



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC CASE NO. 48 OF 2021**

**MARCO PIROLI..... PLAINTIFF/APPLICANT**

**VERSUS**

**MOUNTSBAY REAL ESTATES LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of a Notice of Motion dated 25<sup>th</sup> May 2021 by the Plaintiff/Applicant seeking the following orders: -

**a) Spent**

**b) That pending inter-partes hearing and determination of this Application, a temporary order of injunction be and is hereby issued restraining the Defendant whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instruction or whatsoever from evicting the Plaintiff, re-entering, remaining on, trespassing, continuing to occupy, charging, dealing or in any way interfering with the Plaintiffs quiet possession, enjoyment, use or dealing with the property known as Apartment No. 13 on Plot No. 1127 (Original No. 22/2) registered as Title No. 65572/2 at Mombasa Lands Titles Registry situate at Watamu in Malindi.**

**c) That pending inter-partes hearing and determination of this suit and arbitration proceedings between parties herein over the dispute herein, a temporary order of injunction be and hereby issued restraining the Defendant whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instructions or whatsoever from evicting the Plaintiff, re-entering, remaining on, trespassing, continuing to occupy, charging, dealing or in any way interfering with the Plaintiff's quiet possession, enjoyment, use or dealing with the property known as Apartment No. 13 on Plot No. 1127 (original No. 22/2) registered as Title No. CR 65572/2 at Mombasa Lands Titles Registry situate at Watamu in Malindi.**

**d) That the officer in charge of Watamu Police Station to ensure maintenance of law and order in enforcement of the above court orders.**

**e) That costs of this application be in the cause.**

Counsel agreed to canvas the Application vide written submissions which were duly filed.

**PLAINTIFF/APPLICANT'S SUBMISSIONS**

Counsel relied on the grounds on the face of the application together with the Supporting Affidavit of the Applicant Marco Piroli who states that he is the registered owner and proprietor of leasehold interest in a property known as Apartment No. 13 on Plot No. 1127 (Original No. 22/2) registered as Titles no. CR 65572/1 at Mombasa Lands Titles Registry and situate at Watamu free from any encumbrances and or overriding interests.

He further deponed that he purchased and obtained registration of a transfer of the suit property for value on 12<sup>th</sup> November 2018 from one Erli Pier Angelo who was the registered owner of the suit property. That he took immediate possession of the suit property on 16<sup>th</sup> October 2018 from Erli Pier Angelo and has been enjoying quiet, peaceful and uninterrupted possession of the suit property.

The Applicant also deponed that the suit property is part of the 16 Apartments comprised in Mountsbay Residence estate on Land Portion No. 1127 (Original 22.2) in Watamu whose common areas at all material times managed by the Defendant pending incorporation of a management company by the Defendant.

The Applicant stated that together with the said Erli Pier Angelo, they executed share allotment documents together with the transfer assigning them shares in the management company known as Mountsbay Apartments Management Limited for purposes of management of common areas of the suit property and taking over of the reversionary interest in the head lease to hold in trust for the apartment owners.

It was the Applicant's averment that on diverse dates between December 2020 and early 2021, he raised concerns over the mismanagement of the common areas of the suit property and misappropriation of estate funds and demands for accountability were not addressed.

That further, through their advocates, they requested for arbitration of which the Defendant declined to participate hence the current proceedings.

Counsel for the Applicant raised the following issues for:

- a) *Whether the Applicant was a bona fide purchaser without notice?*
- b) *Whether there was privity of contract between the Applicant and the Respondent?*
- c) *Whether the Arbitration proceedings were properly instituted before the Arbitrator?*
- d) *Whether the Applicant is entitled to the reliefs sought in the Notice of Motion Application?*

On the first issue whether the Applicant was a bona fide purchaser without notice, counsel submitted that the Applicant's interest is based on a transfer dated 16<sup>th</sup> October 2018 and registered on 12<sup>th</sup> November 2018 thus a bona fide purchaser and relied on the cases of **Lawrence P. Mukiri Mungai, attorney of Francis Muroki Mwaura V Attorney General & 4 Others [2017] eKLR and Eunice Grace Njambi Kamau & Another V Attorney General & 5 Others [2013] eKLR**. That the Applicant holds a valid title hence is entitled to the orders sought.

