



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC APPEAL NO. 169 OF 2011

BEATRICE AMTA VOGELBACHER.....APPLICANT

VERSUS

DOMITILA OMODO.....RESPONDENT

RULING

(Application to enjoin two persons as interested parties in an appeal; applicant having had a dispute with her mother on ownership of a property with 14 rooms and judgement delivered where the court ordered the applicant to keep 8 rooms and her mother 6 rooms; applicant filing an appeal; while appeal is pending, the respondent dies; applicant claiming that the two persons that she seeks to enjoin as interested parties, who are her sisters, have now taken over the property; the two persons sought to be enjoined not being parties in the original suit or in the appeal; no avenue for them to be enjoined in the appeal as interested parties; applicant at liberty to file a separate suit against them; application dismissed; appeal stayed pending substitution of deceased respondent or abatement)

1. The application before me is that dated 16 September 2019 filed by the appellant. The principal order sought is that Irene Akinyi Omondo and Hellen Agola be enjoined as interested parties. Before I go to the gist of the application a bit of a background will put matters into context.

2. The genesis of this matter is that the applicant sued her mother in Mombasa CMCC No. 374 of 2005. In the suit, she contended that she bought a portion of the Plot No. Kwale/Ukunda/3305 for Kshs. 40,000/= on 28 March 2002 after which she constructed a residential house. She averred that her mother (the defendant in the original suit and the respondent in this appeal), had without any justifiable cause entered the said property and claimed ownership of it. In the suit she inter alia sought orders of eviction. The defendant filed defence and counterclaim. She pleaded that she is the one who bought and/or leased the land and built her house of 14 rooms on a portion referred to as "House A". She stated that the plaintiff offered to do minor repairs on this house in exchange of the defendant giving her the remainder space of the plot which was agreed. It was claimed that the applicant then built a house of 10 rooms on the portion referred to as "House B". The defendant contended that she is on her portion "A" and collecting rent from it while the applicant was on her portion "B". She asked that the applicant be restrained from the portion "A".

3. The matter was heard and a judgment delivered on 9 August 2011. In her judgment, the learned trial Magistrate found that there was no dispute on the 10 roomed house built by the applicant and the dispute was really over the 14 roomed house claimed by both applicant and the defendant. The trial Magistrate further found that the applicant may have been sending money for construction of the house but there was evidence that the defendant was in possession of the plot and paying rent and thus she could not be evicted. The court held that the defendant does continue occupying and collecting rent from six of the rooms while the plaintiff does collect rent from eight of the rooms.

4. Aggrieved, the applicant filed an appeal to this court on 5 September 2011. That appeal is still pending. On 21 July 2019, the respondent in the appeal (the defendant in the original suit) died.

5. In this application, the applicant has contended that Irene Akinyi Omondo and Hellen Agola, her sisters, came into the suit property during the respondent's illness and refused to move out. That is the reason she wants to have them enjoined as interested parties. The two respondents to this application appeared in court when the application came up for inter partes hearing but they had not filed any formal reply to the application. They sought adjournment which I denied.

6. I have considered the application. It will be noted that what the applicant wants is to enjoin the two persons as interested parties. On my part, I am not persuaded that this is a fit case for joinder of the two persons as interested parties. It will be observed that the suit has already been heard and there is a judgment on record. What is pending is an appeal. I do not see the place of the two mentioned persons in this appeal, which is an appeal squarely between the applicant and her mother. The two persons sought to be enjoined in this appeal as interested parties were not parties in the case before the Magistrate and I do not see where they can fit in this appeal. If the case of the applicant is that they have taken over her house, she has the option of suing them separately. I therefore see no basis for this application and it is hereby

dismissed.

7. On the appeal itself, the respondent died on 21 July 2019. There will be one year pursuant to the provisions of Order 24 for substitution of the deceased respondent or else the appeal will abate. For now I have not been shown evidence of any person being the legal representative of the respondent. If nothing is filed to substitute by 21 July 2020, then this appeal will abate. For now, the appeal is stayed pending substitution or abatement as the case may be.

8. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of October 2019.

MUNYAO SILA.

JUDGE.

IN THE PRESENCE OF:

The applicant acting in person.

Intended interested parties acting in person.

Court assistant; Koitamet.