



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 67 OF 2020

SHIBACHI DONALD ASHIONO.....PLAINTIFF

VERSUS

- 1. TULLIO VAONA**
- 2. GIAN FRANCO FILIPPINI**
- 3. GINO FILIPPINI**
- 4. MARCH ROMANI**
- 5. CHIARA FLARELLI**
- 6. MARIA COLOMBO**
- 7. PIETRO CANOBBIO.....DEFENDANTS**

RULING

1. By this Notice of Motion dated 31st August 2020, Shibachi Donald Ashiono (the Plaintiff) prays for orders against the seven Defendants as follows; -

2. That a temporary injunction to issue against the Defendants by themselves, their servants or agents or any one claiming under them and any one authorized by them or otherwise whatsoever from in any manner howsoever trespassing into or entering into or forcibly taking possession of and thereby alienating or developing the suit property or committing any acts of wastage thereon and/or from interfering with the Plaintiff's quiet and peaceful possession and enjoyment of his ownership rights over and interest in his apartments on the property known as Plot LR No. 12484/3 situate within Kilifi County pending the hearing and determination of this suit;

3. A mandatory injunction order do issue against the Defendants by themselves, their servants or agents or any one authorized by them or claiming under them directing and/or compelling the Defendants to forthwith and unconditionally remove all building materials and/or demolish the structures or walls illegally erected on and around Plot No. 12484/3;

4. An injunction order do issue restraining the Defendants by themselves or their servants or agents or anyone claiming under their name and anyone authorized by them or otherwise howsoever from in any manner or otherwise whatsoever from blocking the common access way to other villas and access of the Plaintiff's to his compound and car park basement garage;

5. A mandatory injunction do issue compelling the Defendants and by themselves or their servants or agents or otherwise howsoever to bring down the wrongful, illegal and unlawful wall structures erected across on Plot No. 12484/3 as well as be responsible for the restoration of the demolished borehole and fresh water reservoir at Mango Villas situate at Kilifi; and

6. That the costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the Plaintiff is based on the grounds: -

a) That the Plaintiff and the 1st to 6th Defendants are registered owners of the Villas developed on LR Nos 12484/2, 12483/3 and

12484/4 which have five blocks of eleven developed apartments with several shared common facilities under one compound;

b) *The Plaintiff is the registered owner of one of the five apartments on Plot No. 12484/3 whose total value is estimated at Kshs 41,300,000/-.*

c) *That since the facilities are shared all the apartment owners have a duty to remit service charge to the management company to be used for payment of services in common such as water and electricity bills, gardening and salaries for security guards;*

d) *That sometimes in April 2019, a dispute arose between the Plaintiff and the 1st to 6th Defendants which escalated in January 2020 when they failed to remit service charge as a result whereof Kilifi SPMCC No. 3 of 2020 was instituted;*

e) *That while the said suit was pending, the 1st to 6th Defendants in culpable collusion and conspiracy with the 7th Defendant trespassed into the property and proceeded to demolish the perimeter wall, the common shared swimming pool, destroyed the water reservoir and disconnected electricity and water supply to the Plaintiff's apartment;*

f) *That the Plaintiff has been exposed to and is likely to suffer irreparable loss and or substantial damage in the exercise of his ownership rights over the interest in the suit property unless the Court grants the injunctive relief sought.*

3. The application is opposed. By their Grounds of Opposition dated and filed herein on 14th September 2020, the Seven (7) Defendants- Tulio Vaona, Gianfranco Filipini, Gino Filipini, Marco Romani, Chiara Giareli, Maria Colombo and Piero Cannobio-oppose the application on two grounds namely: -

1. That there is still a pending case in respect of the same subject matter and parties herein vide Kilifi Senior Principal Magistrates Court ELC No. 3 of 2020.

2. That the Plaintiff/Applicant would have only come before this Honourable Court through an appeal on the ruling which was delivered on 20th day of May 2020.

4. I have perused and considered the application as well as the objection thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

5. The Plaintiff herein owns an apartment on the premises known as Mango Villas erected on LR No. 12484/3 Kilifi. The seven (7) Defendants equally own apartments and/or reside within the said Mango Villas. The residents of the said Villas apparently share certain amenities in common. These include a swimming pool, a borehole and an electricity hub supplying power to all the apartments and the common areas.

6. From the material placed before me by the Plaintiff, it is apparent that since 2019, the Plaintiff and the Defendants have had some dispute in regard to the management of the premises. As a result, the 1st to 6th Defendants did institute *Kilifi SPMCC No. 3 of 2020* against the Plaintiff herein. That suit remains alive and pending hearing and determination.

7. A perusal of a Ruling made thereon on 29th July 2020 by the Honourable J.M Kituku SPM reveals that by a Notice of Motion application dated and filed in Court on 12th June 2020, six (6) of the Defendants herein sought orders to be issued against the Plaintiff as follows: -

“3. That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the Defendant by himself, his agents, servants and/or employees from blocking the Plaintiffs or their employees access to their apartment within Mango Villas residence at Bofa Road, Kilifi or in any manner interfering with the Plaintiff's quiet possession and enjoyment of their property; and

4. That this Honourable Court do vary and review its ruling delivered on 20th May 2020.

8. Those prayers appear to me quite similar to the ones sought by the Plaintiff against the seven Defendants herein. Indeed, in his written submissions filed herein, the Plaintiff refers to the Ruling delivered by the Honourable J.M Kituku SPM on 29th July 2020 and asserts at paragraphs 8, 9 and 10 as follows: -

“8. Vide the 29th July 2020 ruling the lower Court pronounced itself on two distinct prayers: that the 1st to 6th Defendants have unconditional access and that no further constructions, no any demolitions and the Defendants ordered to unconditionally remove all building material and/or structures and wall illegally erected across Mango Villas Ltd.

9. The 7th Defendant under the instructions of the 1st to 6th Defendants ignored the said orders and hurriedly went on with demolitions, constructed another wall across the villas, destroyed the swimming pool and finally blocked the Plaintiff, his family and employees completely from accessing the house making the said apartment uninhabitable.

10. The Plaintiff thus filed a Notice of Motion under Certificate of Urgency on the 4th August 2020 seeking the Honourable Court to hold the Defendants' for contempt of Court orders and a review of the same.”

9. The Plaintiff does not state what became of the contempt application. He however mentions in the Plaintiff filed herein a month after he

instituted the contempt application that the proceedings in *Kilifi SPMCC No. 3 of 2020; Tulio Vaona & 5 Others –vs- Shibachi Donald Ashiono* remain pending. That position validates the Defendants’ contention that there is a pending suit in respect of the same subject matter between the same parties and that the Plaintiff could only come to Court on appeal if dissatisfied with the Lower Court’s Ruling delivered on 20th May 2020.

10. Where there is a similar suit between the same parties over the same subject matter, Section 6 of the Civil Procedure Act bars subsequent proceedings in the following manner: -

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

11. That position indeed encapsulates what is known as the res sub-judice rule. Considering that rule in *Kenya National Commission on Human Rights –vs- Attorney General; Advisory Opinion Reference No. 1 of 2017 (2020) eKLR*, the Supreme Court of Kenya observed aptly as follows: -

“67. The term “sub-judice” is defined in Black’s Law Dictionary, 9th Edition as “Before the Court or Judge for determination.”. The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives.

12. In the matter before me, while indeed the 7th Defendant herein was not a party to the case filed earlier in the lower Court, it was apparent that he was privy thereto and hence the claims being made against himself. I am in the circumstances satisfied that this matter is res sub judice the proceedings in *Kilifi SPCC No. 3 of 2020*.

13. In the premises, I decline to grant any of the orders sought herein and instead hereby stay these proceedings pending the hearing and determination of the said *Kilifi SPMCC No. 3 of 2020*.

14. Each Party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JUNE, 2021.

J.O. OLOLA

JUDGE