



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 230 of 2010

MARGIT SOMMER

CHARO.....PLAINTIFF

VERSUS

ISAAC NJUGUNA

NJOROGE.....DEFENDANT

RULING

(1) By Chamber Summons dated 16th December 2010, the Plaintiff seeks two principal orders as follows:

“3. That pending hearing and determination of this suit this honourable court be pleased to issue an order of injunction restraining the Defendant, whether by himself, his servant and or agent from entering, occupying, trespassing and or dealing in any way whatsoever with the suit premises known as plot number 1067 and 1068 Mwembelegeza, Subdivision No. 1539 (Original No. 651/12) Section III M.N., Plot 1538 (Original No. 651/11) section III M.N. and Magisa Guest House and Restaurant situate on plot LR/539/R/III/M.N.

4. In the alternative, in respect of Plot No. LR/539/R/III/M.N. the Defendant be ordered to furnish security for his continuous occupation of the same by way of lump sum of Kshs.4,000,000/= to preserve the property pending determination of the suit.”

(2) The application was supported by the Affidavits of the Applicant of 16th December 2010 and 16th February 2011. The Defendant opposes the application and has filed affidavits in reply sworn on 20th January 2011 and 14th March 2011. The parties filed their respective written submissions and their counsel made supplementary oral submissions at the hearing of the application.

(3) Simply put, the Plaintiff’s case is that she is the legal and beneficial owner of the suit properties, one category of which – LR 539/R/III/M.N. – is registered in her name and upon which a Guest House business is operated by the Defendant as her agent or manager under license; the second category being properties subdivision Nos. 1539 and 1538 Section III M.N. originally registered in her name and that of her former husband but which were fraudulently transferred into her name and that of the Defendant’s; and the third category being properties – LR Nos. 1067 and 1068 Mombasa/Mwembelegeza registered in the joint names of the Plaintiff and the Defendant upon misrepresentation by the Defendant that the Plaintiff who is a foreigner could not be registered alone as the owner of the properties in Kenya without a personal identification number (PIN). The Plaintiff consequently seeks an injunction to restrain the Defendant from trespassing upon her alleged properties.

(4) The Defendant's defence and counter-claim is that he had a business and personal intimate relationship with the Plaintiff for the period between 2002 and 2010 during which they acquired the plot 1067 and 1068 Mombasa Mwembelegeza jointly; jointly reconstructed a house on plots 1539 and 1538; and in the course of which the Defendant built the guest house, bar and restaurant on the House-without-Land acquired by the Plaintiff at Mtwapa. The Defendant consequently seeks the division of the property held in common and an injunction to restrain the Plaintiff from evicting the Defendant or dealing with the joint properties in any manner detrimental to his interest, pending the trial.

(5) Both parties agree that there are triable issues which should proceed to trial and that the properties should be preserved pending determination of the dispute. They only disagree as to the nature of the order which should be made to preserve the property, and that is the issue for determination by the court at this stage.

(6) For the Plaintiff, it is contended that the Defendant is a trespasser and the balance of convenience lies in keeping the trespasser out of the property. Counsel for the Plaintiff, Mr. Mogaka in his oral argument said:

“The question as to who signed the documents [transfers to include the Defendant in titles Nos. 1539 and 1538] raises a triable issue which should go to trial. The Defendant says that he did not pay any money. There is a prima facie case to be investigated. How did the Defendant become a co-owner. Land is a sensitive issue which should be preserved by injunction so that at the trial nothing should have changed. As regards Magisa Guest House, there is no dispute that the Plaintiff acquired the property. All the Defendant alleges is renovating the property. The Defendant does not produce anything in writing that there was an agreement creating a proprietary interest in the land. Section 3 of the Law of Contract Act. The Defendant has been operating a business but without payment of rent and that cannot extinguish the Plaintiff's right. The Defendant is on the Plaintiff's property as a licensee or a trespasser. The law is that the trespasser must give way when the Plaintiff's license is extinguished. We pray for an injunction in respect of plot LR 539/R/III/M.N. Alternatively, he should be required to deposit security for his continued occupation of the plot.”

(7) For the Defendant, Mr. Akanga advocate urged the preservation of status quo saying:

“The Defendant is a co-owner who should not be enjoined from the property. The application seeks to remove the Defendant from Magisa Guest House. The order should be to preserve the property and not to eject the Defendant immediately. The court should hear the Defendant's case and interest in the property ... The balance of convenience is with the Defendant to continue running the business on terms set by the court so as not to deprive him of livelihood. The prayer [for temporary injunction] is couched in mandatory terms which should not be granted at this stage. Prayer 4 on furnishing of security – the Plaintiff must show what interest the Plaintiff is being deprived such as rent. The basis of Kshs.4 million has no basis. It is not clear whether it is the value of the property or the business. The prayer for security should be rejected. The issue of the Defendant being a trespasser is to be determined by the court. The relationship of husband and wife or lover was not conducive to formality of written agreements. The Defendant was managing the properties as a co-owner of the properties whose title documents were in the custody of the Plaintiff. We submit that there are triable issues for trial but the court should not give blanket orders to evict the Defendant. The court should either issue conservatory orders to safeguard the property in the interests of the parties but not evict the Defendant. The Plaintiff has the custody of the title documents and the Defendant cannot alienate the Plaintiff's ownership.”

(8) I have isolated at least 4 triable issues for the trial court to decide, being:

(a) The validity or otherwise of the transfers to include the Defendant as a co-owner of plots 1538 and 1539 Section III/M.N. The alleged fraud is a matter for determination at the full trial and the Document Examiners' Report and other relevant documents must be scrutinized through oral testimony and cross-examination of their makers at the trial;

(b) The acquisition of plots Nos. 1067 and 1068 Mombasa/Mwembelegeza and their registration in the joint names of the Plaintiff and the Defendant.

