



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 26 OF 2020

MOHAMED NAQI NOORANY.....PLAINTIFF

-VERSUS-

PREMIER FLOUR MILLS LIMITED.....1ST DEFENDANT

CAR-GILL KENYA LIMITED.....2ND DEFENDANT

PARAMAMBA LIMITED.....3RD DEFENDANT

RULING

1. The Plaintiff, **MOHAMED NAQI NOORANY** filed a suit vide a **Plaint** dated **18th March, 2020** in which he has sought a raft of remedies against the Defendants, **PREMIER FLOUR MILLS LIMITED, CAR-GILL KENYA LTD** and **PARAMAMBA LIMITED**.
2. Simultaneously, the Plaintiff filed a **Notice of Motion** application on even date seeking orders of injunction on the grounds that he is the registered and beneficial owner of the suit properties; that he guaranteed the 1st Defendant against the debts of the 2nd Defendant and other Companies; that upon signing of the guarantee agreement, he transferred the properties to the 1st Defendant who gave an oral undertaking that it would revert the properties, and, lastly, that the Defendant may dispose of the properties.
3. The affidavit in support, sworn by the Plaintiff has amplified the reasons for the application and supplied documents to be relied on.
4. On **7th April, 2020**, the Plaintiff filed an additional application under certificate of urgency dated **2nd April, 2020** alleging that the 3rd Defendant had issued notices to tenants to take over the suit premises by directing them to pay rent to them.
5. The Honourable court issued an order for *status quo* and directed that both applications be served upon all the parties and a date for interpartes hearing be taken in the registry.
6. The applications were opposed by the 1st Respondent vide a **Replying Affidavit** sworn by **Diamond Hasham Lalji** on **29th April, 2020**. Attached to it are the guarantee agreement and title documents of the disputed properties marked as **“DHL-1”** and **DHL-6(a) and (c)** respectively.
7. The application was further opposed by the 2nd Defendant which filed its **Replying Affidavit** sworn by **Rahus Delesh Bid** on **21st May, 2020** and also annexed sale agreements between it and the 1st Defendant together with a discharge of charge marked as Exhibit **‘RDB2’** and **‘RDB4’** respectively.
8. On **15th July, 2020**, parties filed their amended documents in compliance with court orders and on **30th September 2020**, parties consented to opening of a joint account in the names of their advocates for purposes of collecting rent due from the suit properties. Further, the parties went on to consent to disposing of the application by way of written submissions.
9. The Applicant/Plaintiff filed their submissions dated **21st October, 2020** on the same date and supplementary submissions on the **25th November 2020**. On the other hand, the 1st Respondent/Defendant filed its written submissions dated **11th November, 2020** whilst the 2nd Respondent/ Defendant filed its submissions dated **10th November, 2020**.

Analysis and Determination

10. I have read through the pleadings by the parties, the documents annexed in support thereof, written submissions filed by Counsel for both Parties together with the cited statute and case law relied upon in support of their respective positions to determine the applications therein. I find the main issue for determination is whether the Plaintiff/Applicant has satisfied the requirements that would warrant him be granted the injunction sought.

11. The principle to be applied in granting of an injunction are well settled in Kenya today. The threshold that was set by the **Giella Case** have been applied from time to time until they are so purified that it suffices for a party to satisfy the requirement under any of the limbs reliance will be placed. A party must establish by evidence that it/he/she has a 'prima-facie case' with a probability of success if a trial was held. When it is in doubt, it must establish that irreparable loss which cannot be compensated for by an award of damages is likely to be suffered; and lastly, that if it is in doubt of the two limbs above, then the court will decide on a balance of convenience.

12. On the issue of establishing a *prima-facie* case, in its amended Complaint, the applicant pleaded that he signed a guarantee agreement under duress for fear of losing his job. He stated that the Director of the 1st Defendant/ Respondent gave an oral undertaking that this would be temporary and that the transfer of the assets named in the guarantee was on mere paper. He also stated that he continued with the collection of rental income from the tenants who occupied **Plot No.TF2 on L.R. No.330/140** registered as **Voi N80, Folio 55/3, file 24712 (Riara Apartments)**.

