



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 65 OF 2018

ANN KINANU KABURU (*Suing as the Guardian ad-litem and heir of the estate of the late*

***Isaiah Mabellini*).....PLAINTIFF/APPLICANT**

VERSUS

ORIANO MABELLINI.....1ST DEFENDANT/RESPONDENT

AHMED HASSAN KOTAR.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR MOMBASA.....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on 10th March, 2021, Ann Kinanu Kaburu suing as the guardian *ad litem* and heir of the estate of Isaiah Mabellini (*the Plaintiff*) prays for orders:

1. *That pending the hearing and final determination of the suit the 1st and 2nd Defendants/Respondents do deposit in Court within 14 days the rental income paid by the 2nd Defendant/Respondent and received by the 1st Defendant/Respondent for lease of the suit properties on portion numbers 2743, 2744, 2745, 2746, 2736, 2748 Malindi for the year 2020 being Euros 40,000/-.*

2. *That the Defendant/Respondent do deposit the rent in Court Quarterly at the sum of Euros 10,000 as per the lease agreement beginning from 31st March, 2021 pending the hearing and determination of the suit failure of which the 2nd Defendant/Respondent do vacate the suit premises;*

(a) *Euro 10,000 at the 31st March, 2021.*

(b) *Euro 10,000 at the 30th June, 2021.*

(c) *Euro 10,000 at the 30th September, 2021.*

(d) Euro 10,000 at the 31st December, 2021.

3. That 1st Defendant/Respondent do give accounts of all money received and from the 2nd Defendant/Respondent from 3rd April, 2015 to 31st March, 2019 and file the same in Court within 14 days.

4. That in the alternative a mandatory order to issue directing the 1st Defendant/Respondent to account for all rents received from the date of commencement of the lease up to date.

5. That the costs of the application be in the cause.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:

(i) That the 1st Defendant has been receiving rent from the lease of the property and misappropriating the same to the detriment of the Plaintiff who is challenging the ownership;

(ii) That the first lease between the 1st and 2nd Defendant expired on 31st March, 2019.

(iii) That the 1st and 2nd Defendants have renewed the lease and the 2nd Defendant is on the suit property running a hotel business and earning huge profits;

(iv) That the Plaintiff who is the original owner of the property is challenging the alleged sale to the 1st Defendant and as such the Plaintiff is also entitled to protection;

(v) That it will be unfair for the 1st and 2nd Defendants to earn profits from what they do not own; and

(vi) That the 1st Defendant is a foreigner who lives in Italy with no other known assets in case of default of refund and as such the Plaintiff prays that the money be deposited in Court until the suit is heard and determined.

3. Oriano Mabellini (*the 1st Defendant*) is opposed to the application. In a Replying Affidavit sworn in Milan, Italy and filed herein on 9th April, 2021, the 1st Defendant avers that the Plaintiff's application is legally incompetent, frivolous and totally devoid of merit.

4. The 1st Defendant avers that it has been acknowledged by the Plaintiff that he is the registered proprietor of the parcels of land forming the subject matter of the suit. The suit properties were

lawfully transferred to himself for valuable consideration by his deceased brother. The 1st Defendant further avers that the transactions between himself and his brother Isaiah Mabellini (*deceased*) involving the suit properties were openly done with the full knowledge of his family, including all his children, some of whom have filed witness statements and are lined up to testify herein.

5. The 1st Defendant further asserts that the lease between himself and the 2nd Defendant was lawfully executed and the 2nd Defendant is lawfully on the suit premises. The 1st Defendant further avers that the mere fact that the Plaintiff has laid a claim over the properties does not make her entitled to claim a share in rents and/or to purport to say that she stands to suffer irreparable harm if the orders are not granted.

6. The 1st Defendant states that the only reason he has not been able to be physically present in Kenya is because of the prevailing Covid-19 pandemic that has resulted in travel restrictions from Italy to Kenya and urged the Court to dismiss the application.

7. Ahmed Hassan Kotar (*the 2nd Defendant*) is similarly opposed to the application. In a Replying

Affidavit sworn on 26th April, 2021 but filed herein on 3rd May, 2021, the 2nd Defendant asserts that the application is incompetent and bad in law as **Order 27 Rule 1 and 6 of the Civil Procedure Rules** does not give any right to a Plaintiff to seek the orders sought herein.

8. The 2nd Defendant further avers that the dispute before the Court is about who is the lawful owner of the suit property between the late Isaiah Mabellini and by extension his widow the Plaintiff herein and his brother the 1st Defendant. As matters stand, the documents of title indicate that the registered proprietor of the properties is the 1st Defendant who has leased the same to the 2nd Defendant.

9. I have perused and considered the Plaintiff's application and the respective responses thereto by the 1st and 2nd Defendants. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties. The Land Registrar Mombasa and the Attorney General (*the 3rd and 4th Defendants*) did not file any response to the application.

