



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 19 of 2009

ANDREW KABAILAPLAINTIFF

VERSUS

CAROL BAHATI KAHINDIDEFENDANT

R U L I N G

The application dated 23rd April 2009 is made by way of Chamber Summons under Order XXXIX Rules 1 and XIX Rule 1 and 2 of the Civil Procedure Rules and section 3, 3A and 63(c) of the Civil Procedure Act. It seeks that the defendant/respondent, her agents, servants and all workmen, be restrained from selling, alienating and/or parting with possession or in any manner interfering with the suit property pending hearing and determination of the application and/or further orders of this Honourable Court.

Further that, the defendant/respondent do account for all rental incomes collected with effect from January 2008 and all other rentals be deposited in court pending hearing and determination of the suit.

It is based on grounds that:

- (1) The applicant is a Makonde by tribe, who initially resided in Vipingo area of Kilifi District and is now being considered for issuance of an identity card by the Government of Kenya.
- (2) The applicant is an artist making wooden carvings as a tradition, which are sold to tourists who frequent Watamu Beaches, through which he met a Dutch Tourist. They became family friends and financed part of the construction of the two Swahili houses and the applicant also constructed a matrimonial home.
- (3) The applicant has assisted the children sired before their marriage through sales of the wooden carvings at his curio shop at Watamu.
- (4) The respondent's action of assaulting the applicant and chasing him away is taking advantage of his state of health and citizenship to enrich herself from the efforts and energies of the applicant.

In the supporting affidavit, the applicant depones that he started cohabiting with the respondent in 1996, when he was running a curio shop at Watamu beach and selling carvings to tourists, while the respondent was a housewife.

The respondent purchased a parcel of land to put up two Swahili structures for rental purposes together with a matrimonial home comprised of two bedrooms, a sitting room and a kitchen at Timboni area of Watamu. The estimated costs of the structures is Kshs. 3,000,000/- (3million) and the rental income as at January 2008 was close of Kshs. 40,000/- per month.

In January 2008, he was diagnosed to be suffering from TB and he lost a lot of weight. It was about the same time that the construction of the twelve room structure had been completed; power installed and attracted tenants. The respondent, hoping that applicant would die, assaulted and treated him with utmost cruelty – a copy of the OB and his treatment notes are marked AKZ

He made reports to the provincial administration vide letters AK 3 (a) (b) (c) respectively, to no avail.

The respondent then went to her counsel who wrote a letter to applicant, expelling him from the matrimonial home – the letter is marked AK4 on grounds that applicant had not contributed towards the construction of the houses. He explains that whatever contribution was made by a white Dutchman towards construction of the houses was in his capacity as a friend of the family and respondent collected the contribution because she was the one who had a national identity card. He terms the respondent's action as calculated to subject him to torture with the hope that applicant dies and she enriches herself, she ensured the applicant did not come into contact with the tenants by directing that collection of the rent be carried out by Shamdin Agencies as per copy of receipt marked AKR

The application is opposed and the respondent stated in her replying affidavit that allegations by the applicant are false as she has never co-habited with him as husband and wife, nor has she ever been a housewife, having been a businesswoman all along, carrying on the business of selling clothes such as kikoy's, lessos, bangles, beads, curves to tourists along Watamu Beach area and she has never been financially dependent on the applicant.

She confirms that she purchased two plots at Timboni village near Watamu, on which two houses are built – this she did without any financial assistance from the applicant as per the copies of sale agreements annexed and rental CB1. She explains that she built the two houses with the financial assistance of Swiss friend and at one time she was even charged by the local authority for constructing without a building permit as per bundle of documents marked CB2 and none of the two houses is a matrimonial house - the applicant has his own house. When respondent first met the applicant, she was already residing in one of the houses and applicant was a mere boyfriend who would occasionally visit her for the night then return to his house during the day.

It is her contention that one of the houses has 8 rooms which she has leased to tenants at a monthly rent of Kshs. 1500/- for each and currently this house has only three tenants. The other house has 12 rooms out of which 10 rooms have been rented out at Ksh. 2000/- per month each – she uses the other two rooms for herself and her children.

The water and electricity supply accounts for the two houses are in her names and the monthly rent paid is inclusive of water and electricity charges – copies of the utility bills are annexed as CB5 and CB6 respectively.

She denies constructing the houses at Ksh. 3m, saying she only used Kshs. 650,000/-.

She explains that it is applicant who used to assault her whenever he visited her house and in a bid to avoid further assaults, she opted out of the friendship and applicant stopped visiting her. Further that she uses the rent income for her upkeep and that of the children, as her other business collapsed, and depositing the rent in court will cause her great financial hardship since the rental income is her only source of livelihood and in any event applicant is not entitled the same. It is the respondent's contention that applicant has not contributed anything towards construction of the houses and has no basis requiring her to account for the rent.

