



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

Civil Case 33 of 2007

THERESIA ALIDA CAHILI.....PLAINTIFF

VERSUS

KASSIM YUSUF.....DEFENDANT

R U L I N G

By an application by way of chamber summons dated 25th April 2007, pursuant to the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Section 3A of Civil Procedure Act and all enabling provisions of the law, the applicant seeks orders:

- 1) THAT service of this application be dispensed with in the first instance due to the urgency of the same.
- 2) THAT this honourable court be pleased to issue a temporary injunction restraining the defendant by himself, his agents, servants, employees and/or in any other manner whatsoever from disposing or selling the said plaintiff's house situated on Plot No. LAMU/BLOCK 1/98 and the plaintiff's boat named TEREZA (formerly Fatah-Likher) and/or interfering with the plaintiff's physical and quiet possession of the said house and boat.
- 3) THAT in the alternative to prayer (2) above this honourable court be pleased to issue an order that a joint bank account be opened between the parties herein and the proceeds from the renting of the said house and boat so far collected be deposited in the said bank account and the same to be released to the owner of the said house and boat upon the determination of this suit.
- 4) THAT this honourable court be pleased to order the defendant to immediately surrender the plaintiff's file of documents which includes, inter alia, the documents listed hereunder and/or in the alternative issue an order to the defendant to deposit the said file or documents in court for safekeeping pending the determination of the suit hereof.
 - (i) Marriage certificate
 - (ii) Kenya Port Authority certificate
 - (iii) Registration receipt of the boat
 - (iv) Fishing licence

- (v) Sale agreement of the house
- (vi) Sale agreement of the boat
- (vii) 2 green exercise books containing valuable information
- (viii) Maroon file and various documents therein
- (ix) Agreement showing Kassim to manage Tereza's boat and house for six months
- (x) Receipts of household goods.
- (xi) That this honourable court be pleased to issue any further or such orders as it may deem fit and just to grant.

The application is based on the grounds that:

- (a) The plaintiff is the rightful owner of a house situate on Plot No. LAMU/BLOCK 1/798 and a boat named TEREZA (formerly FATAH-LIKHER) which properties the defendant has wrongfully laid claim upon without any colour of right.
- (b) The defendant is wrongfully and illegally detaining the plaintiff's file of documents which include, among others the documents listed in prayer (4) above and the plaintiff fears that he might misplace, loose or destroy the same.
- (c) The defendant is wrongfully enriching himself by retaining rental income from the tenants of the said house and boat-renting charges at the expense of the plaintiff.
- (d) If the orders prayed for herein are not issued the plaintiff stands to suffer irreparable loss and damage and therefore it is proper and in the interest of justice that the same be issued.

The application is predicated upon the annexed affidavit of Theresia Alida Cahili sworn on the 25th day of April 2007.

For the applicant it was argued that she is the owner of a parcel of land Lamu Block 1/798 and a boat christened **TEREZA** which she bought at Kshs. 1.8 million and Ksh. 720,000 respectively.

That in breach of her proprietary rights, and/or ownership rights the respondent has detained all the original documents. She exhibited copies of acknowledgement note for payment of the balance of purchase price of the boat, agreement of sale/purchase of the boat between herself and one Rashid Abdalla. The same are marked "**AC-1 (a) and (b)**". That the purchase of the said properties was meant to facilitate her settlement in Lamu.

That the respondent convinced her to leave him in charge of her (respondent's) house and boat while on a visit to Australia sometime in the year 2006. While in Australia, the defendant threatened her through telephone not to come back to Lamu. That her daughter Leane Cahill sent her an e-mail dated 15th March 2007 dated "**TAL 2**" to the same effect.

She became curious and decided to return to Kenya where she was shocked to discover that the defendant was claiming that she had sold the house and boat to him. The respondent produced forged documents in support of the purported sale.

That she is fearful that the respondent might dispose of the house and the boat hence this application. Pending the hearing and disposal of the suit the rents and income from the boat be deposited in a joint account. That unless the orders sought are granted she will suffer damage and loss.

The respondent relied wholly on the replying affidavit sworn on the 9th day of May 2007. On facts, the respondent contended the evidence in support of the application does not meet the legal requirements for the grant of a temporary injunction.

That the applicant, generally a good friend, confided in him of the desire to relocate to Australia. To that end, the applicant requested him to look for a buyer of her land and a boat. That the respondent offered to buy the two properties. That on 27th September 2002 the applicant sold to him a boat christened “**Tereza**” at Kshs. 720,000/= the purchase price of which he paid in full at the time of execution of the sale agreement as per sale agreement exhibited as “**KY 2**”. That on 3rd October 2006, he again entered into a sale agreement with the applicant for the purchase of Lamu 1 Block 1/789 situated at Langoni village, at a consideration of Kshs. 800,000/=, the purchase price of which he paid to the applicant at the time of execution of the sale agreement dated 3rd October 2006 exhibited as “**KY 3**”. That having lawfully acquired the two properties, it is just and fair that he enjoys the quiet possession of the same.

That there is no prima facie case with a probability of success shown as the respondent has exhibited sale agreements marked exhibit “**KY 2**” and “**KY 3**”. The said agreements are prima facie genuine unless proved otherwise. That the court should take judicial notice of the fact that the sale of both the Lamu plot and the boat has been endorsed by a jelly superintendent under the auspices of the Kenya Ports Authority as per annexure “**FAC 1 (b)**” and the respondent’s annexure “**KY 2**”.

That there is no evidence that damages would not be adequate remedy. In those circumstances there is no need to go into balance of convenience.

Last but not least the respondent contended that the application in any event is incompetent to the extent that the same is at variance with the plaint. The plaint does not seek permanent injunction consequently the court should dismiss the application. In this regard I was referred to the authority of **KIHARA V. BARCLAYS BANK OF KENYA LTD. MILIMANI COMMERCIAL CASE NO. 33/02**

I have carefully considered the application, the affidavit in support and the annexures attached thereto in addition to counsel’s submission. I have equally considered the replying affidavit, annexures attached thereto and counsels submission. Having done so I take the following view of the matters raised therein.

The law regarding temporary injunction is now well settled in **GIELLA V. CASMAN BROWN & CO. LTD [1973] E.A 358.**

One, the applicant must establish a prima-facie case with probability of success. The respondent has exhibited sale agreements marked exhibit “**KY 2**” and “**KY 3**”. While the applicant contends that the same are forgeries, the respondent maintains that the same are genuine. It is not unknown for a person to have different signatures for different purposes and I cannot on my part, without the aid of an expert or other evidence find that the signatures on exhibit “**KY 2**” and “**KY 3**” are not of the applicant. In the circumstances no prima-facie case with probability of success has been established.

Two, on the evidence the boat has a monetary value. This is not denied by the respondent. Accordingly damages would be adequate remedy in the circumstances.

On the premises I need not go into the issue of balance of convenience.

The result of the above consideration of issues raised by this application is that the application is for rejection.

Accordingly I dismiss the same. Costs shall be in the cause.

DATED and delivered at Malindi this 7th day of November 2007.

N. R. O. Ombija

JUDGE

Mr. Mwadilo for Omwancha for plaintiff