



**Sciommeri v Tasmac Limited & 4 others (Civil Suit
E006 of 2023) [2024] KEHC 5489 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT E006 OF 2023**

SM GITHINJI, J

MAY 8, 2024

BETWEEN

RUGGERO SCIOMMERI PLAINTIFF

AND

TASMAL LIMITED 1ST DEFENDANT

MOHAMED ABDI MOHAMED 2ND DEFENDANT

REGISTRAR OF COMPANIES 3RD DEFENDANT

NASSAU LIMITED 4TH DEFENDANT

HANNINGTON BARAZA WANJALA 5TH DEFENDANT

RULING

1. For determination is the Plaintiff's Notice of Motion dated 8th June 2023 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to issue a temporary order of injunction restraining the Defendants, whether by themselves and their agents from selling, transferring and or disposing of any assets and or properties of the Nassau Limited (the 4th Defendant) namely all that parcel of land situated in the Malindi Municipality known as Land Portion No. 603 (Original 6/22) Title Number LT, 36 Folio 202A, File 4247 containing by measurement Two Decimal Nine One (2.91) acres or thereabout and Land Portion Number 12069 Malindi measuring approximately Two decimal Nought Five Nine (2.059) hectares or thereabout comprised in a grant registered at the Registry of Titles at Mombasa as CR. 41261 or any other property or assets of the 4th defendants pending the hearing of this application inter-partes.



4. This honourable court be pleased to issue a temporary order of injunction restraining the 1st and 2nd defendants whether by themselves and their agents from appointing and/or acting as directors of the 4th defendant or holding themselves out as director, officer or agent of the 4th defendant pending the hearing and determination of the application inter-partes.
 5. This honourable court be pleased to issue a temporary order of injunction restraining the 5th defendant from acting as the 4th defendant's company secretary and or holding himself out as the 4th defendant's company secretary pending the hearing and determination of this application inter-partes.
 6. This honourable court be pleased to grant leave to the plaintiff to continue with this suit as a derivative action for and on behalf of the 4th defendant with regard to the protection and or preservation of the 4th defendant's properties and or assets.
 7. This honourable court be pleased to grant leave to the plaintiff to serve summons and all the pleadings together with the processes in this matter to the 1st Defendant outside the jurisdiction of the court through the 1st Defendant's director's known email address of Giancarlo.bottini@libero.it.
 8. This honourable court be pleased to issue an interim order of injunction restraining the 1st and 2nd defendants whether by themselves, and their agents or whomsoever from selling, transferring and or disposing the Plaintiff's 480 shares representing 48% stake in Nassau Limited (the 4th Defendant) or in any manner whatsoever dealing with the said shares pending the hearing and determination of the suit.
 9. That this honourable court be pleased to issue an interim order of injunction restraining the Defendants, whether by themselves and their agents from selling, transferring and or disposing of any assets and or properties of the Nassau Limited (the 4th Defendant) namely all that parcel of land situated in the Malindi Municipality known as Land Portion No. 603 (Original 6/22) Title Number LT, 36 Folio 202A, File 4247 containing by measurement Two Decimal Nine One (2.91) acres or thereabout and Land Portion Number 12069 Malindi measuring approximately Two decimal Nought Five Nine (2.059) hectares or thereabout comprised in a grant registered at the Registry of Titles at Mombasa as C.R 41261 or any other property or assets of the 4th defendant pending the hearing and determination of the suit.
 10. This honourable court be pleased to issue a temporary order of injunction restraining the 1st and 2nd defendants whether by themselves and their agents from appointing and/or acting as directors of the 4th defendant or holding themselves out as director, officer or agent of the 4th defendant pending the hearing and determination of the application inter-partes.
 11. This honourable court be pleased to issue a temporary order of injunction restraining the 5th defendant from acting as the 4th defendant's company secretary and or holding himself out as the 4th defendant's company secretary pending the hearing and determination of this application inter-partes.
 12. That costs of this application be borne provided for.
 13. Any other or further order as the court deems fit to grant in the interest of justice
2. The application is founded on the grounds set out on its face and the supporting affidavit of Ruggero Sciommeri the Plaintiff who deponed that Nassau Limited (the 4th Defendant) was incorporated



sometimes in 2006 with the objective of undertaking direct management of properties, buildings, land, houses estate, lodges, restaurants, catering business and similar establishments among other objectives and that the 4th Defendant is the owner of Land Portion No. 603 (Original 6/22) Title Number LT, 36 Folio 202A, File 4247 containing by measurement Two Decimal Nine One (2.91) acres or thereabout and Land Portion Number 12069 Malindi measuring approximately Two decimal Nought Five Nine (2.059) hectares or thereabout comprised in a grant registered at the Registry of Titles at Mombasa as C.R 41261. He stated that at all material times he has been the director of the 4th Defendant. It was further stated that prior to 27th November 2014, Tasmac Limited, the 1st defendant/respondent was the owner of 480 shares in the 4th defendant representing 48% stake in the said company while Caledonian Limited was the owner of 520 shares representing 52% stake in the company. It was additionally stated that the 1st Defendant then sold to the Plaintiff its 480 shares in the 4th Defendant vide an agreement dated 27th November 2014 for the purchase price of Euro 450.

