



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

**Civil Case 153 of 1990**

**MAINA MACHARIA.....PLAINTIFF**

**=VERSUS=**

**COL. DAVID MUCHEMI.....DEFENDANT**

**RULING**

This suit was filed on or about 24<sup>th</sup> October, 1999. The Plaintiff and the Defendant are the joint registered owners of a plot known as 553/11/9 situated in Molo Township and on which is erected a commercial building.

The Plaintiff's claim against the Defendant is in effect refund and contribution of monies that he borrowed in order to save the property from sale by a chargee, Jimba Credit Corporation when it was about to be auctioned. He also prays to be given the first option to purchase the suit premises.

The Defendant filed a Defence and Counter-claim. In the Defence, the Defendant substantially admits the Plaintiff's claim but seeks accounts to be taken and determination of who owes what to the other.

On 20<sup>th</sup> September 2005, the Defendant filed the inter alia application before me seeking that the Defendant and his agents be given unlimited access to the suit premises and also to be allowed to carry out a valuation of the same and assessment of the rents etc. The Defendant claims that this would assist him to prepare for the hearing of his set -off and counter claim.

I have considered the application and supporting affidavit. I have also considered the pleadings and the grounds of opposition.

I do find that there is no dispute that the suit premises are jointly owned by the Plaintiff and the Defendant. The Defendant admits that the Plaintiff is entitled to be paid what he paid to Jimba Credit Corporation by setting off this from the rents. It would appear that the Plaintiff has been in control, custody and possession of the suit premises from the time he paid the loan or even before. It is alleged he has been collecting the rent to the exclusion of the Defendant.

It is my view that the Plaintiff herein seeks that the property be sold to him while the Defendant wants accounts to be taken. None of the parties have expressly asked for dissolution of the partnership or sale of the property so that each party goes his own way.

I think that the Applicant is seeking what will in away amount to a trial of the issues in dispute through this interlocutory application. I do not accept that the partnership between the parties has been dissolved. I do however have no doubt that accounts must be taken of all the amounts paid by the Plaintiff to Jimba Credit Corporation. Equally, the Plaintiff must give a candid and accurate account of all the rents and income he has received over the years and any expenses incurred.

This Court cannot order the parties to sell their property if they do not wish to do so to resolve their dispute. This should have been the way out. On the other hand this Court cannot supervise the parties on how to run their businesses. Even if accounts are taken and one party is found to owe the other, then what happens if the debtor pays off the said sum? What happens if there is a default? Will there be attachment or sale of the suit premises etc.?

I am not inclined to grant the orders sought herein at this stage. I think that a valuer will have to be appointed to take the accounts in any event, but this will be at the trial and not at the interlocutory stage. To do so would be presumptive, and pre-emptive of the issues in dispute.

I therefore disallow the application – costs shall be in the cause.

I do direct that the parties set down the suit for hearing on priority basis.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2007.

M.K. IBRAHIM,

JUDGE.