



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 58 OF 2019**

**LILIAN WATURI WA MBUGUA**

Also known as **LILIAN WATURI MBUGUA.....PLAINTIFF**

**VERSUS**

**1. GEOFFREY NGICHIRI MUBEA**

**2. TIMOTHY NJOROGE NGANGA**

**3. AMOS GICHUNJU NGANGA**

**4. THE LAND REGISTRAR-MOMBASA**

**5. THE HON. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated 24<sup>th</sup> July 2019, Lilian Waturi Wa Mbugua also known as Lilian Waturi Mbugua (the Plaintiff) prays for orders: -

***3. That this Honourable Court be pleased to issue temporary orders of injunction restraining the Respondents by themselves, their servants and/or agents from collecting rent, occupying, selling, transferring, interfering or in any way dealing with the Applicant's property being Plot Portion No. 2539(Original No. 1935/377) Malindi pending the hearing and determination of this suit.***

**4.....**

***5. That this Honourable Court be pleased to order that an independent agent be appointed to collect rent and manage the property being Plot Portion No. 2539(Original No. 1935/377) Malindi and the rent be deposited in a joint interest earning account in the name of the Applicant and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and/or that their appointed agents or in the names of their Advocates pending the hearing and determination of this suit.***

***6. That the costs of this application be provided for.***

2. The application is supported by an affidavit sworn by Rosemary Wangare Muraya, a donee of a power of attorney from the Plaintiff and is premised on the grounds: -

***a) That the Plaintiff purchased the property from one Mary Nganga who however continued to manage the same until her death on 17<sup>th</sup> October 2018;***

***b) That the Respondents who are the deceased's brothers have since assumed ownership of the property claiming to have inherited the same and have denied the Plaintiff access thereto;***

***c) That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are presently collecting rent from the suit property and are occupying it to the detriment of the Plaintiff who is the rightful owner thereof; and***

***d) That it is in the interest of justice that an independent agent be appointed to collect the rent and that the same be deposited in a joint interest earning account in the name of the parties, their agents or advocates.***

3. The application is opposed. In Grounds of Opposition dated 3<sup>rd</sup> October 2019 and filed herein on 7<sup>th</sup> October 2019, Geoffrey Ngichiri Mubea, Timothy Njoroge Nganga and Amos Gichunju Nganga (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively) oppose the same on the grounds: -

- 1. That the Applicant has no locus standi to prosecute this matter as she is but a stranger in these proceedings.***
- 2. That the application as laid is a non-starter in law and an abuse of the due process of the Court and proper to be struck out ex debito justitiae.***
- 3. That the Applicant's application is misconceived, mischievous and has been brought before this Honourable Court in bad faith.***
- 4. That the application is unmeritorious and lacking in substance.***
- 5. That the Applicant has not satisfied the principles governing the grant of temporary injunction.***
- 6. That the Application is full of non-disclosure of material facts with a pure intention of perpetuating an illegality.***
- 7. That the Applicant has not shown that there is any substantial loss and that she will be exposed to suffer in the event of the status quo being maintained.***
- 8. That the Applicant is neither a legal owner or beneficiary of the suit property thus cannot seek the relief sought.***
- 9. That the application was filed in flagrant violation of the well-established legal principles and statutory provisions relevant to the subject application and the same is devoid of merit whatsoever or at all.***
- 10. That the Applicant's application is frivolous, vexatious and untenable and otherwise an abuse of the Court process and its precious judicial time.***
- 11. That the relief sought cannot be granted and in the interest of justice the application should be dismissed with costs.***

4. I have perused and considered the Plaintiff's application and the Grounds of Opposition filed in response thereto by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I have also carefully studied the written submissions placed before me by the Learned Advocates for the parties.

5. The power exercised by the Court in an application seeking an interlocutory order of injunction is discretionary. As was explained by Spry V.P. in the celebrated case of ***Giella –vs- Cassman Brown (1973) EA 358***: -

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”*

6. In ***Roberto Mugo wa Karanja –vs- Ecobank (Kenya) Ltd & Another (2019) eKLR***, it was stated that:

*“The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules require proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the Court in such a situation is enjoined to grant a temporary injunction to restrain such acts.*

7. From the material placed before me, the suit property is registered in the name of one Mary Njeri Nganga who is said to have passed away on 17<sup>th</sup> October 2018. The Defendants are the deceased's brothers while the Plaintiff is her niece. According to the Plaintiff, she had purchased the suit property from the deceased many years back but the property had not been transferred to her name.

8. In support of her contention, the Plaintiff has produced a Copy of a Sale Agreement dated 20<sup>th</sup> August 1991 between herself and the deceased. While there was no proper explanation as to why the property was never transferred to her name for so long, it is my considered view that by virtue of the sale agreement, she has demonstrated that she has some interest in the suit property.

9. Other than the fact that the deceased was their sister, the three Defendants have not brought out anything in their Grounds of Opposition to demonstrate that they had a better title than that claimed by the Plaintiff herein. Indeed, they have not denied that they collect rent from the property and that they have denied the Plaintiff access thereto.

10. Given the very scant facts placed before the Court, I think it is only fair that the suit property be preserved from wastage and or alienation and that the rent proceeds be placed in a joint-interest earning account as proposed by the Plaintiff pending a proper determination as to the

ownership of the suit property.

11. Accordingly, I hereby grant orders as follows: -

***a) That the Defendants herein are hereby restrained by themselves, their servants and or agents from collecting rent, occupying, selling or transferring the suit property pending the hearing and determination of this suit;***

***b) That the parties herein do within 21 days from today appoint an independent agent to collect rent and manage the suit property and in default the Deputy Registrar of this Court to appoint one within 30 days of notification by either side of such default; and***

***c) The rent so-collected be deposited in a joint-interest earning account in the names of the Advocates on record for the Plaintiff on one side, and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the other pending the hearing and determination of this suit.***

12. The costs of this application shall be in the cause.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**