



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAL, JJ. A)

CIVIL APPEAL NO. 52 OF 2018

BETWEEN

SOPHINAH KALONDU MBITI.....APPELLANT

AND

ARUN MAHENDRA ADALJA.....1ST RESPONDENT

KIRAN HIRJI SHAH.....2ND RESPONDENT

HIRJI LAIJI SHAH.....3RD RESPONDENT

RAJNI SHAH.....4TH RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Obaga, J.) delivered on the 1st day of February, 2018

in

H.C. ELC No 576 of 2016)

JUDGMENT OF THE COURT

[1] This is an appeal against interim orders of injunction issued by the High Court to preserve the status quo regarding some 4 properties and an independent manager was appointed to collect the rent until the hearing and determination of the suit. The main suit which was countered with a defence and counter-claim by each of the respondents is far from trial. In the course of hearing this appeal, we were told that Probate proceedings were filed in the Family Division. Thus, in dealing with the instant appeal, we have to be mindful that the contested issues have not been determined and limit ourselves to the narrow issues of whether the learned trial Judge in making the interim orders properly exercised his discretion.

[2] The genesis of the dispute is the aftermath of the death of **Dr Mahendra Krishnalal Adalja** (hereinafter referred to as “the deceased” who died on 14th January, 2016. It appears the identity of properties constituting the estate of the deceased and the person(s) who are his beneficiaries resulted in a multitude of disputes in the said suit and also in the Family Division of the High Court where we were told probate proceeding have been filed. Within the instant appeal, there were four separate applications that were heard together and determined vide the Ruling dated 1st February, 2018, the subject matter of this appeal.

[3] It is apparent that on or about 31st May, 2016, **Sophinah Kalondu Mbiti (appellant)** filed suit before the Environment and Land Court at Milimani (ELC) claiming that she is the registered proprietor of several parcels of land and others she was registered as joint tenant with the deceased, claiming to be a wife of the deceased or to have beneficial interests over those properties. The appellant therefore sought injunctive orders to preserve some 10 properties described as all the parcels of land known as; -

a. Horombo Villa Number 19 Rosslyn gardens L.R No.28431 (Original 18/31).

b. Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.

- c. Town House Number 6 L.R No. 7158/505 Marble Valley.
- d. Clifton Villas L.R 7158/365.
- e. Clifton Villas L.R 7158/366.
- f. Type “C” Flat Number 4 Block A L.R 1870/VI/61 (I.R 92435/1).
- g. Clifton Villas (KIII) L.R 7158/608 Clifton Villas (KIII) L.R 7158/237.
- h. Clifton Villas (KIII) L.R 7158/238.

The appellant contended that she was also a beneficial owner of Motor Vehicles Registration Nos’ **KAF 327S; KBV 150A; Unit Trusts in Britam, Stanlib, ICEA Lion and Treasury Bills.**

[4] There are one or two undisputed facts; one, that deceased was survived by his son **Arun Mahendra Adalja** the 1st respondent; two, that the 2nd and 3rd respondents are the trustees and executors of the deceased Will. However, the date of the Will, and its contents seem to be contested and whereas the appellant contended that she was married to the deceased for nearly two decades, the respondents claim that the appellant was an employee of the deceased who used to be paid a salary for services rendered, and such records of employment were kept, and the appellant was housed in an adjacent flat where she lived with her children and companion, and the deceased would ring a bell to summon her whenever he needed her services.

[5] The 1st respondent who is the son of the deceased resisted the appellant’s claim by way of a defence and counterclaim, and also filed in addition to the replying affidavit to the aforesaid application for injunction, three other applications. In one of the applications, he sought to amend his defence and counter-claim. It seems from the record this particular application was not opposed. The other application which was highly contested was to some extent the flip side of the appellant’s application as it principally sought to restrain the appellant from interfering with the following properties; -

- I. Villa No 10 Clifton Villas situate on LR No 7158/608**
- II. House No 22 Jumbo Prestige situate on LR No 1870/111/550 Westlands**
- III. Horombo Villa No 19 situate and being a portion of LR No 28431 and**
- V. The town house known as Marble Valley situate on LR No 7158/505**

The 1st respondent also sought an order appointing a manager to collect the rent and manage the aforesaid properties until the matter was heard and determined, and the third application was by way of a preliminary objection seeking to strike out some two annexures that were annexed to the appellant’s affidavit in support of the notice of motion dated 14th March, 2017, on the grounds that they were privileged communication that was written on a “*without prejudice basis*” between the lawyers.

