



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 293 OF 2018

EILEEN MERCY WANGARI KARUGI PLAINTIFF

= VERSUS =

CRISPUS MAINA GAITHO..... DEFENDANT

R U L I N G

1. For determination is the notice of motion application dated 10th December 2018 brought pursuant to the provisions of Order 40 rules 1, 2 and 3 of the Civil Procedure Rules and Section 63, 1A, and 3A of the Civil Procedure Act. The applicant prays for orders;

1) Spent

2) Spent

3) That the Defendant, his servants, agents and/or employees be restrained from harassing, intimidating, abusing, threatening, evicting or in any way, entering the Plaintiff's home or work place situated on plot number 9122/23 Jumba Ruins Road, Mtwapa Galaxy or being within 100 metres of the Plaintiff pending the hearing and determination of this application.

4) That an injunction be issued against the defendant, his servants and/or agents preventing them from dealing with, selling, offering for sale, disposing of, leasing and/or alienating the whole or any part of the properties known as;

a) Plot No. 2618 Taveta Phase II Settlement Scheme.

b) Plot No. sub-division No. 237617 (Original No. 3840/4 Section III MN Creek Age Lodge C.R. No. 33354/3).

c) Plot No. 15031/89 C.R. No. 13016/43.

d) Plot No. 15031/157 C.R. No. 50353 Galaxy Voi.

e) Plot No. Voi sub-division No. 89, 90, 157 and 158

f) Plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort.

g) Other properties in Umoja, Ruai, Sultan Palace and St. Kelvin Hill School Voi and others to be mentioned with the leave of the court pending the hearing and determination of this application.

5) That the Defendant through himself, his servants, agents and/or friends be restrained from harassing, intimidating, abusing, threatening evicting or entering the Plaintiff's home or work place situated on plot number 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort (hereinafter referred to as the suit property) or being within 100 metres of the Plaintiff pending the hearing and determination of this suit.

6) That an injunction be issued against the Defendant, his servants and/or agents preventing them from dealing with, selling, offering for sale, disposing of, leasing and/or alienating the whole or any part of the properties known as;

a) Plot No. 2618 Taveta Phase II Settlement Scheme.

b) Plot No. sub-division No. 237617 (Original No. 3840/4 Section III MN Creek Age Lodge C.R. No. 33354/3).

c) Plot No. 15031/89 C.R. No. 13016/43.

d) Plot No. 15031/157 C.R. No. 50353 Galaxy Voi.

e) Plot No. Voi sub-division No. 89, 90, 157 and 158 Voi.

f) Plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort.

g) Other properties in Umoja, Ruai, Sultan Palace and St. Kelvin Hill School Voi and others to be mentioned with the leave of the court.

Pending the hearing and determination of this suit.

7) That a power of arrest to attach to the orders herein specifically that the Defendant shall be liable to arrest and prosecution should he contravene any of the orders stipulated herein.

8) That costs of this application be borne by the Defendant in any event.

2. The application is premised on the grounds listed on its face *inter alia*;

a) That the Plaintiff and defendant cohabited since the year 2003 but were never formally married.

b) That the defendant had contracted another marriage with Ms. Rose Maina but continued residing with the Plaintiff as her partner.

c) That during the pendency of the said cohabitation the plaintiff and the defendant did acquire several properties together.

d) That the plaintiff and the defendant did reside on plot number 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort until the 2nd July 2018 when the Defendant packed and left.

e) That the plaintiff has several properties registered jointly acquired with the defendant being;

(i) Plot No. 2618 Taveta Phase II Settlement Scheme.

(ii) Plot No. sub-division No. 237617 (Original No. 3840/4 Section III MN Creek Age Lodge C.R. No. 33354/3).

(iii) Plot No. 15031/89 C.R. No. 13016/43.

(iv) Plot No. 15031/157 C.R. No. 50353 Galaxy Voi.

(v) Plot No. Voi sub-division No. 89, 90, 157 and 158 Voi.

(vi) Plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort.

(vii) Other properties in Umoja, Ruai, Sultan Palace and St. Kelvin Hill School Voi and others to be mentioned with the leave of the court.

With all the developments thereon.

f) That the plaintiff did on the 20/11/2018 issue to the defendant notice that the properties be severed.

g) That the Plaintiff is now homeless and destitute.

h) That the eviction has deprived the Plaintiff the quiet use and possession of her home.

3. The application is supported by the affidavits sworn on 10th December 2018, further affidavit sworn on 6th January 2019 and further supplementary Affidavit sworn on 20/12/2018. The application is supported further by the affidavits of Lydia Mwamburi and John Alfa Moshi both sworn on 20/12/2018. In the supporting affidavit, Ms Wangari deposed that the Respondent in spite of being married to Rose Maina pursued her relentlessly from the year 2003 until they became an item. That in the year 2007, the Respondent requested him to ask the late Mr. Mwamunga to sell to them some land behind the Respondents' hotel which Mwamunga agreed and did sell at Kshs.75,000/=.

4. The applicant deposed that the defendant later sold this land to St. Kevin School but never gave her a share of the money. The applicant deposed that she stayed with the defendant in Voi and would also visit him in Mtwapa over weekends before subsequently acquiring plot number 9122/93 jointly in the year 2008. It is her evidence that they jointly developed this plot with a 261 roomed apartment and a resort.

5. The applicant continued that she stayed with the Respondent at the hotel and the Respondent's family would visit them as shown in the annexed pictures. She also annexed copies of repayments made to Kenya Commercial Bank for a loan which she states was taken by her to help with the completion of the hotel. She deposed further that they also jointly acquired Galaxy Resort Voi, a property in Ruai and Umoja. That by 2017, money was not a problem to the respondent as he was collecting funds from Creeks Edge Lodge and Galaxy Resort Voi while the applicant was taking care of food and household needs.
6. The applicant listed the properties they had acquired together. The applicant stated that the respondent is a violent man having damaged her Mercedes and even caused her to be locked up at Mtwapa Police station. That on 2/7/2018, the respondent walked out of their relationship with all the original documents pertaining to the purchases. Before this, she avers that they had opened joint account at Equity and D.T.B. Banks for Galaxy resort Mtwapa and she annexed Bank statements to support. In spite of this, the respondent on 7/12/2018 accompanied with his children and some goons went to the Mtwapa resort and threw out the Applicant. That she now had nowhere to go therefore she urged the Court to grant the Orders being sought.
7. The application is vehemently opposed by the respondent by way of a Replying Affidavit filed on 19/12/2018 and Further Affidavit filed on 16/1/2019 and Supplementary Affidavit filed on 12/3/2019. The Respondent deposed that the orders sought cannot be granted. He admitted meeting the plaintiff in Voi in the year 2003 at Galaxy Resort Voi during its grand opening. The Respondent deposed that he bought between 1997 – 1999 4 plots i.e. L.R No. 15031/89, 15031/90, 15031/57 and 15031/58 from Voi Development Limited as shown by annexures **"CM1 – CM4"**.
8. The Respondent deposed that it is false for the applicant to state that they acquired the 4 plots above mentioned jointly. According to the respondent, the two plots bought at KShs.75,000 each referred to by the applicant were hers as shown by annexure **CM5**. The Respondent stated that the applicant sold the two plots to St. Kelvin and he annexed copy of purchase agreement executed between the two. The respondent continued that he operated the Voi Resort until 2009 when he decided to sell it together with the 4 plots to a Mr. Lewis.
9. That the sale to Mr. Lewis was not completed and he took back the hotel in 2015. He denies that the applicant participated in the buying or building of this hotel. He continued that he singly purchased plot number 9122/93 (herein referred as Galaxy Mtwapa). That he was issued with a title in 2008 which later in 2018 he transferred to his wife Rose Wambui Maina. That the photos annexed by the plaintiff do not prove ownership.
10. The Respondent further deposed that the applicant is lying when she says they ran out of funds for construction of Galaxy Hotel Mtwapa. That in 2008, the applicant was not living in Mtwapa as she was transferred to Mtwapa in February 2009. That in 2010 the applicant requested him to sell her the resort and she was to get a loan from her employer but the employer declined to grant her a loan of KShs.16 million. Instead, the applicant opted to purchase his 5 bedroomed bungalow in Voi where his wife and children lived and he annexed the sale agreement as **"CM 14"**.
11. The respondent's Case is that he offered the applicant the apartment in Mtwapa because his wife continued to live in the sold house in Voi. The respondent denied that the applicant had advanced him any money. That the plot numbers bought in Ruai or Umoja is not given hence an order cannot issue against an unknown plot.
12. The respondent states that the orders sought in the motion cannot issue because;
- a) *Prayers number 1 and 2 in the plaintiff's notice of motion cannot be granted as the apartment the plaintiff was living in is now occupied by his wife and children who own the plot as shown above.*
 - b) *That it is the plaintiff who chased his wife from the Voi house by her lawyer's letter dated 20th November 2018 written to him and copied to his wife terming them as trespassers in her house. Attached is a copy of the letter marked "CM 15" which the plaintiff refused deliberately to annex.*
 - c) *The plot in issue is his wife's plot and its number is 9122/93 not 9122/23.*
 - d) *Plot number 2115 Taveta Phase II Settlement Scheme was given to him by the Government of Kenya and he later sold it off. The offer can be found in the plaintiff's annexure marked "EMK-8" dated 27th August 2012.*
 - e) *Plot number sub-division No. 237617 (original 384/4 Section II MN) Creek Edge Lodge CR No. 33354/3 does not belong to him.*
 - f) *The aforesaid plot in **sub paragraph e** was leased to him and one Mr. George Mwangi (deceased) on 8th of June 2010 for 21 years as they were the ones to build.*
 - g) *They constructed but before completion the owner Mr. Billy Thuva Kalume offered it for sale but they could not afford and hence he sold it to one John Ngugi Mburu who then allowed him to continue with the remainder of the lease. Attached are two leases marked "CM 16 and 17."*
 - h) *Plot No. 89, 90, 157 and 158 is where Galaxy Hotel Voi is built and is under lease as earlier stated.*
 - i) *Plot No. 9122/23 is unknown to him as his plot is 9122/93 owned by Rose Wambui Maina.*
 - j) *Plots Umoja, Ruai, Sultan Place are unknown to him.*

