1295164159 to his detriment yet accounts as regarding what is due under the contract and payment to suppliers has not been affected. Though the Same is denied, prima facie the matters raised are ripe for determination.

42. The application also qualifies under the second test that he will suffer irreparable harm and shall be prejudiced should he be shut off the sums released under this contract. The level of financing by each party has to be determined at trial and the respondents have not shown by way of evidence that they have the capacity to compensate the applicant, should judgement be entered as against them. The said

respondents did allege that the applicant should prove that the 1st Respondent is not liquid/financially stable so as not to be able to pay damages, but this position cannot hold in law.

43. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

44. In the case of Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR it was held that;

> "As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

45. The "Evidential burden" in this matter lay on the respondents to show that it was financially strong and liquid to enable then settle the decree, if at all passed against them. They failed to do so and it would thus be just to preserve the sums under dispute.

46. With regard to balance of convenience, the court has to balance the interest of both parties herein, but also look at which party will suffer the most should the orders sought not be granted. If the sums due under this contract is paid to the respondent and the same is wrongly applied, that will prejudice the applicant more and it will take a longer judicial process/time to enforce a decree, which might be issued in his favour. This too without doubt will not be an efficient way to dispose of the business of the court in a timely manner.

47. Be that as it may, it would not also be prudent retain sums due under this contract with the "interested party". It is common knowledge and a fact of which judicial notice can be taken notice of the in "county" and "national government" there is a monster commonly termed a "pending bills". If the said sums are retained by the "interested party for too long, both parties run the real risk of having the said sums applied to a different contracts, and it will take a long administrative effort before the same will eventually be released to the successful party. It would thus be important to retain the status quo where no party incurs further loss.

Disposition

48. The upshot is that the application dated 15th March 2023 has merit. The applicant did in the alternative plead on the grounds thereof that the court could order that the remaining sums under this contract be deposited in a joint account held in the names of both counsels herein. In the premises I do order that: -

    a. That all sums held by Kenya Rural Roads Authority (KERRA) which remains due and is unpaid under the project known as Upgrade To Bitumen Standardsand Mainataince Of Access To Matuu-ekalala-kanguku & Jnct A3 Katuluni C439 Kyasioni Road be deposit in a joint interest Earning account to be opened in the joint names of counsel for the plaintiff and Defendants herein at KCB Bank -Machakos Main Branch and the said sums shall be held until hearing and determination of this suit.

b. The parties are implored to consider opting for Arbitration to settle this matter, as issues as to what works were done, quantities involved are better off determined by a qualified civil Engineer/Arbitrator who is an expert in the said field.

c. The costs of this application shall abide by the main cause.

49. It so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE