REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 8 OF 2020

JOHN WAIMIRI & EMMA MUTHONI.....1ST PLAINTIFF

JULIUS NJUGUNA NJOROGE.....2ND PLAINTIFF

EUGENIO FIORAVANTI.....3RD PLAINTIFF

DE MARTINO MELAKE.....4TH PLAINTIFF

ROBERT OCHOKI NYAMORI/SIRIO LTD.....5TH PLAINTIFF

CARLA TARZALLI.....6TH PLAINTIFF

ALEM DIRAR.....7TH PLAINTIFF

VERSUS

FRANCESCO LEPRI.....1ST DEFENDANT

DEVIS RUZZINI.....2ND DEFENDANT

SUNNY MANAGEMENT & CONSULTING LIMITED...INTERESTED PARTY

AND

JOHARI VILLAS MANAGEMENT LIMITED .....AFFECTED PART

Coram: Hon. Justice R. Nyakundi

Mr. Binyenya for the Defendants/Applicants

Mr. Gichuru for the Plaintiff/Respondents

JUDGEMENT

INTRODUCTION

The Defendants and Interested Party instituted proceedings against the Plaintiffs vide Notice of Motion dated 18.09.2020 and filed on 22.09.2020 seeking the following orders *inter alia*:

1. Spent

2. That pending the hearing and determination of this application, a temporary order of injunction do issue restraining the

Respondents by themselves, their representatives, servants, employees assigns, proxies, agents or anyone acting on their behalf from dealing with the management and provision of security services at JOHARI VILLAS situate on Land Portion Number No. 1371 (Original Number 430/20) Malindi.

3. That pending the hearing and determination of this suit, an order of injunction do issue restraining the respondents whether by themselves, their representatives, servants, employees assigns, proxies, agents or anyone acting on their behalf from dealing with management and provision of security services at Johari Villas situate on Land Portion Number No. 1371 (Original Number 430/20) Malindi.

4. That pending the hearing and determination of this suit, a mandatory order of injunction do issue compelling the Respondents to withdraw Italia Security Limited from Johari Villas situate on Land Portion Number 1371 (Original Number 430/20) Malindi.

5. That pending the hearing and determination of this suit, a mandatory order of injunction do issue compelling the Respondents to pay their respective outstanding service charges to the Affected Party.

6. Costs of this application be provided for.

The application is premised on the grounds (1) – (41) on the face of the application. It is further supported by supporting affidavit of VALENTINA BERTON dated 18th September 2020.

The Respondents opposed the application and in so doing filed a Replying Affidavit dated 08.10.2020 by JOHN WAIMIRI stating, in a nutshell, that the instant application was res-judicata and an abuse of the court process as this court already canvassed the issues raised in the instant application in its ruling dated 08.10.2020.

PARTIES SUBMISSIONS

Neither party filed submissions on this application.

ISSUES FOR DETERMINATION

As was earlier alluded to in this court's ruling dated 16.07.2020, there are weighty matters that need to be addressed in this suit which can only be canvassed at the hearing of the main suit. It is important to mention that the issues raised by the applicants were canvassed before this court in the previous Notice of Motion application dated 16.03.2020 to wit this Court issued a ruling dated 16.07.2020.

I find it an affront to justice that the parties have sought to tie up this matter in court with a similar application. Furthermore, the Applicants did seek to appeal my ruling dated 16.07.2020 and filed a Notice of Appeal dated 21/07/2020 but instead changed their minds and filed this current application. I must warn that this an abuse of the court process and a slight on this court's mandate to ensure expeditious hearing and determination of suits. It is essential and in the interest of justice that parties prosecute their cases as soon as possible for final determination and judgment. I find it abhorrent that the parties are yet to prosecute the main suit.

With that said I shall now turn to the matter of the application at hand. I have considered the Notice of Motion application as well as the Replying Affidavit. I find that there is only one issue for determination in this cause of action: **Does the instant application lack merit?**

LEGAL ANALYSIS

It is not in question that the Respondents herein are shareholders of the Affected Party JOHARI VILLAS MANAGEMENT LTD, a limited liability company incorporated in 2012, by virtue of being owners and occupiers of the houses known as JOHARI VILLAS. The main objective of said company was to carry on the business of the direct management of houses known as JOHARI VILLAS erected on plot No. 1371 within Malindi which are owned by the Respondents. On the other hand, the Applicants are the current directors of the said company who ought to be involved in the direct day to day running of the affairs of the company.

The Respondent's filed a derivative suit against the Applicants and sought leave of this court to continue a derivative action over the said company, alleging some of the issues contained in this current application. The said leave was granted by this court in the aforementioned ruling dated 16.07.2020.

