



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Civil Suit 145 of 2011**

**SCORPIO ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**HOLIDAY SA LIMITED.....DEFENDANT**

**COUNTERCLAIM**

**HOLIDAY SA LIMITED.....PLAINTIFF**

**VERSUS**

**SCORPIO ENTERPRISES LIMITED.....1ST DEFENDANT**

**SIMONE MANCINI.....2ND DEFENDANT**

**SARA FERRARI.....3RD DEFENDANT**

**Reasons for ruling given on 3/12/12**

1.Before me were two Notices of Motion, the first, being the application dated 14th September, 2011 by which the Plaintiff is seeking temporary injunctive orders to restrain the Defendant from illegally distressing rent and/or interfering with the suit property namely the business known as Scorpio Villas on plots no.s 1758, 1759 and 1760 Malindi, pending the hearing of the suit . The Defendant ,who has counterclaimed,subsequently filed the Notice of Motion dated 22nd November, 2011 seeking injunctive orders against the Plaintiff in the original suit and the 2nd and 3rd Defendants in the counterclaim. The application in particular sought a permanent mandatory injunction to bar the said parties from putting up for sale the suit property, or its movable assets. It also seeks an order for security to be furnished by the parties.(Defendants in the Counter-claim).

2.The Plaintiff's application is predicated on grounds that the Defendant has never been its landlord and neither is it the owner of the premises occupied by the Plaintiff. Through the affidavit evidence the Plaintiff states, *inter alia*,that it was served with a proclamation notice upon its movable assets as distraint for rent allegedly owed to the Defendant. That the tenancy agreement entered into in October, 2005 upon which distress was based was not intended to create a tenancy relationship but only intended to assist the Defendant and its Directors deal with their tax matters in Italy and besides the Defendant as a result has never claimed any money from the year 2005.

3. That the Directors of the Defendant's company had in the year 2009 signed documents to dissolve the company proving there was no tenancy agreement. The Plaintiff is likely to suffer irreparable loss and damage as it is a tourist hotel and if the orders sought are denied, the tourists' holiday will be cut short and the hotel black listed as a holiday destination he asserts. That the distress for rent constitutes an illegality and unjust enrichment. That the Plaintiff is willing to give an undertaking to damages as may be ordered by the court.

4. The Plaintiff also filed a further affidavit to the Defendant's replying to the effect that the Plaintiff was a stranger to the alleged agreement for sale and that parties thereto had agreed to have it examined by a document examiner. The Plaintiff contends that the examiner's report revealed that the signatures therein did not belong to the 2nd & 3rd Defendants in the counter-claim. That it was a forgery. Further, that the transfer of shares and the tenancy agreement was intended to help the Defendant's director and his brother with their tax issues in Italy. That, subsequently the two they then signed documents to wind up the company.

5. The Defendant has filed an affidavit to the Plaintiff's application dated 22nd November, 2011. Therein the deponent states that the defendant entered into an agreement for sale of a hotel business namely "Scorpio Villas" (the hotel) with the 2nd & 3rd Defendants (in the counterclaim) built upon plots number 1758, 1759 and 1760 in Malindi. It was deponed that under the terms of the contract of sale, the said hotel and the land upon which it was built were registered in the name of a company by the name Holiday Sa Limited (the company) which had purchased it sometime in year 2002 and that the 2nd & 3rd Defendants (in the counterclaim) represented to the Defendant that they were joint and equal shareholders in the said company. The Defendant therefore entered into an agreement to purchase all their interest in the company and by extension the aforesaid Plots and the developments thereon. That a term of the contract was that the 2nd & 3rd Defendants (in the counterclaim) in the name and style Scorpio Enterprises Limited (the Plaintiff) were to become lessees of the purchasing company upon the completion of the sale.

6. The agreed rent was €112,500 (Euros) per annum and that €337,500 would be treated as rent paid in advance from 1st January, 2006 to 31st December, 2008. The Defendants in the counter-claim allegedly failed to pay rent after 31st December, 2008; such that as at 01.09.11 the balance was € 94,900 (Kshs. 12 716,700). The reason given for failure to pay was that part of the hotel was razed down by fire and the processing of the insurance claim took time. Hence he understood their predicament but the rent was never varied or waived.

7. Further, the deponent states that the balance of the consideration was by banker's cheques, copies of which were annexed to the replying affidavit. That further a sum of €100,000 was deposited with the 2nd & 3rd Defendants (in the counterclaim) and returned to him as agreed. On 14.07.2005 the deponent together with 2nd & 3rd Defendants (in the counterclaim) went to a firm of auditors in Mombasa to transfer the aforementioned shares to his favour; that on the said date 500 shares held by the 2nd Defendant (in the counterclaim) were transferred and subsequently the other 500 held by the 3rd Defendants (in the counterclaim) were also transferred. He averred that the intent of the tenancy agreement was to domesticate it and nothing more. He further avers that the tenancy agreement was void *ab initio* for mistake as the aforementioned plots were not registered in the name of the vendor company and had not been properly witnessed and sealed.

8.He states that the purchaser company has been remitting its returns to the registrar of companies and has never authorised any dissolution of the company as the 2nd Defendant in the counter-claim attempted to do. In addition he depones that due to the representation, by the 2nd Defendant in the counter-claim, regarding ownership of the hotel, he incurred expenses in the purchase of air conditioners, and also paid the said defendants money for rehabilitation of the hotel in addition to incurring company secretarial costs. He claims that the 2nd & 3rd Defendants (in the counterclaim) dealt with him fraudulently as they had no capacity to sell and there was misrepresentation . He dismisses that the letter to the registrar of companies as a forgery as no company meeting was held to agree on the Defendant company's dissolution. He claims that he discovered the Plaintiff's intention to sell the hotel via a property agent's website.

