IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 387 OF 2014

BETWEEN

NGURUMAN LIMITED.....PLAINTIFF

AND

JAN BONDE NIELSEN.....DEFENDANT

RULING NO. 2

1. The plaintiff herein seeks to enforce an undertaking given by the defendant, as plaintiff, in **MILIMANI HCCC No. 332 of 2019,** ***Jan Bonde Nielson v Nguruman Limited***. In that case, the defendant ("Nielsen") sued Hermanus Philipus Steyn, Hedda Steyn (collectively "the Steyns") and the plaintiff ("Nguruman"). He sought declarations that a partnership arrangement existed between Hermanus and Hedda; that Nguruman's corporate veil be lifted; that 50% of the Nguruman's shares held by the Hermanus and Hedda be held on constructive trust for himself; that 50% of shares held in trust by the Steyns be transferred to him; that an injunction do issue to restrain the Steyns from using the corporate veil to interfere with Nguruman and that Hermanus Steyn be restrained from interfering with the management of the partnership assets.

2. In summary Neilsen's case was that as a result of friendship with the Steyns, they agreed to establish a joint venture partnership in 1986 that would construct luxury tourist camps on Nguruman's property. He contended that they agreed that the parties would acquire shares in Nguruman and undertake to develop its property. He claimed that he remitted substantial sums to the Steyns for the purpose of acquiring the Nguruman property and developing it. He instructed Mr. Anthony Gross, Advocate to acquire the shares in Nguruman which were to be apportioned equally between himself and Hermanus Steyn once the complexities of his foreign status were resolved. He later realized that Hermanus Steyn was reluctant to transfer to him the 50% portion of the acquired shares he held in Nguruman. He therefore filed suit to claim his portion of the shares in the partnership.

3. Together with the plaint, Nielsen filed an application for injunction restraining the Nguruman and the Steyns from, inter alia, interfering with the camp operations. On 30th August 2010, Koome J., granted an ex-parte injunction restraining the Nguruman and the Steyns from interfering with Nielsen's homestead community known as Oldonyo Laro. On the following day, 31st August 2011, Nielsen filed an undertaking as to damages on the following terms;

> *I Jan Bonde Nielsen in consideration of this Honourable Court granting interim orders pursuant to my application dated 30th August 2010 and filed on my behalf on the same date, do hereby irrevocable and unconditionally undertake to pay my damages as may be ordered by this Honourable Court in the event it is found at any time that the same is due and payable as a consequence of the grant of the orders aforesaid in the said Application.*

4. The orders granted by Koome J., were affirmed by Odunga J., by a ruling dated 30th March 2012. Nguruman successfully appealed against the injunction order. In a judgment dated 4th April 2014 in ***Nguruman Limited v Jan Bonde Nielsen, Hermanus Philipus Steyn and Hedda Steyn*****, NRB CA Civil Appeal No.77 of 2012 [2014] eKLR**, the Court of Appeal dissolved the injunction. Nguruman has now filed this suit seeking to enforce the undertaking given to the court as a condition for the grant of injunction by claiming damages amounting to USD 46,750,000.00 as compensation for the 187 weeks the injunction was in force.

5. In his defence dated 30th September 2014, Nielsen reiterated the circumstances which led him to filing **HCCC No. 332 of 2010**. He pointed out that the because of the difficulties between him and Hermanus Steyn and the failure to formalize the partnership between them, the Oldonyo Laro Lodge, which was situated on the Nguruman property, could not be let out to any paying guests for the amount claimed or at all and was in fact used as a personal resident by himself and his family. He further contends that this suit is an abuse of the court process

in so far as there are other suits pending between himself, Nguruman and the Steyns which have yet to be determined and which touch on the Nguruman property and Oldonyo Laro camp; ***HCCC 237 of 2014, Nguruman Limited v Jan Bonde Nielsen and Peter Bonde Nielsen***, ***HCCC No. 332 of 2010, Jan Bonde Nielsen v Hermanus Steyn and Others*** and ***Nakuru HCCC No. 120 of 2010, Nguruman Limited v Jan Bonde Nielsen***.

6. The existence of the undertaking as to damages is not disputed. When the matter came up on 19th November 2019, I directed the parties to address me on whether the undertaking should be enforced in the suit in which it was issued. The plaintiff filed written submissions. Both counsel addressed the court briefly on their respective positions. The question for determination is which is the convenient forum to enforce the undertaking.

