REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 4 of 2008

HELGA HAHMANN …………………………...……………… PLAINTIFF

- Versus -

CHARLES MUMBA MWAGANDI …….………...……..… DEFENDANT

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R U L I N G

The application before the court is brought by a Chamber Summons dated 8th January, 2008, and taken out under Court Vacation Rules; rule 3 of the High Court (Practice and Procedure) Rules promulgated under Section 10 of the Judicature Act; Order XXXIX rules 1, 2, 3, 7, 8 and 9 of the Civil procedure rules; Section 3A of the Civil procedure Act, and all other enabling provisions of the law.

The plaintiff/applicant thereby prays for the following orders:-

1. THAT this Honourable Court be pleased to grant leave for an order that the applicant's Chamber Summons dated 8th January 2008 be heard during the vacation as it is extremely urgent.

2. THAT this Honourable Court be pleased to grant an order and/or injunction temporarily restraining the defendant/respondent, his agents, servants and/or representatives from in any way selling, transferring and/or alienating the applicant's house and motor vehicle.

3. THAT the respondent be condemned to bear the costs of this application.

4. Any other and/or further relief that this Honourable Court may deem fit and just to grant.

The application is supported by the annexed affidavit sworn by the applicant herself, and is based on the grounds that:-

(a) The plaintiff is a retired banker of German nationality.

(b) The respondent, who is a supervisor at Tiwi Beach Resort convinced the applicant and send him money to buy her a holiday home in Kenya as well as a motor vehicle the same being for her use when she visits the country on holiday.

(c) The respondent is now attempting to fraudulently dispose off the motor vehicle and house which said properties were purchased wholly with the applicant's funds.

(d) The respondent has refused to hand over possession of the said house and motor vehicle to the plaintiff who is the owner thereof.

Opposing the application, the respondent swore and filed a replying affidavit on 4th February, 2008. The main thrust of his discourse is that he bought the suit properties with money derived from his own resources. In consequence thereof, he neither at any moment asked for or obtained a loan from the plaintiff, nor did he promise to refund anything.

During the oral canvassing of the application, Ms. Kayatta appeared for the applicant while Mr. Mutubia appeared for the respondent. Ms. Kayatta argued that the parties enjoyed a relationship from 2005. In the process, the plaintiff was pursuaded to send money for the purpose of building a holiday home in Kenya, and purchasing a motor vehicle for her. She accordingly sent the money with which the respondent purchased the suit properties which he now refuses to handover to the applicant, and instead seeks to fraudulently dispose off. She submitted that according to the respondent's payslip, he lacked sufficient financial means with which to purchase the house and the motor vehicle. She further submitted that the properties were acquired after the parties had met, and that in all probability it was the applicant who provided the funds. She also submitted that the plaintiff had established a prima facie case exists in this matter, and since the defendant is a man of no means, if an injunction was not granted, the plaintiff would suffer irreparable loss and damage. She therefore urged the court to grant orders as prayed.

Mr. Mutubia for the defendant opposed the application and in so doing relied on the defendant's replying affidavit. He emphasized that the application was mortally defective since it was brought in an omnibus manner instead of bringing two separate applications as ordained under the vacation rules. Dwelling on further technicalities, Mr. Mutubia argued that prayer 2 does not specify the property which the defendant should be restrained from disposing off. Furthermore, the application does not state the plot number or the motor vehicle registration number, nor does it specify the duration over which the injunction is sought. On these grounds, he submitted that the prayer was fatally defective.

On the merits of the application, Mr. Mutubia argued that the plot and the motor vehicle are both registered in the respondent's name and then submitted that the applicant had failed to establish fraud which should have been done on a higher standard than that of a balance of probability. He further submitted that contrary to the applicant's insinuation that the respondent was a pauper, the latter had demonstrated that he was earning a regular salary; that he took a loan from the Co-operative Bank; and that he had other avenues for obtaining funds. Moreover, whereas in the plaint the applicant claims that she sent money to the respondent to acquire the properties for her, in the application she says that she advanced a loan, but does not disclose the amount of the loan and the terms thereof. Mr. Mutubia therefore submitted that her remedy is a refund of the money but not recourse to property.

Finally, counsel argued that the plot was registered in the defendant's name before he received any money from the plaintiff, and the plaintiff has not proved that she financed the acquisition of these properties. Consequently, the plaintiff had not established a prima facie case; the loss was not irreparable; and the balance of convenience lay in favour of the defendant as the registered owner, and therefore the application should be dismissed with costs to the defendant.

In reply, Ms. Kayatta said that the respondent was not prejudiced by the application having been brought in an omnibus manner.

Having considered the pleadings and the submissions of counsel, I find that the two main issues to be determined are whether the application is rendered mortally defective by the manner in which it was brought and if not, whether the applicant has satisfied the conditions for the grant of an interlocutory injunction. With respect to the first issue, there is no gainsaying the technical irregularities alluded to by counsel for the respondent. With the application having been brought during the court's vacation, ideally there ought to have been two applications – the first one for leave to be heard during the vacation and, if

that leave is granted, the application for substantive orders. The applicant in this matter brought only one application asking to be heard during the vacation, and at the same time seeking substantive orders. The court granted leave to be heard during the vacation and gave a date for the inter partes hearing of the substantive prayer. While I agree with Mr. Mutubia that this was prima facie irregular, I also agree with Ms. Kayatta that such an irregularity did not prejudice the respondent in any manner, and therefore the application was not rendered fatal by such irregularity.

