



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

CIVIL SUIT NO. 178 OF 2013

**ESTHER WAMBUI NJOROGE**

**HAWA DIAWARA** (*suing as joint administrators ad*

*litem in the estate of Adama Diawara*).....**PLAINTIFFS**

**VERSUS**

**OSEI KOFI**.....**1<sup>ST</sup> DEFENDANT**

**MUTARI DIAWARA**.....**2<sup>ND</sup> DEFENDANT**

**JOSEPH OWOUR**.....**3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL**.....**4<sup>TH</sup> DEFENDANT**

**GALLERY WATATU**.....**5<sup>TH</sup> DEFENDANT**

**RULING**

The application for determination by the court is the Notice of Motion dated 15<sup>th</sup> May 2013 seeking the following orders.

1. Spent

2. Spent

3. A mandatory injunction do issue compelling the second and third Defendant to return to the Plaintiffs all the artwork in their custody or possession lying at their residence place of work or stored by third parties.

4. An order directed against the officer commanding police department and the Defendant to open the container and to supervise the exercise in the presence of the Plaintiffs and Defendants and /or their representatives to enable the parties to identify take stock or inventory of the artwork and/or things inside and thereafter to preserve the same;

5. The parties be at liberty to seek for more orders and/or directions thereafter.

## 6. The cost of this application be provided.

The Plaintiffs/Applicant case is that, they are administrators ad litem of the estate of the late Adama Diawara, who together with the 1<sup>st</sup> Defendant co-owned the Gallery Watatu Business that was once located at Mezzanine floor Lonhro House. The Plaintiffs stated that the business experienced financial hardship for a while prior to the death of their father leading to its closure sometimes in July 2012. The 1<sup>st</sup> Defendant was assigned to revamp and assist in reviving the business. In July 2012 the 1<sup>st</sup> Defendant organized for a sale of artworks from the premises that he alleges yielded a sum Kshs.4,000,000/= that was spent to meet certain obligations. After the sale was done the 1<sup>st</sup> and 2<sup>nd</sup> Defendant cut all links with the Plaintiffs and the 1<sup>st</sup> Defendant moved to Geneva.

The Applicants also claim that the Defendants parked and stocked parts of the collection from the gallery and took them to Kitengela Glass works where a branch of Gallery Watatu was opened without the Applicants' knowledge. The Applicants reported the issue to Central police station, Nairobi and an OB was issued. The Plaintiffs were later informed that part of the consignment of artworks was parked in a container at Kitengela Glass Works in the premises for one Nani Croze within Kajiado District. The matter was also reported at Ongata Rongai Police Station and in the company of police, Plaintiffs went to check the container but they could not access it. The container was later ferried to Ongata Rongai Police Station where it lies to date.

The Applicants believe that the container is filled with artwork collection that was removed from the business premises and some artwork which could not fit in the container was carried away by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant to their residence. The Plaintiffs also claimed that the 1<sup>st</sup> Defendant took some of the artwork to Geneva for an exhibition and prior to the death of the late Diawara, he was reminded to return or pay for the value but did not. The Applicants also stated that some of the artwork were bequeathed to the late Diawara by his deceased wife, Ruth S.Schaffner.

The Applicants also claim that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are putting pressure on the police to open the container. The Applicants stated that the artworks in the containers are rare works from African continent and from the rest of the world that is priceless and they were seeking the orders to open the container to enable them take an inventory.

The application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a replying affidavit sworn by Mutari Diawara, the 2<sup>nd</sup> respondent. The Respondent's claim is that the matter concerns the estate of the deceased where the letters of administration have not been issued which should be heard by a succession court. The 2<sup>nd</sup> respondent also claims to be a heir to the estate of the deceased, which puts him in the same position and ranking with the Plaintiffs. He contends that their action will amount to intermeddling as the grant ad litem can only be used to institute or defend suit on behalf of the estate.

He also denied the shipment of the some of the art work and stated that the property has been lying at the same place for a year and half .He claims that the idea of taking the container to the police station was amicably reached by family members pending the filling of petition of letters of administration of the estate which are still pending. The Defendants state that the container can only be opened upon filling a petition of letters administration so that an inventory can be taken and filed in court. The Defendant alleged that the Plaintiffs have amassed so much property from the estate and that's why they have continually avoided the succession cause over the property of the estate.

The 4<sup>th</sup> Defendant also opposed the application through the grounds of opposition dated 28<sup>th</sup> October 2013. The 4<sup>th</sup> Defendant claims that the application is an abuse of court process as the same is against **Section 16 Government Proceedings Act Cap 40**. They claim that the Applicants are administrators Ad Litem which means that the Applicants are only interested in pursuing this suit so as to recover the property of the deceased estate and not to preserve it which can be detrimental to other persons who could be having interest in the same. The 4<sup>th</sup> Defendant argues further that the application is bad in law in that, should the court grant the orders it would mean the suit has been disposed of by way of an application

which is contrary to the Civil Procedure Rules (2010).

