



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 56 of 2011

**LIANA TAMBURELI (suing in her capacity as
administrator**

of the Estate of Giovanni Gremmo Deceased as well as in

her own capacity as widow of the deceased.....PLAINTIFF

V

1. MILENA BORA

2. HASHIM SAT

3. THE LAND REGISTRAR

4. THE REGISTRAR OF COAST LAND TITLES

5. THE PRINCIPAL REGISTRAR OF TITLES

6. THE COMMISSIONER OF LANDS

7. THE ATTORNEY GENERAL

8. OMAR SALIM

ABDALLA.....DEFENDANTS

R U L I N G

1. What is before me is the Plaintiff's Application dated 21st December 2011 and filed on 22nd December 2011. The Application seeks for the following reliefs:

a) **THAT pending the hearing and determination of the suit herein the Honourable Court be pleased to issue an Order that the 9th defendant by himself, his employees, servants and agents or anyone of them are restrained by an order of injunction from selling, transferring, letting, parting with possession, charging, subdividing, developing, wasting and or encumbering or in any other manner transacting or dealing with Portion Number 1757 (Original No. 1702/1) and all the improvements thereon.**

b) **THAT pending the hearing and determination of the suit herein the Honourable Court be pleased to make an order for the inspection of Portion number 1757 (Original No. 1702/1) Malindi and all the developments therein for the purpose of ascertaining their state and value and in that connection allow the plaintiff's appointed valuer and any other necessary expert to enter in the suit premises and carry out the said inspection and valuation and to file his report in court, the cost thereof to be in the first instance paid by the plaintiff but the same to ultimately abide the outcome of the suit herein.**

c) **THAT for the better preservation of the records related to Portion Number 1757 (Original No. 1702/1) Malindi, and pending the hearing and final disposal of the suit herein the Honourable Court be pleased to direct the 5th respondent to produce to the Honourable Court for safe keeping, both the skeleton file and the original file held by the 5th defendant in respect of the said property. And in the alternative and without prejudice to the foregoing, the Honourable Court be pleased to make any order as shall be necessary or expedient for the preservation of the said records.**

d) **Costs of and incidental to this application be provided.**

2. The Application is premised on the grounds on the face of the Application and on the Affidavit of the

Plaintiff.

3. The Plaintiff, who has filed this suit as the administrator of the estate of Giovanni Gremmo and the widow of the said Giovanni Gremmo has deponed that her marriage with the deceased was solemnized on 6th April 1961 in Italy and that they were blessed with three children; that the three children are all beneficiaries of the estate of their late father and that during their frequent visits to Kenya, the three children and their spouses would live with the deceased in Portion number 1757 (Original number 1702/1).

4. The Plaintiff deponed that the 1st Defendant was married to one Dealessi Gian Carlo and that she had an extramarital relationship with her late husband; that she has no rights against the estate and that when her husband died, the 1st Defendant continued to hold on to any and all of the items set out in trust for the estate.

5. Upon the death of her husband, the Plaintiff has deponed that she had problems accessing the matrimonial home which is on land portion number 1757 (Original number 1702/1), the suit property, because the 1st Defendant had allegedly leased the property out and that there was a document that purported to transfer a half share of the matrimonial home to the 1st Defendant.

6. The Plaintiff has further deponed that when she saw the transfer document, it was clear to her that the signature purporting to be that of her late husband was a forgery the result whereof led the 1st Defendant to be charged at the Chief Magistrate's Court Malindi, for forgery.

7. It is the Plaintiff's averments that she is in possession of the original documents in respect to the suit property and that the 1st Defendant must have conspired with the officers in the lands office, Mombasa, to have her registered as the proprietor of the suit property; that the 1st Defendant has since transferred the suit property to the 9th Defendant although the official search still reflects the Plaintiff's late husband as the registered owner of the suit property.

8. The Plaintiff has finally deponed that it is necessary that the suit property and the records thereof be protected by an appropriate order of injunction and preservation as sought in the application.

9. The 1st Defendant filed her Replying Affidavit on 17th February, 2012 in which she deponed that the

she lived together with the deceased as husband and wife for over sixteen years and that it was true that family events used to be undertaken in the house which is on the suit property.

10. The 1st Defendant deponed that it was difficult to tell what belonged to her and what belonged to the deceased because they trusted each other and invested together in businesses; that the deceased died on 16th December 2009 by which time he was in control of his accounts and that her relationship with the deceased can be classified as a common law marriage even though they were not married.

