



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LANDS COURT**

**AT MALINDI**

**ELC CASE NO. 244 OF 2016**

**STEFANO POLI.....PLAINTIFF**

**=VERSUS=**

**ASHIONO DONALD SHIBACHI.....DEFENDANT**

**RULING**

1. This is an application dated 19<sup>th</sup> September 2016. The Applicant Stefano Poli urges this court to issue a temporary order of injunction restraining the Defendant/Respondent by himself, his guards/Askaris, servants, agents and anyone acting under the Defendant from interfering with his access to his house situated on Plot No. CR 22104 Kilifi pending the hearing and determination of the suit filed herein.
2. In the Supporting Affidavit sworn on 19<sup>th</sup> September 2016, the Applicant avers that he is the owner of a quarter portion of a house situated on the said CR No. 22104 having purchased the said share from one Anita Solfrid Ottosson in Sogliacchi on 7<sup>th</sup> July 2016. The Applicant is aggrieved that the Defendant who has no share in the subject plot has on 15<sup>th</sup> September 2016 used his guards to block the Applicant from accessing his property thereby forcing a lorry which he had sent to deliver tiles for the renovation of the house to go back to Mombasa with the tiles. The Applicant is now apprehensive that unless the Respondent is restrained by an order of this court, he will continue interfering with the Applicant's access to his property as a result whereof the Applicant stands to suffer irreparable loss and damage.
3. The Respondent Ashiono Donald Shibachi is opposed to the grant of the orders sought. In a Replying Affidavit sworn on 29<sup>th</sup> September 2016, he accuses the Plaintiff/Applicant of material non-disclosure and deliberate gross misrepresentation of facts and circumstances leading to the denial of access of the lorry into the suit premises on the material day.
4. The Respondent avers that he is the Managing Director of Mangos Village Limited, a company incorporated to run and manage the suit premises which share certain common facilities and services. While not denying that the Applicant is the owner of a quarter share of the suit property, the Respondent avers that the Applicant failed to properly introduce himself to the Management Company and the Security Guards manning the premises and hence the misunderstanding that led to the lorry being turned back.
5. I have gone through the application before me and the Replying Affidavit filed in opposition thereto. I have also studied the rival submissions and authorities placed before me by the Learned Advocates representing both the Applicant and the Respondent.

6. The Principles for the grant of injunctions are now well-settled. In the often cited case of **Giella -vs- Cassman Brown & Company Ltd (1973) EA 358**, the court held that:

**“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.”**

7. Accordingly, it is incumbent upon this court to first and foremost consider whether by the facts presented before me, the Applicant has established a prima facie case with a probability of success. A “prima facie” case as was stated in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR(Civil Appeal No. 39 of 2002)** 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.*

.....

*A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

8. In the case before me, it is not in dispute that the Applicant owns a quarter share of a house situated in CR No. 22104, Kilifi. It is the Applicant’s case that having purchased the property and receiving a go ahead from the previous owner to occupy the premises, he hired a lorry filled with wooden tiles so as to renovate the property. When the lorry reached the premises, the Defendant/Respondent through his guards informed the Applicant and the lorry driver that he had no permission to enter the premises. This forced the Applicant to let the lorry go back to Mombasa with the tiles. It is the Plaintiff/Applicant’s case that the Respondent purports to manage the property but is actually not a manager thereof and as a result he has no colour of right over the property purchased by the Applicant.

9. It is evident from the facts placed before me that the Applicant was a very recent owner of the house which is situated within a series of blocks of buildings or apartments fenced together under one compound with one common entrance. Contrary to the Applicant’s contention, it is also evident that the occupants of the apartments commonly known as Mango Villas had since 2<sup>nd</sup> February 2011 incorporated a company known as Mangos Village Limited to run and manage the property which has a number of shared facilities and common areas. While I did not find anything identifying the Respondent as the Managing Director, the Certificate of Incorporation for Mangos Village Limited (annexure ADS 3b in the Replying Affidavit) clearly identifies him as one of the Directors holding two of the company’s 12 issued shares. There is therefore every possibility that he also doubles up as the company’s Managing Director as he states in the Replying Affidavit.

10. I think as a new entrant, it was proper that some communication be made by the Applicant with the Managing Company before he sent the lorry-load of tiles for renovation. The security guards cannot be faulted for seeking to know where the goods were destined to in such circumstances. In any event, it is apparent that the Respondent did not himself physically bar the Applicant from entry. It is inconceivable that the guards would be acting under his instructions to block the Applicant unless the guards knew that he was involved in the Management of the premises.

11. As a person discharging his mandate as the Managing Director of the Management Company, I am unable to issue restraining orders against him in a situation like this where the company has not been enjoined in the proceedings. The Management Company ought to have been enjoined in these proceedings for any alleged culpability on the part of the guards who denied the Applicant access. Those

guards were in my view employees of the company and not the Respondent as a person.

12. In the foregoing circumstances, the application dated 19<sup>th</sup> September 2016 is hereby dismissed with costs.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of July, 2017.**

**J.O. OLOLA**

**JUDGE**