



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 198 OF 2017**

**ELIZABETH FRANCISCA NZISAH MWAILU.....PLAINTIFF**

**-VS-**

**ESTATE OF MAREL SWALEH BIN OMAR.....RESPONDENT**

**RULING**

1. The applicant, Elizabeth Francisca Nzisah Mwailu who is the Plaintiff in this case filed a Notice of Motion dated 5<sup>th</sup> June 2017 in which she seeks orders of Temporary Injunction against the Respondent the Estate of Marel Swaleh Bin Omar restraining them from further collecting any money in the form of rent from the Suit Property on **PLOT NO.148/MN/V/CR 1511** Mikindani Mombasa until determination of this suit as well as eviction orders. The Applicant contends that the Respondent is illegally in occupation of the Applicant's property and has continued to collect rent to recover Kshs.30,000.00 loaned to the Applicant since the year 1996. The Applicant avers that in the year 1996, she obtained a loan of Kshs.30,000.00 from Marel Swaleh Bin Omar refundable by way of collecting rent from the house in Mikindani on **PLOT NO.148/MN/V/CR1511**. The Applicant contends that the net income from the house is now Kshs,7,500.00 per month and since the death of Marel Swaleh Bin Omar, his dependents are still collecting rent from the property despite frequent communication from the Applicant to them to stop and hand over the property back to the Applicant.

2. The Application was opposed by the Respondent through a Replying Affidavit sworn by Khalid Omar Swaleh, on 4<sup>th</sup> July, 2017 and filed in Court on 11<sup>th</sup> July, 2017. He deposes that he is a son of the Respondent, Marel Swaleh Bin Omar and contends that the Application is unmerited, far-fetched, vexatious, brought in bad faith and calculated to embarrass the estate of the deceased. That the deceased has never been on the Suit Property claimed by the Applicant but added that the deceased was the bona fide owner of **PLOT NO.148/V/MN** registered as **CR 1511**. He denied that the deceased gave any loan to the Applicant but contends that the deceased bought a mud house on **PLOT NO.148/MN/V/** registered as **CR 1511** from the Applicant on 1<sup>st</sup> May 1996 for Kshs.30,000.00 after which he demolished the mud house and constructed a permanent structure which is currently on the plot. That the Applicant later bought a house in that plot. That later some individuals made a claim over the whole **PLOT NUMBER 148/V/MN/V/CR 1511** and the deceased and other occupants appointed some representatives who included the Applicant to defend their interests in **Mombasa HCCC No 51 of 2010 (OS)** and judgment was entered in favour of the group in **Mombasa ELC Case No.37 of 2012**.

3. I have considered the Application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by both parties. This being an Application for a Temporary Injunction, it has to be considered on the principles that were set out in the case of **Giella –V- Cassman Brown & Co Ltd**, namely:

- i. The Applicant must show that she has a *prima facie* case with a probability of success; or**
- ii. If the orders sought are not issued she will suffer irreparable loss that cannot be compensated by an award of damages**
- iii. If in doubt, the Court will determine the Application on balance of convenience.**

4. In the Application, the Applicant has deposed in her affidavit that in the year 1996 she obtained a loan of Kshs.30,000.00 from Marel Swaleh Bin Omar (now deceased) who was to collect rent from the house to recover the loan. The Respondent has however annexed an agreement showing that the property was sold by the Applicant to the deceased and there are also judgments in **Mombasa HCCC No.51 of 2010** and **ELC Case No.37 of 2012** which was later entered in favour of both the Applicant and the deceased among others. From the material before the Court, I find that the Plaintiff has not established a *prima facie* with a probability of success. I also take the view that the Plaintiff has not demonstrated what loss if any she stands to suffer if the orders sought are not granted and further that the loss cannot be compensated by an award of damages. The dispute is over rent which in my view can be determined in monetary terms and the Plaintiff compensated by an award of damages in case the injunction is not granted and the Applicant is successful at the trial. The balance of convenience is clearly in favour of the Respondents who are in possession and have been so for quite some time. In addition, from the facts of this case, in my humble view the order for eviction cannot issue as the same is in the nature of a Mandatory Injunction which also amounts to a final order which cannot issue unless the case is unusually strong and clear. In my view, the case is not unusually strong and clear as to allow me to grant that order.

5. In the premises I find and hold that the Plaintiff has not established that she has a *prima facie* case with probability of success and I decline to grant the orders sought. Accordingly, I find that the Plaintiff's Notice of Motions dated 5<sup>th</sup> July 2017 is without merit and is hereby dismissed with costs to the Defendant.

**Delivered, signed and dated at Mombasa this 12<sup>th</sup> February, 2018.**

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**C. YANO**

**JUDGE**