



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 519 OF 2017

JANE NYAMBURA THUO.....PLAINTIFF/APPLICANT

=VERSUS=

CHARLES JOSEPH MAINA THUO.....1ST DEFENDANT/RESPONDENT

STEPHEN IRUNGU THUO.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant is an Octogenarian who is biological mother to the respondents. The applicant filed a Notice of Motion dated **3rd August 2017**, in which she seeks the following orders.

1. Spent

2. Spent

3. The Honourable Court be pleased to issue an order of temporary injunction restraining the defendants/respondents, their agents, servants, and or employees and any other party from selling, alienating, transferring, constructing, subdividing, surveying or in any manner interfering with the plaintiff/ applicant's plot number 21 Kayole pending the hearing and determination of this suit.

4. That this Honourable Court be pleased to issue an order declaring the plaintiff/applicant herein as the owner of Plot No.21 Kayole.

5. That this Honourable Court be pleased to issue an order directing that all rent for the rental income in Plot No.21 kayole be paid to the Plaintiff/Applicant.

6. That this suit be heard on a priority basis owing to the advanced age of the plaintiff who is 80 years old and is sickly.

7. That the cost of this application be in the cause.

2. The applicant contends that she is the allottee of plot No.21 Kayole (suit property) By a power of attorney dated 24th June 2011, she intended to grant power to the second respondent who is her first born to deal with the suit property as he wished. The power of attorney was however not registered and is thus of no legal consequence.

3. The applicant later learnt that the first respondent has a power of attorney dated 20th January 2005, purportedly given by her. She reported the matter to the criminal investigations department now the Directorate of Criminal Investigations and proceeded to prepare a Notice of revocation of the purported Power of Attorney.

4. The respondents are now fighting over ownership of the suit property which she has never transferred to either of the two. The respondents are fighting over ownership of the suit property in Milimani Chief Magistrate's Court Civil suit No. 2605 of 2014 where the first respondent is the plaintiff and the second respondent is the defendant. The applicant tried to be involved in the lower court case but she was allegedly informed that what she was seeking would only be granted in the Environment and Land Court.

5. There is a dispute which tenants from the suit property filed before the Business Premises Rent Tribunal which prompted the Chairman to make an order that rent from the suit property be deposited at the Tribunal until such time when the tribunal will be served with an order

from the Civil Court as to who is the owner of the suit property and only then will the rent be released to such person.

6. The applicant contends that she has no any other source of income and that she was solely depending on income from the suit property for her upkeep. The applicant now prays for injunctive orders and an order that rent be paid to her for her upkeep.

7. The first respondent has opposed the applicant's application based on a replying affidavit sworn on 19th October 2017. The first respondent contends that he is the lawful owner of the suit property as per the allotment card from Nairobi City County; that he has always paid ground rent and has been in possession of suit property from 2004. He contends that the revocation of power of attorney by the applicant was meant to defeat Milimani Chief Magistrate's Court Civil Case No.2605 of 2014 and the cases filed at the Tribunal.

8. The first respondent further contends that the applicant has on various occasions sworn contradictory affidavits; that there was an elders meeting held on 4.1.2014 in which it was resolved that the suit property was his and that the second respondent should take plot No.149 Githurai Langata area.

9. The second respondent has opposed the applicant's application based on a replying affidavit sworn on 7th December 2017. The second respondent contends that prayer (4) of the application's motion cannot be granted as he is he lawful owner of the suit property. The suit property was transferred to him by the applicant. The applicant is his witness in the case before Milimani Chief Magistrate's Court and he is therefore surprised that he has been sued in this case. He denies that he is the one who collects rent from the suit property and that any order against him would be in vain.

10. I have considered the applicant's application as well as the opposition thereto by the Respondents. I have also considered the submissions by the applicant and second respondent. The first respondent had been given 7 days to file his submissions from 27th February 2018. As at 6th March 2018 when the time lapsed, he had not filed his submissions. The issue for determination in this application is whether the applicant has disclosed a prima facie case to warrant issue of injunctive orders. The other issue for determination is whether rent from the suit property should be released to the applicant pending determination of this case.

11. The applicant as well as the respondents are all claiming ownership of the suit property. The applicant claims ownership on the basis that she is the allottee of the land. The first respondent claims ownership on the basis of an alleged power of attorney donated from the applicant in 2005. The second respondent on his part claims ownership of the suit property on the basis of a power of attorney donated to him by the applicant in 2011.

12. I have examined the documents presented herein. What is not contested is that the applicant was the allottee of the suit property. If she was not the allottee, the issue of the power of attorney from her would not have arisen. What has emerged from this application is that the applicant who is aged is being manipulated by the respondents. This is clear from the affidavits sworn by her which tends to support the respective positions of the respondents. The applicant has denied ever transferring the suit property to either the first or second respondent. It is clear that the respondents herein are taking advance of her illiteracy.

13. Each party in this case is trying to bring documents from the City County to show that they are the lawful owners of the suit property. The applicant has clearly made out a prima facie case. Her right to the suit property has been infringed as to call for an explanation from the respondents. The second respondent in his submissions has clearly stated that he is not opposed to rent from the suit property being given to the applicant. If the remarks made by the first respondent in Court on 27th February 2018 which remarks were recorded down are anything to go by, the first respondent has given up on the property.

14. The applicant is an old lady of over 80 years old. She looks sickly. Walking is a problem. Her back is bent due to old age. In all fairness she cannot be kept off the rent from her property even as this dispute goes on. Prima facie, she is the lawful owner of the suit property. I find that she is entitled to an injunction to prevent any of the respondents from interfering with the suit property. She is also entitled to rental income from the suit property. I therefore allow the notice of motion dated 3rd August 2017, in the following terms:-

1. An injunction is issued restraining the defendants/Respondents, their agents, servants and or employees and any other party from selling, alienating, transferring, constructing, subdividing, surveying or in any manner interfering with the plaintiff/applicant's plot number 21 Kayole until the hearing and determination of this suit.

2. An order is hereby given directing that all rental income from plot No.21 Kayole be paid to the plaintiff/applicant. A further order is hereby given that all rental income deposited in the Business Premises Rent Tribunal pursuant to an un-dated ruling of the Chairman in Tribunal Case Nos. 389,390,391,392,393, and 394 of 2014 be released to the Plaintiff/Applicant.

3. An order is made transferring this case to the Chief magistrates Court Milimani to be consolidated with Milimani Chief Magistrate's Civil Case No.2605 of 2014 and be heard by a Magistrate who has the requisite pecuniary jurisdiction owing to the value of the subject matter of the suit property.

4. The hearing of this case should be given priority owing to the age and health status of the Plaintiff.

5. Costs of this application shall be costs in the cause.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 15th day of March 2018.

E.O.OBAGA

JUDGE

In the presence of ;-

Mr Momanyi for Mr Omwega for 1st defendant

Applicant in person

Court Assistant: Kevin

E.O.OBAGA

JUDGE