



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**ENVIRONMENTAL & LAND COURT**  
**CIVIL SUIT NO 24 OF 2015**

**ANIELLO STORELLI.....PLAINTIFF**

**VERSUS**

**DAMARIS MWONGELI MBINDYO.....DEFENDANT**

**R U L I N G**

1. The applicant filed a notice of motion dated 19/2 /2015 under order 40 rule 1, 2, 4 of the civil procedure rule, section 1A, 1B, 3A and 63 of the civil procedure act. He sought 7 prayers;
  - a. **This application be certified urgent, service of the same upon respondent herein be dispensed with in the first instance and be fixed for inter partes hearing on a priority basis.**
  - b. **Pending the hearing and determination of this application herein, an injunction be issued to restrain the defendant whether by herself, her agents, employees, assigns, advocates, servants, or otherwise howsoever and any persons whatsoever be restrained from selling, disposing of, charging, sub-dividing , leasing dealing interfering with and/or intermeddling in any manner whatsoever with the following properties (suit properties) KWALE /WAA/932; KWALE /WAA/1206; KWALE /GALU KINONDO / 1103; KWALE GALU KINONDO /1105; KWALE /GALUKINONDO/1106;KWALEGALUKINONDO/1107;KWALEGALUKINONDO/1111; KWALE GALU KINONDO/1112; KWALE GALU KINONDO /1113; KWALE GALU KINONDO /1114; KWALE GALU KINONDO /1119 KWALE GALU KINONDO / 1120**
  - c. **Pending the hearing and determination of this suit herein , an injunction be issued to restrain the defendant whether by herself , her agents ,employees, assigns, advocates ,servants or otherwise howsoever and any persons whatsoever be restrained from selling, disposing of, charging, sub-dividing leasing, dealing, interfering, with and /or inter meddling in any manner whatsoever with the following properties ( suit properties) KWALE /WAA/932; KWALE /WAA/1206;KWALE/GALU KINONDO /1103; KWALE/ GALU KINONDO /1105; KWALE/ GALU KINONDO /1106; KWALE /GALU KINONDO /1107; KWALE GALU KINONDO /1111; KWALE/ GALU KINONDO /1112; KWALE /GALU KINONDO /1113; KWALE GALU KINONDO /1114; KWALE/ GALU KINONDO /1119 KWALE GALU KINONDO /1120; KWALE /GALU KINONDO/1121;KWALE/GALU KINONDO/1122**
  - d. **Pending the hearing and determination of the suit herein, the court do issue a Mareva injunction or other injunction so that the defendant's bank account domiciled at Barclay**

**Bank Diani Branch account no 0168022891 where the rental income from the suit properties is normally deposited be frozen until further orders of the court.KINONDO /1121; KWALE GALU KINONDO /1112.**

- e. Pending the hearing and determination of the suit herein, an order be issued directing that any and all money from the rental income of the suit properties be deposited in an escrow account in the names of the applicant's Advocates and the respondent's Advocates.**

2. The application is supported by 12 grounds on the face thereof and a sworn affidavit of Aniello Storelli dated 19<sup>th</sup> February, 2015 and a further affidavit dated 21<sup>st</sup> April 2015. He deponed that around 1999, he came to Kenya as a tourist and met the respondent and they lived together as husband and wife. That he began purchasing properties and developing them. That being a foreigner, he was ill advised that he could not own property in his name so he registered some of the properties to his wife the respondent and the remaining properties in the name of a company called Stow City Limited. He deposed that he bought the said company from some Italians and had the respondent registered as the majority shareholder with 98 % and 2% to the respondent's brother. That he made all the necessary payments as required with an understanding that the respondent was holding the same in trust for him. He annexed a sworn affidavit of Peter Ndungu Kibe dated 20th May 2014, who deponed that he is the previous owner of parcel of land known as **Kwale/Waa/1206 and Kwale /Waa/ 93** and he entered into a sale agreement dated 6th June, 2009 with the respondent as the buyer in the presence of the applicant and that it's the applicant who paid him Ksh. 1.6M being the agreed amount personally and not the respondent. He also annexed sworn affidavit of Tonello Lorenzo dated 7th January, 2015, who deponed that he was the previous owner of a company called Stow City Limited. That sometimes in 2006 he sold the same to the respondent whom he knew to be the applicant wife. That the applicant paid personally the purchase price of Ksh. 1.3 M. He stated that the company owned real estate properties which he sold together with the company. These being; **Kwale /Galu Kinondo /1103, Kwale Galu Kinondo /1105, Kwale /Galu kinondo/1106 , Kwale/ Galu Kinondo/1107 ,Kwale /Galu kinondo/1111, Kwale /Galu Kinondo/1112, Kwale /Galu kinondo/1113, Kwale /Galu kinondo/1114, Kwale /Galu Kinondo/1119, Kwale /Galu Kinondo/1120, Kwale /Galu kinondo/1121, Kwale /Galu kinondo/1122 .**

3. The respondent filed her replying affidavit dated 5th March 2015 and opposed the application stating that in all the transactions the applicant has not annexed a single agreement in relation to the disputed over land. That there is no linkage between the parties in this case and the properties mentioned since there are no certificates of official search shown .She deposed that the plaintiff has no relationship with Stow City Limited Company and annexed the certificate of incorporation, saying the company has its own life independent of that of its directors. The respondent deposed further that she is neither a shareholder nor a director of the company which company has not been made a party to this suit. She denied the contents of all the affidavits annexed in support of the application and asked court to put forth the deponents through oral examination. She denied being married to plaintiff who instead is married by Fiorino Rosa annexing their marriage certificate. She continued that the Plaintiff is retired and earns a pension which is hardly above Ksh. 200,000 and which money is further split into two, one portion being to support his wife in Italy and the other half for his upkeep. The respondent challenged the applicant to produce evidence that he has finances to invest in the acquisition of the properties the subject of this suit.

