



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.108 OF 2012

1. DANIEL BERNHARD BEINHARD
2. ELIZABETH BERNHARD BEINHARD.....PLAINTIFFS/APPLICANTS
(suing thro. their Attorney JOYCE REINHARD)

=VERSUS=

1. DAMARIS NTHENYA
2. GIOVANNI OZZI.....DEFENDANTS/RESPONDENTS

RULING

1. What is before me is the Application by the Plaintiff dated 7th May 2015 seeking for the following orders:

- (a) The Defendants, their agents and/or any other person working for them collecting rent in the suit premises Nos.588, 589 and 654 Watamu be compelled by the order of this court to stop doing so forthwith.**
- (b) The court do appoint a Registered agent to manage the suit properties Nos.588, 589 and 654 Watamu.**
- (c) The collected rent be deposited in court pending the hearing and determination of the suit.**
- (d) The consent dated 26th February 2013 be vacated.**
- (e) That costs be provided for.**

The Plaintiffs'/Applicants' case:

2. According to the Attorney of the Plaintiffs, her former advocate, Richard O. & Co. Advocates, entered into a consent with the firm of Kilonzo & Aziz Advocates on 26th February 2013; that she never gave Mr. Richard Advocate any instructions to enter into the said consent and that the consent is unfair to her because she does not collect rent from the suit premises although the property belongs to the Plaintiffs.

The Respondents' case:

3. The Respondents filed their Grounds of Opposition and averred that the Application is unmeritorious and that the Application is fraught with lies, material non disclosures and dishonesty.

Submissions:

4. The Plaintiffs' advocate submitted that the Plaintiffs' Application for injunction was allowed on 22nd May 2012; that a consent was entered into on 15th January 2013 to the effect that status quo should be maintained and that the Plaintiffs never gave to there erstwhile advocate instructions to enter into a consent.

5. The Defendants' counsel submitted that Richard Otara Advocate had an implied general authority to compromise and settle the suit on behalf of the Plaintiffs; that there is no evidence to show that the said advocate had negative instructions and that the Application has been made two years after the consent.

6. Counsel submitted that the 1st Defendant has been in possession and occupation of the suit property and that the Applicants have never been owners or in possession of the same.

Analysis and findings:

7. In the Amended Plaint, the Plaintiffs are seeking for an order of eviction to be issued against the Defendants and for the Defendants to give vacant possession.

8. Although the Plaintiff is seeking for an order that the Defendants should be prohibited from collecting rent from the suit premises, the Plaintiffs have not averred in the Plaint that the Defendants are collecting rent.

9. According to paragraph 10 of the Plaint, the Plaintiffs have averred that the 1st Defendant has converted the Plaintiffs' cottages situated on the suit premises to guest houses where he boarding the same various unknown people.

10. However, there is no evidence of that allegation before the court. Indeed, the Application and the Plaint do not state how much the Defendants are charging as rent. There is also no claim for rent or mesne profits in the body of the Plaint.

11. Consequently, the prayer for the appointment of a manager by the court and the collected rent to be deposited in court cannot issue because it is not premised on any evidence or pleading.

12. The Plaintiffs are seeking for the setting aside of the consent order of 19th February 2013 which allowed for the status quo ante the filing of the suit to be maintained until further orders of this court or further orders by consent of the parties.

13. It is the 1st Plaintiff's deposition that she never instructed the firm of Otara to enter into the said consent, more-so having already obtained injunctive orders.

14. The impugned consent was entered into by way of a letter dated 15th January, 2013 and filed in this court on 19th February 2013.

15. The Plaintiff has not informed the court why she did not move the court to set aside the consent within a reasonable time, considering that the consent was entered into two years ago.

16. Although the Plaintiff has stated that she never gave the firm of Otara advocate instructions to enter into the said consent, there is no evidence before me to show that she gave to the said advocate instructions which are different from the consent. The Plaintiff has not annexed on her affidavit the

express instructions that she gave to her advocate to enable the court verify the veracity of her claim.

17. In any event, by the time the Plaintiff was filing the suit, the Defendants were in situ. That explains why the Plaintiffs are seeking for orders of eviction and vacant possession.

18. Consequently, the Plaintiffs' advocate must have acted bona fide when he recorded the consent of 19th February 2013, that is, to maintain the status quo pending the hearing of the suit.

19. If the Defendants are collecting rent from the suit premises, then the Plaintiffs are entitled to a claim of mesne profits. The Plaintiff would still be awarded the collected rent if they succeed on such a claim.

20. For those reasons, I dismiss the Application dated 7th May, 2015 with costs.

Dated and delivered in Malindi this **13th** day of **November** 2015.

O. A. Angote

Judge