13. The Plaintiff/Applicant has now found out that the 2nd Respondent has issued notices to the tenants for collection of the rental income. Further, at paragraph 17 of the Complaint, the Plaintiff avers that through an affidavit, that an accountant of **Cargi Kenya Limited** acknowledged receipt of titles to **Flat No.4 sun-division No.4756 (original No.1391/25) Section 1MW and Plot No.Nakuru Municipality/Block 7/301** from one Diamond Lalji for sale of the same in settlement of the debt owed to it. The guarantee document exhibited to court regarding the issue of settlement in part states as follows:-

“(2) That by way of security we hereby willingly and voluntarily transfer to the Company the following properties;

i. Nakuru Municipality/Block 7/301 at the last transfer value of Kshs.2,800,000/=.

ii. Flat No.4 on first floor of ALL THAT development known as subdivision No.4756 (original No.1391/25) of Section 1, Mainland North, at the last transfer value of Kshs.1,500,000/=.

iii. Apartment No.TF2 Block C of Riara Apartment on LR. No.330/140, Nairobi at the last transfer value of Kshs.8,500,000/=.

(3) That we hereby jointly and severally agree and undertake to ensure that the Company recovers the full value of the goods stolen by our brother Mr. Hassan M. H. Noorany.

14. From the above averment, it is clear that the amount secured was **Kshs.500,000,000/=** which was deemed stolen by one **Hassan M. H. Noorany** in terms of goods and it is expressed that it was willingly and voluntarily entered into as between the parties.

15. In my mind, paragraph 4 of the said guarantee is the most interesting. It states the consequences of default for 'non-payment of the stolen goods' whereby the Plaintiff/applicant and his deceased wife confirmed that the guarantee be enforced against them (be substituted) in the place of the tortfeasor or on the other hand, if the guarantee became void then the same consequences.

16. On the list of documents dated **29th April, 2020** and filed by the 1st Defendant/Respondent, there are three **(3) letters** dated **23rd May, 2012, 23rd July, 2013** and **31st May, 2013** respectively. The request in all the three letters is for the original title certificate to enable the properties be transferred to the 1st Respondent. Failure to provide the documents, the 1st Respondent would treat that as a default.

17. I have perused the searches filed in court marked as **“DHL-7(a), DHL-7(b) and DHL – 7(c)**. It is clear that the properties were transferred. As for whether the 1st Defendant/Respondent's actions were contractually correct, this can only be determined at the full hearing of the suit. The point at which default occurred so as to warrant enforcement by sale of the properties to other entities, is a matter of evidence which this court cannot delve into at this stage. I therefore find and hold that the Plaintiff/Applicant has satisfied the first condition whereby a *prima-facie* case with a probability of success at trial has been established.

18. The second issue to be determined is whether with the grant of the injunction orders sought, the Plaintiff/applicant is likely to suffer loss which damage cannot be adequately compensated. From the facts, it has been pleaded that the Plaintiff, upto the time the 2nd Defendant/Respondent issued notice to collect rent, was the one benefiting from it. It then dawned on him that the properties had changed hands and therefore he would greatly be inconvenienced if rental income is taken away. The real loss would be the apartment. The prices they fetch in the open market is not equivalent of the rental income and that would be lost forever. Consequently, I find and hold that an award of damages cannot be compared to lifelong rental income.

19. On the issue of in whose favour the balance of convenience would tilt, I find that the 1st Defendant/Respondent which has title in its favour did not claim that indeed it was interested in the rental income as a source to reduce its indebtedness owed to it by the Plaintiff's/Applicant's prodigal brother who is at large. The Defendant's defence is a general denial and shifts proof to the Plaintiff. However, at paragraph 21 of the 1st Defendant's defence, it is admitted that the Plaintiff continued enjoyment of the rental income and faults the Plaintiff's delay in challenging the guarantee and the ownership.

20. By a Consent Order dated **30th September, 2020**, the parties agreed to have the rental income deposited in a joint account of Counsel. In my view, this is a realization of the parties rights to the income. I therefore find that the balance of convenience tilts in favour of the

Plaintiff.

21. The above findings of facts, have gone on to inform this court that the Plaintiff/Applicant has established on all the three limbs/conditions for the grant of an interlocutory injunction.

22. I hence proceed to allow the application dated **18th March, 2020** in terms of **prayer No.4** with a modification to include an order for deposit of the rental income in joint names of Counsel for the parties.

23. I also direct that this suit be set down for hearing within 60 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 4TH DAY OF FEBRUARY , 2021.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.