4. The respondent deposed further that all the transactions were done in the presence of a lawyer and challenged the applicant to explain how he has been misled for this long period of time and by who. She denied being the registered owner of plot numbers Kwale /Galu Kinondo/1103,1105, 1106,1107, 11111,1112,1114,1114,1119 and 1120 and denied the applicant's participation in the construction of the apartments standing on these plots of which plots she deposed belong to Stow City Limited. Finally she states that the applicant has not established any of the principles for granting injunctions and urged for the dismissal of the application

5. In submissions, Mr Abdi stated that the applicant is an old man who invested everything he had into the suit properties. It is their case that before the relationship, the respondent was not in any gainful employment to be able to purchase the suit properties. It is therefore a breach of trust for the respondent to direct tenants to pay her all rents. He submits that if the orders are not granted, the applicant will loose

his life time savings which cannot be compensated in damages. Mrs Umara on the other part submitted that Mareva injunction is only available to a debtor which requires the debt to be proved and material disclosure made. She submits the applicant has not annexed any certificates of an official searches or specify which properties are in the name of the company and which ones in the name of the respondent .

6. Further that the prayer for Mareva Injunction was not pleaded in the plaint therefore should not be granted. She referred this court to the case of **Nairobi City Council versus Thabiti Enterprises Ltd.** Mrs Umara submitted further that the applicant has not proved a prima facie case with a probability of success. In support of this submission, she referred the court to the case of **Mrao versus First American Bank [2003] e KIR and Giella versus Cassman Brown.** That the ignorance of the applicant is his own undoing. She also questioned the locus of the applicant in filing this suit as against section 4 of the Land Act. She urged the court to dismiss the application. Mr Abdi in reply submitted that what is for determination is the application not the main suit. Further that they seeking are for orders to preserve the suit properties. Lastly the applicant they filed copies of titles with the plaint although he did not annex them to his application. He urged the court to grant the orders sought.

7. I have considered the pleadings and the submissions rendered. From the pleadings, what comes out is that not all the properties in dispute are in the name of the respondent. The applicant admitted through submissions that he has not annexed copies of the titles of the property in question to the application but has included them with his plaint. I have perused the file and in the applicant's list of documents there is no single copy of title deed that has been filed with his documents. Even the further affidavit filed on 21.4.2015 did not annex the copies despite the respondent's averment that some of the properties mentioned are in the names of parties who are not part of this suit.

8. These title documents are the crux of the applicant's prayer as contained in his application dated 19.2.2015. In seeking orders of restraint against the defendant and payment of rent, he was under obligation to prove ownership of the suit properties by the respondent first then explain the trust relationship between them thereafter. The respondent conveniently annexed copies of titles for two parcels of land which she admits belong to the applicant. The burden was not upon her anyway to annex all the copies of titles to all the parcels of land in question. The applicant annexed affidavits sworn by witnesses who carried out the construction work and receipts in respect of the purchases of building materials made. Unfortunately these documents do not indicate the plot numbers of which the works and purchases of building materials were undertaken. The contractors deposed the work was done in Diani, Kwale County. There are several plots in dispute, all of which are in Kwale therefore it would have been easier for this court if there was specific reference made/pleaded to the plots that are developed and are generating rental income. .

9. The applicant also prayed for Mareva Injunction to issue to the respondent's account No. 0168022891 held at Barclays Bank, Diani Branch where the rented incomes from the suit properties according to the applicant is usually deposited. No effort was made by the applicant to establish that rents are being collected from the suit premises and deposited in this account. There is nothing presented to this court to associate this account with the rent payments from the suit properties and therefore no basis laid for this prayer to be granted. This may have been difficult to prove but the law of evidence is that he who alleges must prove.

10. In light of the findings in the preceding paragraphs, can the court grant prayers No. 5 for operation of an escrow account? The applicant has not explained which properties are developed and how much rent is due from any of those plots. The respondent denied being the registered owner of properties Kwale/Galu Kinondo/1103, 1105, 1106,1107,1111,1112,1114,1114,1119 and 1120 and deposed that some of them is in the name of a company called Stow City Limited and other 3<sup>rd</sup> parties known to the plaintiff. The applicant admitted and deposed that he caused some of the properties to be registered in the name of this company with the respondent as majority shareholders (paragraph 7 of further affidavit). If by his own admission that part of these properties are in the name of 3<sup>rd</sup> parties not joined in this suit then the court will be in error to grant the prayer sought since a limited company has to own legal status irrespective the fact the respondent is also a shareholder.

11. In conclusion the respondent has admitted two properties in her name to wit Kwale/Waa/1206 and Kwale/Waa/932 belong to the applicant. On the basis of this admission and on the basis of the existence of relationship between the applicant and the respondent whether marriage or business relationship, it necessitates the court to order for the preservation of the properties in dispute pending the outcome of this suit. To preserve the suit properties, I shall grant prayer 3 in terms of an order of injunction be and is issued restraining the defendant or her representatives from selling, disposing of, sub-dividing and/or charging the suit properties listed therein pending the hearing and determination of the suit. Each party to bear their costs of the application.

*Dated and delivered in open court at Mombasa this 12<sup>th</sup> day of June 2015.*

**A OMOLLO**

**JUDGE**