



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 188 OF 2019

VIJAY KUMAR DAVALJI K. GOHILPLAINTIFF

VERSUS

TREO APARTMENTS LIMITED 1 ST DEFENDANT

SURESH MOHANLAL FATANIA..... 2 ND DEFENDANT

SHANTILAL KARSANDAS VARIA 3 RD DEFENDANT

SUNILKUMAR POTATIAL DAVDA4 TH DEFENDANT

CHUNILAL SANTAILALA KHIMASIA 5 TH DEFENDANT

AMMET DIPAK BHATESSA 6 TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAL 7 TH DEFENDANT

JAYANTILAL HARIA8 TH DEFENDANT

MAHENDRA PATHAK 9 TH DEFENDANT

CHIEF LAND REGISTRAR 10 TH DEFENDANT

PRAVINCHANDRA JAMNADASS KAKAD t/a

PJ KAKAD & CO ADVOCATES 11 TH DEFENDANT

RULING

1. The plaintiff brought this suit on 6/6/2019 through a plaint of even date. He contended that in 2003, together with the 2nd and 3rd defendants, they jointly incorporated the 1st defendant under the now repealed Companies Act (Cap 486). The 1st defendant was to serve as a vehicle for the purpose of purchase of LR NO. 1870/11/288 (**the suit property**). Subsequently, on 25/7/2003, the 1st defendant acquired the suit property, The plaintiff thereafter took possession of what he described as his portion of the suit property, developed it, and settled thereon with his family. The 2nd and 3rd defendants similarly took a portion of the suit property and erected thereon six units. The plaintiff further contended that the 2nd and 3rd defendants refused to co-operate with him to complete the subdivision of the suit property and instead fraudulently procured a provisional title and caused subleases relating to the six units to be registered without involving him. He added that the 2nd and 3rd defendants similarly fraudulently procured removal of the caveat he had registered against the title.

2. Consequently, he sought the following orders against the defendants:-

As against the 2nd to 9th Defendants

(a) A declaration that half of the suit property known as LR No. 1870/11/388 and measuring approximately 0.1982 Ha legally belongs to the plaintiff herein and an order do issue for completion of the subdivision No. CPD PT5/4085/1870/11/385 approval by the Nairobi City Council on 28/9/2005 as against the 2nd – 9th and 10th defendants.

As against the 2nd – 9th and 10th Defendants

(b) A declaration that the conduct of the defendants and in particular the registration of the sub-leases in respect of the property known as LR No. 1870/11/388 are fraudulent and illegal hence void ab initio and an order for cancellation of the said subleases and the transfer of the reversionary interest.

(c) An order for the rectification of the register to the suit property being LR No. 1870/11/388 by cancellation of the subleases entered in the name of the 4th to 9th defendants, and the subdivision of the same to reflect the plaintiff as the duly registered owner of one half of the suit property being LR No. 1870/11/388.

(d) A declaration that the plaintiff has in any event been in adverse possession of part of suit premises that he occupies and an order directing the registrar of lands and director of surveys to subdivide the suit land and to issue the plaintiff with a title to 50% of the said parcel of No. IR No. 1870/11/388.

(e) Alternatively an order of specific performance of the said agreement between the plaintiff and the 1st and 2nd defendants for the subdivision of LR No. 1870/11/388 according to the original share allotment of the company at the time, to reflect the plaintiff's 50% ownership of the property, including the existing house that is his dwelling place for the past 15 years.

(f) A permanent injunction restraining the defendants or whosoever whether by themselves, their directors, agents, assignees, nominees, employees, servants, officers, and/or whosoever from trespassing, encroaching, advertising, selling, alienating, disposing off, charging, entering, constructing, evicting, demolishing and/or interfering with the plaintiff's right of quiet possession of his portion of the suit property being LR NO. 1870/11/388 as demarcated by the Director of the City Planning and Architecture on 23/9/2005.

As against the 11th, 2nd and 9th Defendants

(g) General damages and special damages for fraudulent registration of the subleases and dealings by the defendants with the suit property being LR No. 1870/11/388 and costs of rectification of the register.

(h) Punitive and exemplary damages for the said fraudulent dealings in the plaintiff's property against the plaintiff on parcel of land LR No. 1870/11/388.

(i) Costs of this suit.

(j) Any other or further reliefs as this honourable court may deem appropriate.

3. Together with the plaint, the plaintiff brought a notice of motion dated 6/6/2019 seeking the following orders;

(a) Spent.