[6] The matter fell for hearing before **Obaga J.**, who heard all the applications and after considering the issues before him, he made the following orders which are the subject of this appeal; -

- “1. The first defendant shall file and serve an amended defence and counter-claim within 14 days from the date hereof.**
- 2. The plaintiff to file a reply to amended defence and defence to amended counter -claim within 14 days from the time of service of amended defence and counter claim.**
- 3. The undated letter under reference 1/331/001 from Triple OK Law Advocates to Mutua & Co. Advocates with reference to the estate of the late Dr Mahendra Krishnalal Adalja and a reply thereto by Mutua & Co. Advocates dated 9th February 2016 marked as annexures A 13, A 14, and A 15 to the affidavit of Sophia Kalondu Mbiti sworn on 14th march 2017 are hereby struck out from the record.**
- 4. Paragraph 13 of the affidavit of Sophina Kalondu Mbiti sworn on 14th March 2017 is hereby expunged from the said affidavit.**
- 5. Pending the hearing and determination of this suit or probate in respect of the estate of the late Dr Mahendra Krishnalal Adalja, the plaintiff and the defendants or their agents are restrained by way of injunction, from alienating, selling, transferring, charging or in any other way interfering with the following properties: -**
 - a. Horombo Villa Number 19 Rosslyn Gardens L.R No.28431 (Original 18/31).**
 - b. Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.**
 - c. Town House Number 6 L.R No. 7158/505 Marble Valley**

6. A Manager to be identified by the plaintiff and the first defendant is hereby appointed to manage the properties listed in No. 5 hereinabove to receive rent and income and to pay out all outgoing including land rent, rates and service, charges, carry out all necessary repairs and maintenance and to render an account to this court until determination of this suit. The appointment herein to be agreed upon within 30 days failing which the court will be at liberty to identify one for the parties.

7. The plaintiff by herself her agents, employees or servants are hereby restrained from interfering with the first defendant's quiet possession and enjoyment including ingress and egress to flat number 4A East Church Road Flats Westland Nairobi.

8. The Plaintiff do provide to this court true copies of each and every lease in respect of each the properties listed in No. 5 above and a true and complete account of all receipts of rent/income in respect of each of the aforesaid properties from 14th January 2016 until the date of appointment of manager contemplated in No.6 hereinabove.

9. Costs of the four applications shall be costs in the cause”

[7] It is the above orders that have provoked the instant appeal that is predicated on some 11 grounds of appeal that can be compressed thus as they are somehow prolix; that the learned Judge erred in law and fact in granting the 1st respondent a permanent order of injunction which was not prayed for in the counterclaim and when he had challenged the jurisdiction of the court to hear the matter; erroneously stating that the appellant's advocate had abandoned certain prayers in the Notice of Motion dated 14th March, 2017; by isolating 4 properties out of 10 and for appointing a manager to collect rent in respect of properties of a deceased person yet no probate had been filed. The appellant also faulted the learned Judge for making a determination of all four applications at the same time at the prejudice of the appellant; by ignoring the express provisions of the Law of Succession Act regarding a claim of a grandchild; relying on affidavits sworn by strangers, and finally for failing to take into account material facts but instead relying on extraneous matters. Counsel thus urged the appeal be allowed in terms of the appellant's application and substituting thereto with an order dismissing the respondents' applications with costs.

[8] During the plenary hearing, **Mr Eric Mutua**, learned counsel for the appellant relied on his written submissions and made some oral highlights. He stated that the respondents have now filed Probate proceedings in respect of the estate of the deceased, being **Petition No 315 of 2018**; this was after they were prompted by the appellant who filed and served them with a citation. Counsel faulted the trial Judge for striking out one of the exhibits being a copy of a **Will** purportedly made by the deceased which the appellant intends to or will be propounding at the probate court. Counsel went on to submit that the Judge erred by isolating only four properties, two of which were jointly owned by the deceased and the appellant, and two of which were registered in the name of the appellant and subjecting them to a management by a third party; that the appellant had established a *prima facie* case which entitled her to an interim protective measure by the court. Although the respondents were alleging forgeries of title, there was no proof, thus the appellant was deprived the use of her properties. The appellant was able to demonstrate that she had an interest in some of the properties named in the suit and there was evidence it was the respondents who took away the title documents.

[9] Counsel for the appellant contended that he did not drop the **prayers 2 (d) (e) (f) (h) (i) and (j)** as indicated in the ruling which fact is also not founded in the proceedings. Counsel also attributed an error on the part of the Judge for allowing the respondents' application when he had pleaded that the court lacked jurisdiction and stated that the counterclaim cannot hold in view of their contention that the court lacked jurisdiction. Counsel also had a dim view of the findings by the Judge that there was a trust between the deceased and the 1st respondent, arguing that the document that was purportedly produced cannot constitute a Trust Deed and for relying on an affidavit sworn by a stranger, one **Shailesh Krishnalal Adalja**.