k) *St. Kevin School was sold by the plaintiff as stated earlier.*

13. The applicant filed a Supplementary Affidavit on 20/12/2018 to counter the averments in the replying affidavit. She denied paragraph 3 and 4 of the replying affidavit but admitted paragraph 5 – 9 of the same as true. That she was a stranger to paragraph 10 – 16 of the replying affidavit.

14. That in response to paragraph 17, she said that it is true the respondent purchased the 4 plots in Voi alone and in the year 2009 he sold them to Mr. Lewis which sale was not completed after the respondent was not able to trace Mr. Lewis to pay the balance. That she participated in renovation of the hotel after it was repossessed. That her contribution was through purchase of furniture, cutlery, crockery and curtains.

15. The applicant took issue with paragraph 27 and 31 of the replying affidavit stating that she contributed Kshs.180,000 because she trusted the respondent. That in response to paragraph 30, the applicant stated that the defendant took off with his documents. That they have cohabited as husband and wife since 2009 and neighbours know them as wife and husband as evidenced in the chief's letter marked as "EMWK 1" and Independent Electoral and Boundaries Commission nomination paper marked "EMWK 2". That the photos she annexed are proof of a relationship.

16. The applicant denied she had any intention of purchasing Mtwapa land from the respondent as she knew it was jointly owned. That the valuation was only undertaken after they agreed to take a loan using the title as security. The applicant also denied the contents of paragraph 43 – 51 of the replying affidavit. That in response to paragraph 55 – 57, she said that the properties in Ruai and Umoja does exist as his son was even a tenant in Ruai.

17. In response to paragraph 60 and 61, the applicant stated thus;

a) *That if indeed the defendant's wife is occupying her apartment the same amounts to trespass.*

b) *That the alleged sale to the defendant's wife of the parcel of land that houses Galaxy Resort Mtwapa if it was done it was done fraudulently with the sole intention of denying her the ownership of the property. This is especially so since it was done merely two months after the defendant and her fell out and at a time he knew fully well she was in occupation of the house there having left her there himself.*

c) *That although the defendant sold to her the house in Voi he had never surrendered the keys to the house to her and although she was entitled to vacant possession of the same.*

d) *That the plot on which Galaxy Resort Mtwapa is located is number 9122/93 and that I made a typing error in the application when it was number 9122/23. This was an inadvertent error due to the fact that the defendant had taken her personal file when he left that is why he even has access to letters from my employer.*

e) *That with regard to plot number 2115 Taveta, since we were cohabiting as husband and wife I truly believed the same was being acquired on behalf of both of us since he is the one who informed me of the same. Moreover no sale documents have been evidenced before court to prove he disposed of it.*

f) *That plot number 237617 on which Creek's Edge Lodge is located was bought when we were together and as far as she knows if any change of ownership has occurred it is after he left her about five months ago. Equally, no change of ownership has been tabled before court. Moreover the Creek's Edge Lodge is using a Postal Address belonging to herself as shown in the receipts marked as "EMWK 5".*

g) *That she contributed to the renovation of Galaxy Hotel Voi although he is currently leasing it out to someone else which proceeds she was not getting any share.*

h) *That plot number 9122/93 is the one where Galaxy Resort Mtwapa is situated and where I have a house in which the defendant and I have lived in for nine years and the sale to the defendant's wife is fraudulent.*

i) *That the plots in Umoja, Ruai and Sultan Place are very well known to the defendant.*

j) *That the plots sold to St. Kevin the money was received by the defendant.*

18. The respondent also filed a Supplementary Affidavit to contest the facts contained in the Applicant's further Supplementary Affidavit. He deposed that he was present when Galaxy Resort Voi was repossessed. That the hotel was properly in operation and there was nothing to repair/renovate. That if the plaintiff contributed Kshs.180,000, she would have put all the documents as co-owner.

19. In a lengthy further affidavit sworn on 7th January 2019 and filed on 7th February 2019, the applicant dwelt on her relationship with the Respondent and restated the facts contained in her earlier affidavits. The applicant added that she believed the respondent would transfer the property on which Galaxy Resort Mtwapa is to the Company Galaxy Crislyn Kenya Limited. She further deposed that transferring Galaxy Resort to Rose Wambui was immoral and it was meant to defraud her of the business and her home. She also proceeded to annex documents profiling Galaxy Crislyn Kenya Limited. The applicant concluded that it is only just and fair that she be compensated for the loss she has incurred on her investment by way of contribution. That she stands to suffer irreparable loss and damage if the application is not granted.

20. This Court is minded that what is pending is an interlocutory application seeking injunctive reliefs. The pleadings filed by the parties

however delved into matters that touch also on the substantive suit. My role now is limited to consider whether the application meets the threshold set in the case of **Giella Vs Cassman Brown** i.e. that there is shown to be a prima facie case, or that the applicant will suffer irreparable loss unless the orders are given or that on whose favour the balance of convenience tilts.

21. The applicant's submissions gave a summary of the facts contained in the affidavits. What she titled as the "**legal argument and submissions**" discussed matters hinged on the Matrimonial Property Act for which this Court lacks jurisdiction to determine. In any event it was premature to urge the Court to determine the relationship of the parties at this interlocutory stage. Therefore, it is my considered view that cases cited on this subject are inapplicable for now.

22. On *prima facie* case the applicant stated that she has demonstrated that the suit premises is her home and source of income. She relied on the case of **Kisimani Holdings Ltd & Ano Vs Fidelity Bank Ltd (2013) eKLR** where the Court of Appeal declared that, "**the balance of convenience is in favour of the applicant as the sale of one's property is a serious matter that deprives one of a right recognised in law and used as such should not be allowed to proceed on doubtful circumstances.**"

And the case of **Ntima Housing Co-operative Society Ltd Vs HFCK (2018) eKLR** where Ojwang J (as he then was) said thus; "**... 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. Justine Hoffman in the English case of Films Rover International made this point regarding the granting of injunctive relief (1986) 3ALLER 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"....."**

23. The applicant also submitted on the doctrine of *lis pendens* which should be allowed to prevail so as not to defeat a successful plaintiff by the defendant alienating the property the subject of the decree. The plaintiff thus urged the Court to grant orders 2, 3, 4, 5, 6 & 7 sought in her motion dated 10/12/2018.

24. On 24th June 2019, Mr Ondeng' holding brief for Mr. Muthami for the respondent informed the Court that the respondent's submission was filed on 3/6/2019. However, while writing this ruling I was unable to trace the same in the Court file. Since I wrote the ruling after I left the station and during the covid-19 pandemic, I was unable to call for the said submissions. I will however make reference to the Respondent's oral submissions made on 20/12/2018. In them, the Respondent stated that the Applicant had only made physical contribution to the purchase of the property. That since the applicant bought a maisonette from the respondent in Voi means she has somewhere she can live in.