10. The application before me is expressed to be brought pursuant to the provisions of **Sections 1A and 1B of the Civil Procedure Act** as well as **Order 27 Rules 1 and 6 of the Civil Procedure Rules, 2010**. It is the Plaintiff's prayer that the 1st and 2nd Defendant be compelled to deposit the rental income received to-date from the suit premises in Court and that hence the same be deposited quarterly in court pending the hearing and determination of the suit. In the alternative, the Plaintiff prays for an order compelling the Defendants to account for all rents received from the commencement of the lease agreement between the 1st and 2nd Defendants to-date.

11. The Defendants are opposed to the grant of the said orders maintaining that the 1st Defendant acquired the suit premises for valuable consideration before he leased them out to the 2nd Defendant who now runs a hotel business thereon.

12. From the material placed before me, it is apparent that the suit properties situated on Land Portion Nos. 2743, 2744, 2745, 2746, 2736 and 2748 Malindi were initially owned by one Isaiah Mabellini now deceased. A perusal of a copy of the Limited Grant ad litem issued to the Plaintiff on 5th March, 2018 (*as attached to the Plaintiff's Supporting Affidavit*) reveals that the deceased passed away on 6th February, 2017 while domiciled in Italy.

13. It is also apparent from the material placed before me that the late Isaiah Mabellini was the husband to the Plaintiff and a brother to the 1st Defendant. According to the Plaintiff, they got married in 2011 and had lived together with the deceased both in Italy and on the suit properties situated at Casuarina in Malindi, Kenya until sometime in 2016 when the Plaintiff left the country to take up an employment opportunity in Namibia.

14. It is further the Plaintiff's case that her husband had been ailing for quite some time and that his brother the 1st Defendant had been controlling his business and finances for quite some time before his death. In February, 2018, when the Plaintiff took her annual leave from Namibia and travelled back to Kenya, she was surprised to find that their home which they had constructed while together and given the name "African Dada" had been transformed into a hotel and rental premises which had since been leased to the 2nd Defendant.

15. It is further the Plaintiff's case that upon discovery of this changed position, she conducted a search at the Lands Registry only to discover that the title to the suit properties which were hitherto in the name of her husband had been fraudulently transferred to the name of his brother, the 1st Defendant herein in whose names the property remains registered to-date.

16. On his part, the 1st Defendant denies that there was any matrimonial home on the suit properties and/or that there was any fraud in the transfer thereof. On the contrary, the 1st Defendant avers that on or about 28th December 2015, he entered into a sale agreement for the suit properties and all the buildings

constructed thereon from his now deceased brother. On 25th September, 2016, he paid the due consideration for the properties being Euros 240,000/-.

17. The 1st Defendant further asserts that prior to his brother's death, they had met the 2nd Defendant and that by an agreement dated 3rd April, 2015, they executed a lease agreement pursuant to which the 2nd Defendant has been paying rent to an account jointly owned and operated by the 1st Defendant and the deceased.

18. Looking at the totality of the rival positions taken by the parties, it was clear to me that there was no dispute that the Plaintiff herein was married to the deceased and that the suit properties were allegedly sold to her brother-in-law during the pendency of the said marriage. That being the case, the Plaintiff's claim of ownership over the suit premises cannot be said to be remote given that the purchase price is said to have been paid to her husband who was apparently ailing some four (4) months before his death and in the absence of the Plaintiff who was then away in Namibia.

19. Given the circumstances herein and without deciding the point of ownership, I am in agreement with the Plaintiff that this court should make orders herein that are necessary for the ends of justice and to prevent the abuse of the Court process. I did not think the ends of justice would be met when one party continues to enjoy all the benefits accruing from the disputed properties without any assurance that if the prevailing situation was to be overturned by an order of the Court, such party would be able to compensate the other party for the losses incurred.

20. I think the ends of justice can only be met herein if the 1st Defendant gives a proper account of all the rental income received from the suit premises since the execution of the lease agreement and that any rent paid by the 2nd Defendant or any other tenant be deposited in court for the duration of the suit.

21. Accordingly, I hereby make the following orders:

(i) That pending the hearing and determination of this suit, the Defendants/Respondents do deposit in Court within 30 days the rental income paid by the 2nd Defendant/Respondent and received by the 1st Defendant/Respondent for the lease of the suit properties on portion Nos. 2743, 2744, 2745, 2746, 2736 and 2748 Malindi for the year 2021 being Euros 40,000/-

(ii) That the Defendants/Respondents jointly and severally do deposit the rent due being Euros 10,000 quarterly in Court as per the lease agreement beginning 31st March 2022 pending the hearing and determination of the suit, and in default of any single instalment the 2nd Defendant to forthwith vacate the suit premises.

(iii) That the 1st Defendant do give a full account of all rental income received from the 2nd Defendant between 3rd April, 2015 and the date of this Ruling and to file the same in Court within 30 days from the date hereof.

(iv) That the costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 10TH DAY FEBRUARY, 2022 VIA MICROSOFT TEAMS.

IN THE PRESENCE OF:

MS CHEPKWONY FOR THE PLAINTIFF

NO APPEARANCE FOR THE DEFENDANTS

COURT ASSISTANT – KENDI

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J. O. OLOLA

JUDGE