[10] Counsel for the appellant went to state that the Judge failed to exercise his discretion judiciously according to the set down principles as articulated in the case of **Scope Telematics International Sales Ltd V Stoic Company Ltd & Another [2017] eKLR** and several other decisions that provide very clear precedence on what constitutes a *prima facie* case as enunciated in the case of **Naftali Ruthi Kinyua V Patrick Thuita Gachure & Another [2015] eKLR**. Finally, counsel for the appellant also faulted the Judge for ignoring the principles of law in respect of transmission of property to a surviving tenant in a joint tenancy which is a form of concurrent ownership of land where two or more persons, each possess the land simultaneously with the deceased. Counsel urged us to allow the appeal and substitute an order allowing the notice of motion dated 14th March, 2017 and dismissing the respondents' motions with costs to the appellant.

[11] Rising on his feet to oppose the appeal was **Mr. Rebelo**, learned counsel for the 1st respondent, who also relied on his written submissions and made some oral highlights. Counsel urged that this Court should not consider what is before the Probate court, that being a separate proceeding that is not before us. In addition, the documents that were struck out were letters written on a “*without prejudice basis*”. Those letters had been annexed by the appellant to her affidavit in support of the notice of motion dated the 14th March, 2017. In regard to a statement made by the 1st respondent that he did not intend to apply for appointment as an administrator of his father's estate, “**at the present time**” that statement referred to the particular time. However, at the present moment, the 1st and 4th respondents have petitioned for a grant of probate over the deceased estate with a Will attached. The said petition is not in regard to the property in dispute in this matter because it is admitted the properties in this suit were not part of the deceased's estate as the transfers and declarations of Trusts were effected in 2009 and 2010, that was five years before the death of the deceased.

[12] Regarding the dispute over the properties in question, counsel submitted that the appellant contrived what he referred to as a fictitious claim. According to counsel, the deceased inherited substantial estate from his father, **the late Dr. Krishnalal Adalja** and his mother **Damyanti Krishnalal Adalja**. The deceased went on to re-invest the monies from the estate. On 25th October, 1985 the deceased purchased the property described as Flat No. 4A, East Church Road with family monies and made it the family home where he used to live with the 1st respondent and whenever his brother visited or other members of the family. In 2009 and 2010, with the consent of his brother **Shalishe**,

Krishnalal Adalja (the person referred by counsel for the appellant as a stranger), the deceased transferred and vested three immovable properties in the name of the 1st respondent, and vested a vast portfolio of shares and monetary investments in his favour as sole beneficiary and declared himself a trustee of those investments for the sole benefit of 1st respondent.

[13] Regarding the claim by the appellant's counsel that the appellant was married to the deceased, counsel submitted that the appellant was first employed as a housemaid and by 2009, her duties were elevated to include secretarial work although she continued to wash, clean and cook for the deceased. The deceased thus leased for her Flat No 1A as residence for her and her family, including her companion who was also employed by the deceased for odd jobs. A bell was installed from the residence of the deceased in Flat 4A to Flat 1A so as to summon the appellant to attend to the deceased and his visitors when her services were required. Counsel submitted that evidence was adduced of salaries and emoluments paid to the appellant including a letter of resignation at one time. The claim that she and the deceased purchased 10 properties which she was registered as the owner either jointly with the deceased or on her own was denied; so was the claim that the documents of title in regard to 8 properties that were allegedly carted away by the 2nd and 3rd respondents in a bag. To the contrary, counsel was categorical that the alleged documents were in possession of the 1st respondent while the titles of the four properties in question were deposited with the deceased's advocate, one **Mr Ramesh Manek**, by the deceased himself. As regards the claim that the 1st respondent was not entitled to lay a claim over his grandfather's estate, it was stated that the 1st respondent was a beneficial owner of 3 properties; that the other investments were held in his trust by the deceased and they were not capable of being transferred to the appellant.

[14] On whether the appellant established a *prima facie* case to warrant the granting of an injunction, counsel submitted that; three properties were registered in the name of the 1st respondent and the appellant's counsel conceded that the appellant had no firm grounds against which he could continue to insist on an injunction. As regards properties listed as Clifton Villas LR Nos 7158/365, 366 and Clifton Villas (KII) LR.7158/608, counsel for the 1st respondent said they were properties belonging to third parties who purchased the villas in a development known as Clifton villas. Moreover, the appellant did not give any particulars of how the respondents had attempted to alienate the said properties; the respondents had not taken any unilateral or unlawful action to reverse the registration.