11. In respect to the suit property, the 1st Defendant deponed that she did not forge the deceased's signature and that the Plaintiff was not present at the time of signing the agreement and the transfer and that the same were lawfully executed and witnessed before an advocate.

12. The 1st Defendant admits in her Replying Affidavit that she indeed sold the suit property to Omar Salim, the 9th Defendant and that as at the time of sale, the suit property was hers and that she had the legal rights to do so.

13. The 9th Defendant filed his Replying Affidavit on 17th February 2012 in which he deponed that he is the registered owner of the suit property having paid a consideration for it and the requisite stamp duty; that there is no evidence that he acted fraudulently or in cahoots with the 1st Defendant or the lands ministry officials and that he is an innocent purchaser for value without notice.

14. The 2nd to 8th Defendants did not file any response. However, when the Application came up for hearing on 15th May 2013, Mr. Eredi, counsel for the 2nd- 8th Defendants entered into a consent with the Plaintiff's counsel in which prayer number c above was modified to allow the 5th Defendant to hold under lock and key the skeleton file and the original file in respect of the suit property pending the hearing and determination of the suit.

15. Mr. Mwadilo appeared for the 1st and 9th Defendants.

16. I have read the Application and the respective affidavits and the annexures. I have also heard the oral submissions of Mr. Ole Kina, counsel for the Plaintiff and Mr. Mwadilo, counsel for the 1st and 9th Defendants.

17. My task at this stage is not to determine the merits of the Plaintiff's case. That will be for the trial court. All I am required to do is to determine if the Plaintiff has established a *prima facie* case with chances of success and if she will suffer irreparable damage which cannot be compensated by way of damages if the injunctive orders do not issue.

18. It is not in issue that the 1st Defendant has transferred the suit property to the 9th Defendant after purportedly obtaining the same from Giovanni Gremmo, the deceased.

19. What is in dispute is whether indeed the deceased transferred the suit property to the 1st Defendant on 19th May 2009 before he died as claimed by the 1st Defendant.

20. According to the Plaintiff, and relying on the report from the document examiner, the documents purportedly transferring the suit property to the 1st Defendant are forgeries. The Applicant has annexed the document examiner's report which shows that the deceased did not sign the transfer documents and the charge sheet showing that the 1st Defendant has been charged for forgery. That is an issue which can only be resolved at full trial.

21. As has been stated time and again, the whole purpose of an injunction is to preserve matters in *status quo* until the question to be investigated in the suit can finally be disposed of. Here, the question is whether, the document's examiner report is *prima facie* proof that the 1st Defendant, together with the 2nd to the 8th Defendants colluded in the transfer of the suit property to the 1st Defendant who transferred it to the 9th Defendant. The answer can only be in the affirmative.

22. Until the issue of the 1st Defendant or anybody else forging the signature of the deceased is disapproved at full trial, I find and hold that the Plaintiff has established a *prima facie* case with chances of success. In the event that the 9th Defendant deals further with the suit property, the Plaintiff is likely to suffer irreparable damages that will not be compensated by an award of damages.

23. For the reasons I have given above, I allow the Application dated 21st December, 2011 in the following terms:

a) Pending the hearing and determination of the suit herein the 9th defendant by himself, his employees, servants and agents or anyone of them are hereby restrained by an order of injunction from selling, transferring, letting, parting with possession, charging, subdividing, developing, wasting and or encumbering or in any other manner transacting or dealing with Portion Number 1757 (Original No. 1702/1) and all the improvements thereon.

b) Pending the hearing and determination of the suit herein an order is hereby issued for the inspection of Portion number 1757 (Original No. 1702/1) Malindi and all the developments therein for the purpose of ascertaining their state and value and in that connection allow the plaintiff's appointed valuer and any other necessary expert to enter in the suit premises and carry out the said inspection and valuation and to file his report in court, the cost thereof to be in the first instance paid by the plaintiff but the same to ultimately abide the outcome of the suit herein.

c) For the better preservation of the records related to Portion Number 1757 (Original No. 1702/1) Malindi, and pending the hearing and final disposal of the suit herein the 5th respondent is hereby directed to keep under key and lock, both the skeleton file and the original file held by the 5th defendant in respect of the said property.

d) Costs of the application shall be in the cause.

Dated and delivered at Malindi this 28th day of May, 2013

O. A. Angote

Judge