**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO.E122 OF 2018**

**HARUN HAJI ALI.....APPLICANT**

**VERSUS**

**ABDRAHMAN MAALIM ABDIKADIR.....1ST RESPONDENT**

**RAHMA JILLO ADVOCATES.....2ND RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND.....3RD RESPONDENT**

**RULING**

(1) Before Court is the Notice of Motion dated **18th October 2018,** in which **HARUN HAJI ALI** (the Plaintiff/Applicant) and seeks for Orders :-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT pending the hearing and determination of this suit herein and or further orders, the Honourable court be pleased to issue an order of INJUNCTION prohibiting and/or restraining the Defendant/Respondents either by itself, its authorized agents, servants, officers, employees or otherwise whomsoever from any dealings, further transfer, destruction and/or trespass of the suit property, possession and occupation of all that property situated and known as LR 97/ 1987/394 TASIA & LR 97/ 1987/400 TASSIA.**
>
> **4. THAT the costs of this Application be awarded to the Applicant.**

(2) The application which was premised upon **Sections 3A & 63(e)** of the **Civil Procedure Act, Order 5, Order 40 Rules 1 (a) & (b), 2(1) & (2) Rule 10(1) (a) of the Civil Procedure Rules** and all other enabling provisions of law, was supported by the Affidavits of even date sworn by the Applicant.

(3) The 1st Respondent **ABDIRAHMAN MAALIM ABDIKADIR**, strenuously opposed the application by way of his Replying Affidavit dated **31st October 2018**. The 2nd Respondent **RAHMA ADAN JILLO** also filed a Replying Affidavit dated **31st October 2018** in opposition to the application. The 3rd Respondent being **NATIONAL SOCIAL SECURITY FUND**, did not file any papers in reply to the application. In response to the two Replying Affidavits the Plaintiff/Applicant filed the Supplementary Affidavit dated **29th November 2018**.

**BACKGROUND**

(4) The 1st and 2nd Respondents aver that, the Applicant approached and presented himself to the 1st Respondent and several other persons of Somali origin residing in Sweden, as a man who had a vast business empire in Kenya. The Applicant invited these persons to join him in investing with promises of handsome returns upon their investments.

(5) The 1st Respondent then began to send funds to the Plaintiff/Applicant for purposes of investment in the latter's business ventures in Kenya. The 1st Respondent states that by June 2018 they had cumulatively sent to the Applicant funds totaling **USD 1,595,000.00.** At this point the 1st Respondent realized that the Applicant had misrepresented himself and that the funds he was sending were not being invested in

any business venture but instead, according to the 1st Respondent the monies were being utilized by the Applicant to fund his extravagant and luxurious lifestyle in Kenya.

(6) Upon discovering this misrepresentation, the 1st Respondent moved to recover the monies which he had sent to the Applicant. In this regard the 1st Respondent lodged a criminal complaint against the Applicant with the Directorate of Criminal Investigations (DCI) and also engaged Somali elders in an attempt to achieve an amicable solution.

(7) After discussions the Applicant undertook to refund the monies sent to him by **July 2018**. This undertaking was reduced into writing vide a **"Debt Acknowledgement** and **Repayment Agreement"** dated **7th June 2018**. The Applicant further agreed to pledge the Title Document for his two parcels of land being **LR NO.97/1987/394, TASSIA** and **LR NO.97/1987/400 TASSIA** (hereinafter jointly referred to as the **"suit properties"**), as security for the agreement to refund the monies owed to the 1st Respondent and others.

(8) However the Applicant failed to refund the monies owed by **31st July 2018** and the suit properties were transferred to the 1st Respondent and two others.

(9) The Plaintiff/Applicant now challenges the transfer of the suit properties to the 1st Respondent and avers that there was no sale agreement to warrant such transfer, The Applicant contends that he stands to suffer great prejudice if the orders sought are not granted given that he had invested a colossal amount of money towards the purchase of said suit properties. The Plaintiff/Applicant further avers that on **18th June 2018** whilst in the offices of the 2nd Respondent, he was assaulted and forced to sign the Debt Acknowledgement Agreement. The Applicant avers that he does not speak or understand English. He states he is only able to understand Somali, Kiswahili and Swedish. He complains that the documents which he was coerced into signing were neither translated nor explained to him. As such the Applicant claims that the two documents ought to be voided in their entirety. The Applicant contends that the suit properties have been taken from him through fraud.

**ANALYSIS AND DETERMINATION**

(10) I have considered the written submissions filed by both counsels as well as the relevant statute and case law. The Plaintiff/Applicant is seeking injunctive orders. The factors which a court ought to bear in mind in determining whether or not to grant an interlocutory injunction were set out in the case of **GIELLA –VS- CASMAN BROWN [1973] E.A** as follows:-

(1) The Applicant must show that he has a **"prima facie"** case with a probability of success against the Respondent.

(2) The Applicant must demonstrate that unless the orders sought are granted, he will suffer irreparable harm which cannot be adequately compensated by an award of damages.

(3) That if the court is in doubt the matter to be determined on a balance of convenience.

