



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Civil Suit 6 of 2010**

**PAPILIO LTD .....PLAINTIFF**

**VERSUS**

**VALBONESI BRUNO**  
**VALBONESI ALESSIO**  
**BICHI ERAZIA .....DEFENDANTS**

**RULING**

The application dated 26<sup>th</sup> January 2010 is by way of Chamber summons under Order XXXIX Rule 1 and 2 of the Civil Procedure Rules, Section 34 and 63(e) of the Civil Procedure Act and seeks that the Defendant/Respondents be compelled to open the passage to the ocean as per the Deed Plan dated 28<sup>th</sup> October 2008 and be further restrained by a temporary injunction by themselves, agents, legal representatives or anyone claiming interest through them, from blocking and/or closing the said passage to the ocean pending hearing and determination of the suit. It is premised on grounds that:

- (a) The respondents have closed and/or blocked the passage and/or way to the beach, the only means of accessing the beach.
- (b) That passage is a recognized right to the ocean as indicated in the Deed Plan dated 28<sup>th</sup> October 2008.
- (c) The National Environment Management Authority (NEMA) has already warned that any development in respect of the suit premises should not hinder public from accessing the beach.
- (d) The Respondents have been warned several times to open access to the ocean but they have refused, failed and/or neglected to do so.
- (e) The balance of convenience tilts towards granting an injunction and no prejudice will be occasioned to the respondent.

The application is supported by the affidavit sworn by Emilio Trambalgho a director of the plaintiff company, where he deposes that applicant is the registered proprietor of parcel No. 12842 bearing Title No. CR 46585 – a copy of the official search is annexed and marked ET1 – which property is a beach plot, with access/passage to the ocean (supported by the Deed Plan ET2).

While the plaintiff/applicant was developing its property, one of the conditions that NEMA imposed as per the Environmental Impact Assessment Report (ET3) was to avail access for the public to the beach.

The respondents claim is in respect to plot No.1 2844 which borders plot No. 12843 and is separated by a passage to the ocean.

The respondents have now gone ahead and closed the only access to the ocean by erecting an illegal wall as shown in a photograph annexed as Ex. ET5.

At one point, the issue was with the Ministry of Lands and the District Surveyor gave his report dated 21-12-09 (ET 6). The company which sold the plots to the appellant and respondents i.e Geranium Investments Ltd. has also protested against the acts of the Respondent as per a copy of letter written to the Town Engineer (ET7).

All efforts to have the respondent open the way to the ocean have failed, and applicant states it stands to suffer irreparable damage since it is operating a hotel with the right to access the beach – which right the respondents want to deny.

The applicant makes undertakings for damage if it finally loses the claim after enjoying the injunction.

The respondent has not entered appearance nor filed any papers in response to the application, and the matter proceeded exparte.

Mr. Otara for the applicant in his submissions reiterated what applicant has stated in the grounds in the face of the application, and the supporting affidavit.

There being no explanation or denial by the respondent regarding the allegations, which are fortified by the annexed photograph and surveyors report and correspondences raising complaint about their conduct, and from the Deed Plan it is apparent that applicant does not

have another direct access to the beach other than through the passage since there are two other plots in front of applicant's property, which directly border the sea/beach – then I am persuaded that applicant has made out a prima facie case with probability of success – respondents have not shown that they have an exclusive right to that passage. Applicants indicate they are operating a hotel and denial of access to the beach will adversely affect the business and hotel guests – this kind of loss of business would not adequately be compensated by way of damages.

On that basis, I order that respondent do open the passage to the ocean immediately and are hereby restrained from blocking or closing the same until the suit is heard and determined.

Delivered and dated this 26<sup>th</sup> day of **May 2010** at Malindi.

**H. A. Omondi**  
**LADY JUSTICE**