(c) The alleged construction of the Magisa Guest House on plot 539/Secitn III/M.N. and operation thereof by the Defendant and the terms of the transaction; and

(d) The alleged matrimonial relationship between the Plaintiff and the Defendant and its possible effect on the parties' dealings with the suit property.

(9) In thanking Mr. Mogaka counsel for the Plaintiff for citing the authorities of **Giella v. Casman Brown & Co. Ltd (1973) EA 361; Noormohamed Janmohamed v. Kassman Virji Madhani (1953) 20 EACA 8; Shariff Abdi Hassan v. Nadhif Jama Adam C.A. Civil Appeal No. 121 of 2005; Mbuthia v. Jimba Credit Finance Corp. & Another (1988) KLR 1; and Banana Hill Investments Ltd v. Pan African Bank Ltd & 2 Others (1987) KLR 351**, I have considered the principles for the grant of interlocutory prohibitory and mandatory injunctions set out in these decisions. I agree with the general policy of judicial practice that temporary injunctions are granted to preserve the status quo and that an interlocutory mandatory injunction will be granted only in special circumstances and clear cases such as those of trespass to property. As regards interlocutory prohibitory injunctions, I agree that **“the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s proposition”**. Because the determination of the disputed facts will be done at the trial, the appropriate test for the interlocutory prohibitory injunction is the balance of convenience and adequacy of damages. See **Platt JA in Banana Hill Investment Ltd case at p.59** and my decision in **Michael Ndungu Mbugua & 2 Others v. Cecilia Wanjiru Cooper & Another Msa HCCC 460 of 2011**. I also concur with the conventional judicial wisdom that **“in disputes concerning land, it is usual to grant an injunction”** as held in **Mbuthia v. Jimba Credit case at p.2**.

(10) Applying these principles for the grant of interlocutory injunctions to the facts of this case, I find that the balance of convenience lies with the Plaintiff with regard to the occupation of the residential house on plots Nos. 1538 and 1539 Section III M.N. from which the Defendant concedes to have moved out since May 2010 and in view of need to protect the Plaintiff having regard to the alleged assault upon the Plaintiff by the Defendant.

As regards plots Nos. 1067 and 1068 Mombasa/Mwembelegeza, there is no evidence as to whether there is any settlement or business activity being carried out thereon and they were indeed only brought into the matter by the Defendant in his defence and counter-claim. An order for the Defendant not to dispose of his undivided share in these properties should suffice to preserve the status quo. It is noted however that the Plaintiff has the custody of all the title documents for the suit properties.

(11) As regards the Magisa Guest House, although the Plaintiff contends that her application is not mandatory in nature, the grant of the prayer 3 of the Chamber Summons of 16th December 2010 would lead to the eviction of the Defendant. In view of the triable issues set out above, I am not persuaded that the Defendant is a trespasser who ought to be ejected by a mandatory injunction. Although section 3 of the Law of Contract Act requires that a suit for land be based upon a written contract, it does not pre-empt a defence of proprietary estoppel in an action for recovery of land; and it also does not affect implied, resulting or constructive trust. The Defendant appears to claim an interest in the Guest House by virtue of expenditure in reconstruction of **“8 single rooms Swahili type to 14 self-contained rooms”** which he later converted into a guest house and furnished it to operate as Magisa Guest House bar and restaurant independently of the Plaintiff since 2007 to date.

At this interlocutory stage, I am not in a position to rule that the Defendant is a “licensee or trespasser” as urged by the Plaintiff’s counsel. The Defendant may at trial adduce evidence to bring himself within the review of the Rule in **Ramsden v. Dyson (1866) L.R. 1H.L 129 cited in Commissioner of Lands v. Hussein (1968) EA 585, 592:**

“The rule of law applicable to the case appears to me to be this: If a man under a verbal agreement

with a Landlord for a certain interest in land, or, what amounts to be same thing, under an expectation, created or encouraged by the Landlord, that he shall have a certain interest, takes possession of such land, with the consent of the Landlord, and upon the faith of such promise or expectation, with the knowledge of the Landlord, and with no objection by him, lays out money upon the land, a court of equity will compel the Landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory v. Mighell (18 Ves. 328), and, as I conceive it, is open to no doubt”

(11) Accordingly, for the foregoing reasons, I make the following orders on the Plaintiff’s application dated 16th December 2010:

(1) The Defendant is restrained by interlocutory prohibitory injunction from disposing of his interest in parcels of land known as Plots Nos. 1067 and 1068 Mwembelegeza; Sub-divisions Nos. 1539 (Original No. 651/12) Section III/M.N. and 1538 (Original No. 651/11) Section III/M.N. pending determination of this suit;

(2) The Defendant is restrained by interlocutory prohibitory injunction from entering upon and occupying plots of land Sub-divisions Nos. 1539 (Original No. 651/12) Section II/M.N. and plot 1538 (Original No. 651/11) and the house constructed thereon pending determination of this suit.

(3) The alternative prayer for security of Kshs.4 million which was not sufficiently substantiated is rejected.

(4) For avoidance of doubt, the Defendant is at liberty to continue to occupy and operate the premises known as Magisa Guest House, Bar and Restaurant on parcel of land LR 539/R/III/M.N. pending the determination of this suit.

(5) Costs of this application will be costs in the cause.

(12) The court considers that the dispute between the parties calls for expedited resolution and therefore makes further directions for hearing on priority basis before the appropriate Division of the High Court.

Dated and delivered this 6th day of September 2012.

EDWARD M. MURIITHI
JUDGE

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In the presence of:

Mr. Mutiso for Mr. Mogaka for the Plaintiff

Mr. Akanga for the Defendant

Miss Linda –

Court Clerk