9.The Defendant also filed a supplementary affidavit dated 29th March, 2012 deponed to by its advocate who avers that he handed over documents to the Director Criminal Investigation for preparation of a document examiner's report, but the director declined to have one prepared, stating that the intended report was for use in a civil matter as opposed to a criminal matter. He points out that the Plaintiff's advocate had served him with such a report. The deponent therefore avers that that refusal is suspect and questionable and hence calls for its expunging from the records.

10.I now turn to the notice of motion dated 22nd November, 2011. The application is premised on the agreement for sale of the hotel between the Defendant and the 2nd & 3rd Defendants (in the counter-claim). The Defendant asserts that it is the *bonafide* beneficial owner of the suit property, that the 2nd & 3rd Defendants (in the counter-claim) were to hold it in trust and that the Plaintiff is constructively its tenant. That the Plaintiff had evinced on an intention to sell by advertising in a property agent's website. The Defendant fears that the attempted sale of the hotel is aimed at defeating the counter-claim. The Defendant is therefore apprehensive that the same will be disposed off yet it has invested upwards of € 1,277,300 and is owed € 337,500 in rent arrears. Further, that the Plaintiff has come to court with unclean hands after defrauding the Defendant by falsely representing that it had capacity to sell the suit property. The applicant relied on the annexures in its affidavits of reply to the Plaintiff's application.

11.To the Defendant's application, the 2nd and 3rd Defendants (in the counter-claim) have filed replying affidavits both dated 16th March, 2012, each denying the sale agreement in respect of the hotel. They claimed that the agreement annexed to the Defendant's replying affidavit was a forgery as confirmed by document examiner's report annexed. That the alleged payments by the Defendant were made in Italy hence the court has no jurisdiction to entertain the Defendant's claim.

12.Both applications were argued together and written submissions filed. Having considered all the material canvassed in respect of the application, I take the following view.

13.The grant of a temporary injunction, is governed by the principles elucidated in the landmark case of **Giella v Cassman Brown** must come into play.

Firstly, a *prima facie* case with chances of success must be established. Then the successful party must demonstrate that they are likely to suffer irreparable harm or damage not amenable to be compensated by damages will be an insufficient recompense and where in doubt the court may consider the matter on a balance of convenience see EA Industries v Trufoods [1972] EA 420).

14. It is not in dispute that the suit property namely, 'Scorpio Villas' stands on Malindi portion numbers 1758, 1759 and 1760. The annexures to the applications, contain indentures indicating that the portion 1758 is owned by the 2nd and 3rd Defendants (in the counter-claim) while the other two portions are owned by persons not party to this suit. These indentures are all dated 25th August, 2008. The impugned sale agreement was purportedly executed in the year 2005 but it is not demonstrated that at the time, the said portions of land belonged to either Holiday Sa Limited or the 2nd & 3rd Defendants in the counterclaim. The Defendant states that the tenancy agreement was bad for mistake as no due diligence was done to establish the owner of the land upon which the hotel was built. The Plaintiff and the 2nd & 3rd Defendants in the counterclaim have annexed a document examiner's report that concludes that the signatures appended to the impugned sale agreement as those of the 2nd & 3rd Defendants (in the counterclaim) do not actually belong to them. There is no report to the contrary. On the face of it the Plaintiff has established a case (see *Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others [2003] KLR 123*)

15. The Plaintiff has pointed out that the hotel in question is a tourist destination and an unlawful attachment of its assets would lead to it being black-listed as a tourist destination. Such a loss in reputation may be irreparable in damages. The balance of convenience leans in favour of the Plaintiff. Consequently, the prayer for temporary injunction pending the hearing of the suit was granted in terms of prayer 3.

16. Of the Defendant's Application, as a rule of thumb, permanent injunctive orders are not granted at the interlocutory stage. Hence the prayers could not be considered. The threshold in proving the *prima facie* case for granting temporary mandatory injunction is higher than that required for an ordinary injunction see *Kenya Breweries Ltd & Another Vs Washington Okeyo Civil Appeal No. 332 Of 2000 (NAI) The Court Of Appeal, (U.R)* And *Locabail International Finance Ltd Vs Agro-expert & Others (1986) I ALL ER.* Upon a closer look at the Defendant's prayers, they seek restraining orders as opposed to 'compelling' orders. In essence they are prayers for prohibitory and not mandatory injunction as described.

17. Even supposing that the Defendant was seeking temporary prohibitory injunctive orders, it still has not established a *prima facie* case as their claim has been watered down by the annexures of the plaintiff and the 2nd & 3rd Defendants, especially the report of the document examiner disputing the authenticity of signatures to the sale agreement alleged in their favour. As indicated in the ruling on 3rd December, 2012, the material before the court does not support the granting of the Defendant's prayers.

18. As the court of appeal stated in *George Orango Orago Vs George Liewa Jagalo & 3 Others [2010] eKLR* that **'The purpose of an (temporary) injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.'** While I granted the prayer 3 of the Plaintiff's notice of motion, let me emphasise verbatim what I stated on 3rd December that:

“However in light of the colossal sums involved I would in the interest of justice order that pending the hearing of of this suit, the status quo in respect of the suit property be maintained. For this reason, the Plaintiffs would seek leave of court, with notice to the adverse party, before entering into any transactions or dispositions that may fundamentally alter the character or title in the suit property.”

Delivered and signed this **21st** day of **December, 2012** in the presence of Mr. Kiarie for the Plaintiff, Mr. Macharia for the Defendants

C.W. MEOLI

JUDGE

