



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MALINDI  
Civil Suit 29 of 2007**

**ASPANI PROPERTIES.....PLAINTIFF**

**VERSUS**

**ROBERTO CAMELLINI.....DEFENDANT**

**R U L I N G**

By an application by way of chamber summons dated 4<sup>th</sup> April 2007, pursuant to the provisions of Order XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the applicant seeks orders:

- 1) *That the court do certify that this matter is extremely urgent and the same should be heard exparte in the first instance.*
- 2) *That a temporary injunction do issue against the Defendant restraining the Defendant by himself, agents and/or servants from carrying on with construction work on plot Number.430/Watamu.*
- 3) *That the court do issue any other order it deems just to grant.*
- 4) *Costs of this Application.*

The application is based on the ground that:

- 1) *The Plaintiff/Applicant is the legal owner of plot Number 430/Watamu.*
- 2) *The Respondent without the consent and or permissions of the Plaintiff started putting up structure onto the said plot and he is still doing so despite being told to stop.*
- 3) *That unless the orders sought are granted, the Plaintiff stands to suffer irreparable damages as the suit premises is being wasted and damaged by the going construction.*
- 4) *The Plaintiff's case raises a prima facie case with a high probability of success.*
- 5) *The balance of convenience demands that the suit premises be preserved until the case is heard and determined.*

The application is predicated upon the annexed affidavit of Arnoldi Roberto sworn on the 3<sup>rd</sup> day of April 2001. The applicant relied on the contents of the said affidavit and on oral submissions.

For the applicant it was submitted that he is a director of the plaintiff's company and have the consent of the other directors as per exhibit "ARI" to sue on their behalf.

That land parcel No. 430 Watamu belongs to Aspani properties whose directors are Manoni Mentore, Belegetti Carla, Arnoldi Roberto, Trezzi Fiani and Roberto Camellini, the defendant herein. Evidence of ownership is exhibited as “**AR2**”.

The defendant without consent of the other directors started erecting structures on the suit premises contrary to the company’s rules and regulations as per exhibit “**AR3**”.

The conduct of the defendant amounts to wasting and damaging the suit premises hence the prayer that this court should issue a temporary injunction restraining the defendant by himself, servants or agents from carrying on construction on the suit land pending the hearing and determination of the entire suit.

The respondent filed replying affidavit by Roberto Camellini sworn on the 11<sup>th</sup> day of April 2007.

For the respondent, it was conceded that he is one of the directors of the applicant company having been appointed so by reason of having purchased the suit property. That he took over the shares of one Luciano Mazzucchelli together with his place as a director in the applicant’s company.

That it is not true that Arnoldi Roberto has consent of other directors of the applicant company to sue on their behalf as exhibit “**AR-1**” is merely an instruction note to M/s Muisyo & Company advocates.

That there are no resolutions of the company authorizing the filing of the suit as enjoined by the Companies Act.

That Roberto Arnoldi, Giovanni Terezzi and Manomi Godfred, all directors of the applicant, have all done renovation to their various houses within the suit premises without any permission from either the company or other owners of the various houses yet no one has complained. He is thus being discriminated against.

That the entire suit is bad in law to the extent that it has been brought by Arnoldi Roberto as opposed to the company. In any event the suit brought by Arnoldi Roberto on behalf of the other directors is representative in nature and yet no leave of the court was sought and obtained as required by order 1 Rule 8 of the Civil Procedure Rules.

That a company is run by board resolution and not by decisions of individual directors. No such resolution has been passed. As it were the suit has been brought by an individual.

That it is not true that he has wasted or damaged the suit premises as alleged. He has merely modified the house like all the directors who have done so without seeking the approval of any other director save for the Municipal Council of Malindi.

That the applicant has not come to court with clean hands, there is no prima-facie case established, damages would be adequate remedy and the balance of convenience is in favour of the respondent at all events.

I have carefully analysed the issues raised in the application, the various affidavit and appreciated the law on the point.

It is not in dispute that the applicant is a limited liability company. It is axiomatic that a company being on artificial person acts through its board of directors but within the confines of the Articles and Memorandum of Association.

There must be a specific resolution of a company board of directors authorizing any act the company engages in. Minutes of the board, generally speaking, are a true reflection of what has been resolved at board meetings or general meetings. Anybody dealing with a company is obliged to seek and confirm from the minutes that a meeting of the board had in deed taken place. It is contended on behalf of the defendant that there was no resolution of the company to undertake the exercise the company is purported

to have taken, or rather that the resolution was belatedly introduced by the so called “**reply to replying affidavit of Arnoldi Roberto sworn on the 22<sup>nd</sup> day of April 2007 marked as exhibit “AP1”** and commissioned on 23<sup>rd</sup> April 2007.

Quite apart from the fact that the same is belated, my reading of it is that it does not authorize the company to file suit against the respondent. In my view it is an undertaking to demolish the new built parts and to present a project to occupy the balconies.

To me, it appears to be an afterthought. The applicant is trying to close the stable when the horse has already bolted. It is an exercise in futility. It cannot resuscitate the suit.

Having said that, I prefer to rest my judgment on this point on the basis of the foregoing.

The up-shot is that the application fails and is dismissed with costs to the respondent.

**Dated and delivered at Malindi this 7<sup>th</sup> day of September, 2007.**

**N.R.O.OMBIJA**

**JUDGE**

Mr.Mwadilo for Muisyo} for applicant.

Mr.Mouko } for respondent.