7. The position taken by counsel for the plaintiff is that the court has discretion to order an inquiry as to damages either in the suit where the order is given or in separate proceedings. He submitted that since the Court of Appeal discharged the injunction granted by the High Court, this court should now hear the matter. Counsel referred to several decisions regarding when an inquiry for damages will be ordered. In ***Ushers Brewery Limited v P S King and Company (Finance) Ltd*** **[1971] 2 All ER 468, 472**, the court held as follows;

> *It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until the plaintiff has failed on the merits at the trial or it is established before the trial that the injunction ought not to have been granted in the first instance.*

8. The principles and guidance applicable to the procedure and practice of undertaking as to damages were aptly summarised by Neill LJ., in ***Cheltenham and Gloucester BS v Ricketts and Others*** **[1993] 4 All ER 276** as follows:-

> *(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
>
> *(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
>
> *(3) The undertaking is not given to the party enjoined but to the court.*
>
> *(4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.*
>
> *(5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued.*
>
> *(6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial …..…*
>
> *(7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available……. (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry ……..… (c) The court can adjourn the application for enforcement of the undertaking to the trial or further orders. (d) The court can determine forthwith that the undertaking is not to be enforced.* [Emphasis mine]

9. Counsel for plaintiff urged that **HCCC No. 332 of 2010** is a proper forum to enforce the undertaking since there the plaintiff is not expressly prohibited or prevented from enforcing an undertaking in a separate action.

10. Counsel for the respondent accepted that the court has discretion to determine when the undertaking should be enforced. He however submitted that the undertaking is to the court and not to the other party hence the undertaking should be enforced in the suit in which it was given. Counsel further submitted that in view of the existence of the other suits relating to the same parties and the same subject matter, the court ought to find that this suit violated **section 6** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)***.

11. As stated in ***Cheltenham and Gloucester BS Case*** **(Supra)**, the court has discretion to determine at what stage to conduct an inquiry as to damages within the suit in which the undertaking it given. That discretion is dependent on the circumstances of each case. Such factors include whether the injunction is dissolved before the trial or after the trial and the nature of evidence required. Although the cases do not specifically deal with question whether the defendant should file a separate suit which is the situation here, Neill LJ., made the point that an undertaking as to damages does not give rise to a cause of action.

12. In normal circumstances, where an application to enforce the undertaking is made in the suit in which it is given, the only issue is assessment of damages subject to applicant establishing causation. This case is different because the defendant filed a defence to the suit. The plaintiff then filed an application to strike out the statement of defence on the ground that it did not disclose any reasonable defence and/or that it was frivolous and vexatious and would prejudice a fair trial. After hearing the application and considering the defence, whose contents

I have set out earlier in this ruling, Amin J., delivered a ruling dated 21st April 2019 holding that the defendant had a valid defence to the suit. She observed that:

> *[14] In the circumstances, the Plaintiff's new suit is premature. However, it is the prerogative of any person to bring whatever suit he wishes. The defence is a substantive defence and goes to the root of the dispute between the parties which is yet to be resolved.* [Emphasis mine]

13. I understand that by stating that this suit was premature, the learned judge meant that the issue of the undertaking ought to await trial of **HCCC No. 332 of 2010**. For all intents and purposes, the court's view was that the issue of enforcing the undertaking was not ripe for trial. The plaintiff has not appealed against the finding and order of Amin J. In view of the aforesaid finding, I direct that the issue of the undertaking be heard together with **HCCC No. 332 of 2010**.

14. Since the court has held that the defendant has a valid defence which in intricately connected to **HCCC No. 332 of 2010**, it would be more convenient, save judicial time and the parties costs for the undertaking to be enforced in the case in which it was given.

15. I direct that this suit, being a suit for enforcement of an undertaking given by the plaintiff in **HCCC No. 332 of 2010**, be placed before the judge hearing **HCCC No. 332 of 2010** for directions and further orders.

16. Costs in the cause.

DATED and **DELIVERED** at **NAIROBI** this **10th** day of **FEBRUARY** 2020.

D.S. MAJANJA

JUDGE

Mr Abdullahi, SC with him Ms Ngugi instructed by Ahmednasir, Abdikadir and Company Advocates for the plaintiff.

Mr Kiragu instructed by LJA Associates Advocates for the defendant.