**PRIMA FACIE CASE**

(11) In **MRAO –VS- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR,** a prima facie case was defined as follows:

> **"a prima facie case in a civil application includes but is not confirmed to a "genuine and arguable case." It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter."**

(12) The 1st Respondent has cited the **"Debt Acknowledgement and Repayment agreement"** dated **7th June 2018** signed by the Plaintiff in which the Plaintiff admitted owing the 1st Respondent and two (2) others namely **Galbeed Keyd Abdi** and **Ahmed Hassan Mohamed** the cumulative sum of **USD 1,595,000**. A copy of the said Agreement (**AMA-3a)** was annexed to the 1st Respondent Replying Affidavit dated **31st October 2018.** The Agreement bears the Applicants signature and is witnessed by a lawyer namely **Rahma Adan Jillo Advocate** (the 2nd Respondent herein) who has also affixed his stamp thereon. Similarly **Annexture AMA 3(b)** to the same Replying Affidavit is an **"Agreement for Sale/Transfer"** of the two suit properties which Agreement is dated **7th June 2018**. The latter Agreement also bears the signature of the Applicant witnessed by the 2nd Respondent.

(13) The Applicant does not deny having signed the two documents. However he seeks to vitiate the Agreement on the grounds that he was assaulted and coerced into signing the Agreements. The Applicant told the court that he reported this assault on this person at Central Police Station Vide **OB No.93 of 9/6/2018**. The Applicant also avers that he did not understand the import of the two Agreements as he does not read or speak English and therefore had idea what the documents which he was forced to sign contained.

(14) The two Agreements are both dated **7th June 2018**. In his Supplementary Affidavit dated **29th November 2018** the Applicant confirms that he went to the legal offices of the 2ndRespondent on **7th June 2018**. The report at Central Police Station was made on **9th June 2018**. If as alleged the Applicant was assaulted in that office and forced to sign documents which he did not understand on **7th June 2018**, why did it take him two (2) days to make a report to the police. This delay is not explained and such behavior is not consistent with a person who had been assaulted and forced to sign strange documents.

(15) Secondly a perusal of the Applicant's Supporting Affidavit filed on **18th October 2018**, the day the motion was filed under certificate,

reveals that no mention is made at all in that Affidavit of any assault, coercion, force or duress. The Applicant only raises these issues in his Supplementary Affidavit filed after the 1st and 2nd Respondent had filed their replies to the application. Allegations of coercion, assault and duress are very grave allegations and certainly go to the root of the two agreements. Why did the Applicant fail to raise these issues at the first instance and at the earliest opportunity? In his Affidavit in support of his Notice of Motion dated **18th October 2018** at para 12, the Applicant merely claims that he made a report to the police "**in connection to death threats to me and my family."** No mention is made of an assault to his person, having occurred in the offices of the 2nd Respondent. Why did he only belatedly raise the allegations of assault and coercion in a Supplementary Affidavit almost as a postscript or an afterthought? The possibility that the Applicant is only belatedly raising these allegations in an attempt to run away from the two Agreements which bear his signature cannot be excluded.

(16) Finally an interlocutory injunction is an equitable remedy and it is trite law that he who comes to equity must come with clean hands. In **KENCAB CONS LTD –VS- NEW GATITU SERVICE STATION LTD & Another [1990]KLR** it was held that:-

> **"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."**

The Applicant failed to disclose to the court that he owed a substantial amount of money to the 1st Respondent. No mention is made of this fact in his Affidavit dated **18th October 2018**. The applicant also failed to disclose that there existed an Agreement signed by himself where he had undertaken to refund the monies owed as well as an Agreement for transfer of the suit properties. These issues were only revealed to the Court by the Respondents in their Replying Affidavits. It is clear that the intention of the Applicant was to conceal these relevant facts from the Court. The Applicant is therefore guilty of material non-disclosure which makes him undeserving of the orders sought. All in all I find that the Applicant has failed to disclose a prima facie case and on this ground his application for an injunction is not meritious.

**IRREPARABLE HARM**

(17) The next question is whether the Applicant is likely to suffer irreparable harm which cannot be adequately compensated by an award of damages. In **HALSBURY'S LAWS OF ENGLAND 3rd Edition Volume 21 para 739,** it is stated as follows:-

> **"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds, first that the injury is irreparable and second that it is continuous**."[own emphasis]

The same text proceed to define irreparable injury thus:-

> **"By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damage is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."** [own emphasis]

(18) The suit properties are properties whose value can be ascertained. It follows that any loss the Applicant may suffer is quantifiable and can be adequately compensated by an award of damages. There has been no allegation that the Respondents would not be in a position to pay such damages if ordered to do so. Therefore this limb also fails.

**BALANCE OF CONVENIENCE**

(19) The role of any court is to interpret and uphold the terms of a valid contract. As things stand there exist contracts by which the Applicant bound himself to refund certain monies in default of which the suit premises would be transferred to the 1st Respondent. Granted the validity of these Agreements is being challenged by the Applicant. However a determination on this issue will have to abide the full hearing of the suit. My view is that the balance of convenience favours the Respondents.

(20) Finally I find no merit in the present application. The Notice of Motion dated **18th October 2018** is hereby dismissed in its entirety and costs are awarded to the 1st and 2nd Defendant/Respondents.

**Dated in Nairobi this 11th day of October 2019.**

**……...**

**Justice Maureen A. Odero**