



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI Civil Case 74 of 2005**

**SILVANA DOMENICA SAROLI.....PLAINTIFF**

**VS**

**ALCAMO VINCENZA.....DEFENDANT**

**RULING**

This is a chamber summons application under order XIX rule 1 CPR seeking that;-

- 1) The Plaintiff be ordered to forthwith deliver accounts of all monies that the Plaintiff has received from guests to the suit premises from 2002 to-date in terms of prayer (f) of the defence and counter claim.
- b) Costs of this application be paid by the Plaintiff.

-It is premised on grounds that the suit premises are registered jointly to the Plaintiff and the Defendant.

-The Plaintiff at para 7 of the amended plaint filed on 17/8/06 admitted that she operates the suit premises as a guest house.

-The Plaintiff has sought a declaration in the amended plaint dated 16/8/06 and filed on 17/8/06 that she is entitled to all incomes and earnings derived from the suit premises.

-The Defendant has in her further amended defence and counterclaim amended on 31/8/06 prayed for an order that accounts of all monies received by the Plaintiff from paying guests to the suit premises be taken.

-The Plaintiff filed a reply to the defence and defence to the counterclaim on 31/10/05.

-The Plaintiff did not file any affidavit under order XIX rule 1. In the absence of that affidavit, Order XIX Rule 1 requires an order for proper accounts to be made.

-The Plaintiff is running the suit premises as a guest house and receiving income from guests.

-There is no dispute that the Plaintiff is receiving an income from the suit premises. The Plaintiff has not explained by way of an affidavit why the order for the taking of accounts should not be made.

The application is opposed in the grounds of application, the Plaintiff/respondent states that;-

- 1) The application is incurably defective for lack of a supportive affidavit.

- 2) The application is misconceived and bad in law.
- 3) The application is unmerited and is otherwise an abuse of the court process.

In arguing the application Mr Ole Kina submits that there is no dispute that the Title to the suit premises shows Plaintiff and Defendant as joint proprietors. He points out that from the amended plaint, he admitted that he is running a guest house on the suit premises and that the Plaintiff has sought a declaration that he is entitled to all earnings in the suit premises and the Defendant wants an order account of all monies received by Plaintiff from the paying guests. Under order XIX rule 1, it is the duty of the person resisting an order of accounts to explain to the court by way of affidavit why that order should not be granted. In this instance Respondent/defendant has not filed an affidavit to that effect and the defence and counter claim do not attempt to give any explanation.

In response Mr Maosa for Plaintiff/Respondent submits that the provision reads “when necessary” an affidavit in support of the application shall be filed and says they did not find it necessary to file an affidavit as they wish to rely on the pleadings and the court is being unnecessarily overburdened with bundles of documents. He points out that the amended defence and counterclaim do not admit joint ownership which they now raise and that infact they deny that Respondent paid any money or jointly bought the premises – then in the counter claim they turn around and say it is Defendant who paid full purchase price, Mr Maosa explains that it is only in matters where parties are met dispute matters, that the court can be moved to order taking of accounts.

Here Respondent insists on being the one who erected the structures and spent in excess of 20 million shillings and that when the property was bought, it was vacant and so there is no reason to share the proceeds. Mr Maosa submits that the application is merely intended to delay the hearing of the main application because pleadings closed in September 2006 and such an application should have been made immediately and not 2 years later and discoveries were made in May 2005 yet hearing of the matter remains elusive. He further points out that the counter claim is not only seeking taking of accounts but ten other remedies being sought, yet he zeroes in on taking of accounts and he prays the application be dismissed.

Mr Ole Kina` seeks refuge under order L rule 3 saying its only where there is an intention to rely upon any evidence that a party is obliged to file an affidavit in support of any application and that perhaps counsel is referring to Order XIX Rule 2 but that here the fact of title in joint names is not in dispute. He argues that the burden is not on the applicant to show that an order for looking of accounts is merited, rather, it is the respondent to show why that order should not be made and that there is nothing to show that the application is an abuse of court process. Mr Ole Kina further states that it`s the manner of acquisition which is in dispute, but the fact that the Title shows both parties as owners is not in dispute should the respondent be ordered to make an account of all monies received from guests in the suit premises.

Order XIX rule 1 CPR provides as follows;-

*“Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made”*

Order XIX rule 2 addresses the procedure of making such an application which is by way of making such an application which is by way of chamber summons and supported by an affidavit when necessary

It would appear from the two rules cited that the failure by either party to file an affidavit in support of their respective points is not fatal – it is important and it need not fall into order L rule 3. The dispute is with regard to the parcel of land known as Portion No.5630 (originally No.5181) Malindi and according to the amended plaint the parties contributed an equal sum of money towards the purchase and it was registered towards the purchase and it was registered in the joint names.

The purpose was for joint construction of residential premises with each party contributing equally in financial and material terms. The Defendant abandoned the quest to have the property developed and let the plaintiff undertake the building project and so he says Defendant is not entitled to any of proceeds arising there from. These are the proceeds applicant wanted to be accounted for.

The Defendant's amended Defence and counter claim she denies having found or contributed towards the purchase of the property or having brought the property jointly with plaintiff. She also denies that its purpose was for developing residential premises.

So if the issue joint ownership is denied in the pleadings, why does the applicant then find it convenient now to turn round and say they are jointly registered? Is not it because she wants to have both her cake and eat it by insisting on knowing how much money respondent has been collecting. The applicant is not being candid – he who comes to equity must do so with clean hands.

-The applicant's hands are soiled - blowing hot and cold when it suits her.

Indeed the statement of amended defence has an admission that Plaintiff has erected some structures on the suit premises and made extensions of the villa that was in existence – whether that was proper or not – applicant had no hand in the construction so why should Respondent account for what he receives from this?

Her defence creates great confusion to the application when she once again turns round and says she improved the premises – it just smirks of bad faith to require taking of accounts and an attempt to abuse the principle of quic quic quid planta the solo solo credit – because in her own admission, some of the structures from which Respondent is now draining income, were relief erect by respondent. My finding is that the application lacks merit and is dismissed with costs.

Delivered and dated this 7<sup>th</sup> day of November 2008 at Malindi.

**H A OMONDI**

**JUDGE**

Mr Maosa for Plaintiff

No appearance for respondent at 9.30am.

**H A OMONDI**

**JUDGE**