



**Niaz v Niaz & 2 others (Environment & Land Case 4 of 2023)
[2024] KEELC 4616 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 4 OF 2023
SM KIBUNJA, J
JUNE 12, 2024**

BETWEEN

ASSAD NIAZ PLAINTIFF

AND

MOHAMED ZAFFER NIAZ 1ST DEFENDANT

MOHAMED SAJJAD NIAZ 2ND DEFENDANT

NAHEED NIAZ 3RD DEFENDANT

RULING

1. The plaintiff moved the court through the notice of motion dated the 23rd March 2023 as amended on the 4th April 2023 seeking temporary order of injunction restraining the defendants whether by themselves, their employees, servants, agents from demolishing and pulling down the building structures, evicting, selling, disposing of or otherwise howsoever, taking possession, leasing, letting, charging or otherwise howsoever interfering with the plaintiff's occupation and possession of and title to L.R MN/1/16839 – 16843, Mombasa County, pending the hearing and determination of this suit. The application is premised on the twenty seven (27) grounds on its face and supported by the supporting and further affidavits of Assad Niaz, plaintiff, sworn on the 4th April 2023 and 20th September 2023 respectively. It is the plaintiff's case that the defendants defrauded him of his inheritance of seven parcels of land, 2500 shares in Niazsons (K) Ltd, shares in company owning L.R. No. 7158, Spring Valley Nairobi, 25% of testator's funds at Habib Bank A. G. Zurich, London and 1/3 of the residue of the testator's estate in the United Kingdom and Kenya, left to him by Niaz Mohamed Janmohamed under his Will of 14th November 1995, then valued at Kshs.205,207,084/-, which is currently equal to Kshs.612 million. After the death of the testator on 13th September 1996, the 1st and 2nd defendants, who had been appointed executors of the Will, petitioned the court, without involving the plaintiff who was then about 20 years old. That the Will had required of the executors to safeguard the plaintiff's interest until he was 30 years old. That upon attaining the age of 30 years on 13th October



2006, he asked the 1st and 2nd defendants, executors, to release his inheritance to him but they have not complied. That in 2009, the plaintiff was allowed by the 2nd and 3rd defendants to take possession of Nyali property consisting of MN/1/16839 – 16843, Mombasa, that are registered in the names of 3rd defendant, who is wife to 2nd defendant. That though the plaintiff has been paying rates and managing the said property, the 2nd and 3rd defendants have been demanding that he gives them vacant possession. That he has been residing on the said Nyali property for 15 years, and has a bona fide interest over the same. That he has a high chance of succeeding in his claim for compensation due to the defendants having defrauded him of his inheritance, and he ought to be declared the owner of MN/1/16839 – 16843, the suit properties. He denied that he was permitted to take possession of the suit properties or discussing and agreeing to pay rent for the same. That the monies paid by his father to the 2nd defendant was for his father's medical needs and expenses. That by the time he reached 30 years, all the properties owing to him under the deceased's will had either been sold by the 1st and 2nd defendants, who have never accounted for the proceeds thereof, or converted and transferred to their wives and other beneficiaries without his consent. That he delayed in filing this suit as the defendants were always dissuading him, promising to transfer his inheritance to him since 2009. That by the time he revoked the power of attorney issued to 1st defendant, his disinheritance had already taken place through illegal actions by the 1st and 2nd defendants. That he occupied the suit properties without permission and has been in possession for 15 years, and ought to be declared the owner, as compensation of his legitimate inheritance sold off by the defendants, or alternatively under adverse possession.

2. The application is opposed by the 2nd and 3rd defendants through the replying affidavit of Mohamed Sajad Niaz, 2nd defendant, sworn on the 25th June 2023, deposing inter alia that parcels MN/1/16839 to 16843 are the remaining portions of L.R No. 1504/1/MN, which was bequeathed to him by his late father, Niaz Mohamed Janmohamed, in his Will. That the said properties are now registered with his wife, the 3rd defendant. That in 2009, they allowed his elder brother namely, Arshad Niaz, the plaintiff's father, and their families to occupy the residential house on L.R No. 16842/1/MN. They also allowed his elder brother, Arshad Niaz, the plaintiff's father, to temporary use L.R Nos. MN/1/16839, 16840, 16841 and 16843 for storage for construction materials and equipment relating to the business he and the plaintiff were carrying on. That over a telephone conversation with his elder brother in late 2012, they discussed about payment of rent over the occupation of the suit properties, and he followed it up in writing on 23rd November 2012. That his elder brother replied through the email of 26th November 2012 pointing out that his funds were tied up in business investments, but he promised to revert back on the rent payment. That vide subsequent discussions, his elder brother and the plaintiff agreed, to hand over the properties in repair by middle of August 2015, and to pay Kshs.3,375,000/- by way of rent for the properties from 1st January 2010 to 15th August 2015. That the properties were not vacated as agreed and sometimes in 2018, his elder brother paid him 6,000 pounds, which was equivalent to Kshs.820,000/- . That his elder brother left the suit properties after falling out with the plaintiff. That though the plaintiff vacated the residential house which is on one of the properties, he has continued to use the other properties storing motor vehicles, plant and equipment. That in February 2023, the plaintiff had asked to buy one of the properties and earlier in 2022 had introduced one Edward Markosewe and Edward Maina Njoroge as prospective buyers of some of the properties. That from reports he received from his niece called Noreen, who visited the suit properties on 24th December 2022, the said properties were in disrepair. That the plaintiff's claim to the suit properties on adverse possession cannot hold as his occupation was admittedly with permission. That there are no basis of issuing any injunction as they have not issued any official threat or taken steps or proceedings to recover possession. That the plaintiff's allegations against him in regard to his interests over the estate of the deceased are fantasies and fabrications. That the plaintiff had signed a general power of attorney on the 9th April 1999 giving the 1st defendant extremely wide ranging power to act on his