25. That since the transfer to Rose Wambui Maina was done in 9/3/2009, no orders can issue against her unless she is joined to these proceedings. That it is admitted the applicant was living in Galaxy Resort Mtwapa. But when the applicant wrote a notice for the respondent's wife to vacate the Voi property, the respondent had to act on the notice by bringing his wife to Mtwapa Resort which resulted in the applicant leaving the resort.

26. The respondent further submitted that the applicant has not shown that the plot described in paragraph 4(d) belongs to him while paragraph 4(f) is not directed at any specific plot. He urged the Court to decline the orders.

27. From the pleadings filed it is not in dispute that the applicant lived on the premises described as Galaxy Resort Mtwapa standing on L.R 9122/93 Jumba Ruins Road. The respondent did not plead that he serve her with notice to vacate the said premises. The respondent deposed that the applicant left when she saw the respondent and his family coming on to the premises. To the extent that the applicant was living on this plot and on the basis that she had lived on it since February 2009 inspite of the transfer and registration into the name of Rose Wambui as the owner from March 2009 as alleged; the applicant was entitled to be served with ample notice instead of using indirect means to evicted her. The non-service of notice and the longevity of the duration of occupation exhibits a prima facie case with a probability of succeeding. It is illegal to justify a wrong but stating that the applicant had alternative housing in Voi to move to.

28. The applicant also sought injunctive orders in respect of the plot where Galaxy Resort Voi is built on. The respondent produced evidence to show that he had purchased the said plots 15031/157 – 158, 15031/89 and 15031/90 between 1997 – 1999. It is not in dispute that the applicant first met the respondent in the year 2003 during the opening of Galaxy Resort Voi. The applicant deposed that her contribution was made during the renovation of the hotel in the year 2012 when the same was repossessed from Mr. Michael Lewis. This confirms the respondent's evidence that he bought and built Galaxy Resort Voi before they became an "**item**" with the applicant.

29. The applicant proceeded to itemise her contribution by stating that she bought furniture, crockery, cutlery and curtains which contributions have been denied by the respondent. However, given that the property was purchased and developed before the relationship took place and given that the applicant's contribution can be itemised and assessed, I find that the applicant has not demonstrated that her contribution if any cannot be compensated by an award of damages. I am therefore not satisfied that she is entitled to the orders of injunction in respect of Galaxy Resort Voi.

30. In respect to plot number 2618 Taveta Phase II Settlement Scheme, there is a letter of offer annexed by the applicant which ascertained when the same was acquired i.e. on 27th August 2012 from the director of Land Adjudication and Settlement. The respondent deposed that he had already sold it but no sale agreement was annexed. On the basis that it was acquired during the existence of the relationship between the parties although issued in the respondent's name, I shall issue an order of injunction to preserve it from being alienated to afford the plaintiff an opportunity to present her claim of entitlement to the same during the full hearing of this case.

31. There were no plot numbers given for the properties in Ruai, Umoja and Sultan Palace. I agree with the respondent's argument that court orders including orders of temporary injunction should not be given in generally. In respect to the property sold to St. Kevin Hill School, the transaction was already completed as evidenced in the note annexed as **EMWK-A** in the further affidavit of the applicant. The applicant's complaint was that the money was received by the defendant. An injunction can only issue to stop a horse that has not bolted. In this instant,

the plaintiff relief lies in claiming a share of the proceeds that sale but not through issuance of the injunctive order which would be an exercise in futility.

32. In view of the analysis given herein above, I find that the applicant is entitled:

(i) To injunctive reliefs as sought in prayer 4 and 6 of the motion in so far as it relates to;

(a) The suit property comprised in plot No. 2618 Taveta Phase II Settlement Scheme.

(b) The suit property comprised in plot No. 9122/93 Jumba ruins road also known as Galaxy Resort Mtwapa.

(ii) Prayer 5; that the defendant through himself, his servants, agents and/or friends be restrained from harassing, intimidating, abusing, threatening, evicting or entering the plaintiff's home or work place situated on plot number 9122/23 Jumba Ruins Road, Galaxy Resort Mtwapa pending the hearing and determination of this suit.

(iii) Prayer 7 is declined on account that there is a laid down process to be followed where there is disobedience of a Court Order.

(iv) Costs of the motion abide the winner in the main suit.

Dated and signed at BUSIA this 4th day of June 2020.

A. OMOLLO

JUDGE

Ruling delivered electronically by email this 9th Day of June, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE