



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 576 OF 2016

SOPHINAH KALONDU MBITI.....PLAINTIFF

=VERSUS=

ARUN MAHENDRA ADALJA & 3 OTHERS.....DEFENDANTS

RULING

1. This is a Ruling in respect of four separate applications filed in this suit. The first application is a Notice of Motion dated 14th March 2017, brought by the Plaintiff. It seeks injunctive orders to preserve the following properties:-

- a. Horombo Villa Number 19 Rosslyn gardens L.R No.28431 (Original 18/31).
- b. Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.
- c. Town House Number 6 L.R No. 7158/505 Marble Valley
- d. Clifton Villas L.R 7158/365
- e. Clifton Villas L.R 7158/366
- f. Type "C" Flat Number 4 Block A L.R 1870/VI/61 (I.R 92435/1)
- g. Clifton Villas (KIII) L.R 7158/608
- h. Clifton Villas (KIII) L.R 7158/237
- i. Clifton Villas (KIII) L.R 7158/238
- j. L.R NO. 1870/III/447 Shanzu Villas.

2. The first application also seeks the following reliefs:-

1. That pending the hearing and determination of this application and or suit or any pending or subsequent probate or succession matter a mandatory injunction do issue directed at the defendants to grant the plaintiff access and or quiet possession of flat No.4 Block A L.R 1870/VI/61 (I.R 92435) East Church Flats.
2. That pending the hearing and determination of this application and or suit or any other pending or subsequent probate or succession matter, the 1st defendant be ordered to release to the plaintiff motor vehicle Registration Numer KBV150A.
3. That pending the hearing and determination of this application and or suit the defendants be ordered to provide to the plaintiff the original or photocopies of title documents to the following properties:-

- a. Horombo Villa Number 19 Rosslyn gardens L.R No.28431 (Original 18/31).
- b. Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.

- c. Town House Number 6 L.R No. 7158/505 Marble Valley
- d. Clifton Villas L.R 7158/365
- e. Clifton Villas L.R 7158/366
- f. Type "C" Flat Number 4 Block A L.R 1870/VI/61 (I.R 92435/1)
- g. Clifton Villas (KIII) L.R 7158/608
- h. Clifton Villas (KIII) L.R 7158/237
- i. Clifton Villas (KIII) L.R 7158/238
- j. L.R NO. 1870/III/447 Shanzu Villas.
- k. Certificate of death for Dr.Mahendra Krishnalal Adalja.

4. That costs be in the cause.

3. The second application is a Notice of Motion dated 31st March 2017 brought by the first defendant. It seeks the following reliefs:-

1. That pending the determination of this suit Sophinah Kalondu Mbiti the Plaintiff be restrained by herself her employee(s) and/or agents(s) from making any agreement to sell, mortgage, charge, lease, or otherwise, encumber or dispose of any one or other the following properties:-

- i. Villa Number 10 Clifton Villas situate on land Reference number 7158/608:**
- ii. House number 22 Jambo Prestige situate on land reference number 1870/III/550 Westlands**
- iii. Horombo Villa number 19 situate on and being a portion of land reference number 28431; and**
- iv. The town house known as marble valley situate on Land reference number 7158/505.**

2. That the said Sophinah Kalondu Mbiti be restrained from entering upon, taking possession, collecting the rent, or otherwise dealing with any one or the other the immovable properties hereinabove listed as 1(i),1(ii),1 (iii),and 1 (iv).

3. That this Hon. Court do appoint a manager to manage the aforesaid properties to receive the rent and income and to pay out all outgoings in respect thereof including land rent, rates and service charges ,to carry out all necessary repairs and maintenance and to render an account to this Hon. Court until the determination of this suit.

4. That pending the appointment of a receiver and manager the rent and/or any payment made by the tenants/occupiers on account of (i) Villa number 10 Clifton Villas situate on land reference number 7158/608 (ii) House number 22 Jambo Prestige situate on land reference number 1870/III/550 Westlands(iii) Horombo Villa number 19 situate on and being a portion of land reference number 28431 and (iv) Marble Valley situate on land reference number 7158/505 shall be paid into court pending further orders of this Hon. Court.