behalf in all legal matters. That the power of attorney remained in force until 8th November 2001 when the plaintiff revoked it. That though the deceased's will had referred to various subdivisions of subdivision No. MN/1/32, cinemax property, the subdivision process and issuance of separate titles was never completed. The property was however transferred to 1st & 2nd defendants and plaintiff as per the deceased's will. That subsequently, the 1st defendant transferred his undivided share of the cinemax property to his wife, Uzma Niaz while 2nd defendant transferred his to 3rd defendant. He denied selling cinemax property and pocketing the proceeds deposing that it was the plaintiff, 3rd defendant and Uzma Niaz who sold and transferred the cinemax property to Halcyonian Ltd on the 20th August 1999 for Kshs.8.5 million. The transfer was executed for the plaintiff by the 1st defendant. That the plaintiff had filed a suit against the 1st defendant and Niazsons (K) Ltd, and in an affidavit sworn on 14th December 2001 that on returning to Kenya, he lived with 1st defendant as he worked on sorting out the issue of his inheritance from the deceased's estate. That he had assumed his proprietary interest as a shareholder of Niazsons (K) Ltd, where he also worked, which discredits the plaintiff's claim that he did not receive his inheritance under the deceased's will. That there is no explanations tendered why the plaintiff had to wait for 17 years since attaining the age of 30 years, to lodge this suit.

3. The application is also opposed by the 1st defendant through his replying affidavit sworn on the 26th October 2023, deposing inter alia that the plaintiff was not in good terms with his father, Arshad Ulhaq Niaz, who is the deponent's eldest brother. That the plaintiff stayed with his family and he paid his university education in United Kingdom. That the plaintiff lived with him for a time when he returned to Kenya in 1999, and he took care of his legal fees and other incidentals when he was charged with a serious criminal offence for which he was eventually acquitted. That after the death of his father, the 2nd defendant and himself, as the appointed executors under the will, applied for probate in Nairobi HC Succession Cause No.49 of 1997, which the plaintiff's father challenged, but was not successful. He deposed that they briefed all the adult children in the family, including the plaintiff, about the probate proceedings. That among the properties bequeathed to the plaintiff was the Spring Valley house on L.R. No. 7158/208 and a share in L.R. No. 1504/1/MN [cinemax property] that the executors transferred to him. That the funds at Habib Bank Zurich, London had 220,000 GBP that was held as collateral to Habib Bank Zurich, Nairobi for the operations of Niazsons (K) Ltd, but it was wiped out in settling what the company owed at the time of its winding up, at the instance of Barclays Bank. That no property that was meant to go to the plaintiff was transferred to third parties, 2nd defendant or himself. That the plaintiff joined Niazsons (K) Ltd upon returning to the country in 1999 and participated in its management. The directors of the company, with approval of the plaintiff, later decided to sell the Cinemax property. The plaintiff gave the deponent the power of attorney to effect the transaction, and the proceeds realised was used in paying the company's post-dated cheques, with no funds being left to be shared among the registered proprietors. That he was the one taking care of the Nyali property that was bequeathed to the 2nd defendant. That when the plaintiff got married in 2009, he requested the deponent to allow him to use the Nyali house for his honeymoon, and he granted his request. That the plaintiff was not entitled to any portion of the Nyali property as it was wholly bequeathed to the 2nd defendant. That the deponent deposed that he is the one who has been paying the rates and put up the fence on the Nyali property on behalf of the 2nd defendant and not the plaintiff. That Stalion Insurance Company failed to pay a claim of Kshs.1 billion and China Road & Bridge Corporation declined to pay for the work done to Niazsons (K) Ltd, and as a result the company faced financial stress with its obligations to Barclays Bank leading to its winding up. That the plaintiff's action is a replica of his father's failed attempt through the probate proceedings, and there is no explanation tendered why he did not raise the issues herein when he filed the suit against him and the company in 2001 at Nairobi High Court.



4. The learned counsel for the plaintiff, 2nd & 3rd defendants filed their submissions dated the 13th February 2024 and 20th February 2024 respectively, that the court has considered.
5. The issues for determinations by the court are as follows:
 - a. Whether the plaintiff has established a prima facie case with a probability of success for the injunction order he seeks to issue: or put conversely, whether the plaintiff has met the threshold for the injunction order sought to issue at this interlocutory stage.
 - b. Who pays the costs?
6. The court has carefully considered the grounds on the application, the affidavit evidence by parties, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
 - a. That as submitted by counsel for both the plaintiff, 2nd & 3rd defendants, a party like the plaintiff who seeks for temporary injunctive order at the interlocutory stage must meet the legal requirements as set out in various superior courts decisions including the following: *Giella versus Cassman Brown & Company Limited* [1973] EA 258 and *Mrao Ltd versus First American Bank of Kenya Ltd & 2 Others* [2003] eKLR. To succeed in his quest, the plaintiff must establish a *prima facie* case with a probability of success, inter alia by establishing the existence of some legal interest over the suit property. He must also show the court that he is likely to suffer irreparable damages which is incapable of being otherwise adequately compensated by an award of damages for example, and that the balance of convenience tilts in the order being issued in his favour.
 - b. The plaintiff has through ground 14 on the amended notice of motion, and paragraph 5 of his deposition in the supporting affidavit, confirmed that parcels MN/1/16829 – 16843, the suit properties, also referred to as the Nyali property, originated from the properties bequeathed to the 2nd defendant, and are currently registered with the 3rd defendant. That has been confirmed by the 1st to 3rd defendants, through their depositions in their respective replying affidavits.
 - c. The plaintiff has through his depositions accused the 1st and 2nd defendants of defrauding him of his bequeathed inheritance totalling Kshs.612 million. He has on grounds 1, 14A, 16 to 18 and 23 to 26 on the amended notice of motion, and paragraphs 6 to 14 of the supporting affidavit, set out his claim over the suit properties, Nyali property, to be compensation for the inheritance bequeathed to him, that the 1st and 2nd defendants defrauded him, or alternatively, on adverse possession, as he has been in occupation of the same for 15 years. The 1st and 2nd defendants have rebutted that allegation through their filed replying affidavits, and deposed that they distributed the assets in accordance with the Will left by Niaz Mohamed Janmohamed, the deceased. That they allowed the plaintiff to use the suit properties upon his request, after he got married in 2009. At ground 16 of the notice of motion, the plaintiff stated “That after numerous demands by the plaintiff to release his properties to him, the 2nd & 3rd defendants allowed the plaintiff to take possession of the Nyali property in the year 2009 and the plaintiff took possession of the same and has been living therein to date.” That even though the plaintiff appear to have changed that position through paragraph 5 of his further affidavit, the court would need evidence to be adduced by the parties first, so as to make a determination on the matter of adverse possession, one way or the other. On the compensation claim, the court is also of the view that evidence would need to be presented first, to determine whether



or not the defendants, or any of them indeed defrauded the plaintiff of his inheritance. In view of the undisputed fact that the suit properties are subdivisions from the properties bequeathed to the 2nd defendant, who then transferred them to his wife, the 3rd defendant, and considering the standard of proof in fraud matters, the court is of view the plaintiff has failed to present a prima facie case with a probability of success.

- d. That the plaintiff has at grounds 1 and 21 of the amended notice of motion valued his bequeathed inheritance at Kshs.612 million. This effectively shows that if he succeeds in the suit, his claim of compensation is capable of being valued, and an award made in monetary/ financial terms. He does not therefore stand to suffer irreparable loss if the prayer of injunction sought is not granted at this stage. That noting that the suit properties were bequeathed to the 2nd defendant, and he transferred them to his wife, the 3rd defendant, and in the absence of any evidence of fraud as at this moment, upon which to vitiate or impugn the transactions so far relating to the said properties, the balance of convenience tilts towards not issuing the prayer sought.
 - e. That though the application is without merit, the court is of the view that justice in the suit will be better served through an order that the costs abide the outcome of the suit, as the contestations herein are between close family members, the provision of section 27 of Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
7. In the upshot of the above conclusions, the court finds and orders as follows:
- a. The plaintiff's amended notice of motion dated the 4th April 2023 is without merit and is dismissed.
 - b. The costs in the application to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF JUNE 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Plaintiff : Mr. Wachira for Kingara

Defendants : M/s Oruta for 2nd and 3rd defendants

Leakey – court assistant.

S. M. Kibunja, J.

ELC Mombasa.