On the issue whether there was privity of contract between the Applicant and the Respondent, counsel submitted that the Respondent and Erli Angelo had a valid and binding contract between themselves which prescribed certain rights and obligations between them and upon executing the registered transfer dated 16<sup>th</sup> October 2018 the rights and obligations that were hitherto bestowed upon Erli Pier Angelo were transferred or assigned to the Applicant.

On the issue as to whether the arbitration proceedings were properly instituted before the arbitrator and whether the Applicant's application was made properly before this court, counsel submitted that the Respondent's consent had been dispensed with upon its default and refusal to propose an arbitrator of its choice despite correspondence from the Applicant to do so.

It was counsel's submission that pursuant to provisions of Clause 5.2 of the lease agreement, the Respondent had a statutory obligation to acquiesce to Arbitration proceedings when disputes arose under the contract thus arbitration proceedings were validly and lawfully instituted before the arbitrator despite the lack of the Respondent's consent.

On the last issue as to whether the Applicant is entitled to the reliefs sought, counsel stated that the Applicant has proved that he has a prima facie case and has met the threshold for grant of injunctions. That the Applicant will suffer irreparably if the orders sought are not granted and urged the court to allow the application as prayed.

## **RESPONDENT'S SUBMISSIONS**

Counsel relied on the respondent's Replying Affidavit sworn by one Said Hashim Rashid a director of the Defendant company who deponed that by a sub-lease agreement between one Erli Pier Angelo and the Defendant dated 3<sup>rd</sup> June 2015, the Defendant sublet all those premises known as apartment No. 13 on Plot No. 1127 Watamu whose consideration, terms and conditions are expressed thereat and the said sub-lease was also subject to the implied terms of leases as implied in the Land Act 2012 and Land Registration Act 2012.

He stated that it was an express term and condition of the sub-lease between the said Erli Pier Angelo and the Defendant that; -

- a) *Any assignment or transfer of the sub-lease had to be with the consent of the Defendant or the head lessor.*
- b) *That the said Erli Pier Angelo would only transfer and assign the said sub-lease only if on such transfer or assignment, the transferee or assignee thereof executes a deed of covenant with the Defendant as the head lessor that the assignee or transferee and his successors in title will at all times from the date of such conveyance or transfer duly pay all sums payable under clause 2 of the sub-lease dated 3<sup>rd</sup> June 2015 and observe and perform all the covenants, restrictions and stipulations contained in the said sub-lease.*
- c) *That the sub-lease shall comply with reasonable rules and regulations which may from time to time be made by the sub-lessor for the purpose of regulating the common liabilities, obligations and privileges between other sub-lessees in the estate with regard to the use and enjoyment of common parts and amenities on the estate.*

The Respondent further stated that unknown to him Erli Pier Angelo unlawfully and irregularly transferred without the consent of the Defendant the suit property and on 20<sup>th</sup> August 2020 the Defendant transferred the ownership of the suit property and management of common areas.

The Respondent further stated that sometime in January 2021, the Plaintiff authored a document labelled contract for Final closure of Economic Management year 2020 and guidelines for new management year 2021 purporting to be an agreement with all sub-lessees and required the Defendant's directors to sign effectively ceding management of common areas to the Plaintiff and the other sub-lessees notwithstanding that Mountsbay Apartments Management Limited was actually managing the said common areas.

The Respondent further stated that they discovered the Plaintiff had an assignment of lease dated 16<sup>th</sup> October 2018 from Erli Pier Angelo which it had not consented to as per the terms of the lease between the Defendant and the said Erli Pier Angelo which prompted the Defendant to issue the notices dated 26<sup>th</sup> February 2021. The said notices were responded to through the Plaintiff's Advocates.

The Respondent further deponed that the said commons areas were run and managed by the management company and it is not true that the Plaintiff ever raised issues with the management. Further, that the Respondent stated that they did not agree to have the matter settled through arbitration nor consent to the appointment of any arbitrator and that there is no privity of contract between the Plaintiff and the Defendant.

Counsel for the Respondent raised the same issues for determination as the Plaintiff's counsel on privity of contract and bona fide purchaser and whether the Applicant is entitled to the orders sought.

It was counsel's submission that there was no privity of contract between the Applicant and the Respondent as the Respondent has neither entered into a contract of transfer of the sub lease with the Plaintiff nor did the Defendant consent to the transfer of the subject sub lease between the Applicant and the former registered sub lessee Erli Pier Angelo thus the Respondent has no locus to be sued in this claim.

Counsel further submitted that the Applicant has not disclosed that he is in breach of term of the sub-lease agreement between the Defendant and Erli Pier Angelo which required that the transfer of the subject sub lease be consented to by the Defendant contrary to Section 67 of the Land Act and Section 55 of the Land Registration Act 2012.

Counsel cited the cases of **Agricultural Finance Corporation v Langetia Limited [1985] KLR** and **Muchendu v Waita [2003] KLR**.

On the issue as to whether the Applicant was a bona fide purchaser for value without notice, counsel answered in the negative on the grounds that the purchase and transfer were without consent or permission of the Respondent as expressed and/or implied by the instrument of sub-lease dated 3<sup>rd</sup> June 2015. That the said transfer was irregular, null and void. Counsel relied on the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** and **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR**. that no legal or right remedy can flow from an illegal act. Counsel also relied on the case of **Juma Nyamawi Ndungo & 5 Others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR**.

On the issue whether the Applicant has established a prima facie case, counsel submitted that the Plaintiff has failed on the following grounds: -

- i. There is no cause of action that has been established as against the Defendant by the Plaintiff by virtue that there is no Privity of contract between the Plaintiff and Defendant as submitted hereinabove.*
- ii. The transfer of apartment No. 13 to the Plaintiff by Erli Pier Angelo without the Defendant's consent and Notice was irregular and unlawful and no good title thus passed on to the Plaintiff. The management Company for the common areas was not to be held in trust for the apartment owners and the lease agreement dated 3<sup>rd</sup> June 2015 clearly attests to this fact.*
- iii. The Plaintiff's subject sub-lease is not worthy of the Courts protection as there is no valid sub-lease to protect as it tainted with irregularities for failure of the Plaintiff or his predecessor in title to obtain a consent from the Defendant to transfer the sub-lease to the Plaintiff. Further the title document which the Plaintiff places reliance on is tainted with illegality which the Court cannot be called upon to act in vain.*
- iv. That Plaintiff failed to comply with reasonable rules and regulations made by the sub-lessor (the Defendant) and served on the sub-lessees for the purpose of regulating the common facilities obligations and privileges interest of the sub-lessee and the sub-lessees of other apartments in the estate with regard to the use and enjoyment of the common parts and amenities in the estate.*
- v. That notwithstanding the said irregular transfer and assignment of sub-lease the Plaintiff herein in contravention of the obligation, rules and regulations of the sub-lease between the Defendant and Erli Pier Angelo his predecessor in title started interfering with the management, use and control of common parts and began inciting other subtenants of the Defendant against the management company running the day to day activities in the common areas.*
- vi. The premises known as Mounts Bay Residence Watamu do not constitute a Condominium as the common parts thereof are wholly appropriated by Mounts Bay Apartments Limited.*
- vii. The notice to terminate the sub-lease for Apartment No. 13 on Plot No 1127 (Original 22/2) Watamu is legal, valid and proper.*

On the issue whether the Plaintiff filed these proceedings while the proceedings before the arbitration being In the Matter of Arbitration between Marco Piroli and Mounts Bay Real Estates Limited are still pending for hearing and determination before Kyalo Mbobu Arbitrator. That the Plaintiff in the said arbitration matter is seeking similar reliefs as the ones sought in this matter which might lead to conflicting decisions.

