REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Suit 9 of 2012

GIORDANO ALIEVI AND

GABRIELLA TOSCANO.....PLAINTIFFS

VERSUS

KIBOKONI PROPERTIES LIMITED .....DEFENDANT

R U L I N G

1. The basic facts of this case are not in dispute. In 2007 the defendants alongside three others herein brought a suit (Malindi HCC 2/2007) for trespass against the present plaintiffs and two other parties seeking vacant possessions of some villas erected on title no. CHEMBE/KIBABAMSHE/404, damages and mesne profits "from the date of illegal occupation of the suit property until the date of vacation or eviction of together with interest thereon."

2. The suit was met with a defence in which the present plaintiffs denied to be illegal trespassers and asserted that they acquired their interest in respect of the portion of the suit land occupied by them through purchase of shares in SICA Limited which in 1997 acquired a "beneficial interest" in the suit property by virtue of an agreement between itself and ADAM KAZUNGU NZAMBA and HAFSA S. MOHAMED, who had been given a letter of Allotment by the Director of Land Adjudication and Settlement".

3. It is not in dispute that in July 2010 the property became registered in the name of the Defendant, who on 17th January, 2012 served a demand notice on the present plaintiffs (and another party) demanding payment of rent in the sum of Kshs.960,000/-. The said notice concluded that;-

"TAKE NOTICE that if the above sum is not settled in or before 31/01/2012 we shall have no alternative but to instruct Auctioneers to Levy Distress for the outstanding rental sum at your own risk as to further costs and Auctioneers Charges"

4. This letter was placed in the hands of the lawyers of the present plaintiffs and after an exchange of correspondences with the firm of T. O. K`OPERE & CO. ADVOCATES for the present Defendants, the

former filed the present suit on 31/1/2012 seeking restraining orders against the present defendants.

5. Contemporaneously filed with the plaint was Notice of Motion under order 40 rule 2 and 4 Civil Procedure Rule and primarily seeking that the Defendant be restrained from levying distress against the plaintiffs pending the determination of this suit. It must be stated that the original Civil Suit No. 2 of 2007 has yet to be heard, and on this basis the defendant herein raised an objection to the filing of this suit citing 6 of the Civil Procedure Act.

6. MR. SIMIYU however argued that the two suits are different as they relate to different causes of action. The contents of affidavits filed by the parties with regard to the Notice of Motion appear to be in the same vein as the respective pleadings in HCC 2/07(see annextures GT 1 a, b, c to the supporting affidavit) and no real value lies in restating them here. More so because of the orders to be made in concluding this ruling.

7. Having carefully considered all the material before me, I take the following view. This case and HCC 2 of 2007 relate to the same subject matter. In the latter case the present Defendant who is one of the plaintiffs therein asserts that the present plaintiffs (defendants in that case) are trespassers who must give vacant possession. The Defendants therein assert that they are lawfully present on the suit property, citing the manner in which they came into possession, prior to the registration of the current Defendants as the sole proprietors of the suit property.

8. This present suit was prompted by the Defendant's threat to destrain the plaintiffs during the pendency of HCC 2/07. I agree that the plaintiff's action of filing a separate cause contravenes section 6 of the Civil Procedure Act. That said, however, the attempt by the Defendant herein to destrain the plaintiff's amounts to extra-curial self-help.

9. The plaintiffs are admittedly not their tenants and no orders for payment of rent have been issued in HCCC 2 of 2007. Besides, in that suit the present defendants have sought mesne profits. Rather than set down their suit for hearing the defendants appear to have resorted to short cuts. Their notice to the plaintiffs (annexture GT 3 to supporting affidavit) leaves no doubt about that.

10. With regard to the substance of the Notice of Motion, it is evident that the plaintiffs are relying on interest acquired through a third party SICA Ltd, and physical possession, against the Defendant who are the registered owners. Clearly the plaintiffs are not tenants of the Defendants. Have the plaintiffs shown a prima facie case? I am doubtful. Secondly the damage that may be suffered appears amenable to monetary compensation. However, in the circumstances of this case, the balance of convenience appears to tilt in the applicant`s favour.

11. They have been in occupation even before the defendant became the sole proprietor and are in occupation todate, of some of the villas on the suit land. If the court finally finds in favour of the defendants, they stand to recover mesne profits in regard to the period of the plaintiffs' occupation of the villas. Over all my decision has also been influenced by the admitted conduct of the defendants, which to me appears akin to an attempt to steal a march over the plaintiff's in the pendency of their earlier case in court. It is not clear why since 2007 the defendants have failed to prosecute their case, only to attempt a short cut five years down the line.

12. I do therefore grant an injunction against the defendants pending the determination of this suit in terms of prayer 4 of the Notice of Motion. However, for the sake of good order and furthering the overriding objective of the Civil Procedure Act, I direct that this suit be consolidated with Malindi HCC 2 of 2007 and the parties take all necessary steps to pave way for the hearing thereof.

Costs will be in the cause.

Read and delivered at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. MEOLI
JUDGE