



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E156 OF 2021

YUSUF ABDI ADAN.....PLAINTIFF

=VERSUS=

MAHAMMED ABDIKADIR ADAN.....DEFENDANT

RULING

1. The dispute in this suit revolves around the question of management of **Hong Kong Shopping Mall**, standing on **Land Reference Number 36/VII/399**, situated in Eastleigh, Nairobi (**the suit property**). There is common ground that the two parties to this suit are the registered owners of the suit property, having acquired it jointly in 2003. They are registered as tenants-in-common.

2. On or about 6/5/2021, the plaintiff, Yusuf Abdi Adan, initiated this suit against the co-owner of the suit property, Mahamed Abdikadir Adan, through a plaint dated 16/4/2021. His case is that they co-own the suit property as tenants-in-common. The suit property is valued at about Kshs 270,000,000 and has about 197 shops which fetch a monthly rental income of about Kshs 2,441,540. Upon purchasing the suit property, the two parties agreed that the plaintiff would manage the suit property, including formalizing terms of rent agreements and collecting rent from tenants. Further, the plaintiff was entrusted with custody and control of the suit property.

3. The plaintiff further contends that the two parties, together with others who are not parties to this suit, co-own another property, **Bangkok Shopping Mall**, also located in Eastleigh. The management arrangements relating to Bangkok Mall is similar to the management arrangements relating to Hong Kong Mall.

4. It is the case of the plaintiff that the defendant is scheming to eject him from the suit property in a bid to frustrate his co-ownership and interest in the suit property, to his detriment. He contends that on 5/4/2021, the defendant in cahoot with the other co-owners of Bangkok Mall schemed and ejected him from Bangkok Mall and were harassing tenants in the said Mall to sign new lease agreements, all in a bid to frustrate the plaintiff from collecting rent. The defendant together with the other co-owners of Bangkok Mall have since then kept the plaintiff out of Bangkok Mall using a militia whom they have instructed to deny him any entry to the Mall.

5. Consequently, the plaintiff seeks the following verbatim orders against the defendant:-

(i) A declaration be issued that the plaintiff as co-owner of all that property known as Hong Kong Shopping Mall in Eastleigh, Nairobi, developed on Land Reference No 36/VII/399 is legally entitled to custody and access over all parts of the premises, and to mandatorily participate in rent collection from current and future tenants.

(ii) A permanent injunction be issued restraining the defendant whether by themselves, their servants, agents representatives, assigns or however otherwise from directly or through any other means from harassing the tenants in the suit property known as Hong Kong Shopping Mall in Eastleigh, Nairobi, developed on Land Reference No 36/VII/399.

(iii) The OCS Pangani Police Station be directed to enforce compliance with prayers (ii) and (iii) above (sic).

(iv) Costs of the suit.

(v) Any further relief that the court deems just and fit to grant.

6. Together with the plaint, the plaintiff brought a notice of motion dated 16/4/2021, seeking the following interlocutory reliefs:-

1. Spent.

2. Spent.

3. That pending the hearing and determination of this application and suit, the court be pleased to order that all rent with respect to all that property known as Hong Kong Shopping Mall Eastleigh, Nairobi, developed on Land Reference No 36/VII/399 be collected by the plaintiff as before.

4. That pending the hearing and determination of the main suit, the Honourable Court be pleased to issue a temporary injunction restraining the defendants and interested party (sic) whether by themselves, their servants, agents, representatives, assigns or howsoever otherwise from directly or through any other means evicting or restraining entry, management or control by the plaintiff with respect to the whole or any part of all that property known as Hong Kong Shopping Mall in Eastleigh, Nairobi, developed on Land Reference No 36/VII/399.

5. That the OCS Pangani Police Station be ordered to enforce compliance with orders 2, 3 and 4 above.

6. That the court be pleased to issue such further orders as may be just.

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

7. The said application is one of the two applications which are the subject of this ruling. The plaintiff's application was supported by his affidavit sworn on 16/4/2021 in which he reiterated his case as summarized above. He exhibited copies of the title documents, valuation report, and a notice dated 5/4/2021 directing tenants of Bangkok Mall to pay rent to Omar Adan Sholi.

8. The defendant responded to the plaintiff's application dated 16/4/2021 through a replying affidavit sworn on 38/5/2021. In addition, the defendant brought a notice of motion dated 25/5/2021 in which he sought the following orders:-

1) That this application certified as urgent and be heard ex-parte on priority basis and that service be dispensed with in the first instance.

2) That the honourable court be pleased to discharge the ex-parte interim orders granted herein on the 7th of May 2021 and issued on the 10th of May 2021

3) That the court, pending the hearing and determination of the suit, be pleased to issue an order of injunction to wit:

a) The plaintiff and the defendant either by themselves or an appointed manager take joint possession, control, management including collection of monthly rent and/or goodwill of the property Land Reference Number 36/VII/399 christened Hong Kong Shopping Mall in Eastleigh

b) The Inspector General of Police to ensure compliance of the order

c) The parties or their respective appointed managers to file monthly management reports with the court.