[15] Counsel concluded that the eight properties can be divided into three clusters; the 1st cluster comprising of three properties that are registered in the name of the 1st respondent; 2nd cluster comprising of two properties that the appellant alleged were registered in her joint name with the deceased and the 3rd cluster being two properties registered in the name of the appellant which the 1st respondent claims the deceased was holding in his trust. Also the 1st respondent was able to demonstrate that the property known as No 10 Clifton Villas, House No 22 Jambo Prestige LR No 1870/111/550 and 19 Roslyn Garden that were registered in the name of the appellant had a trust deed executed contemporaneously with the transfers and were bought with monies extracted from the 1st respondent's bank accounts.

[16] For these reasons, **Mr Rebello** submitted that the appellant's motion did not meet the threshold of granting the orders she sought, whereas the 1st respondent was able to establish that the properties alleged to belong to the appellant with the deceased and those in the appellant's name were subject to a trust. Moreover, the appellant was not the one who used to collect the rent, therefore the orders to preserve the income deriving from the properties and also to maintain the status quo was reasonable as it secured the properties and the income until the matter will be determined.

[17] The 2nd, 3rd and 4th respondents were represented by **Mr Saende**, who did not make any submissions as he wondered why his clients had been joined in the suit as well as the appeal. As far as he was concerned, the 2nd and 4th respondents were named executors of the Will that will be propounded before the Family Division Court.

[18] The above is the brief summary of the matter before us, which we have considered in the appeal with some level of caution, bearing in mind that this is an appeal from interlocutory orders as the hearing of the suit on its merits before the High Court is yet to take place. Accordingly, and as this Court has stated repeatedly, in an appeal arising from interlocutory orders where the suit is yet to be tried, this Court should refrain from expressing concluded views on any issue which it thinks may arise in the pending trial.

[19] In dealing with the notice of motion that gave rise to the impugned ruling, there is no doubt that the Judge was exercising judicial discretion which we cannot interfere with unless we are satisfied that the discretion was not exercised judicially. In **MBOGO & ANOTHER V. SHAH** [1968] EA 93, the court held as follows: - (as per **Newbold, P.**)

“... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

[20] We ask ourselves whether the High Court offended the principles stated in the aforesaid statement, and whether the appellant satisfied the triple requirements that is to say;

“(a) Whether the appellant established her case at a *prima facie* level.

(b) Whether she demonstrated irreparable injury if a temporary injunction is not granted, and

(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour. These being the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction

should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. "*Prima facie*" is a Latin phrase for "at first sight", the legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the appellant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point."

[21] The central issue is whether the appellant presented sufficient material before the Judge to enable him conclude that the appellant had a right to those properties which was being or likely to be invaded by the respondents, and conversely the 1st respondent who also sought orders in regard to the three properties had a similar duty. The appellant's contention is that she was married to the deceased for a period of 25 years and by virtue of the marriage relationship, they purchased the properties some of which are in her name while the others are in joint names with the deceased. The appellant did not claim to have contributed to the purchase of those properties in any other way other than as a wife. Nonetheless there is no marriage certificate that was annexed, and this assertion was vehemently denied by the respondents. This therefore is an issue that can only be determined after a trial whether the appellant was married to the deceased.

[22] The appellant also posited that the properties were purchased by the deceased in her name or jointly, this was also opposed by the respondents who claimed that by the time the alleged transfers were effected, the deceased held the properties in trust for the in trust for the 1st respondent. Moreover, it is common ground that the deceased was suffering from prolonged illness that may or may not have affected his mind and was hospitalized for a long period of time. The deceased was in and out of the hospitals in the ICU and it was within that period, it is alleged, that the appellant manipulated the deceased to sign the transfers while taking advantage of the deceased diminished capacity. It is further alleged that the deceased withdrew monies held in trust for the 1st respondent to purchase the properties that are listed as cluster 2 and cluster 3.

All these are matters to be determined after trial.