5. That the plaintiff do provide to this Hon. Court true copies of each and every lease in respect of each properties aforesaid and a true and complete account of all receipts of rents/income in respect of each of the aforesaid properties from the date of the death of the deceased Dr. Mahendra Adalja until a date to be determined by this Hon. Court.

6. That the plaintiff by herself her agent(s) and/or employee(s) be restrained from interfering with the applicant's quiet possession and enjoyment including ingress and egress to flat number 4A East church Road Flats Westlands Nairobi.

4. The third application is a notice of Motion dated 8th September 2017, and filed in court on 18th September 2017. It is brought by the first defendant and seeks leave of the court to amend the defence and counter-claim.

5. The fourth application is the one dated 13th September 2017 and filed in court on 18th September 2017. It is brought in the nature of a preliminary objection and seeks to have some two annexures to the plaintiff's affidavit in support of notice of motion dated 14th March 2017, struck out or in the alternative , the plaintiff's entire affidavit be struck out.

Application dated 8th September 2017.

6. This application seeks leave of Court to amend the defence and counter-claim of the first defendant. On 10th October 2017 this court directed those wishing to oppose the application to file their responses by 6th November 2017. As at the given deadline, there was no one

who had opposed the same. I therefore allow the same in the following terms:-

- a. **The first defendant shall file amended defence and counter claim within 14 days from the date hereof.**
- b. **The plaintiff to file a reply to amended defence and defence to amended counter-claim within 14 days from the date of service.**
- c. **Costs of this application shall be in the cause.**

Application dated 13th September 2017

7. In this application, the first defendant contends that the Plaintiff has annexed to her supporting affidavit in respect of Notice of Motion dated 14th March 2017 some two annexures which were written on a “ **a without prejudice basis**”. The first defendant argues that correspondence written on a without prejudice basis should not be given in evidence. The first defendant prays that paragraph 13 of the said affidavit which has introduced the two documents should be expunged from the record.

8. The two documents in contention are an undated letter titled “**the Estate of the late Dr Mahendra Krishnalal Adalja** ” from the law firm of Triple OK Law Advocates to the advocates of the plaintiff. The undated letter annexed a will of the late Dr Adalja dated 9th November 2015.

9. The Plaintiff opposed this Notice of Motion through grounds of opposition dated 11th October 2017 and filed in court on 12th October 2017. The plaintiff contends that the undated letter from Triple OK Law Advocates is not being produced as evidence but as a means through which the annexed will was forwarded. The plaintiff further contends that the will marked A14 in her affidavit was not marked “ **without prejudice**” and that admission of the contested documents cannot prejudice the defendants in any manner.

10. Negotiations on a “**without prejudice**” basis are important as they help in the disposal of claims without having to resort to litigation. In the instant case the correspondence in issue was intended to resolve the dispute between the plaintiff and the estate of the late Dr Adalja without resorting to court action. These negotiations did not however materialize and did not lead to any agreement. In the case of **Walker Vs Wilsher (1889) 23 QBD 335 Lindley LJ** stated as follows:-

“What is the meaning of the words without prejudice”. I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice operated to alter the old state of thing to establish a new one”.

11. In the instant case, the firm of *Triple OK Law Advocates* were trying to initiate ways of settling the matter out of court in the spirit of article 159 of the Constitution. This offer was not accepted by the plaintiff and therefore no agreement was reached. In the circumstances, the plaintiff is precluded from exhibiting such correspondence. It does not matter that the will marked “**A 14** “ in the plaintiff’s supporting affidavit was not marked without prejudice . It is the letter which forwarded it which was marked without prejudice and the will cannot be isolated from the forwarding letter. I therefore find that the letter as well as its annexures ought not to have been exhibited. I allow the notice of motion dated 13th September 2017 in terms of prayer (1) and (2). Costs of this application shall be in the cause.

Application dated 14th march 2017 and that f 31st March 2017.

