



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.284 OF 2000

HANS MOLLIN.....PLAINTIFF

- versus -

FESTUS OGADA.....DEFENDANT

RULING

The application dated 26-6-2000 is by plaintiff made under O.39 rr 1, 2 & 3 of the Rules and S.3A of Cap.21 asking for mandatory and prohibitive orders of injunction for to compel the Defendant to grant free access to Plaintiff to premises in Plot No.3143 and secondly to restrain him from disposing off the said plot No.3143 in any way. From affidavit of support sworn by Hans Mollin on 26-6-200. He says that he gave money to Defendant to buy a plot and build a house thereon of two storeys in which Plaintiff and Defendant would live one downstairs and another upstairs respectively. Further that the Defendant was to register the same in the name of the Plaintiff, but the Defendant having done so and both having stayed as agreed on the built house Defendant has now refused to register the same in Plaintiff's name and is now claiming the same in his name and has expelled Plaintiff from the same property.

Defendant on the other hand denies that there was such agreement or that he built the house by Plaintiff's money. He however accepts that he operated Plaintiff's account with Barclays Bank briefly on arrangement but for un-related expenses and that he has not asked the Plaintiff to vacate any way.

Mandatory injunction is granted where the matter is really necessary and the case is strong and clear. It is a drastic order and the Court of Appeal has stated in many cases that it can only be granted in exceptional cases and very sparingly. Where it would result in a very oppressive order where the hardship caused to the Respondent would be unbearable and or be beyond the relief granted it should not be granted. This is so because it is really a discretionary remedy and an equitable one. It is drastic because it means is compelling

Respondent to undo what is already done. The other point to consider is whether the order when granted will have the effect of concluding and determining the substantive case or that it is the only relief, and more. The Court of Appeal again has stated in many cases particularly in **E.A. Fine Spinners vs. Bedi Investments Ltd C.A. Civil App. No. NAI 72/94 per Gicheru, J.A.** that it really does not matter that it ends in determining the case or that it is the only relief. Lastly the Court would have to take into consideration amongst other relevant circumstances the benefit which the order will confer on the Plaintiff and the detriment caused to Defendant.

I will consider these principles. Here the question really is whether Defendant owns the house, but more whether the Plaintiff has a right to occupy the same. There is evidence from Defendant that the Plaintiff

was in occupation and that he can still continue. I therefore see no basis then why while the issue of ownership is not established occupation is also being determined. The ownership will depend on evidence as to source of purchase proceeds. If purchase was through Plaintiff's funds there still can arise resulting tusk or issue as to agency.

The second prayer is for prohibitory injunction. This must be decided on the principle by the Court of Appeal in *Giella vs. Cassman Brown* 1978 EA 358, and here on the basis of the reasons above I think the Plaintiff's case is reasonable and is prima facie and has reasonable chances of success.

But more I would decide it on balance of convenience and hold that it would on balance favour the withholding of any transaction affecting ownership until determination of the suit.

Damages may not be useful. If the house is sold while in the name of the Defendant if it turns to be owned by Plaintiff he will have lost all.

On these grounds I grant the orders as prayed with costs.

Dated this 14th Day of September, 2000.

A.I. HAYANGA

JUDGE

Further Order by Consent:

The mandatory order is that the Plaintiff will have free access to move in and out of the premises but only to and out of the ground floor of the Plot no.3243 aforesaid and to occupy by staying and living in the same ground floor until determination of the suit and have access to the garden and all communal facilities within the premises. Hearing date be fixed on priority.

A.I. HAYANGA

JUDGE