(b) That this honourable court be pleased to issue a temporary injunction restraining the respondents, whether by themselves, their agents and servants from alienating or causing to be alienated, selling, disposing, transferring and/or in any way whatsoever, dealing with the subleases registered on the suit property herein being all that prime parcel known as LR No 1870/11/388 measuring approximately 0.1982 Ha, situate within Nairobi City County pending the inter-partes hearing and determination of this application.

(c) That this honourable court be pleased to issue a temporary injunction restraining the respondents, whether by themselves, their agents and servants from alienating or causing to be alienated, selling, disposing, transferring, charging and/or in any way whatsoever, dealing with the subleases registered on the suit property herein being all that prime parcel known as LR No 1870/11/388 measuring approximately 0.1982 Ha situate within Nairobi City County pending the hearing and determination of this suit.

(d) That an inhibition order be made under the provision of Section 68 and 106 of the Land Registration Act pending final determination of this suit in accordance with the law, all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the suit land with any land registry, government department and all other registering authorities be and is hereby prohibited in all that parcel of land known as LR No 1870/11/388 measuring approximately 0.1982 Ha, situate within Nairobi City County.

(e) That costs of this application be borne by the respondents.

4. In his sworn affidavit dated 6/6/2019, Vijay Kumar Davalji K Gohil deposed that he was the director and shareholder of the 1st defendant company. He stated that, together with the 2nd and 3rd defendants, they incorporated Treo Apartments Limited (the 1st defendant) on 22/5/2003, in which he held the majority shares at 50%. The other 50 % was to be shared equally between the 2nd and 3rd defendants. The main objective of incorporating the 1st defendant company was to enable the shareholders pool resources and purchase a parcel of land known as LR No 1870/11/388 (**the suit property**) situated in Westlands within Nairobi, which was valued at Kshs10, 800,000. He further deposed that it was mutually agreed that the suit property would be registered in the name of the 1st defendant and later be subdivided according to the shares owned by each of them. There was a house on a portion of the suit property. It was mutually agreed that the plaintiff would occupy the house while the 2nd and 3rd defendants would share the undeveloped portion equally. He deposed that he paid Kshs 6,400,000 while the 2nd and 3rd defendants paid Kshs 2, 200,000 each for the purchase of the suit property. He further deposed that on 25/7/2003, the suit property was transferred into the name of the 1st defendant. The 2nd and 3rd defendants however refused to have the suit property subdivided. Instead, they erected 6 units on the suit property which encroached on part of the plaintiff's portion of the suit property.

To secure his interest, he lodged a caveat at the Lands Registry. He added that the 2nd and 3rd defendants fraudulently, maliciously and unlawfully swore an affidavit alleging that the title of the suit property had been stolen during a carjack incident. The plaintiff stated that the process of lifting the caveat was done unlawfully, illegally and unprocedurally because he was not informed of the same. A letter notifying him that the caveat had been lifted was issued on the same day the caveat was lifted.

5. The plaintiff deposed that the 2nd and 3rd defendants subleased the apartments to the 4th to 9th defendants who were described as shareholders of the suit property. He further deposed that the title issued shows that he owns the suit property in equal shares with the 4th to 9th defendants. He added that the 4th to 9th defendants have threatened to evict him from the suit property.

6. The application was opposed. The 2nd, 3rd and 11th defendants filed a notice of preliminary objection dated 5/7/2019 on the following grounds;

(a) That pursuant to Section 6 of the Civil Procedure Act, this suit is subjudice to other similar pending suits.

(b) That this honourable court lacks jurisdiction to entertain the suit.

(c) That this suit is fatally defective and an abuse of the court process.

7. The 4th to 9th defendants filed a replying affidavit dated 8/11/2019 and a notice of preliminary objection dated 1/7/2019. The replying affidavit was sworn by Mahendria G Pathak, the 9th defendant. He deposed that the plaintiff's application was an abuse of the court process. He further deposed that the plaintiff had filed a similar suit, to wit, Nairobi HCCC 64 of 2016 and an Insolvency Petition which has not been determined. He further deposed that sale of part of the suit property was done procedurally because upon constructing and selling the six units, the 2nd and 3rd defendants transferred their shares to the 4th – 9th defendants. He added that the plaintiff's suit was premature because there was a clause providing for arbitration.

8. The Notice of Preliminary Objection raised the following grounds:

(a) That the subject suit is premature, bad in law and offends the 1st defendant's memorandum and articles of association and in particular Article 31 in that all internal disputes should be resolved first through arbitration. The suit herein should thus be stayed pending arbitration and struck off altogether.

(b) That the plaintiff has no locus standi to bring the subject suit either as against the 1st defendant company and/or against the 4th -9th defendants/respondents or at all.

(c) That the 1st defendant/ respondent company is the subject of liquidation proceedings (Insolvency Petition No 14 of 2018- IN THE MATTER OF TREO APARTMENTS LTD) instituted by the plaintiff/applicant herein and filing of the suit herein and moreso without leave offends among other provisions, Section 428 as read together with Section 431 of the Insolvency Act.

(d) That the suit property belongs to the 1st defendant and the suit therefore offends the rule in SALOMON V SALOMON [1897] AC 22.

(e) That the suit offends the principles in FOSS V HARBOTTLE and ought to be struck off.

(f) That the events complained of took place in the year 2003-2005 or thereabout and the plaintiff's claim is therefore statute barred under the provision of the Limitation of Actions Act.

(g) That the suit is incurably defective and incompetent in law and ought to be struck off with costs.

(h) That the plaintiff has not demonstrated that he has a prima facie with any possibility of success nor does it meet the test in Giella vs Casman Brown and the prayers sought ought to be refused.

9. The application was canvassed by way of written submissions. Counsel for the plaintiff filed written submissions on 4/12/2019 in which he framed the following issues for determination: (a) Whether the Preliminary Objection raised pure points of law; (b) Whether the matter was *sub judice* under the provisions of Section 6 of the Civil Procedure Act; (c) Whether the court had jurisdiction to hear the application; (d) Whether temporary orders of injunction should issue (e) Whether the application was fatally defective; (f) Who should bear the costs of the application. Counsel for the plaintiff submitted that the preliminary objection filed by the defendants did not meet the threshold set in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696**. It was submitted that Article 162 (2) (b) establishes the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of and title to land. Counsel further submitted that the jurisdiction of the Environment and Land Court is set out in Section 13 of the Environment and Land Court Act. It was contended that this matter was properly before the court. Counsel further submitted that the issues raised in the Insolvency Petition cannot be determined by this court and therefore, the current suit did not offend the provisions of Section 6 of the Civil Procedure Act. It was further submitted that the previous suits were not heard to conclusion and therefore, the claim of *res judicate* or *sub judice* would not arise. Reliance was placed on the case of **Albert Magu Musa v Samuel Kagundu Muchira & 3 others [2017] eKLR**.

10. The plaintiff's counsel further submitted that the plaintiff had established a prima facie case against the defendants. He argued that the defendants did not contest the fact that the plaintiff was the legal owner of one half of the suit property and therefore, the plaintiff's right to own the suit property must be protected. It was further submitted that the balance of convenience tilted in favour of the plaintiff since he was the majority shareholder and risked losing his property. He argued that in such circumstances, a preservative order should issue. Reliance was placed on **Joel Kipkurui Arap Koeh v Alice Wambui Magundu & 3 others [2018] eKLR** and **Shivabhai Nathabhai Patel v**

Manibhai Hathibhai Patel [1959] EA 907. Lastly, it was submitted that an order of inhibition should be issued to bar the parties from performing further transactions on the suit property pending the hearing and determination of this case. Reliance was placed on the case of **Dorcas Muthoni & 2 Others v Michael Ireri Ngari [2016] eKLR.**

11. The 2nd, 3rd and 11th defendants filed their submissions on 26/11/2019 through the firm of P J Kakad & Kakad Advocates. It was submitted that the suit herein was *sub judice* because it involved the same parties and dealt with the same issues that were raised in the previous suits instituted by the plaintiff. It was argued that there was a pending insolvency suit and Nairobi HCCC No 64 of 2006 which are yet to be determined. It was argued that where *sub judice* is likely to feature, the party who wishes to file a fresh suit should withdraw the existing suits. Reliance was placed on **Republic v Chairman District Alcoholic Drinks Regulation Committee & 4 others Ex-Parte Detlef Heier & another [2013] eKLR.** Reliance was placed on the following cases: **Muturi Investments Ltd v NBK [2006] eKLR;** and **Kampala High Court Civil Suit No 450 of 1993, Nyanza Garage v Attorney General.**