At the hearing, Mr. Gichana submitted on behalf of the applicant that he did transactions regarding construction of the house by proxy because not being a Kenyan citizen, he did not have a national identity card.

He points out that respondent is withdrawing all the rents accruing from the houses, to the exclusion of applicant and the only way to secure the situation is to issue an injunction restraining respondent from selling or alienating the suit property as the property was acquired jointly. To support his argument, Mr. Gichana has cited the decision in **Kivuitu v Kivuitu (1991)2 KAR** and says that although the case relates to Married Women's Property Act, it applies to the present case.

Mr. Shujaa, on behalf of the respondent submits that applicant has not satisfied the conditions for granting a temporary injunction and the prayers sought should not be allowed. He points out that the amendments in the supporting affidavit do not establish a prima facie case with probability of success as there is no evidence of the applicant's contribution towards construction of the houses at all. He invites court to consider the fact that applicant does not say they own the houses jointly and admits that the land on which the house was built was purchased

by the respondent, further that applicant admits that part of the money used in the construction was donated by a foreign friend and applicant has not demonstrated that he has a superior interest or that he will suffer irreparably if the injunction is not granted, in any event the cost of construction is known and can be calculated – computed in monetary terms and there is no allegation that respondent intends to sell the property, so there is no need for an injunction.

Mr. Shujaa argues that there is no need for ordering taking of accounts as no criminal intention on the part of the respondent has been demonstrated as envisaged by Order XIX Rule 1 Civil Procedure Rules. In response Mr. Gichana submits that the requirement under Order XIX is that there must be a replying affidavit which should satisfy the court regarding preliminary questions.

Have the conditions for granting an injunction been met?

It is not in dispute that the parcel of land on which the houses stand belongs to the respondent. It is also not contested that there are rental houses on the premises and the utility bills are in her names. Applicant does not deny that she contributed to the construction but insists that he too contributed through the foreign friend who was either Swiss or Dutch. However there is nothing presented in court to demonstrate that the contribution by the foreign friend was made for and on behalf of the applicant – as a matter of fact applicant says the foreigner was a friend to both himself and the respondent and prima facie there is no evidence to show.

- (a) They jointly owned the houses
- (b) They were husband and wife – as a matter of fact this issue can only be determined at the substantive hearing since it seems this was either a come-we-stay arrangement, or as respondent puts it, he was merely a boyfriend.
- (c) There is nothing to show this was matrimonial property.

Due to the absence, then, I find that the first limb in **Giella v Cassman Brown** has not been satisfied – and the applicant has failed to show that he has a prima facie case with probability of success.

Would damages be adequate compensation or would the applicant suffer irreparably? Applicant in his own affidavit boasts that he is recovering and the dwindling tourist business is picking up – so that proceeds from the rent are not his only means of livelihood. It is not even demonstrated that he had previously received the rents

There is no evidence that applicant is likely to sell or alienate the houses. But of greater significance is the fact that the amount of rent being collected is known, so that in the event of the applicant's claim succeeding, this would easily be computed and damages in monetary terms would adequately compensate the applicant's loss – so applicant has failed to show that he would suffer irreparable loss and damage which would not be adequately compensated by damages.

Then comes the third principle – now that the first two have failed – in whose favour does the balance of convenience tilt? Applicant has not demonstrated that he has been collecting the rent, or that the rent is his only means of livelihood, he does not own the parcel on which the property stands and has not demonstrated direct contribution – whereas respondent owns the land, has utility bills in her name, receives the rent for her own upkeep and that of the children (whom she is staying with) was involved in the construction, as supported by correspondences from the local authority – surely the balance tilts greatly in favour of the respondent – away from the applicant.

The upshot is that the applicant has failed to meet the conditions required for grant of an injunction, and the first part of those prayers must fail.

Should the respondent then render an account for all rental dues collected with effect from January 2008 to date? Should the other rents collected be deposited in court?

The applicant has failed to demonstrate any superior interest in the property which is drawing the rents.

Order XIX provides that where there is a prayer for taking of accounts, then the defendant is required to satisfy the court that there is some preliminary question to be tried – here there are several preliminary questions which I have already addressed in the earlier part of the ruling – culminating in the one major question – has applicant demonstrated that he is entitled to claim a part of the rent and therefore warrant

respondent accounting for the same and making deposits of rents paid into court? The answer is in the negative –
Consequently the earlier application is unmerited and is therefore dismissed with costs to the respondent.

Delivered and dated this 3rd day of **March 2010** at Malindi.

H. A. Omondi

JUDGE