3. Mr. Ruggero Sciommeri further stated that subsequent to the 1st Defendant transferring 480 shares to the Plaintiff, the 1st Defendant unsuccessfully commenced numerous legal proceedings against the plaintiff seeking nullification of the aforesaid transfer which question of transfer and ownership of the shares was settled in ELC Misc. Application No. 5 of 2013. It was also stated that sometime in 2008, the 1st defendant through the office of the Director of Public Prosecution, initiated criminal proceedings against the plaintiff together with others in Criminal Case No. 981 of 2018 alleging fraudulent transfer of shares from the 1st Defendant which case was dismissed for the prosecution having failed to establish a prima facie case to warrant placing the accused persons on their defence. The said ruling was appealed by the Director of Public Prosecution which appeal was withdrawn on 9th September 2022 thus the issue of transfer of shares was put to rest. It was additionally stated that the 1st Defendant filed another suit against the Plaintiff being Malindi HCCC No. 17 of 2019 (OS) seeking to nullify the plaintiff's shares which suit was dismissed for being Res judicata.
4. It was averred that the 1st, 2nd and 5th Defendants have unlawfully, illegally, fraudulently and in connivance with the Registrar of Companies purported to transfer the Plaintiff's 480 shares in the 4th Defendant using forged documents. That the said illegal activities also include the purported appointment of the 2nd Defendant as the director and the 5th Defendant as the Company secretary of the 4th defendant respectively. That due to the above, the plaintiff prays that the defendants be restrained from dealing with the shares of the subject matter in this suit pending the hearing and determination of the suit. Further, the defendants be restrained from appointing and or purporting to act as directors of the 4th defendant pending the hearing and determination of the suit.
5. Additionally, sought is leave to facilitate service of summons to the 1st defendant a company incorporated in Mauritius and leave to continue with the suit as a derivative action on behalf of the 4th defendant limited to preservation of the properties and assets of the 4th Defendant.
6. The 1st Defendant filed a preliminary objection dated 17th July 2023 on the following grounds;
 1. The suit is sub judice to Civil Appeal No. 4 of 2022 at Malindi court of Appeal which is yet to be determined.
 2. The suit is sub judice to Criminal Appeal No. E028 of 2020 which is pending before this court.
 3. The suit is res judicata pursuant to Malindi ELC Misc No. 5 of 2013 and Court of Appeal No. 6 of 2017.
 4. The Plaintiff/ Applicant has no locus standi to institute this suit.



7. The 1st and 2nd Defendants filed a replying affidavit sworn by Mohamed Abdi Mohamed sued as the 2nd defendant who stated that the 1st Defendant has never sold any or all of its 48% stake in the 4th Defendant where it is the founder. Further, that the issue of the shares has never been put to rest curtesy of Malindi Court of Appeal Civil Appeal No. 4 of 2022.
8. The 3rd Respondent filed a replying affidavit dated 25th July 2023 sworn by Ann Kanake the Senior Assistant Registrar of Companies who deponed that from their records, the applicant company was incorporated as a private company limited by shares on 27th December 2005 and the details of the shareholding were as set out under paragraph 3 of the Replying affidavit. Ms. Ann Kanake stated the various changes in directorship and Company secretary of the company over the years as laid down in the replying affidavit. She stated that the current position of the company is as follows;
 - a. Caledonian Limited Shareholder 520 shares.
 - b. Rugerro Sciomeri- director.
 - c. Tasmac Limited (Mauritius) Director/Shareholder 480 shares.
 - d. Mohamed Abdi Mohamed Director.
 - e. Hannington Baraza Wanjala Secretary
9. The 4th Defendant and the Interested Party filed a Notice of Admission dated 20th July 2023 admitting wholly the Plaintiff's suit as pleaded in the suit as well as pleaded in the Notice of Motion.