12. These two applications are seeking injunctive orders in respect of the following properties among others:-

- a. **Horombo Villa Number 19 Rosslyn gardens L.R No.28431 (Original 18/31).**
- b. **Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.**
- c. **Town House Number 6 L.R No. 7158/505 Marble Valley**
- d. **Clifton Villas (K III) LR 7158/608.**

13. The properties listed in (a) and (b) in paragraph 12 above are registered in the plaintiff’s name. Those listed in (c) and (d) are registered in the joint names of the plaintiff and the late *Dr Mahendra Kirishnalal Adalja* (deceased). The plaintiff contends that she was wife to the deceased while the first defendant who is son to the deceased contends that the plaintiff was a house help to the deceased and not a wife. I do not wish to go into details of this as this is not the proper court to determine the issue and in any case positions of parties in application for injunction are not supposed to be decided at interlocutory stage.

14. When the advocates for the plaintiff and the first defendant were submitting during highlighting of submissions, they made certain concessions. The advocate for the plaintiff dropped plaintiff’s quest for injunctive orders for properties listed in prayer 2 (**(d) (e) (f) (h) (i)** and **(j)**). The advocate for the first defendant conceded to injunctive orders being granted to the plaintiff in respect of the four properties listed in payer 2 **(a),(b) (c)** and **(g)** of the plaintiff’s Notice of Motion on condition that the injunction applied equally to the plaintiff as the first defendant is also claiming the same properties.

15. The plaintiff and the first defendant in their respective applications are seeking to have orders preserving the four properties until the matter is determined. Already the advocate for the first defendant has conceded to grant of injunctive orders as sought by plaintiff in respect

of the four identified properties. The plaintiff on her part is not conceding to injunctive orders being granted to the first plaintiff arguing that she cannot be enjoined from dealing with the properties in her name. She further contends that the two other properties which were in her joint name with that of the deceased are hers by way of transmission as one of the joint owners has died.

16. The Plaintiff may be having a valid reason as regards transmission of a property upon demise of one of the joint owners. The issue however in this matter is on whether the plaintiff was a wife of the deceased or not and as I have said hereinabove, this question cannot be decided by this court as that is outside the jurisdiction of this court. There is also the issue of whether the monies which purchased the properties in issue came from the account of the first defendant which account was being operated by the deceased as trustee of the first defendant. The first defendant has demonstrated on how the money which purchased the four suit properties were moved from an account which the deceased was operating. These monies are said to have been from proceeds of sale of shares held in trust for the first defendant. I find that this is a proper case where the four properties should be preserved until hearing and determination of this suit.

17. The plaintiff is seeking a mandatory injunction to allow her access into flat no. **4 Block A on LR 1870/VI/61 (IR 92435)** East Church Flats and have quiet possession of the same. During highlighting, the plaintiff's advocate seemed to suggest that the plaintiff only needed to access flat No. 4 Block A to remove her personal belongings. This means she is no longer keen on having possession of the same. In any case, I have gone through the defendant's affidavits and that of the brother to the deceased. It is clear that the plaintiff was staying on a flat on the ground floor. The two flats were connected with a bell which was on flat 4A. This was for purposes of the deceased calling the plaintiff in case he needed her services like making tea for visitors etc. The flat (Flat 4A) is not in her name. The relationship between her and the deceased is yet to be determined by the proper court. I therefore do not find any special circumstances which would warrant issuance of a mandatory injunction at interlocutory stage.

18. The Plaintiff is also seeking an order compelling the first defendant to release to her motor vehicle registration **No KBV 150 A**. It is not clear who owns this vehicle. In the absence of these details and given the fact that the true status of the relationship between the plaintiff and the deceased is yet to be established, there is no basis upon which an order to that effect can be issued.

19. The plaintiff is also seeking an order directed at the defendants directing them to release either the original or copies of titles in respect of properties listed in prayer 5 of the notice of motion dated 14th March 2017. During highlighting counsel for the plaintiff stated that they needed the copies or originals in order to ascertain the plaintiff's interest in the same. Already, the plaintiff knows what interest she is claiming in four of the ten properties listed. She stated through her advocate that she is not keen on pursuing any injunctive orders in respect of the remaining six properties. There is therefore no need to order that she be given copies or originals of the documents. On the issue of death certificate, this is an issue which can be addressed in the family division of the High Court. I therefore see no need to direct that she be given either an original or copy of the death certificate of the deceased.

