



REPUBLIC OF KENYA



Salama Beach Hotel Limited & 3 others v Ignazio & 4 others (Civil Case 10 of 2020) [2024] KEHC 7745 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 10 OF 2020
M THANDE, J
JUNE 21, 2024**

BETWEEN

**SALAMA BEACH HOTEL LIMITED 1ST PLAINTIFF
ISAAC RODROT 2ND PLAINTIFF
STEFANO UCELLI 3RD PLAINTIFF
MARIO SCOTTI CAMUZZI 4TH PLAINTIFF**

AND

**DR ARCURI IGNAZIO 1ST DEFENDANT
D SSA DAL MORO MADDALENA 2ND DEFENDANT
AVV DE CESAI PATRIZIA 3RD DEFENDANT
TEMPLE POINT RESORT LIMITED 4TH DEFENDANT
ACCREDO AG 5TH DEFENDANT**

RULING

1. By an Application dated 25.7.23, the 1st 2nd and 3rd Defendants seek that the interim order of injunction granted in favour of the Plaintiffs on 5.8.2020 be discharged. They also seek costs of the Application.
2. The grounds upon which the Application is premised as set out therein are that the 1st-3rd Defendants are the duly appointed trustees in bankruptcy of Ventaglio International SA (Ventaglio), the majority shareholder of the 1st Plaintiff, holding 81,000 shares of 90,000 shares. Their mandate is to hold and manage all the assets of Ventaglio including the shares in the 1st Plaintiff, and distributing the proceeds thereof to its creditors. In the order of 5.8.2020, the 1st -3rd Defendants were restrained from *inter alia* disposing the interests, properties, shares and or other assets in the 1st Plaintiff pending the hearing and determination of this suit. The 1st-3rd Defendants stated that they have complied with pretrial directions



yet the Plaintiffs have for over 2 years failed to list the suit for hearing and have intentionally and by design delayed, prejudiced and frustrated the determination of the issue of the true directorship and shareholding of the 1st Plaintiff. This delay has prejudiced the entire body of the creditors of Ventaglio as the order in particular prohibits any realization of the shares of Ventaglio in the 1st Plaintiff. The 1st-3rd Defendants further asserted that the order is against public policy as it unfairly restrains them from performing their public duty as court appointed trustees in bankruptcy for Ventaglio. It was averred that it is in the interests of justice that the orders sought are granted.

3. The Application is opposed by Isaac Rodrot, the 2nd Plaintiff (Rodrot) vide his replying affidavit sworn on 19.10.23. His case is that the Application is unnecessary for the reasons that in a ruling of 6.4.21 in HCCC No. 10 of 2019, Nyakundi, J. listed Petitions Nos. 6 of 2019, 10 of 2020 and 12 of 2020 and HCCC Nos. 118 of 2009 and 10 of 2019 as related to each other. The learned Judge then proceeded to consolidate HCCC Nos. 118 of 2009 and 10 of 2019. Rodrot appealed the ruling in Civil Appeal No. E028 of 2021. He then applied and got orders staying the said ruling. His understanding is that the consolidated HCCC No. 118 of 2009 and HCCC No. 10 of 2019 cannot proceed until his appeal is determined. He denied the allegation that the delay in this matter has been caused by the Plaintiffs and attributed the same to various factors including the Court not sitting, the Court being on vacation and an application or recusal of the Judge by the 3rd Defendant. As regards the tenure of the order of 5.8.2020, he asserted that the same was to last until determination of the suit. Additionally, that the issues raised herein are matter matters to be canvassed at the hearing of the main suit and that certain legal issues raised in this suit are likely to be conclusively decided by a 3 Judge bench in Constitutional Petition No. 12 of 2020 as consolidated with others.
4. I have carefully considered the Application, the rival affidavits and submissions as well as the authorities cited.
5. Under Order 40 Rule 1 of the [Civil Procedure Rules](#), the Court is empowered to grant temporary injunction as follows:

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
- 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 orders.

6. In order to prevent abuse of the court process by a party enjoying a temporary injunction through deliberate delay of the matter in respect of which the injunction has been granted, Order 40 Rule 6 was introduced and provides as follows:

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.



7. This Rule which stipulates that an interlocutory injunction should remain in force for no more than 12 months is a safeguard against the machinations of mischievous litigants who take no further steps to progress the matter after obtaining an injunction. The Court of Appeal had occasion to consider the import of Rule 6 of Order 40 in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and had this to say:

Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders.

8. Rule 6 Order 40 Rule 6 is couched in mandatory terms that an interlocutory injunction will automatically lapse after 12 months by operation of law. The court may however, for sufficient reason order otherwise. In such a case, an interlocutory injunction shall last for as long as the court so orders. In the case of *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another* [2018] eKLR, the Court of Appeal stated as follows:

(17) A plain reading of Order 40 Rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse.

9. The record shows that this suit relates to the shareholding of the 1st Plaintiff. The Court notes that the issue of the shareholding of the 1st Plaintiff is the subject of very contentious litigation. It has given rise to various suits including Petitions Nos. 6 of 2019, 10 of 2020, 12 of 2020, HCCC Nos. 118 of 2009, 10 of 2019 as well as the present suit.

10. The order that the 1st-3rd Defendants seek to be discharged was issued by the Court pursuant to an application dated 18.5.2020. The order is reproduced below:

1. That an order of temporary injunction be and is hereby issues restraining the Respondents/ Defendants by themselves, their successors in title, agents or otherwise while in Italy, Kenya or otherwise from disposing their interests (if any), properties, shares and or other assets in Salama Beach Hotel Limited, the 1st Applicant, pending the hearing and determination of this suit.
2. That costs of this application do abide the outcome of the suit.

11. The record shows that the Plaintiffs sought injunctive orders against the Defendants on grounds that they were in the process of auctioning in Italy, their interests in Salama. In the ruling of 5.8.2020, Nyakundi, J. noted that the Defendants had not filed a defence and found that the Plaintiffs had established a prima facie case as their interests were clearly threatened by the alleged ongoing auction proceedings in Italy. The learned Judge further found that given that the auction was to take place outside the Court's jurisdiction and that the financial position of the Defendants could not be ascertained, irreparable injury would be occasioned to the Plaintiffs if the relief sought was denied.

12. To my mind, this is sufficient cause as contemplated in Order 40 Rule 6. Further, it has been demonstrated by Rodrot and the record bears him out that there are many matters and applications filed before this Court and the Court of Appeal relating to the shareholding in the 1st Plaintiff, most of which still pending. In light of this, I do find that it is necessary that the orders granted remain in place pending the hearing and determination of this suit to preserve the subject matter of the same.



13. In the end, it is my finding that the Application dated 25.7.23 is unmerited and is accordingly dismissed.
Costs in the cause.

DATED, SIGNED AND DELIVERED VIA MS TEAMS THIS 21ST DAY OF JUNE 2024

M. THANDE

JUDGE

