



REPUBLIC OF KENYA
HIGH COURT AT MOMBASA

CIVIL SUIT 194 OF 2009

1. ANTHONY GETAMBU

2. DR. ESTHER MUTHONI GETAMBU.....PLAINTIFFS

VERSUS

ABHAVI STONE CONSTRUCTION LTD.....DEFENDANT

RULING

The plaintiffs have lodged this Chamber Summons under Order XXXVIII Rules 1 (ii) (b), Order XXXIX Rules 1, 2, 2A and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for orders:

- i) of injunction restraining the defendant from entering, excavating, quarrying and/or mining building blocks and/or any other products and/or damaging or wasting and/or committing any wrong to the immovable property on parcel of land known as Kilifi/Roka/1237 and or interfering with the said land in any other manner whatsoever.**
- ii) of arrest against the directors of the defendant company; Gorasia Manji Naran, Naran Ravji and Prabul Manji for them to be brought before the court to show cause why they should not furnish security in the sum claimed in the plaint, for the defendants appearance in court.**
- iii) freezing the defendant's account number 0310239008 at Prime Bank Mombasa Branch to safeguard the interest of the plaintiffs.**

The application, which is supported by an affidavit sworn by the 1st plaintiff, is based on the main grounds that the plaintiffs are the registered proprietors of the suit property and the defendant has unlawfully and illegally entered upon the same and excavated building blocks thereon and unless restrained will continue the said unlawful acts. The plaintiffs further contend that the defendant is owned by foreigners whose assets are unknown. In response to the application, the defendant's director Gorasiya Prafulchandras Manji has sworn an affidavit in which he lays claim to the suit property on the basis of an agreement entered into between the defendant and one Bavana Paul Kalala. The said director further deposes that he has applied for alien registration and further that Naran Davji is a Kenyan. He has further deposed that he owns Parcel No. Kilifi/Roka/73 which he is willing to offer as security and that in fact the defendant moved out of the suit premises on 10th June 2009.

When the application came up for hearing on 8th July 2009 counsel agreed to file written submissions by 29th July 2009. However, by 27th August 2009, only counsel for the applicants had filed his written submissions. I have considered the application, the affidavits filed and the submissions of counsel for the applicants. Having done so, I take the following view of the matter. With regard to the prayer for an

interlocutory prohibitory injunction the applicants have exhibited the Title Deed of the suit property and the current certificate of official search. The two documents are in the applicants' names. They have in my view demonstrated that their title is indefeasible. The defendant's claim on the other hand is unknown in Law. The agreement of sale which has been exhibited is in respect of a different title and was not with the plaintiffs. There is therefore no doubt that the applicants are entitled to the possession of the suit property to the exclusion of all others including the respondent save with the applicants' consent or authority.

In the premises, the applicants have shown a prima facie case with a probability of success at the trial. I also find and hold that unless the injunction is granted the applicants might otherwise suffer irreparable injury. As I am in no doubt as to the first condition for the grant of the injunction, I need not consider the balance of convenience.

With regard to the prayer made under Order XXXVIII Rule 1 (ii) (b) namely, that the court issues a warrant of arrest against the directors of the respondent and freezes the defendant's account to safeguard the plaintiff's interest, I note that the basis of that prayer is the applicants' allegation that the directors of the defendant are all Indians and staying in Kenya on alien certificates and will leave the country because of the huge compensation likely to be awarded by the court.

Before a court can grant the orders sought under the said sub-rules, it must be satisfied that the respondent with intent to delay the plaintiff or to avoid any process of the court or to obstruct or delay the execution of any decree that may be passed against it, is about to abscond or leave the local limits of the jurisdiction of this court or that the respondent is about to leave Kenya under circumstances affording a reasonable probability that the applicants will or may be obstructed or delayed in the execution of any decree that may be passed against the respondent. On the material availed to the court, I am not satisfied that the respondent or its directors have the said intention which is a prerequisite before the orders sought can be issued. Without evidence that the respondent or its directors intend to do what is feared by the applicants, I cannot grant the orders sought which would infact operate as pre-trial attachment. I am not satisfied that the said orders should issue. In the premises, I decline prayers sought under Order XXXVIII Rule 1 (ii) (b) of the Civil Procedure Rules.

I however allow the application in terms of prayer 3 thereof. I grant the injunction pending the hearing and determination of the suit on the condition that the applicants file separate undertakings as to damages within the next seven (7) days.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Matara for the Respondent and Mushelle holding brief for Wachira for the Applicants.

F. AZANGALALA

JUDGE

23RD SEPTEMBER 2009