



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 9 OF 2019(OS)

IN THE MATTER OF: SECTION 91 (1) AND 91 (8) OF THE LAND REGISTRATION ACT, 2012 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 37 RULE 11 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

MICHAEL PLATZER.....APPLICANT

VERSUS

BRECKCEDIS NALIKA MAKOLO.....RESPONDENT

RULING

1. The Application for determination is the Notice of Motion dated 21st January 2019 by the Applicant brought under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 40 Rules 1, 2 and 10 of the Civil Procedure Rules and all other enabling laws. The Applicant seeks the following orders:

a) Spent

b) That pending the hearing and determination of this Application this Honourable Court be pleased to restrain the Respondent, her employees, servants, agents or anyone else claiming under her from selling, charging, transferring, leasing and/or disposing off the Property known as KWALE/DIANI COMPLEX/1276.

c) That pending the hearing and determination of this Suit, this Honourable Court be pleased to restrain the Respondent, her employees, servants, agents or anyone else claiming under her from selling, charging, transferring, leasing and/or disposing off the Property known as KWALE/DIANI COMPLEX/1276.

d) That this Honourable Court be pleased to issue a mandatory injunction against the Respondent compelling her to give free and full access to the Applicants of the Property known as KWALE/DIANI COMPLEX/1276 and the house erected thereon.

e) That costs of this Application be borne by the Respondent.

2. The Application is premised on the grounds on the face of the Motion and supported by the affidavit of Michael Platzer, the Applicant sworn on 5th November 2018 and a supplementary affidavit sworn on 14th February 2019. The Applicant and the Respondent are registered as Tenants in common of the Property known as KWALE/DIANI COMPLEX/1276 (hereinafter referred to as the Suit Property). The Applicant avers that he ordinarily resides in Austria but visits Diani, Kenya occasionally. That sometime in the year 2012, he visited Kenya as a tourist and met the Respondent with whom he developed a close friendship.

3. It is the Applicant's case that sometime in the year 2013, he decided to purchase a piece of land in Diani so as to construct commercial villas that he would rent out and also live in during his stay in Kenya. The Applicant avers that he identified and purchased the Suit Property for the sum of Kshs.16 million which he paid for solely. The applicant has attached copies of bank statements marked. "MP-1". The Applicant states that since he was a foreigner and ordinarily residing in Austria, he decided to engage the respondent to take care of his interest by obtaining the necessary approvals and generally supervise the construction works on the Suit Property. The Applicant thus requested the Respondent who was a trusted close friend living in Diani and was more familiar with the laws of Kenya to be registered as a

co-owner so as to take up such responsibilities and to supervise the development on the Applicant's behalf and that the Respondent agreed. The Applicant avers that the transfer for the Suit Property was done in their joint names and a title deed issued on 18th December, 2013. It is the Applicant's contention that the developments were done with funds from his personal account only. The Applicant further contends that during the construction period, he agreed to be paying rent for the Respondent's residential apartment and catered for her personal expenses. The Applicant avers that he developed the Suit Property by putting up a permanent house thereon which was completed in the year 2016. He states that as a way of compensating the Respondent for her efforts, he allowed the respondent to live in the said house and bought her a car for Kshs.700,000/=. That since the Respondent was not engaged in any gainful employment, he gave her over 3,500 Euros on diverse dates in the year 2014 as a capital to start a club and a saloon business. The Applicant states that they started having serious differences with the Respondent and on or about 10th March, 2018 the Respondent threatened to kill him if he set foot in the Suit Property. The Applicant avers that he reported the matter at Diani Police Station but no action has been taken. The Applicant states that the Respondent has now completely denied him access into the Suit Property and has been threatening to harm him if he attempts to interfere with her occupation. It is the Applicant's contention that the Respondent continues to unfairly benefit from a Property she did not acquire and thereby denying the Applicant the right to enjoy it, despite having spent millions of money on the same. The Applicant denies living with the Respondent as husband and wife.

4. The Respondent has filed a replying affidavit sworn on 5th February 2019 in opposition to the Application. The Respondent avers that since 2012 when she met the Applicant, they have been living as husband and wife whenever the Applicant comes to Kenya from Austria and that while he is away, they always kept contact due to this relationship. The Respondent avers that whenever the Applicant came to Kenya, they initially would rent out cottages for the period he was in Kenya. That in the year 2015 during the subsistence of their relationship, in the interest of investing together for their future life and to save on high costs of renting out cottages, they identified the Suit Property for purchase. The Respondent avers that by consent and without coercion or undue influence they agreed to purchase the Suit Property jointly as equal proprietors with equal rights and shares over the Property and that the Applicant made monetary contributions towards the purchase of the Suit Property. The Respondent states that she oversaw the construction of the villa.

5. The Respondent denies that her role as a co-owner of the Suit Property was pegged on the responsibility to supervise the developments on the Suit Property. The Respondent avers that the reason why the Suit Property was registered in their joint names was because they were in a relationship, adding that the services she offered of supervising the development was out of good faith since it was an investment to generate income for them in the future. That due to the Applicant's perpetual absence from Kenya, she oversaw each and every transaction from purchase to construction to completion of the villa on the Suit Property. The Respondent denies that the Applicant sent her money and purchased her a car as compensation for services rendered, arguing that the same were done out of good faith and love. It is the Respondent's contention that she contributed in terms of time, creativity, negotiation skills in the procurement of all services and materials used on the Property, and that after completion of the construction, she has been managing the villa. The Applicant avers that she has equal rights over the Suit Property. The Respondent states that their disagreements started sometime in 2018 when the Applicant in conjunction with his friends started bringing and entertaining strange women in the villa, prompting the Respondent to confront the Applicant and asking him to leave with his friends and the women. The Respondent prays that the Application be dismissed and the case be heard on its merits.

6. Both the Applicant and the Respondent filed their Written Submissions which have been read and considered in this ruling. The issue for determination is whether the injunction orders should issue in favour of the Applicant.

7. The conditions for the grant of temporary injunctions were laid in the case of **Giella-v- Cassman Brown & Company Limited (1973) EA 358** as follows:

“First an Applicant must show a *prima facie* case with a probability of success. Secondly, 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, it will decide an application on the balance of convenience.”

8. Has the Applicant made out a *prima facie* case with probability of success? In the case of **Mrao Ltd –v- First American Bank of Kenya Limited & 2 Others (2003)KLR 125**, a *prima facie* case was described as follows:

“A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. In this case, there is no dispute that the Suit Property is registered in the joint names of the Applicant and the Respondent. The Applicant has explained how the Property was acquired and how it became registered in their joint names. The Applicant states that he wholly financed the purchase price and the funds for developing the Property. The Respondent contends that she contributed in terms of her time, creativity, negotiation skills in the procurement of all services and materials and managing the Property. The issue of ownership can only be dealt with at the trial.

10. From the evidence on record, I find that the Applicant has established a *prima facie* case with a probability of success. As both parties are jointly registered as co-owners of the Property, it is my view that the Property should be preserved pending the hearing and determination of the Suit.

No doubt if the Respondent went ahead to sell, charge, transfer, lease and/or dispose of the Property, the Applicant stands to suffer irreparable harm not compensable in damages.

11. Besides the order for Prohibitory Temporary Injunction, the Applicant also seeks an order for Mandatory Injunction against the Respondent compelling her to give free and full access of the Suit Property to the Applicant. As already stated the Suit Property is registered

in joint names of the Applicant and the Respondent. Section 24 of the Land Registration Act states that:

“24. Subject to this Act –

a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

12. The title issued to the Applicant conferred absolute rights of proprietorship and the privileges that go with ownership in terms of Section 25(1) of the Land Registration Act, 2012 Section 25 provides as follows:

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register. ”

13. The Applicant was lawfully registered as joint proprietor of the Suit Property and pursuant to Article 40 of the Constitution he is entitled to protection of the Property and in particular he should not be arbitrarily deprived of the same unless such deprivation is done in accordance with the law and in compliance with the constitution. In the case of **Locabail International Finance Ltd –v- Agro Export & Others (1986) 1 ALL ER 901** it was stated:

“A mandatory injunction ought not to be granted on an application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for prohibitory injunction. ”

14. Taking into account the above decision and other decisions and bearing in mind the circumstances of this case and also considering that the Respondent has not controverted the Applicant’s assertions in this Application that the Applicant solely contributed to the acquisition and development of the Suit Property and that the Respondent’s name was only included in the title as a joint owner so as to take care of the Applicant’s interests, particularly by supervising the construction works on the Suit Property and obtaining relevant approvals from government authorities, I am satisfied that the Applicant has met the test of special circumstances. In my view, the Applicant’s case is strong and clear to enable this court grant the orders sought.

15. The upshot is that the Notice of Motion dated 21st day of January, 2019 is merited and the same is allowed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Maiga holding brief for Ms. Waithera for Applicant

Ms. Oyier for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE