



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 104 OF 2015**

FRANCESCA REGAIOLLI.....PLAINTIFF

=VERSUS=

1. PETER NYIRO NGANGA

2. SUZANNE CHARTER.....DEFENDANTS

**R U L I N G**

**Introduction:**

1. There are two Applications before me. The first one is by the 1<sup>st</sup> Defendant and is dated 15<sup>th</sup> February, 2016. In the Application, the 1<sup>st</sup> Defendant is seeking for the following orders:-

- (a) **THAT further dealings with the suit premises be restricted until determination of this suit;**
- (b) **THAT Plaintiff be ordered to vacate the premises known as House Number Q7 erected on portion number 587 in AG Complex, with only her personal belongings and leave everything else behind.**
- (c) **THAT Plaintiff be ordered to return all the personal property of the Defendant, documents and cash and all the personal property of the late Monique Grignon within fifteen (15) days from the date of the Ruling of this Application.**
- (d) **THAT the Plaintiff/Respondent be ordered to deposit a security of Kshs.2,000,000 in court.**
- (e) **THAT costs of this Application be provided for.**

2. The second Application is dated 14<sup>th</sup> December, 2015 and was filed by Suzanne Charter, the 2<sup>nd</sup> defendant. It is seeking for the following reliefs:-

- (a) **THAT further dealings with the suit premises known as House Number Q7 erected on portion number 587 in AG complex, situated in Malindi, be restricted until determination of**

**this suit.**

**(b) THAT costs of this Application be provided for.**

**The Defendant's case:**

3. The 1<sup>st</sup> Defendant has described himself as the co-executor of the Estate of Monique Grignon; that according to the last Will and Testament of the deceased, the suit premises and all personal belongings to the deceased were transferred to him and that the purported sale of the suit land by the deceased to the Plaintiff was irregular because money was never transferred by the Plaintiff to the deceased's accounts.

4. According to the 1<sup>st</sup> Defendant, all the Powers of Attorney, Wills or transactions between the Plaintiff and the deceased were revoked; that he was living with the deceased in December, 2014 and that he never saw the payment of Kshs.50,000,000 being made to the deceased.

5. The Applicant has deponed that he should be reinstated in the house and that the Plaintiff has refused to participate in taking the inventory in the house as ordered by the court.

6. According to the 1<sup>st</sup> Defendant, the Plaintiff is a tourist and can flee from the country; that the search conducted at the land registry on 26<sup>th</sup> June, 2015 shows the owners of the suit property to be Marco Vancini, Patilia Burani and Paula Penzo and that the search of 17<sup>th</sup> November 2015 shows the Plaintiff to be the owner of the house.

**The 2<sup>nd</sup> Defendant's case:**

7. The 2<sup>nd</sup> Defendant deponed that she was a close friend of Monique Grignon; that she was the executor of his Will; that according to the last Will and Testament of the deceased, the suit premises was transferred to the 1<sup>st</sup> Defendant and that the purported sale of the suit property by the deceased to the Plaintiff was irregular.

8. According to the 2<sup>nd</sup> Defendant, the Power of Attorney and the Will that the Plaintiff is relying on were revoked by the deceased, that the suit property is worthy Kshs.130 million and that she is the owner of the apartment neighbouring the suit property.

9. The 2<sup>nd</sup> Defendant deponed that she has examined the bank records of the deceased and has not come across any money that was deposited in his account around the time of the purported sale.

**The Plaintiff's case:**

10. In his Replying Affidavit, the Plaintiff deponed that he is the registered proprietor of house number Q7 erected in AG Complex, Malindi; that he purchased the house from the late Monique and that the Transfer of Lease was registered in his favour on 9<sup>th</sup> February, 2015.

11. It is the deposition of the Plaintiff that the late Ms Monique voluntarily executed in his favour a Special Power of Attorney; that she also executed her last Will freely and that she revoked the last Will after transferring the land in his favour.

12. The Plaintiff finally deponed that there is no evidence to show that the late Ms Monique transferred the suit property to the 1<sup>st</sup> Defendant and that he (the Plaintiff) is the registered proprietor of the land and is also in possession.

**Submissions:**

13. The 1<sup>st</sup> Defendant's counsel submitted that the 1<sup>st</sup> Defendant was a companion of the late Monique for

the last three years of her life; that the Power of Attorney and Will in favour of the Plaintiff was revoked by the deceased and that the Plaintiff has on numerous occasions altered the names of the lawful owners of the suit property.

14. The 1<sup>st</sup> Defendant's counsel submitted that this is a clear and simple case in which the Plaintiff used unlawful means to acquire a position of advantage by illegally evicting the 1<sup>st</sup> Defendant from the suit premises.

15. Counsel submitted that a mandatory injunction cannot issue where a party has stolen a match on another party as in the present case.

16. Counsel relied on several authorities which I have considered.

17. The Plaintiff's advocate submitted that the Applicants have not demonstrated any evidence to entitle them to the orders of mandatory injunction; that the Plaintiff is the registered proprietor of the house No. Q7 erected on land portion number 587, Malindi and that the late Monique freely and voluntarily sold and transferred her interest in the said house at a valuable consideration vide a Transfer of Lease dated 27<sup>th</sup> December, 2014.

18. Counsel submitted that there are no special circumstance in this case and that the case is not a clear one as envisaged in the holdings in the cases of **Nderu Vs Kenya National Chamber of Commerce & Industry & Another (2003) KLR** and the **Locabail Finance Limited Vs Agro Export & Others (1986) 1 II 901**.

19. In any event, it was submitted, the reliefs sought by the Applicants being equitable in nature cannot override the legally recognised rights of the Respondent because equity follows the law.

20. The Plaintiff's counsel finally submitted that there is no evidence to show that the Plaintiff took or is withholding the personal property, documents and cash of the 1<sup>st</sup> Defendant; that the Plaintiff only bought the furniture belonging to the late Monique and that the said furniture was conveyed to her together with the house.

### **Analysis and findings:**

21. The Certificate of Postal Search shows that the Plaintiff is the registered proprietor of the suit property.

22. The Plaintiff/Respondent produced in evidence the Transfer of Lease dated 27<sup>th</sup> December, 2014 that was purportedly signed by himself and the late Grignon Monique in respect to the suit property.

23. The Transfer of Lease shows that the late Ms Monique appeared before Ms Wangari Mwangi advocate on 27<sup>th</sup> December, 2014 and executed the Transfer of Lease before the said advocate. The Transfer of Lease was then duly registered on 9<sup>th</sup> February, 2015.

24. The Defendants' case is that the suit property was bequeathed to the 1<sup>st</sup> Defendant vide a Will and Testament dated 25<sup>th</sup> February, 2015. By this time, the documents before me shows that the deceased had already transferred the suit property to the Plaintiff.

25. The issue as to whether the deceased indeed transferred the suit property to the Plaintiff can only be dealt with conclusively at trial.

26. However, the court is seized of the registered Transfer of Lease that is said to have been signed by the deceased before an advocate and a Certificate of Postal Search showing that the Plaintiff is the registered proprietor of the suit property.

27. The evidence before the court shows that it is the Plaintiff who is in possession of the house.

28. Until it is proved at trial that the deceased never signed the Transfer of Lease dated 27<sup>th</sup> December, 2014, it is the Plaintiff who is entitled to own and use the suit property.

29. In the circumstance, I find and hold that the Defendants have not established a prima facie case with chances of success or that they will suffer irreparable damage that cannot be compensated with damages.

30. Considering that the subject matter of this case is an immovable property, an order for security of Kshs.2,000,000 is not necessary. Indeed, no basis was laid by the Applicant for the prayer for security, or for an order that the Plaintiff appropriated the personal properties of the Defendant.

31. For those reasons, I dismiss the Applications dated 14<sup>th</sup> December, 2015 and 15<sup>th</sup> February, 2016 with costs.

Dated, signed and delivered in Malindi this **14<sup>th</sup>** day of **July**, 2016.

**O. A. Angote**

**Judge**