Analysis and Determination

10. The court directed that the preliminary objection and the application be disposed of together by way of written submissions. Only the plaintiff filed his submissions which I have taken into consideration as well as the authorities relied upon. In the absence of the other parties' submissions and the admission by the 4th Defendant, I find the following issues for determination;
 1. Whether the P.O is meritorious?
 2. Whether the orders for interim injunction sought are merited?
11. It is well settled that a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. See *Mukisa Biscuits Manufacturing Company Limited -v- West End Distributors* (1969) EA 696. In *Oraro v Mbaja* [2005] eKLR the court stated that: -

“A Preliminary Objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.”
12. The Preliminary Objection raised by the 1st and 2nd defendants is on res sub judice, Res judicata, and the Plaintiff's locus standi.
13. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.



14. The provisions of Section 6 of *Civil Procedure Act* defines the above principle or the doctrine as follows;
- “..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”
15. According to the 1st and 2nd Defendants, there is a pending suit in Malindi Court of appeal Civil Appeal No. 4 of 2022. The same was not attached to the replying affidavit for me to make a determination on the same. Thus I find that the doctrine of sub judice has not been proved.
16. The doctrine of *res judicata* is set out in the *Civil Procedure Act* at section 7 as follows:
- “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 can 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.”
17. The doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R. 378, observed thus:
- “...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
18. The 1st and 2nd defendants have not demonstrated how this suit is *res judicata* through any documentary evidence for this court to find in their favour. The same equally fails.
19. On locus standi, in the case of *Law Society of Kenya V Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, it was stated as follows: -
- “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
20. Locus standi is the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard for he is a stranger to the suit. Locus standi is so important that in its absence, party has no basis to claim for anything before the Court.
21. The plaintiff states that he is a shareholder of the 4th Defendant holding 48% shares thus the basis of the instant suit. The 1st and 2nd defendants state that he has no locus standi. This is in dispute and would



invite the production of evidence before the court makes a determination. Consequently, the issue of locus standi fails.

22. In a nutshell, the Preliminary objection herein fails as the same does not fit into the principles enunciated in the Mukisa Biscuits case. The issues raised in the preliminary objection require for evidence to be adduced so that the court can reach a determination on merit. The P.O thus fails and the same is hereby dismissed.
23. Now onto the interlocutory injunctions sought. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that: -

Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.

24. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [*Supra*] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

25. The Court of Appeal in the case of [Nguruman Limited –v- 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.”

26. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction.



27. The Court of Appeal in Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a prima facie case as follows;

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

28. From the above definition, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial. Has the Plaintiff therefore demonstrated this?

29. In the instant application, the Plaintiff emphasizes that the key orders for injunctions are in terms of prayers 8,9,10 and 11 as set out in the application. To summarize the prayers, the plaintiff seeks an injunction to restrain disposition of the 480 shares, injunction to restrain the disposition of the 4th Defendant's assets, an injunction restraining constitution of directors or officers and Company secretary of the 4th defendant. The 4th defendant fully associates with the plaintiff's application. It is the plaintiff's position that he holds 480 shares in the 4th Defendant. The 1st and 2nd defendants on the other hand contest this position and state that the Plaintiff has no stake as the 1st Defendant has never sold the shares to the plaintiff. The 4th Defendant's admission of the plaintiff's suit and the instant application connotes that the plaintiff holds the 480 shares in the 4th Defendant as averred by the plaintiff. In the circumstance therefore, I find that the plaintiff has established a prima facie case to warrant the granting of the interim injunction sought.

30. Having found that the Plaintiff has established a prima facie case, I will now determine whether the Plaintiff has demonstrated that he stands to suffer irreparable injury, which would not adequately be compensated by an award of damages if the interlocutory injunction is not granted.

31. The Court in the Nguruman Limited case (*supra*) expressed itself as hereunder: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages...”

32. By the 1st and 2nd Defendant's own admission, the suit properties are worth tentatively Kshs. 1,500,000,000. The plaintiff's claimed stake in this is 48% from the 480 shares he avers to own. In my considered view, should the interim injunction not be granted the plaintiff stands to suffer irreparable loss in the event the suit properties are disposed. I find that the plaintiff has satisfied the second condition.

33. As regards the issue of balance of convenience, I associate myself with the decision in Pius Kipchirchir Kogo -v- Frank Kimeli Tenai [2018] eKLR where it was held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience



caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

34. In light of the above findings, I am convinced that the balance of convenience tilts in favour of the Plaintiff.
36. Flowing from the foregoing, it is my finding that the Notice of Motion dated 8th June 2023 succeeds and prayers no. 8, 9, 10 and 11 of the Notice of Motion are hereby allowed. Costs to abide event.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Wafula for the Plaintiff

Mr Mogaka for 2nd and 3rd Respondent

Mr Kilonzo for the 4th Defendant