12. The 1st, 4th – 9th defendants filed their submissions on 16/12/2019 through the firm of J M Njenga & Company Advocates. Counsel submitted that the plaintiff did not have the *locus standi* to institute this suit. It was argued that a company is capable of instituting proceedings in its name. Reliance was placed on **Shlawete Ltd & another v Pianeli Casino [2012] eKLR** where Meoli J in relying on the English cases of **Salomon v Salomon [1897] AC 22** and **Foss v Harbottle** held that a company can institute a suit against its directors. It was further submitted that this court cannot determine this matter because the insolvency petition has not been concluded; that the matter had previously been litigated and was pending appeal. Reliance was placed on the following cases: **Thiba Min Hydro Co Ltd v Josphat Karu Ndwegs [2013] eKLR;** **Manfred Walter Schmitt & another v Attorney General & 3 others [2014] eKLR;** and **Kolaba Enterprises Limited v Shamshudin Hussein Varvani & another [2014] eKLR.** Counsel submitted that the present suit offended the Memorandum and Articles of Association of the 1st defendant because Clause 11 provided that where there was a disagreement, the matter would be referred to an arbitrator. Reliance was placed on **Manzini Wanderers Football Club v Special Coca-Cola Committee of the National Football Association Swaziland and others (1970-1976) Swaz L R 428)** where the court held that the constitution of a company is binding and where it is provided that a matter should be referred to arbitration, the courts should not interfere. It was further submitted that the plaintiff did not follow due process because he ought to have obtained prior leave from the court.

13. It was further submitted that the plaintiff had not established a *prima facie* case against the defendants. It was argued that no evidence had been placed before this court to warrant an order of injunction. It was argued that the plaintiff would not suffer irreparable loss if an injunction was declined because he was in possession of part of the suit property. It was argued that in the absence of the first two requirements for granting an injunction, the balance of convenience tilted in favour of the plaintiff.

14. I have considered the application, the notice of preliminary objection, the affidavits in support and against the application, the parties' respective submissions, the relevant legal framework, and the relevant jurisprudence. The key question in this application is whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to grant interlocutory injunctive orders. However, the two notices of preliminary objection raise questions relating to the jurisdiction of this court to entertain this suit together with the present application. Because questions relating to the jurisdiction of this court have been raised, the law behoves me to dispose those questions before making any other determination in this suit [**See Owner of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.**]

15. The first question of jurisdiction is premised on the arbitration agreement contained in the 1st defendant's articles. It requires that all disputes involving the 1st defendant and its shareholders be resolved through arbitration. The present suit involves the plaintiff on one part and the 11 defendants on the other part. The plaintiff is a shareholder of the 1st defendant. The 2nd to 9th defendants are also shareholders of the 1st defendant. There is, however, no indication that the 10th and 11th defendants are shareholders of the 1st defendant. To this extent, the 10th and 11th defendants cannot be compelled to submit themselves to arbitration under the said arbitration agreement because they are not privy to the arbitration agreement. This ground of preliminary objection therefore fails.

16. The second question of jurisdiction relates to the existence of a related suit, namely, Nairobi High Court Insolvency Petition No. 14 of 2018 filed by the plaintiff herein. The plaintiff has not contested the fact that the above petition subsists in the Commercial, Tax and Admiralty Division of the High Court at Nairobi. The petition was initiated by the plaintiff. The Insolvency Act, No 18 of 2015, contains an elaborate framework on administration and liquidation of incorporated bodies such as the 1st defendant. The dispute in this suit is about the shareholding of the 1st defendant and the entitlement of the various shareholders to the leasehold interest in the suit property which is registered in the name of the 1st defendant. The insolvency court is the forum where each of the shareholders, including the plaintiff, will be entitled to ventilate their respective stakes in the 1st defendant and in the suit property.

17. In my view, it would go against the spirit and letter of Sections 6 and 7 of the Civil Procedure Act if this court were to allow the present proceedings to go on while aware that there are insolvency proceedings relating to the 1st defendant and having a direct bearing on the reliefs sought in this suit. I will therefore allow the preliminary objection to the extent that the proceedings herein will be stayed pending the hearing and determination of Nairobi High Court Insolvency Petition No 14 of 2018.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF MARCH 2020

B M EBOSO

JUDGE

In the presence of:-

Mr Mirie holding brief for Mr Kingara for the plaintiff

Jeruto holding brief for Njenga for 4th-9th defendant

Kathangu for the 2nd, 3rd and 11th defendant

June Nafula-Court clerk