



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.130 OF 2015**

**1. SHARIF MOHAMED A. OMAR**

**2. BOGANVILLAE COTTAGES LTD.....PLAINTIFF**

**=VERUS=**

**BONTEMPI LUIGI.....DEFENDANT**

**R U L I N G**

1. In the Application dated 31<sup>st</sup> July, 2015, the Plaintiff is seeking for the following orders:

**(a) THAT the Defendant, his agents, servants, auctioneers or successors in title (if any) be restrained from transferring, charging, selling, leasing or in any way dealing with the following:-**

**(i) L.R Number 3044 (Orig. No. 26/ii) Malindi**

**(ii) LR.8980**

**(iii) L.R.7861**

**(iv) LR. 7851**

**pending the hearing and determination of the suit.**

**(b) THAT the court may make such other or further orders as it deems fit.**

**(c) THAT the costs of this suit be provided for.**

2. The Application is supported by the 1<sup>st</sup> Plaintiff's who has deponed that he is a director in the 2<sup>nd</sup> Plaintiff; that in 1991, he had 150 shares in the company while his son had 25 shares and that it was agreed that the running of the affairs of the company be placed in the hands of the Defendants.

3. According to the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff was paid Kshs.17,000,000 for putting up temple cottages; that the said amount was paid to the Defendant on behalf of the 2<sup>nd</sup> Plaintiff; that a further payment of Kshs.3,000,000 was made to the 2<sup>nd</sup> Plaintiff and that the said money was used to purchase the suit properties.

4. It is the 1<sup>st</sup> Plaintiff's case that he filed HCCC No. 255 of 1995 which was determined in his favour and that the subsequent appeal filed by the Defendant was dismissed.
5. The 1<sup>st</sup> Plaintiff has deponed that the Defendant is now disposing off the suit properties and that he is of Italian national.
6. In his response, the Defendant deponed that the injunctive orders cannot be granted because he is the registered owner of the land; that the fear that he shall sell the suit property is merely an apprehension and that the Applicant's remedy lies somewhere else and not before the court.
7. The parties' advocates filed brief submissions in which they rehashed their clients' depositions. I have considered those submissions and the quoted authorities.
8. This is not the first time the dispute involving the Plaintiff and the Defendant has been in court.
9. Indeed, the Plaintiff herein sued the Defendant together with Mr. Bruno Turato and Elizabeth A. Ngege in Mombasa HCCC No. 255 of 1995.
10. In that suit, the Plaintiffs herein had sought for a declaration that plot Nos 3074 and 3104 Malindi are held by the Defendant herein in trust for the 2<sup>nd</sup> Plaintiff.
11. In his Judgment of 26<sup>th</sup> July, 2007, Sergon J entered Judgment in favour of the Plaintiffs.
12. The Defendant herein appealed against the Judgment of the High Court. The Court of Appeal delivered its Judgment dismissing the appeal on 19<sup>th</sup> June, 2015. In the said Judgment, the court held as follows:-  
  

**“We are satisfied that taken in totality and in consent, the evidence on record demonstrates systematic misappropriation of the company's funds (the 2<sup>nd</sup> Plaintiff) by Luigi (the Defendant herein). Consequently, the use of those funds to purchase and transfer plot 3104 in his wife Ngege gives rise to a constructive trust by which she holds the said plot in trust to the company.”**
13. Based on that decisions, it is the Plaintiffs case that the Defendant diverted the monies of the company in which the 1<sup>st</sup> Plaintiff was a director to purchase the suit properties.
14. The Defendant has not denied the 1<sup>st</sup> Plaintiff's deposition that he held 150 shares in the company while his son held 25 shares respectively.
15. The Defendant has also not denied that he is the one who was running the company and that he used the money that was meant for the company to purchase the suit properties.
16. In the circumstances, it is only proper that pending the hearing and determination of the suit, the Defendant should be restrained from selling the suit properties to enable the court determine with finality whether indeed the Defendant is holding the same on behalf of the 2<sup>nd</sup> Plaintiff.
17. It is for those reasons that I allow the Application dated 31<sup>st</sup> July, 2015 as prayed.

Dated, signed and delivered in Malindi this 22<sup>nd</sup> day of **September**, 2016.

**O. A. Angote**

## Judge