



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 182 OF 2017

VERONICA MWIKALI FORSTER suing through Attorney

SALIMU SWALEH MOHAMED.....PLAINTIFF/APPLICANT

VERSUS

MUSTAFA ALI SHEKUE.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 15th August 2017. By the said Motion Veronica Mwikali Forster (the Plaintiff) prays for an order of a permanent injunction to issue restraining the Defendant from entering, remaining, occupying, renting, interfering with and/or in any manner dealing with premises known as Apartment Nos 1 and 2 situated at Villa Veronica Malindi.

2. The application is supported by an affidavit sworn by Salim Swaleh Mohamed, the Plaintiff's attorney and is premised on the grounds stated on the body thereof as follows:-

i) That the Plaintiff herein is the absolute registered owner of a quarter(1/4) acre of undivided share on Plot No. 21 Watamu measuring approximately 12.7 acres or thereabouts registered in the name of Abdalla Salim Bakhshweni;

ii) That the Plaintiff erected a building thereon and named the same Villa Veronica;

iii) That the Plaintiff rented out Apartment Nos 1 and 2 (at) the said Villa Veronica to one Maria Eyer who passed away sometimes in March 2017; and

iv) That the Defendant herein is said to be having the keys to the said apartment and claiming to have been given the said apartments by the said Maria Eyer(now deceased) without the consent and/or knowledge of the Plaintiff.

3. In response to the application, Mustafa Ali Shekue (the Defendant) avers that he is the person in actual occupation of the premises being the heir to the Estate of the late Maria Eyer. According to the Defendant the property in issue was sold to Maria Eyer by the Plaintiff's husband one Forster Fritz pursuant to a handwritten agreement.

4. The Defendant avers that the late Maria Eyer informed him that she had used the premises for over 28 years until the year 2008 when the Plaintiff tried to defraud her of the same as a result whereof the matter ended up in Court. The Plaintiff has since used various means to try to take over the house in vain.

5. I have considered the Plaintiff's application and the Defendant's response thereto. The Plaintiff/Applicant is seeking an injunction to restrain the Defendant/Respondent from entering, remaining in, occupying, renting and/or interfering in any manner with Apartments No. 1 and 2 situated at Villa Veronica, Watamu pending the hearing of this suit.

6. According to the Plaintiff, she is the absolute registered owner of ¼ acre of an undivided share of Plot No. 21 Watamu. It is her case that she purchased the land from the original owner one Salim Abdalla Bakhshwein and proceeded to erect a building thereon which she named Villa Veronica. It is further her case that she leased the two apartments to one Maria Eyer who passed away in March 2017 and that the Defendant herein has been claiming to have been given the said apartments by the deceased Maria Eyer and has refused to surrender the keys thereto.

7. On his part, the Defendant avers that he is the person in actual possession of the premises being the heir of the Estate of the late Maria Eyer. It is his case that the property in dispute was sold to Maria Eyer some 28 years back by one Forster Fritz, a Swiss national who was the

husband to the Plaintiff herein.

8. I note from the material placed before me that while the Plaintiff claims to be the registered owner of the suit property, entry No. 12 on the Certificate of Ownership attached to her Supporting Affidavit indicates that the transfer done on 26th November 1983 was made to and is registered in the name of Villa Veronica. While the Plaintiff who goes by the name Veronica Mwikali Forster may have some connection to the said Villa Veronica, I did not think that the two names referred to the same thing or person. As it were, Villa Veronica sounded to me more like a business name and nothing was placed before me to explain any connection between the said Villa Veronica and the Plaintiff.

9. Whatever the case, it is evident that the Plaintiff had tried many times to kick out the deceased Maria Eyer from the premises but she had always held out that she had bought the same. From pleadings filed at Malindi Principal Magistrates Court Civil Case No. 350 of 2008, it is evident that there was an attempt to kick her out of the suit premises and that she went to Court and succeeded in remaining in the suit premises.

10. From the Defendant's Replying Affidavit, it is also evident that the Plaintiff herein had on 21st November 2013 attempted to force Maria Eyer out of the premises which according to the Defendant are separate from the Plaintiff's though within the same compound and known as Villa Maria. The Plaintiff was consequently charged in Malindi Criminal Case No 727 of 2013 with the Offence of Forcible Entry Contrary to Section 90 of the Penal Code.

11. In her Supporting Affidavit to an application made in Malindi CMCC No. 350 of 2008 aforesaid, the deceased Maria Eyer deponed at paragraph 5 thereof as follows:-

5. That I am not a tenant of the Defendant as is envisaged in the distress for rent or in any other way and that I am (the) owner of my two villas known as Villa Maria, within a larger compound commonly referred to as "Villa Veronica" which I have previously run as a guest house. I annex a copy of the Licence and mark as "ME-1".

12. I note from the pleadings herein that the basis of the Plaintiff's suit is the fact that the said Maria Eyer was her rent paying tenant. In the circumstances before me and in the interest of justice, I think it would be proper that the ownership of the suit property is determined before the orders sought herein can be granted.

13. I am accordingly not satisfied that the Plaintiff has at this stage made out a prima facie case to warrant the issuance of the orders sought.

14. The application dated 15th August 2017 is accordingly dismissed with costs.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE