



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 206 OF 2013

PAOLO TARLAZZI (suing through his attorney)

CARLA TARLAZZI.....PLAINTIFF

=VERSUS=

ROBERTO CIAVOLELLA.....DEFENDANT

RULING

Introduction:

1. The Application before me is the one dated 27th November 2013 by the Plaintiff. The Application is filed pursuant to the provisions of Sections 1A, 1B, 3A and 63 (a) of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules.
2. In the Application, the Plaintiff is seeking for the following orders:
 - a. **THAT warrants of arrest against Defendant/Respondent, his agent, assignees, representatives, employees and servants to appear before this Honourable court and show cause why they should not be committed to six (6) months jail for disobeying the said court order issued on the 19th August 2013.**
 - b. **THAT costs be provided for.**
3. The Application is supported by the Plaintiff's affidavit.

The Plaintiff's/Applicant's case:

4. According to the Plaintiff's deposition, this court issued orders on 19th November, 2013 temporarily restraining the Respondent, his agents, representatives and assigns from dealing in any manner with the suit property known as Villa numbers 7 and 8 situated on land portion number 1371 along Marine Park road. The order was served on the Defendant.
5. It is the Plaintiff's deposition that despite the said court order, the Plaintiff put in the said two villas new fittings, vanishings and a stranger who has occupied Villa number 7 contrary to the order of court.

The Respondent's case:

6. In his reply, the Respondent has stated that it is not true that he has interfered and or disobeyed the orders of this court as alleged because he is not the owner and or caretaker of Villa numbers 7 and 8.
7. According to the Respondent, the renovations in respect to the suit property, including other Villas were commenced in September 2013 through a private company known as Home Holiday Resort Malindi Limited and that at the institution of this suit, the Plaintiff knew or ought to have known that the suit properties never belonged to the Defendant personally but to a separate legal entity being Melville Limited.
8. It is the Defendant's contention that Melville Limited is not his agent, employee, servant or assignee.

Supplementary Affidavit:

9. The Plaintiff filed a Supplementary Affidavit in which she stated that it is not true that the suit property is being managed by Home Holiday Resort Malindi as alleged; that the suit property is being managed by Johari Villas Management Limited which is mandated to manage the condominium properties of Melville.
10. The Plaintiff further stated in the Supplementary Affidavit that the Defendant, through Melville Limited filed a suit in the lower court being Malindi CMCC No. 15 of 2014 and obtained orders to reinstate water in Villas 7 and 8, the subject of this suit. Indeed, it was averred, the Defendant sought orders in the lower court for the reconnection of the water because the occupants in villas 7 and 8 were tourists. Consequently, it was deponed, the Defendant, by allowing the tourists in the villas, contravened the order of this court.
11. The parties disposed of the Application by way of submissions which I have considered. I have also considered the authorities that have been relied upon by counsels.

Analysis:

12. The *ex-parte* injunctive order that this court issued on 20th November 2013 was directed to the Defendant, his agents, representatives, assignees, employees, servants or any person acting on his behalf.
13. According to the Application which gave rise to the *ex-parte* orders, the Plaintiff and the Defendant entered into an agreement dated 27th September 2013 in which it was agreed that the Defendant would transfer to the Plaintiff the suit property, which agreement, as alleged by the Plaintiff, was not honoured by the Defendant. The issues raised in that Application have not been argued inter-parties.
14. Although the Defendant was restrained by this court from interfering with the suit properties, there was no indication from the substantive Notice of Motion whether indeed the suit properties were owned by the Defendant. That will be a pertinent issue during the hearing of the Application *inter-parties*.
15. For the purpose of the current Application, the Defendant has denied that he owns or manages the suit property and consequently, he cannot be accused of having interfered with the suit property when the property is owned by Melville Limited and managed by an entity known as Johari Villas Management or Home Holiday Resort Malindi.
16. The Defendant has annexed on his Replying Affidavit an Indenture dated 7th October 2008 and registered on 4th November 2008. That indenture shows that the property is owned by a company known as Melville limited.
17. Indeed, in his Supplementary Affidavit, the Plaintiff has admitted that Johari Villas Management limited is the one which is mandated to manage the condominium properties of Melville.
18. If it is true, as shown in the Replying Affidavit of the Defendant, that the suit property is owned by Melville Limited and managed by Joharis Villas Management Limited, a fact which has not been denied by the Plaintiff, I do not see how the Defendant could be accused of having renovated and put in occupation tourists in the suit property.
19. I agree with the Defendant's advocate's submissions that even if the Defendant is one of the Directors of Melville limited, the company cannot be said to be his servant or agent. A company is distinct and enjoys a separate legal personality from its members (See Salomon -Vs- Salomon &

Co. Ltd. (1897) A.L 22 and **Section 16** of the Companies Act).

20. In view of the fact that a company cannot be an agent of its members, I find and hold that no evidence has been placed before me to show that it is the Defendant who personally renovated the suit property and put tourists in villa numbers 7 and 8. The said alterations and tenants could only have been put in place by the owner and or manager of the suit property, which, according to the documents before me, was either Melville limited or Johari Investment Limited.
21. Indeed, it would have been different if the ex-parte order had been directed to Melville Limited because a company, in certain instances, acts through its agents or directors. A director of a company can be held to be in contempt of a court order where that order is directed to the company and not vice versa.
22. For the reasons I have given above, I dismiss the Plaintiff's Application dated 27th November 2013 with costs.

Dated and delivered in Malindi this **9th** day of **May**, 2014

O. A. Angote

Judge