



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 69 OF 2017**

**ALEX NGOMBO KITHI.....PLAINTIFF**

**VERSUS**

**CAROL MAXTED.....DEFENDANT**

**RULING**

**1.** The plaintiff/applicant brought a Notice of Motion dated **6<sup>th</sup> March, 2017** in which he is seeking for orders that:-

**1. This application be certified as urgent and service thereof be dispensed with in the first instance.**

**2. The plaintiff/applicant be and is hereby allowed to access his property the said parcel of land known as KWALE/DIANI BEACH BLOCK/1497 pending hearing and determination of this application.**

**3. The plaintiff/applicant be and is hereby allowed to access his property the said parcel of land known as KWALE/DIANI BEACH BLOCK/1497 pending hearing and determination of this suit.**

**4. Pending the hearing and determination of this application a temporary injunction be and is hereby issued barring the defendant/respondent, her servants or agents from interfering with the plaintiff/applicant's business to wit "FRANGIPAN COTTAGES".**

**5. Pending the hearing and determination of this suit a temporary injunction be and is hereby issued barring the defendant/respondent, her servants or agents from interfering with the plaintiff/applicant's business to wit "FRANGIPAN COTTAGES".**

**6. Cost of this application to be borne by the defendant/respondent.**

2. The application is premised on the grounds appearing on the face of it together with the supporting affidavit of Alex Ngombo Kithi sworn on 6<sup>th</sup> March, 2017 in which he averred that he is a joint registered owner with one Daniel Thomas Ford of the suit property and that the defendant is the mother of the said Daniel Thomas Ford. He produced a copy of title deed in their joint names. He further averred that he had a relationship with the defendant with whom they cohabited as husband and wife for more than three years. He stated that he started an accommodation business known as "FRANGIPAN COTTAGES" situated within the suit property which he used to raise money to sustain himself and his family. He produced copies of certificates of registration and permits for the said business. The plaintiff further stated that he occupied one of the cottages together with the defendant as their residential home. He further stated that the defendant with the help of local security guard known as 'Hero' has recently without any justifiable cause and colour of right restrained the applicant from accessing the suit property, bringing the said business to its knees. He further stated that he has been left with no place to call home and is apprehensive that unless the orders sought are granted he is in real danger of losing both the suit property and the accommodation business and is bound to suffer irreparable loss and damage.

3. The application is opposed. The defendant filed a replying affidavit sworn by herself on 4<sup>th</sup> December, 2017 in which she averred that the suit property, which is registered in the joint names of her son Daniel Thomas Ford and the applicant, was bought as a gift to her by her late mother Amy Watkin in the year 2007. That her mother fully paid for the plot through her Barclays Bank account in the United Kingdom to the vendors bank account in Germany. She produced a copy of Barclays Bank International payment slip. she further averred that she preferred to have the suit property registered in the name of her son but before then the applicant who was known to her advised her that a person who is not a Kenyan National could not be registered as the sole owner of freehold property. She therefore advised her son to have the suit property registered in his name jointly with the applicant. It is respondent's contention that the applicant did not contribute any money towards the purchase of the suit plot or its development. She further averred that there are no cottages on the suit plot which is only

used as a holiday home by the respondent's son and his family. She averred that Frangipan Cottages is a stranger to her and denied that the applicant runs any form of business on suit land.

4. Both the plaintiff and the defendant filed their written submissions which have been read and considered in this ruling.

5. The issue for determination is whether the injunction orders should issue in favour of the applicant. The conditions for the grant of temporary injunctions were laid in the case of *Giella -vs- Cassman Brown & Company Limited 919730 EA 358* as follows:-

**“First an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally 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”.**

6. Has the plaintiff made out a *prima facie* case with probability of success? In the case of *Mrao -vs- 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”.**

7. In this case, there is no dispute that the suit property is registered in the joint names of the applicant and one Daniel Thomas Ford who is a son to the respondent. The respondent has explained how the property was acquired and how it became registered in the said joint names. On his part, the applicant has based his claim on his name being in the title documents and the alleged business that he is running. The same has however been denied by the respondent. The applicant has not rebutted the respondent's contention that he made no contribution for the purchase and development of the suit property. The issue of ownership can only be dealt with at the trial.

8. From the evidence on record, I find that the applicant has not established a *prima facie* case with a probability of success. Secondly, the applicant has not shown that he stands to suffer irreparable harm not compensable in damages. It is my view that the income from the alleged business can be quantified in damages and the applicant paid in the event he succeeds at the end.

9. Moreover, looking at the facts of this case, the prayers sought in the application are in the nature of mandatory injunction. Granting the same would entail eviction of the respondent from the suit premises. The Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd -vs- Agroexport & Others [1986] 1 ALL ER 901* where it was stated:-

**“A mandatory injunction ought not to be granted on an interlocutory 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 a prohibitory injunction”.**

10. Taking into account the above and other decisions and bearing in mind the circumstances of this case and also considering that the applicant has not controverted the respondent's assertions in this application that the applicant never contributed to the acquisition and development of the suit property and that his name was only included in the title as a joint owner to meet legal requirements, I am not satisfied that the applicant has met the test of special circumstances. The applicant's case is not unusually strong and clear to enable this court grant the orders sought.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

11. The upshot is that the application is dismissed with costs.

Dated, signed and delivered at Mombasa on this 18<sup>th</sup> day of December, 2018.

C.K. YANO

JUDGE