



**REPUBLIC OF KENYA**

**IN The ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 38 OF 2020**

**BENEDETTE MWIKALI MUGAMBI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARK KAZUNGU MRAMBA.....DEFENDANT/RESPONDENT**

**RULING**

1. By this Notice of Motion dated and filed herein on 15<sup>th</sup> June 2020, Benedette Mwikali Mugambi [the Plaintiff] prays for orders:-

- 1. That this Honourable Court be pleased to issue temporary [orders of] injunction restraining the Defendant/Respondent, his agents, employees, servants, relatives or any other person [s] acting on his behalf from erecting any other or further structures on or dealing in any manner with the suit premises being Plot LR No. 20252/3, Kilifi CR. No. 30843 situated at Kilifi Township within Kilifi County pending the hearing and determination of this suit;**
- 2. That this Honourable Court be pleased to issue a mandatory [order of ] injunction directing the demolition of the Defendant's structures on the suit premises or any other structures thereon pending the hearing and determination of the suit;**
- 3. That this Honourable Court be pleased to enter summary judgement against the Defendant/Respondent by issuing eviction orders in respect of the suit premises being Plot LR No. 20252/3 Kilifi , CR No. 30843 situated at Kilifi Township within Kilifi County and consequently hand over vacant possession of the same to the Plaintiff; and**
- 4. That [the] costs of this application be provide for.**

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

- i. That the Plaintiff is the registered owner of the suit property**
- ii. That the Defendant filed a suit for adverse possession against the Plaintiff on 3<sup>rd</sup> May 2017 being Malindi ELC No. 98 of 2017 [OS]; Mark Kazungu –vs- Benedette Mwikali Mugambi;**
- iii. That the said suit was dismissed on 13<sup>th</sup> May 2020 after the Defendant failed to prove that he had acquired the land by way of adverse possession and he is therefore a trespasser thereon;**
- iv. That there is danger that the Defendant may proceed to erect more structures on the land or even invite third parties to occupy the same in a bid to frustrate recovery of the same; and**
- v. That the Defendant's presence on the suit premises is and shall remain unlawful and/or illegal hence the need to grant the orders sought herein.**

3. The application is however opposed in his Replying Affidavit sworn and filed herein on 23<sup>rd</sup> June 2020, Mark Kazungu Mramba [the Defendant] while admitting that the Plaintiff is registered as proprietor of the suit property avers that the said registration was not in full compliance with the law.

4. The Defendant further avers that the orders for eviction sought herein should have been sought in Malindi ELC No. 98 of 2017 [OS] and that in any event, the issuance thereof at this interlocutory stage is akin to the court concluding the matter without hearing the parties.

5. The Defendant further avers that he has already filed an Appeal against the determination in ELC 98 of 2017 [OS] and it will be improper under the circumstances for the Court to issue eviction orders.

6. I have given full consideration to both the Plaintiff's application and the response thereto by the Defendant. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Plaintiff's application brought pursuant to the provisions of Orders 36, Order 40 Rules 1 & 2 as well as Sections 1A, 1B, 3A and 6 3[e] of the Civil Procedure Act and Rules prays essentially for a summary judgement and a mandatory injunction to issue against the Defendant.

8. As it were, Order 36 of the Civil Procedure Rules empowers the court in an appropriate suit to enter judgment for the Plaintiff's claim under summary procedure in the absence of a *bona fide* triable issue which would entitle a Defendant to leave to defend. Where a *bona fide* triable issue is raised, the Defendant must be given unconditional leave to defend.

9. In the matter before me, it was not in dispute that the Defendant had initially filed as against the Plaintiff Malindi ELC Case No. 98 of 2017 [OS] seeking to be declared as the proprietor of the suit property by virtue of adverse possession. By a judgement delivered therein on 13<sup>th</sup> May 2020, the claim for adverse possession was determined to be without basis and the same was thereby dismissed with costs to the Plaintiff.

10. Having emerged successful in the said litigation the Plaintiff who was the Defendant in the previous suit has now brought these proceedings essentially to have the Defendant evicted from the suit premises. But in his Statement of Defence dated 22<sup>nd</sup> June 2020 as filed herein on 23<sup>rd</sup> June 2020, the Defendant asserts that the Plaintiff ought to have filed a counterclaim in the previous proceedings.

11. It is also the Defendant's case that the Plaintiff did not fully comply with known legal provisions when she obtained registration as proprietor of the suit land and that in any event, he has filed an appeal against the decision of the court to the Court of Appeal. The Defendant further avers that the Plaintiff's suit is now statute barred given that he has now lived on the land cumulatively for a period in excess of 12 years.

12. It was however clear to me that given the nature of the pleadings brought against the Plaintiff herein by way of originating summons there was very little room for the filing of a counterclaim. Having been found not to be entitled to the suit premises, by virtue of his claim under the doctrine of adverse possession, the Defendant was declared a trespasser and the plaintiff is thereby entitled by law to seek his ejection from the suit property.

13. The Defendant further submitted that since the court found in the judgment delivered on 13<sup>th</sup> May 2020 that he had been on the Suitland since 2006, this suit was time barred as the same having been filed on 15<sup>th</sup> June 2020 had come more than 15 years late. That contention is however spurious and untenable in law. As the court found in its judgement in Malindi ELC No. 98 of 2017 [OS], the Plaintiff and her deceased husband had previously made efforts to eject the Defendant from the land and time could not run when the dispute was already in court.

14. The same goes for the contention that the Defendant has filed an appeal against the judgment delivered on 13<sup>th</sup> May 2020. Order 42 Rule 6 of the Civil Procedure Rules is clear that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from unless there is an order of stay from the court.

15. In the circumstances herein, I am satisfied that the Defendants' defence does not raise any triable issues and that this is an appropriate case for summary judgment and the eviction of the Defendant from the suit property.

16. Accordingly, I allow the Motion dated 15<sup>th</sup> June 2020 in terms of prayers 3 and 4 thereof with costs.

17. The Defendant has 45 days to remove himself and the structures he has erected from the suit property failure to which he shall forthwith be evicted therefrom and the structures removed at his cost.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF AUGUST, 2021**

**J.O. OLOLA**

**JUDGE**