



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

**CIVIL SUIT NO. 17 OF 2010**

**MAURIZIO TURATO.....PLAINTIFF**

**-VERSUS-**

**COSIMO TERESA LIMITED .....DEFENDANT**

**RULING**

There are two applications to be determined in this matter – the one dated 11<sup>th</sup> March 2010 was by way of Chamber Summons made under Order XXXIX Rules 1, 2 and 9 Civil Procedure Rules section 3A Civil Procedure Act seeking that a temporary injunction do issue against the defendant, restraining the defendant by itself, workers, servants and/or agents from entering, trespassing up, alienating, disposing of, offering for sale, selling or giving access to the apartments being apartment No. K201 and D205 Malindi generally known as Oasis Village and or restraining the defendant from preventing, or obstructing the plaintiff's authorized persons' entry or access or in any manner dealing with the same whatsoever pending hearing and determination of this suit.

(2) That this order be served upon Mrs. Pepe Teresa and Mr. Tom Ngonyo Hinzano for compliance

3) The order be effected with the assistance of the Court Bailiff and the Officer-Incharge, Malindi Police Station to ensure compliance.

It is premised on grounds that:-

(a) There is a prima facie case set out with probability of success.

(b) The plaintiff is bound to suffer gravely and irreparably

(c) It is in the best interest of the parties that the property be preserved.

In the supporting affidavit sworn by the applicant Maurizio Turato, he states that he duly purchased the two apartments as per copy of agreement marked MR1 and he made deposit and further payments to the respondents towards purchase price as per copies of cheques marked MT2(a) and MT2(b). He had also made some earlier payments in Italy.

He received a demand letter from the respondent's advocate dated 14<sup>th</sup> April 2009, (MT3) and he deposited with the respondent's advocate a cheque for the outstanding balance (MT4) and the cheque was received unconditionally.

Upon making inquiries, Applicant discovered that the respondent's capacity to sell as transacted was doubtful. The applicant returned to Kenya on 19<sup>th</sup> February 2010 from Italy and found a letter dated 05-02-10 (MT 5) in his post box claiming the defendant's right to re-entry, which was not provided in the

sale agreement.

On 10<sup>th</sup> February 2010, the defendant's agents or servants went to the said apartment and purported to block applicant's access to the same. Applicant states that in one of the apartments he has a tenant who works for Kenya revenue authority and who would be greatly prejudiced by such obstruction.

The other apartment is occupied by one of his workers named Miriam who has a small school going child – she occupies the apartment as part of her employment package and would suffer great damage. This is why he wishes the respondents to be restrained.

In response, the respondent's director Thomas Hinzano Ngunyo filed a replying affidavit stating that the applicant has failed to disclose that there is another suit i.e **Malindi CMCC – 65 of 2010 Maurizio Turato v Casimo Teresa** which is pending (copies of the relevant pleadings are annexed as THN 1).

The Resident Magistrate Miss Ocharo, who heard the matter declined to extend orders and directed that a hearing date be taken in the registry as per exhibit THN 3. It was subsequent to this that the applicant filed a notice of withdrawal of the suit and filing of this application before the High Court is an abuse of the court process. The court granted interim orders pending interpartes hearing. The other application is also by way of Chamber Summons dated 26-4-10 made under Order XXXIX Rule 4 Civil Procedure Rules, section 3A, 1A and section 63(e) Civil Procedure Act seeking that the orders granted on 11<sup>th</sup> March 2010 be set aside and be discharged; and the court to order the plaintiff to deposit any rent and rent collected from the suit premises since October 2009 to date, with the court, until the matter is heard and determined.

Further that the plaintiff be ordered to deposit in court the monthly installments as agreed in the contract of sale dated 1<sup>st</sup> April 2009, pending hearing and determination of the suit.

It is based on grounds that the application dated 11<sup>th</sup> March 2010 is simply intended to deny the defendants their dues while plaintiff reaps the fruits of the contract which he does not wish to comply with.

Secondly the orders of 11<sup>th</sup> March are assisting the respondent to act in breach of the contract.

The plaintiff does not have money to meet his obligations in accordance with the agreement and filing of this suit is simply an abuse of the court process.

In the affidavit sworn by Thomas Hinzano to support his application, he depones that the defendant has failed to pay the agreed installments yet he has already taken unlawful possession of the premises, contrary to the agreement. The plaintiff has rented out the premises despite the fact that he is not to be in possession of the property until the full and final payment is made. So plaintiff is not paying installments and at the same time he is earning from the same property purchased from the defendant and this is why defendants wish to exercise their right to sell it.

The plaintiff is a foreigner whose immigration status is not known and in the event that he loses the case and decides to leave the country, he will have enriched himself from the defendant's property.

The plaintiff in response has filed a replying affidavit in which he states that the claims being made by the defendant are an afterthought and intended to prevent him from peacefully occupying the premises which he duly purchased from them.

He states that although KRA confirmed that the defendant is registered, they also pointed out that defendant had not filed returns or paid taxes and is therefore not a properly constituted company so he might end up losing a lot of money if the defendant is deregistered or ceases to exist.

