REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Case 73 of 2005

ANNE NJERI MBUGUA……………………..…………………PLAINTIFF

VERSUS

1.ANJELO BERTOLACCI

2. FABIIO BERTOLLACI………………………………DEFENDANTS

RULING

Before me is Chamber Summons application by the plaintiff in this suit seeking mandatory injunction against the respondents to compel them to allow her into the suit property located on Plot No. 9304, Malindi and a prohibitory injunction to restrain the respondents from alienating, transferring or dealing in the aforesaid property. The application is premised on the grounds set out in the application, the supporting affidavit and supplementary affidavit of the applicant. These grounds are that since 1995 the applicant and 1st respondent have cohabited in the suit property as husband and wife. That, as a wife, the applicant has made significant contribution to the enhancement of the value of the suit property besides purchasing household items including furniture. She sourced and at times paid for building material for the completion of new structures on the suit property. She therefore prays for the orders to preserve her fair share in the suit property.

The application is opposed and the respondents have filed a replying affidavit in which the 2nd respondent has averred that he is the registered proprietor of the suit property, which was purchased in 1993 by his parents. That the 1st respondent married one Nesta Elisa on 30th March, 1959, which marriage subsists. That the applicant was hired as a live-in caretaker of the property in consideration of financial assistance to her son, sister and other children. That even through the 1st respondent may have had some sexual relationship with the applicant the same had no effect on the 1st respondance marriage to Nesta Elisa, and further that the relationship with the applicant was adulterous and immoral. Nesta Elisa has also sworn an affidavit in which she has confirmed that she is the legal wife of the 1st respondent and also the fact that she was instrumental in the engagement of the applicant as a caretaker of the suit property. These are the two opposing positions. I have considered the same as well as authorities cited.

To begin, may I point out that the applicant's application is expressed to be brought under Order 50 rules 1,2 and 2 (A) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. An injunction can only be sought under the provisions of order 39 Rule 1 of the Civil Procedure Rules. The

Court's inherent jurisdiction under Section 3A of the Act cannot be invoked where there is express provision in the procedures. Be that as it may, the equitable remedy of injunction is discretionary and the Court will grant it only on certain conditions being satisfied. The conditions laid down in the celebrated case of **Giella V Cassman Brown & Co. Ltd** (1973) EA 358 are that, first, the applicant must show a *prima facie* case with a probability of success, and, Secondly that 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 as to the two (above), it will decide the application on the balance of convenience. These principles followed on from the case of **E.A. Industries V Trufoods Ltd** (1972) EA 420 which would seem laid down the principles for grating interlocutory injunction. In dealing with the first ground, the Court is simply concerned with a *prima facie* case for the applicant. The Court is not, at this stage, called upon to decide the issues of fact, but rather to weigh the strengths of the case for each party without making any definite finding of law or fact. Applying these principles to the application before me and looking at the plaint, the applicant's claim is on a property located on plot No. 9304 known as Laura Nyumba Ya Jua. Her claim is based on a relationship with the 1st respondent which she regards as a marriage entitling her to a claim of a share in the property.

According to her, she has been living with the 1st respondent, who has all along being the owner of the suit property in which they cohabited since 1995. As a wife she made the usual contributions to the property. The 1st respondent has been paying school fees to her son. According to her she could not have been a caretaker as there was no remuneration. It would appear from her pleadings that the applicant's claim is that, on account of cohabitation, a presumption of marriage arose.

For the respondents, it was argued that no sufficient evidence has been adduced to support a presumption of marriage. It was also submitted that the 1st respondent lacked capacity to contract a marriage. That the property having been sold to the 2nd respondent, the applicant cannot claim a share of it. That for a presumption of marriage to be relied on it must be shown that the applicant's customary law recognizes it. Has the applicant shown by affidavit evidence, and on a *prima facie* basis that she was a wife to the 1st respondent?

At the trial she will be adducing evidence of the existence of her presumed marriage with the 1st respondent. But, again on a *prima facie* basis, it has been shown that the 1st respondent was, between the period he cohabited with the applicant, married to Nesta Elisa, who has sworn an affidavit that her marriage to the 1st respondent has not been dissolved. The applicant, on the other hand, has averred that the 1st respondent informed her and she believed that the 1st respondent was separated from his wife. Her belief was fortified by the fact that the 1st respondent stayed in Malindi while his wife stayed in Italy. It is trite that a marriage, at least in Kenya does not end when couples are separated. It is only when a decree absolute is issued that a marriage can be said to have been dissolved.

The other point is that the suit property has been transferred to the 2nd respondent. Can the applicant still claim her share of it?

These are all points that will be ventilated at the trial of the suit. Suffice it to state that at this stage the applicant has not made out a *prima facie* case. Her claim is that she is entitled to a share in the suit property. Prayer 3 of the plaint states:

"**3. The plaintiff be given her fair share of the**

property located on plot No. 9304, Malindi"

She is not claiming possession. Her share, if any, can be computed and an award of damages would be adequate compensation. Since the Court is not in doubt I will not decide the application on the balance of convenience.

Before I conclude I wish to deal with a point of preliminary objection which was raised by the learned counsel for the applicant. The point taken was that the annextures to the 2nd respondent's affidavit offended the provisions of Rule 9 of the Oaths and Statutory Declaration Rules, which provides;

"**All exhibits to affidavit shall be securely**

sealed thereto under the seal of the

Commissioner and shall be marked with

serial letters of identification".

This provision is clearly mandatory and because of its importance the rules produce, in the Third schedule the format for marking the exhibits. The Court has rejected exhibits marked but not signed by a commissioner for oath – See **Municipal Council of Mombasa V Khalifa HCCC** Misc. Civil Application No. 102 of 2002.

Where the exhibits were merely marked with letters and figures of identification in the case of **Southern Credit Banking Corporation Ltd. V Gami Quarries Ltd**. (NBI) HCCC No.56 of 2004, the Court struck out paragraphs in the affidavit to which the exhibits related.

In a case where the exhibits were marked in the manner set out in the **Southern Credit** Case (supra) I rejected the exhibits See **Grace Wokie Rodrot V Isaac Mwaura Rodrot** Judicial Separation No. 8/2005. But in a case very similar to the instant one, Ransley, J. In **Amir Suleiman V Aberdare Safar**i HCCC.45 of 2004 found that where the exhibits are bound together and the Commissioner's seal is affixed on separate sheets, that that complied with Rule 9 of the Oaths and Statutory Declaration Rules. My take on this point, with regard to the present application is this.

Rule 9 aforesaid requires that the exhibits be marked for identification. So that the paragraphs in the affidavit dealing with each exhibit will have cross-reference to the exhibit.

It is imperative that each exhibit be sealed and serialized and it is no excuse that the exhibits are many or that it will be expensive to seal each one of them. The form of Jurat contained in the Third schedule of the Oaths and Statutory Declaration Rules does not envisage a bundle of exhibits. It is worded in a manner to suggest that each exhibit will be marked appropriately to correspondent with the affidavit.

The affixing of the seal on a loose sheet over a bundle of exhibits is clearly contrary to Rule 9 of the Oaths and Statutory Declaration Rules.

The result of that is that all the reference to those exhibits are struck out. I have deliberately not, made any reference to the exhibits in my ruling for that reason. For the other reasons stated in this ruling, the applicant's application for injunction is dismissed with costs. The main suit shall be set down for hearing on a date to be fixed at the registry.

Dated and delivered this 4th day of October, 2005 at Malindi.

W.OUKO

JUDGE

4.10.2005

Ruling delivered in the presence of Mr.Machuka & Mr.Ole Kina.

CC: Linda

W.OUKO

JUDGE