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

9. The said notice of motion by the defendant, dated 25/5/2021, is the 2nd application falling for determination in this ruling. The defendant's application dated 25/5/2021 was supported by an affidavit he swore on even date. The case of the defendant is that they co-own the suit property on which they have erected a five storey commercial building known as **Hong Kong Shopping Mall** which consists of rental units that are leased to tenants who together pay a monthly rent of Kshs 2,400,000. Indeed, the plaintiff has been in control of the premises and has been collecting rent. It is also true that the defendant, the plaintiff and two other persons [Hussein Ahmed Farah and Hussein Unshur] co-own **BangKok** Mall. He adds that the three-co-owners filed ELC Case No 136 of 2021 against the plaintiff with a view to safeguarding their rights as co-owners of Bangkok Mall.

10. The defendant further contends that the plaintiff's insistence that he be the only person in charge of rent collection casts negative aspersions as to his intentions in bringing the present application. He adds that eviction of the plaintiff from Bangkok Mall was as result of the plaintiff's intentional and malicious prevention of the defendant from accessing the property. He further contends that the plaintiff sought to "disenfranchise" him and cause him to be evicted from Bangkok Mall.

11. The position of the defendant is that it is necessary for the parties who co-own the suit property to report to each other on the management and control of the suit property and to account for the rent collected, pending the hearing and determination of this suit. The defendant contends that the plaintiff has not satisfied the requirements of **Order 40 rule 1** of the **Civil Procedure Rules**.

12. Lastly, the defendant faults the plaintiff for procuring interim orders through misrepresentation and concealment of material facts. He contends that the plaintiff has been the sole manager of the suit property since 2016 but has not rendered accounts since then. He adds that he does not intend to dispossess the plaintiff of the suit property but only seeks equal management, control, possession and sharing of proceeds of the suit property in equal proportion. He states that it is the plaintiff who has locked him out using a militia.

13. The two parallel applications were canvassed through written submissions that covered the parties' respective positions on the parallel applications. The plaintiff's written submissions are dated 2/6/2021 while the defendant's written submissions, are dated 2/6/2021. Parties orally highlighted their submissions in the virtual court on 3/6/2021.

14. I have considered the parallel applications, the parallel affidavits, the parties' respective submissions, the relevant legal framework, and

the applicable jurisprudence on the issues falling for determination in the two applications. The plaintiff's application dated 16/4/2021 is principally a plea for an interlocutory injunctive relief restraining the defendants from evicting him or seizing the management/control of the suit property from him. Prayer 2 of the defendant's application is spent because the order of 7/5/2021 ceases to have effect upon determination of the plaintiff's application dated 16/4/2021. Prayer 3 of the defendant's application is principally a plea for an interlocutory injunctive order granting the parties herein joint management of the suit property either directly or through agents.

15. The principles upon which our trial courts exercise jurisdiction to grant interlocutory injunctive relief are well-settled. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that unless the interlocutory injunctive relief is granted, he would stand to suffer damage that may not be remedied through an award of damages. Thirdly, should the court be in doubt as to whether the applicant has satisfied the above two requirements, the application is to be determined based on the balance of convenience. [see *Giella v Cassman Brown (1973) EA 358*]. Lastly at this interlocutory stage, the court does not make conclusive or definitive pronouncements on the substantive issues.

16. There is common ground that the two parties to this suit are co-owners of the suit property. Secondly, there is no contestation about the entitlement of the parties to equal shares of the rental income net of reasonable expenses. There is, however, mutual suspicion and hostility to the extent that the parties to this suit cannot sit down and agree on direct joint management of the suit property or joint management through a jointly appointed agent. Both parties seek police enforcement of the principal interlocutory reliefs that they seek from the court.

17. Taking into account the unique circumstances of the parallel applications, I do not think these are applications to be determined on the basis of the first two limbs of the test in *Giella v Cassman Brown (1973) EA 358*. These two applications will best be disposed on the basis of the third limb of the test, taking into account the need to faster reconciliation between the two co-owners. Secondly, this is a matter that calls for mediation so that the parties can go to a negotiating table to either reconcile and agree on management of the co-owned property or agree to dispose it altogether; reconcile accounts; share the proceeds; and ultimately part ways.

18. I will in the circumstances maintain the status-quo where the plaintiff shall continue to manage the suit property on condition that he renders accounts to the defendant and he remits to the defendant 50% of the net rental income from the suit property on the 10th day of every month. This matter will be given a hearing date this year so that the above status-quo order does not obtain for long. In the intervening period, the parties will be referred to mediation.

19. In the ultimate, the plaintiff's application dated 16/4/2021 and the defendant's application dated 25/5/2021 are disposed in the following terms;

a) Pending the hearing and determination of this suit by the court or pending the resolution of the management dispute between the parties herein through mediation, the plaintiff shall continue to manage and collect rent relating to Hong Kong Shopping Mall developed on Land Reference Number 36/VII/399, Eastleigh, Nairobi.

b) The plaintiff shall render to the defendant accounts, management reports, and 50% of the net monthly rental income received from the suit property on or before the 10th day of every month, pending the determination of this dispute.

c) If necessary, the Sub County Police Commander in Charge of the area shall enforce Order (a) above.

d) This suit shall be given an early tentative hearing date within the current calendar year at the time of reading this ruling, for hearing of the suit in the event the dispute is not resolved through mediation.

e) This matter is hereby referred to mediation. The matter shall be listed for mention before the Deputy Registrar in Charge of Mediation on a date to be fixed, when parties together with their advocates, will attend before the Deputy Registrar.

f) Costs of the two applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Wakwaya holding brief for Dr Otiende Amolo for the Plaintiff

Mr Otieno holding brief for Mr Sagana for the Defendant

Court Assistant: June Nafula