



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT NO. 277 OF 2015

(FAST TRACK)

SAUMU SALIM

MWABUSO

JUMA ABDALLA

MOYO

ABDALLA ALI MOYO (DECEASED)
.....PLAINTIFFS

VERSUS

IDDI MOHAMMED MWATANDARA
DEFENDANT

RULING

1. The plaintiffs have sued the defendant seeking an order stopping their eviction and or demolition of their hotel built on Plot NO. Kwale 3417. Together with the suit, they filed this notice of motion application dated 29th October, 2015. The application is brought under the provisions of Order 40 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.

2. The Plaintiffs are seeking the following orders;

1) Spent

2) Spent

3) That pending the hearing and determination of this suit, the honourable Court be pleased to issue an order for temporary injunction restraining the defendant either by himself or through his agents, servants or in any other manner whatsoever from trespassing into the plaintiff's property and or effecting development on the plaintiff's plot No. 3417, Kwale.

4) Costs of the application be provided for.

3. The application is supported by the grounds on the face of it and the affidavit deposed by Saumu Salim Mwambuso. The 1st Plaintiff deposed that she is the wife and one of the administrators of the estate of Abdalla Ali Moyo. The suit property was leased by her late husband since 1960 where he operated a hotel. She deposed that upon the death of her husband she took over the running of the hotel. She

continued that in 2014, the defendant without any colour of right threatened to demolish the hotel hence this suit.

4. The application is opposed. The defendant in reply stated that he is the registered owner of the land and annexed a title thereto. The defendant continued that he also owns the hotel having purchased the same from the 2nd plaintiff and Ali Abdalla Moyo. He deposed that the premises having been sold, the plaintiff should vacate his land. Further that the rent of Kshs. 300/= is low considering where the land is located. He urged the Court to dismiss the application.

5. Both parties filed written submissions which I have read and considered. The applicants argue that they have fulfilled the principles of **Giella vs Cass Man Brown** to warrant the grant of injunction. The applicant submit that she has been a tenant from 1960 and that there is threat of eviction which will result in her suffering irreparable loss.

6. The defendant annexed a title to the property showing he acquired ownership of the suit property on 7th June, 2010. He also annexed a sale agreement of the hotel building between himself and the 2nd plaintiff and Ali Abdalla Juma. The agreement is dated 23rd September, 2010. The applicants did not file a further affidavit to contest the existence of such an agreement. This raises the question whether there is a prima facie with probability of succeeding has been proved. If the applicants have been paid for the building/hotel. Then they cannot stop the defendant from taking possession.

7. The applicants have also not annexed any document to show the existence of a lease between them and the previous owner. The photographs of the hotel annexed by the applicant's shows it is in a depilated state creates a doubt on the mind of this court whether the hotel is indeed operating. The photos shows depilated structures which look abandoned. This brings to question whether there is any irreparable loss to be suffered or whether the balance of convenience tilts in favour of the applicant in the absence of evidence that the business is running.

8. In the circumstances of this case where the applicants are claiming a right over house without land, the damages payable if the suit succeeds can be ascertained and compensation made. In my opinion and I so find that the applicants have failed to prove any of the three principles laid down in **Giella vs Cassman Brown**. Consequently I find no merit in the motion dated and proceed to dismiss it. Each party to bear their respective costs in the application.

DELIVERED, DATED and SIGNED at **MOMBASA** this 22nd Day of June 2016

A. OMOLLO

JUDGE

In the presence of:-

..... for plaintiff

..... for defendant

Court Assistant