



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 192 OF 2018**

**NASSIR KHAMIS BALETH.....PLAINTIFF**

**VERSUS**

**1. KURT MAYER**

**2. CHARO BAYA MWARUWA**

**3. ISLAM OMAR SAID**

**4. SAID ISLAM ALMASHJARY.....DEFENDANTS**

**RULING**

1. By a Notice of Motion application dated 16<sup>th</sup> October 2018, Nassir Khamis Balleth (the Plaintiff) prays for a temporary order of injunction to issue against the Defendants restraining them from trespassing into, cultivating, constructing on or interfering in any manner with a parcels of land described therein as 10719/532 and 10719/533 Maisha Mapya –pending the hearing and determination of this suit.

2. The application which is supported by the Plaintiff's affidavit is based on the grounds that:-

***i) The Respondents have threatened to alienate the Applicant's land forcefully and unlawfully;***

***ii) The Respondents have commenced construction of a building within the boundaries of the Applicant's land without his consent or permission; and***

***iii) The Respondents have obstructed the Applicant from accessing and making use of his land and consequently his Constitutional rights have been infringed and he has been subjected to irreparable loss and damages.***

3. The said application and the Plaint filed contemporaneously therewith name the Defendants/Respondents as Kurt Mayer (1<sup>st</sup> Defendant) and Islam Omar Said & Others (as the 2<sup>nd</sup> Defendant). For some reason unclear to me however, the Summons issued by the Court on 17<sup>th</sup> October 2018 lists the Defendants as four individuals as follows:-

1. Kurt Mayer

2. Charo Baya Mwavuwa

3. Islam Omar Said

4. Said Islam Almashjary.

4. From a perusal of the record, it is apparent that an attempt was made by the Plaintiff to serve the four individuals with summons. On 22<sup>nd</sup> October 2018, the said Islam Omar Said and Said Islam Almashjary filed a Memorandum of Appearance herein as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Subsequently however by a Notice of Withdrawal of suit dated 14<sup>th</sup> February 2019 and filed herein on 20<sup>th</sup> February 2019, the "suit" against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was withdrawn.

5. On 17<sup>th</sup> December 2018, Charo Baya Mavuwa, listed in the Summons to Enter Appearance as the 2<sup>nd</sup> Defendant filed a Memorandum of

Appearance under Protest as well as a Notice of Preliminary Objection to the suit stating:-

*a) That the suit is bad in law vexatious and an abuse of the Court process.*

*b) That no cause of action is disclosed against the purported 2<sup>nd</sup> Defendant in the Summons to Enter Appearance.*

*c) That the application and the suit therefore against the 2<sup>nd</sup> Defendant is unsustainable in law and accordingly is for striking out.*

6. I have perused and considered the application before me. It is clear to me that the summons to Enter appearance were issued in error as the only parties named in the pleadings herein are Kurt Mayer and Islam Omar Said. As the Plaintiff has withdrawn his suit against the said Islam Omar Said, the existing suit would be only against the said Kurt Mayer as the 1<sup>st</sup> Defendant herein.

7. As it turned out, when this matter came up for hearing on 15<sup>th</sup> May 2019, this Court was informed that the said 1<sup>st</sup> Defendant passed away long before this suit was filed. In acknowledgment of that fact the Plaintiff's Advocates submitted that the purported 2<sup>nd</sup> Defendant herein Charo Baya Mavuwa is the deceased 1<sup>st</sup> Defendant's Caretaker and that the orders sought herein should hence be issued against him.

8. That submission is obviously not serious. As it were, no suit can be brought against a dead person and I am not aware under what provision in law I could substitute an alleged Caretaker of the dead person's property for that deceased person.

9. The suit and the application before me are certainly misconceived and an abuse of the Court process. Both are struck out with costs to the said Charo Baya Mwavuwa purported to be the 2<sup>nd</sup> Defendant herein.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**