The application was prosecuted by way of written submissions. Parties filed and exchanged their submissions.

The Plaintiffs submitted that they have a legal right to commence action for filling suit pursuant to the grant of administration ad litem, limited only for the purpose of filling this suit. The Applicants stated that they involved the police in tracing the stolen artifacts. The Defendant actions complained of are justified by futuristic agreement and which never materialized presently nor will it in future, on account of the death of the owner. The Plaintiffs also added that the 1<sup>st</sup> ad 2<sup>nd</sup> Defendant had the intention of embezzling the content of the container.

On the issue raised by the 4<sup>th</sup> Defendant that injunctions do not apply to the government. The plaintiff submitted that the prayer is to be issued against any party who may at the instigation of the 1<sup>st</sup> or 2<sup>nd</sup> Defendant, act contrary to the interest of the plaintiff by releasing the container. The plaintiff further submits that Article 23(3) of the Constitution provide that Injunctions lie against the government which is traditionally issued in situation of urgency where a right is threatened. In support of that position the Plaintiffs relied on the case of **Dr Anne Kinyua vs Nyayo Tea Zone Development Corporation & 3 others 2012 eKLR.**

The Plaintiffs further submitted that the 4<sup>th</sup> Defendant is the custodian of the container and they are agreeable to the opening of the container, taking stock or inventory and preservation of the contents. The Plaintiffs maintain that without opening the container neither party can make headway in determining the content.

The Plaintiffs further submitted that the **Section 79 and 82 of the Copyright Act Cap 130** affirms the position that the administrators where representation has been granted, is the personal representative for all purpose of the grant subject to any limitation imposed by the grant and can under section 82 (a) enforce the suit, otherwise all causes of action which by virtue of any laws survive the deceased arise out of the death of his estate. In support of this position, the plaintiff relied on the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd (2001) 1EA 127** where the court allowed the applicant seeking for Anton pillar order, to enter into the respondent office premises and seize and inspect all computers and other equipment that could contain alleged pirated softwares as well as various office records. Also in the case of **Uganda Performing Rights Society Ltd Vs Fred Mukubira, Misc. App No. 818 of 2003 High Court of Uganda at Kampala (Geoffrey Kiryabwire Ag Judge 17.2.2004)** the court granted Anton pillar order to the applicant to enter on the premises at the respondent's residence and a shop and to inspect cassette tapes , documents material or articles relating to the alleged unauthorized recording, compilation, distribution and/or sale of musical works and to remove into custody of the honourable court all authorized recording, computation , distribution and/or sale of musical works or whatever would constitute evidence in the trial of the main action.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant also submitted that the Plaintiffs acknowledge that not all the artwork in the said container belongs to the Plaintiffs. The Defendants claim that the Plaintiffs are in a fishing expedition to have the containers opened so that they can lay claim on whatever they get therein despite not knowing the content before opening. The Plaintiffs want a case on whatever they see on opening the container since they do not know what they want from it. The Defendant stated that the Plaintiffs should not be aided in doing this since it is not in good faith therefore the status quo should be maintained.

The Defendants also submitted that the letters of administration ad litem only allows a person to sue and defends suits on behalf of the estate. It does not allow a person to hold, collect, utilize and dispose of the assets of the estate to which the artwork allegedly belongs. The Defendants submitted that the plaintiff should either seek a grant of letter of administration ad litem of the estate to which the artwork allegedly belongs. The Defendants alleged that since taking out of the grant ad litem the Plaintiffs have consistently used them to harass other beneficiaries of the estate without letters of administration which would enable them to administer the property.

The Defendants further submitted that the Plaintiffs have not disclosed that the 2<sup>nd</sup> Defendant is also a beneficiary of the estate of the deceased and was the one running the gallery solely. The Defendants maintained that the issues before the court are independent and pertain to the estate from which the Plaintiffs and the 2<sup>nd</sup> Defendants are beneficiaries. The Defendant submitted that the current civil case is an attempt by the plaintiff to give an account of the estate and hence the reasons as to why they have not filed for the letters of administration. The Defendants prayed that the matter be referred to the family and succession court for directions and final determination.

The Defendant submitted that there was a threat of the items in question getting wasted, lost, destroyed or disposed of to warrant the issue of the order sought and pray that the order sought are likely to benefit the plaintiff prematurely to the detriment of the Defendant and pray that the same be dismissed and the matter set down for hearing of the suit. The Defendants alleged that the 2<sup>nd</sup> Defendant had been in possession of the goods for a period of 2 years within which he has not sold, misused, converted or dealt with them in any prejudicial way to any party.