His contention is that as at the time of entering into the contract, the defendant was not properly constituted and was operating illegally.

He denies having any financial problem though he acknowledges that the property had not been transferred to him.

He claims to have spoken to one Polcino Cosimo who said he was not aware of any sale and that there appeared to have been an unsanctioned change of directorship without regard for law or existing rights and a High Court Succession Cause No. 17 of 2009 has been filed to challenge administration of Oasis Village. He explains that he could therefore not continue to make further payments before settling the question of validity of the transaction.

Both counsel had agreed to dispose of the applications by way of written submissions, however I only received the submissions written by plaintiff's Counsel Miss Chepkwony. She submits that although the defendant is registered as a company, the status of its directors is not known and this is what makes the plaintiff fearful that defendant mischievously concealed this information and he may end up losing a lot of money which he has already paid to the defendant so as a way of securing his interests he has decided to stop any further payments until the matter is clarified. To fortify this, plaintiff alludes to High Court Succession Cause No. 17 of 2007 in which the directorship and administrators of Oasis Village is being challenged.

Miss Chepkwony submits that the plaintiff has established a prima facie case as he has demonstrated that he entered into a contract with the defendants, made payments and then realized that the legal capacity of the defendant to enter into a contract is questionable and that defendant had concealed this information. Further that despite receiving so much money from the plaintiff, defendant has refused to transfer the property to plaintiff.

On this point, it is important to note that defendant does not deny being in occupation of the property, and he acknowledges that defendant had refused to transfer the property to him.

What does the agreement say about the payments, transfer and occupation?

Paragraph B of the agreement states that:

***“And whereas in consideration thereof the owner agreed upon completion of the said work to transfer to the Buyer two apartments....”***

This was an agreement which extended the date of completion.

There seems to be an earlier agreement made on 30<sup>th</sup> April 2009, which seems to have been varied because although clause 4 of that agreement refers to purchase price already being paid in full before execution, both parties confirm that the payments were being made in installments and that is an outstanding balance. The bottom line however is that the agreement assured applicant of transfer of the property **upon completion of the construction.**

I am aware of a hotly contested succession cause filed in Malindi High Court in relation to the Cosimos, and that some letters of administration had been obtained by one set of the family of Cosimo and this is also being challenged.

Indeed the question of who is the administrator of Cosimo is in issue and this will impact on who is the legal director of the company which entered into the contract with the plaintiff. Of course Polcino Cosimo has not sworn any affidavit to confirm that he is contesting the change of directors, but this is a fact which I take judicial notice of as the matters aforementioned have come before me on more than one occasion. The questions raised by KRA are also not denied by defendant.

So what would happen in the event that defendant is deregistered for failing to file returns and failing to pay taxes?

And what about the fact that defendant wants to take possession and resell? I think the plaintiff has adequately demonstrated that there is need to preserve the subject matter and to that extent I find that plaintiff has established a prima facie case with probable chances of success and he has adequately satisfied the first limb of the celebrated **Giella v Cassman Brown case 1973 EA page 358.**

Would damages be adequate compensation? Miss Chepkwony argues that plaintiff needs to protect his rights and interest, the directorship is under challenge by a High Court Succession Cause, he has paid a lot of money if he is locked out of the property he will suffer double loss i.e losing the property and losing

the money. Miss Chepkwony cites the decision of **Lucy Njoki Waithaka v Industrial and Commercial development Corporation (ICC) HCCC 321 of 2001** to fortify her argument that even if the injury were adequately compensable in damage, an injunction may still issue. Of course the value of the building can be assessed and quantified, the money he has so far paid is known and that too can be computed, but here the violation or threatened violation is compounded by what definitely appears to be a high handed conduct of the defendant i.e non disclosure of the true state of affairs at the time of contracting, receipt of money, refusal to effect transfer upon completion of works, and now an attempt to take back the property and resell it.

Surely this scenario identifies with that envisaged by Ringera J in the **ICDC case** and I am persuaded that in losing both the apartments and money the defendant will have suffered irreparably and is deserving of an injunction.

However to be fair to the defendant, I will direct that the plaintiff deposit the monthly installments of the purchase price due in court as and when they fall due until the suit is heard and determined.

It is not clear to me why the plaintiff should deposit the rents collected from the premises in court- it's not like he has been given the premises free of charge.

I think the upshot is that the orders sought in the application dated 11<sup>th</sup> March 2010 are confirmed to the extent that defendants, its director, servants and or agents are restrained from interfering with the plaintiff or his servants/agents in relation to the two apartments.

For clarity of purpose – the plaintiff may deal with the two apartments in terms of entry and access by himself or authorized agent BUT he cannot resell them until the suit is heard and determined.

The defendant's application dated 26-4-10 falls in that I decline to discharge or set aside the restraining orders – since I have confirmed them and they shall remain in force until the suit is heard and determined.

The prayer for rent collected from the premises being deposited in court is rejected.

I allow prayer 4 that the monthly installments due be deposited in court as agreed in the contract of sale pending hearing and determination of this suit.

Each party shall bear its own costs.

Delivered and dated this 4<sup>th</sup> day of **November 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Miss Chepkwony for Applicant  
Mr. Michira for respondent