20. The first defendant sought orders restraining the plaintiff from dealing in any manner with the four properties identified as being in contention. The first defendant also asked the court to appoint a manager to manage the four properties. Until the appointment of such manager, the first defendant prays that the rent from the four properties should be deposited in court and that the plaintiff be ordered to render a true and complete account of rental income received from the four properties from the time the deceased died until the time when this court can order. Finally the first defendant seeks for an order directed at the plaintiff asking her not to interfere with the first defendant's possession of flat No.4 A East Church Road Flats Westlands in Nairobi.

21. A part from the plaintiffs stating that she cannot be enjoined from a property which is registered in her name, she did not say anything regarding appointment of a manager and rendering accounts or interference with flat 4 A. In fact during highlighting, the plaintiff's advocate wondered for how long such a manager will manage the properties. This clearly shows that in principle she is not opposed to appointment of a manager to manage the said four properties.

22. It is clear that the plaintiff is not in possession of Flat No. 4 A. Allegations were made that the plaintiff is intimidating tenants in the four properties. She was not the one collecting rent from the four properties during the lifetime of the deceased. She has not denied these allegations. As there are issues to be determined particularly on which of the two wills is genuine or not or whether the deceased was coerced into releasing money to purchase the four properties, it is necessary that the properties be managed by a neutral person. It is also necessary that a good account be made of the income from the four properties.

23. Having given the above analysis I make the following orders:-

- 1. The first defendant shall file and serve an amended defence and counter-claim within 14 days from the date hereof.**
- 2. The plaintiff to file a reply to amended defence and defence to amended counter -claim within 14 days from the time of service of amended defence and counter claim.**
- 3. The undated letter under reference 1/331/001 from Triple OK Law Advocates to Mutua & Co. Advocates with reference to the estate of the late Dr Mahendra Krishnalal Adalja and a reply thereto by Mutua & Co. Advocates dated 9th February 2016 marked as annexures A 13, A 14, and A 15 to the affidavit of Sophia Kalondu Mbiti sworn on 14th march 2017 are hereby struck out from the record.**
- 4. Paragraph 13 of the affidavit of Sophina Kalondu Mbiti sworn on 14th March 2017 is hereby expunged from the said affidavit.**
- 5. Pending the hearing and determination of this suit or probate in respect of the estate of the late Dr Mahendra Krishnalal Adalja, the plaintiff and the defendants or their agents are restrained by way of injunction, from alienating ,selling ,transferring ,charging or in any other way interfering with the following properties:-**

- a. Horombo Villa Number 19 Rosslyn Gardens L.R No.28431 (Original 18/31).
- b. Town House Number 22 Jambo Prestige L.R No. 1870/III/550 Westlands.
- c. Town House Number 6 L.R No. 7158/505 Marble Valley
- d. Clifton Villas (K III) LR 7158/608

6. A Manager to be identified by the plaintiff and the first defendant is hereby appointed to manage the properties listed in No. 5 hereinabove to receive rent and income and to pay out all outgoings including land rent, rates and service, charges, carry out all necessary repairs and maintenance and to render an account to this court until determination of this suit. The appointment herein to be agreed upon within 30 days failing which the court will be at liberty to identify one for the parties.

7. The plaintiff by herself her agents, employees or servants are hereby restrained from interfering with the first defendant's quiet possession and enjoyment including ingress and egress to flat number 4A East Church Road Flats Westland Nairobi.

8. The Plaintiff do provide to this court true copies of each and every lease in respect of each the properties listed in No. 5 above and a true and complete account of all receipts of rent/income in respect of each of the aforesaid properties from 14th January 2016 until the date of appointment of manager contemplated in No.6 hereinabove.

9. Costs of the four applications shall be costs in the cause.

10. Parties herein are at liberty to apply to court for further orders.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 1st day of February ,2018.

E.O.OBAGA

JUDGE

In the absence of;-

Mr Rebelo for 1st defendant and for Mr Saende for the 2nd, 3rd and 4th defendants

Mr Musyoki for Mr Mutua for Plaintiff

Court Assistant : Hilda

E.O.OBAGA

JUDGE