## ANALYSIS AND DETERMINATION

The issues for determination are whether the Plaintiff/Applicant has established a prima facie case for grant of temporary injunction and whether the application is proper before the court as there are pending arbitration proceedings.

When this matter came up for hearing of this application under certificate of urgency, the court granted temporary orders of injunction pending the hearing of this application inter- partes.

The issues raised by the Applicant and the Respondent are issues that will be determined at the hearing of this case.

It is on record that the Applicant requested for arbitration of which the Respondent refused to participate in hence the filing of this application. The Respondent acknowledged the jurisdiction of this court to hear and determine this case and further filed a counterclaim in this suit.

The principle for grant of injunctions are well settled as per the **Giella Cassman Brown case** which require a party to establish that he or she has a prima facie case against the Respondent and prove that if the order is not granted that he or she will suffer irreparable loss not capable of being compensated by an award of damages and if the court is in doubt then use the principle of a balance of convenience.

The Applicant has established that he is the registered owner and proprietor of leasehold interest in a property known as Apartment No. 13 on Plot No. 1127 (original no. 22/2) registered as Titles no. CR 65572/1 at Mombasa Lands Titles Registry and situate at Watamu free from any encumbrances and or overriding interests.

It is also the Applicant's case that he purchased and obtained registration of a transfer of the suit property for value on 12<sup>th</sup> November 2018 from one Erli Pier Angelo who was the registered owner of the suit property and took immediate possession of the suit property on 16<sup>th</sup> October 2018.

The registration and transfer of the suit property is prima facie that he is the owner of the land at this interlocutory stage unless contrary evidence is adduced to show that the same was acquired irregularly which the Respondent claims that was done without the consent. Such evidence has not been tendered to rebut the fact that the Applicant is the owner of the suit land.

In the case of **Amir Suleiman v Amboseli Resort Limited [2004] eKLR Ojwang J** (as then was) held that; -

*‘.....counsel for the Defendant urged that the shape of the law governing the grant of injunctive relief was long ago in **Giella Vs Cassman Brown, in 1973** cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of **Films Rover International** made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”*

I am in agreement with Ojwang J (as he then was) that the court should take whichever course appears to carry the lower risk of injustice if should it turn out to be have been wrong. There is no prejudice that will be occasioned to the Respondent if temporary injunction is issued pending the hearing of the issues raised by both parties on privity of contract and whether the Applicant is a bona fide purchaser. If we deal with those issues at this juncture it will mean that the court is determining the case at an interlocutory stage without giving the parties an opportunity to give their side of the case.

This is a case involving ownership of leasehold interest in a property known as Apartment No. 13 on Plot No. 1127 (original no. 22/2) registered as Titles no. CR 65572/1 at Mombasa Lands Titles Registry and situate at Watamu, in the case of **Francis Githinji Karobia v Stephen Kageni Gitau [2017] eKLR Kimau J** stated that: -

*“this court notes that land being unique in nature and character damages in certain instances would not constitute an adequate remedy.”*

This does not mean that all land matters should be categorized as those that damages would not be adequate remedy. The court has to look at the circumstances of each case. There is no blanket ticket for land matters to qualify for grant of injunction on the basis of sentimental value or that damages would not be sufficient remedy.

At this preliminary stage the court cannot delve into the merits of the case but is not precluded from expressing a prima facie view of the matter as was held in the case of **Thomas Nyakamba Okong'o -Vs- The Co-operative Bank of Kenya Ltd [2012]eKLR**. Where the court held as follows: -

*“In determining this application, I am well aware that at this stage the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the Supporting Affidavit has stated on oath which is not true.”*

The Plaintiff/Applicant is still the registered owner and is in occupation of the suit land and it would be in the interest of justice that the

status quo be maintained pending the determination of the rights of the parties.

I have considered the application, the submission by counsel and order that status quo be maintained pending the hearing and determination on this case.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF MARCH, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***