Sections 143 & 144 of the Companies Act impose a duty on the directors of a Company to act in a way as to promote the success of the company for the benefit of its members. This court expected that the main suit would then be prosecuted to allow it make a final determination on all the issues raised but unfortunately the same has not happened to date.

Now instead of prosecuting the case the Applicants wish this court to compel the Respondents to withdraw Italia Security Limited from the suit property and pay their outstanding arrears of the service charge. It is important to note that from the evidence on record the said security company was in fact offering services before the current dispute and as such is not a stranger to either party herein. The provision of Security services is a crucial undertaking which cannot be taken lightly. In view of the foregoing I see no reason to bar the said security company from offering their services pending the hearing and determination of this suit. Further the second issue raised by the Applicants on the payment of service charge can be canvassed at the hearing of the main suit.

Turning over to the matter at hand, the guiding law on the issue of ***res judicata*** is section **7 of the Civil Procedure Act** which provides 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 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".

The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

''Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

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."

In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

"Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

It therefore follows that a Court will invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties. The question therefore is whether the Applicants have satisfied the conditions for the application of the principle of res judicata in view of the facts of this case.

Coming back to the matter at hand, the issues raised by the Applicant's Notice of Motion application were already previously canvassed before this court and determined albeit temporarily in this court's previous ruling and they can further be canvassed at the hearing of the main suit. I therefore see no reason to delve into the nitty-gritties of the same.

Turning over to the matter of the injunction sought by the applicants, the issue of granting an injunction is now well settled in the case of **Giella v Cassman Brown & Company Limited (1973) E A 358,** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"First, 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."

The test for granting of an interlocutory injunction was also considered in the American case of ***Cyanamid Co. vs Ethicom Limited (1975) A AER 504*** where three elements were noted to be of great importance namely:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

The circumstances for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

i. There must be a serious/fair issue to be tried

I have considered the arguments advanced by both sides and I find that in view of the rival positions taken by both sides, the same can only be determined and resolved after full hearing as the issues cannot be determined at the interlocutory stage. This may therefore call for the court in the interest of doing substantive justice to issue conservatory orders to ensure that the status quo is preserved until the suit is heard and determined by this Court. I am further not satisfied on the strength of the documents produced in this application by the Defendants/Applicants that there is established a prima facie case with a probability of success.

ii. Damages are not an adequate remedy

The Defendant/Applicants contend that if injunction orders are not granted they stand to suffer irreparable injury pending the hearing and determination of this case. It is also their contention, if injunction orders are denied they will stand to lose and that such loss cannot be adequately compensated by way of damages. They have however not shown any evidence that the same is true.

I find that if the said injunction pending hearing and determination of this suit is granted the main suit shall be rendered moot before this court has had an opportunity to hear the dispute.

iii. The balance of convenience lies in favour of granting or refusing the application

In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR,** the court dealing with the issue on balance of convenience expressed itself thus: -

> **"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies. "**

I have considered and weighed the conflicting parties' interest as regards the balance of convenience and in which position the same tilts to as regard granting or rejecting the application for injunction. I have considered all the facts of this application as regards which party stands to suffer the greater harm following the decision of this motion. I have to consider amongst the two parties which party have a stronger case on the merit and on whether there is irreparable harm, if I decide the motion in a particular manner, which in my view may influence the balance in favour of granting or rejecting to grant the injunction. I have in considering the application for the Applicants on the strength of the documents submitted to the court found that the Respondents as residents of the said villas have a stronger case unlike the Applicants. They stand to suffer more prejudice should the security services be withdrawn as well as should they be compelled to pay the service charge which matter is in dispute before this court, before they have had their day in court.

In view of the above it is my considered opinion that the Applicants have not demonstrated to this court that they stand to suffer greater harm if the application for injunction is dismissed. The Respondents on the other hand will suffer great harm if the injunction is granted, as in the event that it is successful in the suit it will be at liberty to exercise its rights as per the Lease agreement.

DESPOSITION

Having carefully considered the application and submissions by learned counsel I find that the application lacks merit and is therefore dismissed.

For avoidance of doubt I shall now proceed to make the following orders;

1. That the Plaintiffs in this case do prosecute the main suit within 45 days of this Ruling.

2. That the status quo remains pending the hearing and determination of the main suit.

3. That costs of this application be in the cause.

JUDGMENT DELIVERED, DATED AND SIGNED AT MALINDI THIS 6TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (wasigeb@gmail.com eliasmutuma@mgaadvocates.com)