[23] The learned Judge gave a detailed summation of the disputed issues and to us it is apparent that the appellant's claim over the properties stems from the alleged marriage relationship with the deceased. This relationship was denied and as the Judge rightly held, it was not a matter suited for him to determine as an ELC matter, the jurisdiction of ELC is well circumscribed in the Act. Just like the trial Judge, we agree that the way her claim is pleaded, the appellant came to own the said properties on the basis that she was in a marriage relationship with the deceased. That is how she came to be registered as proprietor of the said properties and others that were held jointly with the deceased. To us the disputed issue of the marriage relationship between the appellant and the deceased becomes central. The validity of the Will allegedly bearing the date of 2nd September, 2015 where the appellant claims the deceased bequeathed certain properties to her, will also come into sharp focus at the opportune time; so is the issue of whether the properties or proceeds used to purchase them were held in trust by the deceased for the 1st respondent and whether there were declaration of trusts over the same properties.

[24] We therefore cannot fault the Judge in his conclusion where he said in his own words that; -

"The Plaintiff may be having a valid reason as regards transmission of a property upon demise of one of the joint owners. The issue however in this matter is on whether the plaintiff was a wife of the deceased or not and as I have said hereinabove, this question cannot be decided by this court as that is outside the jurisdiction of this court. There is also the issue of whether the monies which purchased the properties in issue came from the account of the first defendant which account was being operated by the deceased as trustee of the first defendant. The first defendant has demonstrated on how the money which purchased the four suit properties were moved from an account which the deceased was operating. These monies are said to have been from proceeds of sale of shares held in trust for the first defendant. I find that this is a proper case where the four properties should be preserved until hearing and determination of this suit."

[25] Apart from the marriage relationship, there are other contested issues, the allegations that the deceased held monies in trust for the 1st respondent that was withdrawn without his consent and was used to buy properties in issue. This is also a matter for trial, so are the allegations of manipulation and fraud. Both parties made counter- allegations of fraud against each other and to us, we think these allegations could not possibly be sorted out in an interlocutory application that was decided based on affidavit evidence. **Mr. Mutua**, submitted that the respondent did not prove the allegations of fraud which in our view was not possible, as there was no *viva voce* evidence that was called and subjected to court room processes to determine those allegations. There was no evidence by hand writing or document examiners experts that was called at this interlocutory stage. It is also common ground that the deceased was ailing for a prolonged period of time and was in and out of hospitals, such issues as his mental capacity that are raised by the 1st respondent are not without basis.

[26] On whether the Judge erred by granting the orders, as he did appointing a manager to manage and collect rent from the 4 properties pending the determination of the suit, although the 1st respondent had not admitted jurisdiction of the ELC, on our part we find the 1st respondent filed an appearance on 28th June, 2016, filed a defence and counter-claim and proceeded to file the three applications. All these were filed without any protest that was recorded, even during the hearing as the application was argued there was no protest. The prayers were also anchored in the counter-claim which was a demonstration that the respondents had submitted to the jurisdiction of the court.

[27] On the issue of whether counsel for the appellant abandoned certain prayers, the record of proceedings shows that the contested properties were those registered in the appellant's name alone and as joint tenants with the deceased. This being a Court of record, we reproduce here below how **Mr. Mutua**, learned counsel for the appellant was recorded to have said:-

"In respect of properties listed in prayer (2) it is contested whether or not the plaintiff has an interest on the properties. We therefore concede that we have no firm grounds to insist on an injunction. These are the properties of (sic) her than the four

I have mentioned”

[28] The appellant also did not oppose the application for amendment of the defence and counter-claim, we have not seen any pleadings in form of a replying affidavit, grounds of opposition or even submissions. In any event, we were not told how the amendments are prejudicial to the appellant. That ground fails. As regards the ground of appeal that the Judge relied on an affidavit of a stranger, we do not see any particular averments that were taken from the said affidavit and in any event the appellant had an opportunity to controvert those averments. Moreover, the dispute here wholly involved the 1st respondent who is a son of the deceased and we do not see anything wrong in inviting his uncle who is the deceased’s brother to swear an affidavit as long as he would have been available for cross examination if called upon, and the appellant was given an opportunity to respond.

[29] All in all, we think the orders that were granted were merited to preserve the disputed properties as well as the income deriving therefrom, until the dispute is determined. We hasten to add that it makes sense to preserve the disputed properties and the income during the trial, so that none of the parties will be prejudiced pending the hearing and determination of the suit, the outcome of the suit notwithstanding. These orders in our view are not injudicious and we therefore find no justifiable reasons for interfering with the Judge’s discretion.

[30] For the foregoing reasons, we are satisfied that this appeal lacks merit as we find no justifiable reasons to depart from the preliminary findings and the orders issued by the trial Judge. Accordingly, we hereby dismiss the appeal with costs to the respondents.

Dated and delivered at Nairobi this 24th day of May, 2019.

M. K. KOOME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR