



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 17 OF 2017

AHMED OMAR ALI ABDULREHMAN.....APPELLANT

VERSUS

HAMID OMAR ABDULREHMAN SHARLEEN.....RESPONDENT

RULING

1. This is the Notice of Motion dated 25th January, 2017. It is brought under Order 40 Rule1, Order 45 rules, Order 51 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and enabling provisions of the law.

2. It seeks orders that;

1. Spent.

2. Spent.

3. Spent.

4. Pending the hearing and determination of this suit an injunction be issued to restraining the Defendants either by himself or through his employees, servants and/or agents from collecting rent from offices/shops existing on plot Numbers Mombasa/Block XXI/248, Mombasa/Block XXI/594 and in any other manner whatsoever interfering with the said properties.

5. Costs of this application be paid by the defendants.

3. The grounds are on the face of the application and are;

i. The applicant is registered as joint owner of the suit premises along with the Respondent herein and one Amour Omar Abdulrehman.

ii. The Respondent has been collecting rent in the sum of kshs.380,000/= from the premises and using it entirely by himself to the exclusion of the applicant.

iii. The Applicant further prays for a severance of the properties among the joint owners.

iv. It is in the interest of justice to allow this application.

4. The application is opposed. There is a replying affidavit sworn by Hamid Omar Ali Abdulrehman, the Defendant/Respondent herein sworn on the 1st March, 2017.

5. It is the Plaintiff/Applicant's case that he and his brothers are joint owners of the suit premises.

That the defendant has been collecting rent amounting to Kshs.380,000/= per month from the said premises and using it entirely by himself to the exclusion of the Plaintiff.

He prays that the defendant be restrained from collecting rent.

6. It is the defendant/respondent's case that he is not the one collecting rent. The rent being collected by their sisters Fatma and Asha.

He prays that the application be dismissed with costs.

7. I have considered the pleadings, the application, the supporting affidavit and the annexures. I have also considered the replying affidavit and the annexures.

I have considered the submissions on record.

The issues for determination are;

- a. Whether the Plaintiff/Applicant's case has satisfied the condition for grant of temporary injunction.
- b. Who should bear costs.

8. It is now appropriate to consider the facts that have emerged and the legal principles applicable.

The principles were set down in the precedent setting case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

9. In the case of *Mrao Limited –versus- First American Bank Limited And 2 Others (2003) eKLR.* the Court of Appeal gave a definition of what amounts to a prima facie case.

It stated,

“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.”

10. Has the plaintiff/Applicant herein made out a prima facie case with a probability of success at the trial?

The Plaintiff states that the Defendant has been collecting rent in respect of the suit premises. He has annexed to his supporting affidavit.

What appears to be a statement of account for rent collected from House Numbers 52 and 56. The same does not show that the Defendant is the one collecting rent.

11. On the other hand the Defendant has denied that he is collecting rent. In paragraph 5 (a) of the replying affidavit he states.

- a. **“That I have not been collecting rent of the above mentioned properties. Infact the rent of the said properties was being collected by Asha Omar Abdulrehman and Fatma Omar Abdulrehman who are our sisters.”**
- b. **“I further even that the tenants of the above mentioned properties have been depositing rent directly to an account held by the said sisters at Standard Chartered Bank**

Annexed herewith and marked “HOA1” are copies of the deposit slips depicting the rent paid by the tenants.”

12. I find the Plaintiff/Applicant has failed to put in any material before the court to show that the Defendant/Respondent is the one collecting rent.

13. The Plaintiff, the Defendant and their brother Amour Omar Abdulrehman are joint owners of the suit premises.

14. I find that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success at the trial.

15. He has also failed to demonstrate what irreparable injury he is likely to suffer if these injunctive orders are not granted.

He has not proved that whoever is collecting rent will not render a proper account of the rent collected.

I find the application herein premature.

16. All in all, I find that the application herein lacks merit and the same is dismissed with no orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Mombasa on the 29th day of November, 2017.

L. KOMINGOI

JUDGE

29/11/2017