



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 127 OF 1993**

**WATTS.....PLAINTIFF**

**VERSUS**

**NDUATI .....RESPONDENT**

**RULING**

The plaintiff and the defendant are partners carrying on business of a restaurant known as Shanzu Sea Haven: and are registered joint owners of leasehold plot No 1068 M N/Shanzu together with the buildings situated thereon. A valuation report prepared by Burn and Fawcett, a Mombasa firm of Chartered Surveyors and Valuers shows the value of this plot as 20 million. It is this property of immense value.

By the Chamber Summons filed under order XXXIX rules 1, 2, 3, 9, the plaintiff seeks the order restraining the “defendant from constructing any building upon any portion of the land being plot No 1068 IMN belonging to the parties as joint tenants.” The application was opposed by the defendant.

In paragraph 5 of the plaintiff’s supporting affidavit it is averred that the defendant “had not obtained approved plans to construct the disputed house at the particular site where it is being constructed illegally.”

In paragraph 6 of the same affidavit the plaintiff also avers that the said house is being constructed in

“at a place or area which is a prime site specially reserved for further development and extension of the restaurant in the future”

One of the plaintiff’s prayers in the main suit is for the dissolution of the partnership and the taking of accounts by a receiver duly appointed by the court. According to the plaintiff (as alleged in paragraph 8 of the plaint) “it has become unreasonably practicable (sic) for the plaintiff to carry on business in a partnership with the defendant.” She alleges that the defendant has been uncooperative and violent towards her.

In the entire statement of defence all the allegations made by the plaintiff in the plaint are denied: The defendant denies that there are disagreements between him and the plaintiff; he even denies to have assaulted her as alleged in paragraph 7 of the plaint. Paragraph 8 of the statement of defence reads:

The defendant denies that there is any reason or justification or grounds whatsoever for the dissolution of the partnership or the receiver or for an account or for an injunction as prayed in the plaint .... “

With regard to the construction the defendant avers that he has obtained all the necessary plans and approvals: but he did not annex them to this replying affidavit. He suspects that the plaintiff's allegations in her pleadings are because she is unhappy and angry that he is going to marry someone else. In this regard he has annexed her letter to him. Unfortunately the letter does not at all reveal and manifest her alleged ill-feelings or malice towards his intended marriage: on the contrary she says in it that she wished him well.

The granting of an injunction is exercise of the Court's discretion. But as it is settled that the discretion has to be exercised within the ambit of the principles which were enunciated in the case of *Giella v Casman Bown & Co Ltd* [1973] EA 358. In the context of the pleadings filed herein, it has to be said that if the partnership is proved to have irretrievably broken down, as alleged by the plaintiff then the orders sought in the plaint will inevitably be granted.

According to the plaintiff the intended construction of a house on the proposed site will affect the value of the property, and so she has not consented to it. She is of the view that the construction is not at all for the benefit of the partnership.

The existence of this dispute over the siting of their manager's house is clear evidence that the partners have fundamentally disagreed and that the dissolution of the partnership is the only available solution. One partner is not competent to exclude the other from taking part in the management of the partnership business. The right of a partner to take part in the management of the affairs of the firm is an overriding one. It is a right which can only be excluded by a mutual agreement. A passage in the *Treatise on the law of Partnership* 11th Edition by Salt & Francis at p 387 reads:

“The good faith of the partners is pledged mutually to each other that business shall be conducted with their actual interposition so that each may see that the other is carrying it on for their mutual advantage.”

When a situation emerges where one partner seeks to impose his wishes or unilateral decision affecting any aspect of the partnership business on the other partner then the partnership will have failed and stands to be dissolved. Until such partnership is dissolved the interest of each of the parties is protected best when the status quo is maintained. Otherwise it will be tantamount to allowing one partner to betray the fundamental principles governing the partnership. In the present case the status quo would be that which existed before the construction of the disputed house was commenced.

To whom does the balance of convenience favour? The defendant argues that the constant escalation of the cost of materials would render the construction very expensive. It is also argued that the injunction would entail the breach of the building contract with a third party. So it is urged that these factors dictate against the granting of the injunction. But on the other hand the plaintiff has pointed to the alleged unsuitability of the site for the proposed house and used it to argue that it will reduce the value of the plot and business and that will thereby cause her prejudice or injury in the event that her share is converted into money. I am inclined to prefer the plaintiff's argument. Whereas it can be cogently argued that the plaintiff's share could be 1/2 of the monetary value of the property which would be recovered from the proceeds of sale thereof, the damage to be suffered by the defendant as highlighted above is also only a monetary nature which can be quantified ; and is already secured by the plaintiff's undeniably substantial investment in the suit property. The plaintiff's position in the case is stronger because the construction of the house is an act which denies her the right of a partner.

For the foregoing reasons I grant the injunction restraining the construction of the house during the pendency of the suit. The costs of the suit to be in the cause.

Dated and delivered at Mombasa this 3<sup>rd</sup> day of May, 1993,

**I.C.C. WAMBILYANGAH**

.....

**JUDGE**