The 4<sup>th</sup> Defendant submitted that the application for injunction is mischievous and an abuse of the court process and the same is in contravention of Section 16 of the Government Proceedings Act Cap 40 which provide that no injunctive order can be issued against the government. The 4<sup>th</sup> Defendant submitted that it was agreeable to the opening, taking of stock or inventory and preservation of the contents of the container since there is no dispute over the ownership of the content of the container. The 4<sup>th</sup> Defendant prays for the status quo to be maintained to avoid the likelihood of endless litigation arising.

I have considered the applicant's application in detail, taking into account the brief submissions by each party and the contents of both the supporting and replying affidavits of both counsel.

The test on whether to grant a mandatory injunction or not was correctly stated by **the Court of Appeal in Kenya Breweries Ltd v Okeyo (2002) 1 EA 109**:

*“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which reads:*

*‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the plaintiff .... a mandatory injunction will be granted on an interlocutory application’.*

*Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 All ER 901 at page 901 it was stated:*

*‘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 than was required for a prohibitory injunction’.*

*The principles of law enunciated by these decisions have received full approval by the court within our jurisdiction. See the cases of Belle Maison Limited vs. Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) and the Ripples Limited vs. Kamau Mucuha H.C.C.C. No. 4522 1992 per Mwera, J.*”

From the foregoing, it is clear that the Plaintiffs have to establish and indeed prove to the Court that they have a strong case for the issuance of mandatory orders at the interlocutory stage, and as such, the issuance of such orders will be depended upon a clear case being made out before Court. As reiterated in the above authorities, the Court would be reluctant to grant mandatory orders at an interlocutory stage when it would seem that it would in so doing determine and bring litigation to an end.

In this case, it is not in dispute that the Applicant/Plaintiffs are the persons appointed administrators ad litem of the late Adama Diawara who together with the first Defendant, co-owned the Gallery Watatu. Their legal obligation as such administrators' ad litem was to gather all the free assets of the deceased's estate for the purpose of distribution to the beneficiaries of the estate of the deceased. Such assets would without doubt include the deceased's interest as a whole, in the Gallery Watatu.

There is affidavits evidence to the effect that when the deceased who was a co-partner in Gallery Watatu died, the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant auctioned substantial artwork belonging to the gallery, raising thereby, Ksh.4,000,000/- which was allegedly not properly accounted for, apart from the popular explanation that it went to meet certain obligations. Furthermore, it was alleged in the supporting affidavits that the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the latter being stated to be one of the beneficiaries, cut links with the Plaintiffs who were struggling to gather what belong to the estate of the deceased from the artwork. It was even alleged, but not denied that the 1<sup>st</sup> Defendant moved out of Kenya to Switzerland with some artwork belonging to the Gallery Watatu which partially could have belonged to the Estate of the Deceased.

Furthermore, affidavit evidence of the Plaintiff's asserted and the assertions were not denied, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants parked and stocked parts of the Gallery Watatu Artwork and took it to Kitengela, outside Nairobi City to open up a new gallery in the business name of Gallery Watatu. It is also not denied that some of the artwork stocked in a container and kept also at Kitengela in a house of one Nani Croze, with a purpose of sending it out of the country, was intercepted at the instance of the Plaintiff's by the Ongata Rongai Police before the container was taken to Ongata Rongai Police Station. It is the same container that became the subject of this application in which the Defendants are required to release the artwork to the Plaintiffs after opening the container and undergoing an exercise of identification of the same to establish the source and ownership of the artwork.

The issue to resolve accordingly, is whether or not the Plaintiff's have established a sufficient case for the granting of a mandatory injunction to

- a. Open up the container at Ongata Rongai Police Station in the presence of all the concerned parties to identify the therein artwork in protection of the interest of the Estate of the deceased represented by the Applicants/Plaintiffs.
- b. Release what is identified as belonging to the Estate to the Applicants for the purpose of distribution after the issuance of a grant of letters of administration.

I have carefully considered the facts presented by both sides. I have no doubt in my mind that by parking and stocking a large amount of artwork which the Estate of the Deceased, represented by the Plaintiffs, will be entitled, for the purpose or intention of sending it out of the country, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants clearly acted against the interest of the Estate of the Deceased. Furthermore, in so acting, I am strongly convinced that the Defendants were purposefully, in face of things, intending to short-change the Gallery Watatu as well as the deceased's Estate a beneficial interest in the artworks. That, without doubt, amounted to stealing a match by the Defendants against the Plaintiffs. It is also clear to me that the only way to rectify or stop the Defendants from succeeding, is to grant the mandatory injunction to compel the opening-up of the sealed container to identify the artwork in it, so that those belonging to the estate may be released from it to the Plaintiffs.

If doing the above which the court believes is fair and just, also happens to fully settle the case at this interlocutory stage, then so be it.

In the circumstances of this case accordingly, I hold that a mandatory injunction is justified and I hereby grant the application in terms of prayers 3, 4, 5 with costs to the Applicants. Orders Accordingly.

Dated and delivered at Nairobi this 7<sup>th</sup> day of May, 2015.

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**DA ONYANCHA**

**JUDGE**