



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 589 OF 2015

AKSHATA MANDEVIA.....1ST PLAINTIFF/APPLICANT

IMRAN LALANI.....2ND PLAINTIFF/APPLICANT

VERSUS

ANIL MANDEVIA.....1ST DEFENDANT/RESPONDENT

ANIKET MANDEVIA.....2ND DEFENDANT/RESPONDENT

RULING

[1] The Notice of Motion dated **24 November 2015** was filed herein by the Plaintiffs/Applicants pursuant to Sections **1A, 1B** and **3A** of the **Civil Procedure Act, Order 40 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** for the following orders:

[1] [spent]

[2] That pending the hearing and determination of the application *inter partes*, the Court be pleased to issue a temporary injunction restraining the 1st and 2nd Defendants/Respondents by themselves, their employees, servants or agents from threatening, assaulting, harassing and otherwise interfering with the lives, personal and bodily integrity of the 1st and 2nd Applicants;

[3] That pending the hearing and determination of the application *inter partes*, the Court be pleased to issue a temporary injunction restraining the Respondents from acting as *bona fide* shareholders of 90 shares in Viking House Best of Kenya Limited or from selling, disposing of or otherwise dealing with the said shares;

[4] That pending the hearing and determination of this application *inter partes*, the Court be pleased to issue an order directing the Registrar of Companies to reverse forthwith the fraudulent transfer of shares purportedly effected by a Transfer Deed dated February 2, 2015 and stamped on February 4, 2015;

[5] That pending the hearing and determination of the application *inter partes*, the Court be pleased to issue a mandatory injunction compelling the Respondents to return forthwith the Applicants' business equipment and personal belongings that are under the custody and control of the Respondents;

[6] That pending the hearing and determination of the this suit, the Court be pleased to issue a temporary injunction restraining the 1st and 2nd Defendants/Respondents by themselves, their employees, servants or agents from threatening, assaulting, harassing and otherwise interfering with the lives, personal and bodily integrity of the 1st and 2nd Applicants;

[7] That pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction restraining the Respondents from acting as *bona fide* shareholders of 90 shares in Viking House Best of Kenya Limited or from selling, disposing of or otherwise dealing with the said shares;

[8] That pending the hearing and determination of this suit, the Court be pleased to issue an order directing the Registrar of Companies to reverse forthwith the fraudulent transfer of shares purportedly effected by a Transfer Deed dated February 2, 2015 and stamped on February 4, 2015;

[9] That pending the hearing and determination of this suit, the Court be pleased to issue a mandatory injunction compelling the Respondents to return forthwith the Applicants' business equipment and personal belongings that are under the custody and control of the Respondents;

[10] That the costs of the application be provided for.

[2] The application is based on the grounds set out therein and the Supporting Affidavit sworn by **Akshata Mandevia** on **24 November 2015** together with the annexures thereto. The brief background to the application is that the 1st and 2nd Applicants are husband and wife. The 1st Applicant is the daughter of the 1st Respondent and a sister to the 2nd Respondent. It was the 1st Applicant's case was that on **23 June 2014**, the 1st Respondent transferred ninety (90) shares in the company known as **Viking House Best of Kenya Limited** (hereinafter **the Company**), to her and that she thereupon became the legal and beneficial owner of the said shares. That she thereafter learnt that the shares aforementioned had been transferred to the 2nd Respondent by a Transfer Deed dated **2 February 2015**; and when she raised the issue with the Respondents, what followed was a series of persistent intimidation, harassment, threats, trespass and violence against the Applicants as well as unlawful arrest, false imprisonment and confinement of some of the employees of the Applicants in a bid to threaten and instill fear on the Applicants, and frighten the 1st Applicant from pursuing her rights. It was further contended by the Applicants that the Respondents also caused damage to some of their furniture, and took into their own custody the Applicants' expensive office furniture, business equipment, computing equipment and other appliances; and that as a result thereof the Applicants are apprehensive that unless this Court intervenes by granting the orders sought, the Respondents shall continue with their scheme of harassment and fraud; hence their application for interim relief pending the hearing and determination of the suit.

[3] In their Replying Affidavit sworn by **Anil Mandevia**, the 1st Respondent, the Respondents opposed the application contending that prayers 2, 5, 6 and 9 cannot issue before the Commercial Division, because the same are based on alleged personal wrongs arising from alleged criminal/tortious acts; and that since the standard of proof required in criminal matters is beyond reasonable doubt, the prayers aforementioned cannot be granted at an interlocutory stage in an application for interim injunction. As for prayers 3, 4, 7 and 8 of the application, it was the contention of the Respondents that currently, the shareholding of the Company, as per the document annexed to the Supporting Affidavit and marked **AM 14**, is in the names of the Respondents; and therefore that a *status quo* order would suffice.

[4] The 1st Respondent explained how he acquired the suit property known as **Viking House**, and the circumstances under which the Company, **Viking House Best of Kenya Limited**, was formed. He conceded that he did transfer 90 shares to his daughter, the 1st Applicant, but contended that the transfer was only temporary for the purpose of facilitating the 1st Applicant in her quest to purchase a flat in London through mortgage. He further stated that out of caution and on the advice of his lawyers, a Transfer Deed was contemporaneously prepared in respect of the 90 shares, that was duly signed in his favour by the 1st Applicant. He added that when he realized that he had been misled by the 1st Applicant, he caused his Advocates, **Maina Njuguna & Associates**, to revert the shares by filing the Transfer Deed that had been held in escrow; after which he transferred the same to the 2nd Respondent in trust. He

therefore denied that the 1st Applicant's signature in the Transfer Deed had been forged as alleged.

[5] The 1st Respondent further denied the allegations of harassment, intimidation, assault and threats of violence levelled against the Respondents, contending that he loves both his children and would never knowingly cause either of them any harm or allow any harm to befall them. He accordingly urged the Court to dismiss the application with costs on the ground that the Applicants had failed to satisfy the requirements for the grant of the orders sought.

[6] The 1st Applicant, in her Further Affidavit filed on **31 March 2016** refuted the averments in the 1st Respondent's Affidavit, contending that although the Transfer Deed purports to have been executed in the presence of one **Richard Odenyo, Advocate**, of P.O. Box 21242, Nairobi, she had never met nor appeared before him; and that from the records held by the Law Society of Kenya, the said **Richard Odenyo** had been a judicial officer from as early as **8 September 2009**. The 1st Applicant further averred that the special resolution extracted from an alleged special general meeting of the directors of the Company held on **2 February 2015** was a forgery, and that at the time of the purported special general meeting, she was in the United Kingdom. The 1st Applicant engaged the services of a forensic document examiner, Mr. **Emmanuel Karisa Kenga**, with a view of verifying the signatures on the Transfer Deed and it was her contention that the signatures were found not to match her genuine signature. She thus reiterated her position that she is still the holder of 90 shares in the suit company and is therefore deserving of the orders sought.

[7] In their written submissions filed on **14 June 2016**, the Plaintiffs/Applicants posited that the only issue for determination is whether the Court should aid the Defendants by preserving a position which they obtained through fraud and forgery. They reiterated their position as expressed in their Notice of Motion and the Supporting Affidavit together with the annexures thereto marked **AM1 to AM10**, as well as the Further Affidavit filed on **31 March 2016** and the documents annexed thereto; and urged the Court to allow their application. Counsel for the Plaintiff relied on the authorities of **Jonesco vs. Beard [1930] All ER 483**; **Lazarus Estates Ltd vs Beasley [1956] 1 All ER 341**; and **Prest vs. Petrodeal Resources Ltd & Others [2013] UKSC 34**, for the proposition that the effect of fraud is to vitiate any consent that may have been given, so that the transaction becomes voidable *ab initio*, and that having demonstrated fraud, they had not only shown that they had a *prima facie* case with a probability of success in terms of the principles set out in **Giella vs Cassman Brown Limited [1973] EA 358**, but also proved that they stand to suffer irreparable harm which cannot be compensated in damages to warrant the issuance of a temporary injunction as sought herein.

[8] With regard to their prayer for mandatory injunction, the Applicants relied on **Locabail International Finance Ltd vs Agroexport and Others [1986] 1 All ER 901** and reiterated their contention that the Respondents unlawfully and unprocedurally transferred her 90 shares to themselves, and that they further employed underhanded tactics in a bid to sanitize the transfer. It was thus the Applicants' submission that they have satisfied the conditions for the grant of an interim mandatory injunction as well, and urged the Court to allow the application dated **24 November 2015** as prayed and grant the orders sought pending the hearing and determination of this suit.

[9] The Defendants/Respondents, on the other hand, submitted that since there is a *status quo* order in place with regard to the shareholding of the Company, in which the 1st Respondent currently holds 1 share while the 2nd Respondent holds 99 shares, the orders sought are unwarranted. It was thus their contention that prayers numbers 1 to 5 are spent, and therefore deserve no consideration. With regard to prayers 6 to 9, it was the Respondents' submission that the same cannot issue on the ground that they are criminal in nature, and therefore that the standard of proof, which is higher than that which is required in civil cases, had not been met. It was further argued that given the standard of proof required in cases where fraud is alleged, such are not matters that can be disposed of by way of interlocutory applications or on the basis of contested affidavit evidence.

[10] The Respondents further argued, on the basis of **Industrial & Commercial Development Limited vs. Mawa Family Company Limited & Others [2015] eKLR**, that the 1st Applicant having paid no consideration for the 90 shares that she claims, the transaction was void. The Respondents further asserted

that if anything, it was the 1st Plaintiff/Applicant who obtained the shares by fraudulent manipulation of the 1st Respondent, on the pretext that she needed the shares to enable her obtain a mortgage for a property that she was purchasing in London, when her real intention was to dispossess him of the suit property, which he contended is his only source of income; and that upon discovery of the fraud, the 1st Respondent merely used the Transfer Deed that had been executed earlier by the 1st Applicant and the 1st Respondent as a precautionary measure, to reverse the transfer.

[11] The Respondents relied on the case of **Nephat Muchiri Wagachau vs. Margaret Kariuki & Others [2009] eKLR** and **Susan Nyokabi Ngoci & Another vs. Kimson Holding Limited & Another [2015] eKLR** to support their proposition that failure by the Applicants to plead fraud in their Complaint dated **24 November 2015**, is fatal to their claim. They thus urged for the dismissal of the application dated **24 November 2015**, contending that the Applicants have not satisfied the conditions for the grant of either a temporary injunction as per the case of **Giella vs. Cassman Brown Limited** or mandatory injunction as enunciated in the case of **Locabail International Finance Ltd vs. Agroexport & Others** (supra).

[12] The Court has carefully considered the application, the grounds upon which it has been brought, the Supporting Affidavit and the annexures thereto, as well as the response filed by the Respondents herein. I have also carefully perused and considered the written submissions filed herein by the parties as well as the oral submissions that was made by their Counsel on **7 September 2016**. I would agree with the Respondents that prayers 1 to 5 of the Notice of Motion dated **24 November 2015** are spent and therefore deserve no consideration.

[13] The application is expressed to have been brought under **Order 40 Rule 2 of the Civil Procedure Rules**, which provides thus:

"In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, any injury of a like kind arising out of the same contract or relating to the same property or right."

Accordingly, it was incumbent upon the Applicants to demonstrate that on a *prima facie* basis, their suit seeks to have the Respondents restrained from committing a **breach of contract** or **committing other injury of any kind**.

[13] In their Complaint filed on **24 November 2015**, the Applicants seek judgment against the Defendants in the following terms:

[a] A permanent injunction restraining the 1st and 2nd Defendants/Respondents by themselves, their employees, servants or agents from threatening, assaulting, harassing and otherwise interfering with the lives, personal and bodily integrity of the 1st and 2nd Applicants;

[b] A declaration that the transfer of 90 shares by Transfer Deed dated **2 February 2015** is null and void;

[c] A permanent injunction restraining the Respondents from acting as *bona fide* shareholders of 90 shares in Viking House Best of Kenya Limited or from selling, disposing of or otherwise dealing with the said shares;

[d] an order directing the Registrar of Companies to rectify the Register by cancelling the fraudulent transfer of shares and issuing an appropriate CR 12 form;

[e] An order compelling the 2nd Defendant to return forthwith the Plaintiff's business equipment and personal belongings that are under the custody and control of the 2nd Respondent;

[f] General damages for tort;

[g] Recovery of accounts;

[h] Interest and costs.

[14] Regarding the circumstances under which the 1st Applicant acquired the 90 shares that are the subject of this suit, she stated in paragraph 7 of her Supporting Affidavit that the Company was owned initially by her parents, the 1st Defendant and **Bina Mandevia**, until the month of **June 2014**, when they jointly caused 90 of the shares to be transferred to her. The relevant CR 12 form evidencing the transfer was exhibited to the 1st Applicant's affidavit as **Annex. AM2**. In effect, the 1st Respondent had transferred his 90 shares to the 1st Applicant, thereby remaining with 9 shares only, while **Bina Mandevia** continued to hold her one (1) share in the Company, as confirmed by the documents marked **Annex. AM3** to the Supporting Affidavit.

[15] The 1st Respondent, on the other hand contended that the 1st Plaintiff convinced him that the only way she could secure a mortgage from Barclays Bank PLC, United Kingdom, was to show that she had a majority stake in the Company, and that it was therefore necessary for the property known as **Viking House, LR No. 1870/X/10, Nairobi**, to be transferred to the Company; and that she persuaded him that such a transfer would translate into tax relief for him and his wife. The 1st Defendant further averred that he succumbed to the sweet talk and pressure from the 1st Defendant and ended up agreeing to giving her 90 of his shares, but on condition that she signed a resignation form and a Share Transfer form as a safeguard. The 1st Respondent exhibited copies of the register in respect of the London property as **Annex. AVM3** to the Replying Affidavit, and the said documents do confirm that **Flat No. 21** at Argyll Mansions, Hammersmith Road, London, had been purchased by the two Applicants at GBP 707,000 on or about **23 September 2014** with funds from Barclays Bank PLC. The 1st Respondent further demonstrated through the documents marked **Annex. AVM6** that he sent funds to the 1st Applicant to support their purchase of the London property. These averments were not rebutted by the Applicants.

[16] In the circumstances, it would appear that this was a family arrangement in which the 1st Defendant/Respondent, opted to assist the Plaintiffs/Applicants in purchasing their London property. Thus no written contract was drawn and indeed no consideration was paid by the 1st Applicant for the 90 shares. Indeed it is doubtful whether the 2nd Respondent, who now holds 99 shares in the company, paid any consideration either. Hence, it cannot be said, strictly speaking, that there is a contract between the parties which is threatened with breach for purposes of **Order 40 Rule 2 of the Civil Procedure Rules**.

[17] The Plaintiffs/Applicants did argue however, and this appears to be the main plank of their case, that whereas the 1st Respondent would be within his rights to have a change of heart and require that the 90 shares be re-transferred to him, such transfer could only be done by lawful means and not fraudulently. In support of their allegations of fraud the 1st Applicant contended that:

[a] She was out of the country when the re-transfer was effected, and therefore she did not attend the special general meeting that is alleged to have taken place on **2 February 2015**;

[b] She did not appear before **Richard Odenyo** as purported by the Transfer Deed dated **2 February 2015** and that in any case, records from the Law Society of Kenya marked AM1 to the 1st Applicant's Further Affidavit showed that the said Richard Odenyo was not a practicing Advocate as at **2 February 2015** when the document was allegedly signed.

[c] She contended that the signature on the Transfer Deed purporting to be hers is a forgery.

[18] Whereas the foregoing averments are forceful, the fact of the matter is that the re-transfer was effected on **2 February 2015** and as matters stand, the shareholders of the Company are the Defendants (see the bundle of documents marked **AVM 1**); hence, it would be a misnomer to say that they are not *bona fide* shareholders of the Company and to ask that they be restrained from acting as *bona fide* shareholders of the Company, when, in the eyes of the law, they indeed are the current shareholders.

Accordingly, it is my considered view and finding that the Applicants have not demonstrated that they have a **prima facie case** to warrant the issuance of the restraining orders prayed for in paragraph 7 of the Notice of Motion dated **24 November 2015**.

[19] The foregoing notwithstanding, **Rule 2 of Order 40 of the Civil Procedure Rules** does provide that a temporary injunction can be availed to restrain a defendant from committing "**injury of any other kind**" in relation to the suit property. The Applicants have demonstrated that it was after the 1st Defendant transferred the 90 shares to the 1st Applicant that her brother, the 2nd Defendant, commenced a series of acts of threats, insults, intimidation and even violence against them and some of their employees; thereby causing them to flee the country out of fear for their lives. The details thereof were set out by the 1st Applicant in her Supporting Affidavit, at paragraphs 4 to 15 thereof. To buttress those averments, the 1st Applicant exhibited the documents marked **AM4 to AM8 and AM13**.

[20] Of particular significance is the averment at paragraph 6 of the Supporting Affidavit, in which the 1st Applicant referred to an incident of assault at the hands of the 2nd Respondent that occurred in **October 2012** thus:

"This abuse was escalated to physical violence when on or about October 20, 2012, I was assaulted by the 2nd Defendant whereby he threw glass objects at me from the kitchen at our parents residence, causing bruising to my side and back. He also kicked me and verbally abused me. Such was the severity of this attack that I had to seek medical intervention."

[21] The 1st Applicant exhibited the email marked **AM1** to her affidavit that was written to her by the 1st Defendant assuring her that the incident would not recur; and added that, inspite those assurances, the intimidation and harassment continued, such that when they visited Kenya on **12 June 2015**, the 2nd Defendant forcibly entered her room and threatened her once again, and as a result she had to leave the country that very day. It is noteworthy that, apart from a general traverse at paragraph 24 of the Replying Affidavit, all these averments remain entirely unrebutted.

[22] In **Nguruman Limited Vs Jan Bonde Nielson & 2 Others** Civil Appeal No. 77 of 2012 the Court of Appeal stated thus:

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."

[23] In the premises, I am satisfied that, in respect of the Applicants complaints of threats, harassment and intimidation, a *prima facie* case has been made against the Respondents. I therefore find no merit in the argument that since the allegations also have criminal elements, a higher standard of proof is called for. In such a matter as this where the very lives of the Applicants have been threatened, I am persuaded that the Applicants have not only proved that they have a *prima facie* case, but also that they stand to suffer irreparable harm. No amount of damages could ever compensate either of them for loss of life of a spouse. Indeed, the balance of convenience would be in favour of granting the restraining orders prayed for in paragraph 6 of the Notice of Motion.

[24] Prayers 8 and 9 of the Notice of Motion seek temporary mandatory injunction directing the Registrar of Companies to reverse forthwith the transfer of shares effected by the Transfer Deed dated **2 February 2015**; and compelling the Respondents to return forthwith the Applicants' business equipment and personal belongings that were unlawfully seized by the Respondents. Those are prayers for a mandatory injunction. It is now trite that mandatory injunction can only be granted in very clear cases. In this regard,

I find the words of Megarry J in Shepherd Homes Ltd vs. Shadahu [1971] 1 Ch34 instructive, that:

"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation."

[25] The same position was enunciated in Locabail International Finance Ltd vs. Agroexport and Others [1986] 1 All ER 901 thus:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."

[26] The foregoing English decisions have found approval in local cases, such as the Court of Appeal case of Kenya Breweries Ltd & 2 Others vs. Washington Okeyo [2002] eKLR. In the instant case, allegations of fraud have been made by the Applicants, which have been disputed by the Respondents. Counter allegations of fraud have similarly been made by the Respondents which the Applicants denied. In the premises, it cannot be said that this is a straightforward matter that can be disposed of summarily. It is also significant that the Respondents raised the issue of whether the Applicants could succeed on a case based on fraud, when no particulars thereof were provided in the Plaint. [27] As for prayer 9, which seeks that the Respondents be compelled to return forthwith the Applicants' business equipment and personal belongings that are under the custody and control of the Respondents, again these are matters in contention. There is no indication that irreparable harm will befall the Applicants for which damages would not be adequate if this aspect of their case awaits hearing for determination on the merits. Hence, I take the view that this is not an appropriate and fit case for the grant of an interlocutory mandatory injunction as prayed for in prayers 8 and 9 of the Notice of Motion dated **24 November 2015**. Indeed, the Applicants have sought an award of general damages in their Plaint of 24 November 2015.

[27] In the result, the Applicant's Notice of Motion dated **24 November 2015** succeeds only in terms of **prayer 6**, but fails in respect of prayers 7, 8 and 9 thereof. However, given the nature of this dispute, and the fact that the parties are family members, I would direct that the current the **status quo** with regard to the shareholding of the Company, **Viking House Best of Kenya Limited**, be maintained pending the hearing and determination of this suit. It is further directed that the costs of the application be in the cause.

Orders accordingly.

SIGNED DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2016

OLGA SEWE

JUDGE