The second point taken by Mr. Mutubia was that the application did not specify the property which the defendant should be restrained from disposing off. That is so. The dispute between the parties concerns one plot and one motor vehicle both of which seem to be well known to the litigants. It must be out of this knowledge that the respondent attached to his replying affidavit the respective copies of the title deed as well as the log book. At any rate, the two properties are clearly described in paragraph 4 of the plaint as well as in clause 1 of the prayers for judgment. In such circumstances, as the respondent could not have been prejudiced in any way by the omission, I would find it unjust to declare the application fatally defective as urged by Mr. Mutubia. The same goes to the argument that the applicant has not specified the duration of the period over which the injunction is sought. If the court were to find that the injunction sought is indeed merited, the court would exercise its discretion to determine the period over which such an injunction would remain in force.

Coming to the merits of the application, the conditions to be satisfied for the grant of an interlocutory injunction were clearly spelt out in GIELLA v. CASSMAN BROWN & CO. LTD. [1973] EA 358 in which Spry, V.P, said at p. 360:-

"*The conditions for the grant of an interlocutory injunction are now … well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*"

On the first condition, the applicant contends that she sent money to the respondent for the purpose of purchasing a plot and construction thereon of a house for the applicant. She also sent money for the purchase of a motor vehicle for her. It is her case that the respondent duly purchased the plot and had it registered in his name in lieu of the applicant's name, and that he also bought a motor vehicle which he got registered in his own name. It is therefore her case that the respondent did so fraudulently. She attached to the application documents which show that she actually did send moneys to the respondent. Counsel for the respondent submitted that the applicant had not established fraud as the standard required was higher than that of a balance of probability. If the matter rested there, I would at this stage have said that it will depend on the evidence yet to be adduced.

It is noteworthy that the respondent admits having received money sent to him by the applicant. However, his explanation was that the money was meant for procuring accommodation and transport whenever the applicant was coming for holiday in Kenya. Compared with the frequency with which the money was sent, I find the respondent's explanation wanting. For instance, the applicant's chart of the remittances shows that she sent money in December, 2005, January 2006, and thereafter in February, March, April, May , June, July, August, November and December, 2006. Is it possible that she was coming for holiday in Kenya every month of the year? Moreover, in December, 2005, she sent the money on the 15th and 28th days of that month. Similarly, in February of 2006, she sent the money twice; and also in March, and November. In May, she made remittances four times, and in December, three times. It was only in April, June, July and August, 2006, that she sent the money once each month. If the Applicant was indeed sending the money only when she was coming on holiday in Kenya, then she would have been coming on holiday at least once every month, and on some occasions she would have come twice a month, while in May 2006, she would have come four times and in December 2006, three times! This is not believable. In spite of the applicant having apparently contradicted herself by deposing in her supporting affidavit that the money was a loan to the respondent, and without making a definite finding at this stage, it seems to me that the explanation by the respondent is a smoke screen, and that on a balance of probability, the applicant has shown a prima facie case with a probability of success.

As for the second condition as set out in GIELLA'S CASE, the issue is whether the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages. It seems to me that the amount of money sent by the applicant to the respondent is quantifiable, and that on the face of the record, if that money could be paid back, then the applicant would not suffer irreparable injury. The issue therefore narrows down to whether the respondent would be in a position to refund that money. In MUREITHI v. CITY COUNCIL OF NAIROBI [1976 – 1985] EA 331, borrowing from the speech of Lord Diplock in AMERICAN CYNAMID CO. v. ETHICON LTD [1975] 1 AII ER 504, Madan JA, as he then was, said at p. 333:-

"*The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial … If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.*"

Is the respondent in this matter in a financial position to pay the damages which would be recoverable at common law? On the basis of the depositions on the record, and without making any definite finding at this stage, the respondent has not been candid about his financial means. Attached to his replying affidavit is a copy of his payslip for October 2007. It depicts his gross salary as Kshs. 13,350/- per month, which is reduced to Kshs. 4,367/- net per month after statutory and other deductions.

He states in his affidavit that he disposed off his properties in Malindi, and that he has "other businesses." Neither the nature nor the quality of those "other businesses" is disclosed. Against a backdrop of 40.050 Euros which the applicant alleges to have advanced to the respondent, if any damages were ordered to be paid, I doubt that the respondent would be in a financial position to pay them.

The third condition laid down in GIELLA'S CASE is that where the court is in doubt, it will decide an application on the balance of convenience. The most convenient step to take in this application is to maintain the status quo until this case is heard and determined. Inasmuch as the respondent avers in paragraph 20 of his replying affidavit that he has no intention whatsoever of disposing off the house as he has no other house to live in, he will not be prejudiced by any such order. On the contrary, if the property is not preserved, the applicant will be inconvenienced should she win the case and the respondent is not in a position to pay damages which may be awarded.

For the above reasons, an injunction is hereby granted temporarily restraining the defendant/respondent, his agents, servants and/or representatives from in anyway selling or transferring the house located at Mwaroni on Plot No. 3837 South Coast and motor vehicle Registration No. KAT 428K Toyota Hiace, pending the hearing and determination of this case. Costs will be in the cause.

Dated and delivered at Mombasa this 9th day of May, 2008.

L. NJAGI

JUDGE