



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO 180 OF 2017**

**CHRISTINE NIKAJE EPHRAIM** (Suing as the legal

Representative of the estate of late **DINAH MSHENGA-deceased**).....**PLAINTIFF**

**VERSUS**

**KARISA JEFWA YAA**.....**DEFENDANT**

**RULING**

1. Before me for determination is a Notice of Motion Application dated 4<sup>th</sup> August 2017. The Plaintiff Christine Nikaje Ephraim prays for an Order of injunction to issue restraining the Defendant by himself, servants and/or agents from wasting, alienating, selling, disposing, encroaching, erecting structures, trespassing and or/ in any other way dealing with the property known as Kilifi/Mtwapa/1 pending the hearing and determination of the suit. In addition she prays for an order of vacant possession directed at the Defendant to vacate the said parcel of land and in default an eviction order to issue.

2. The said application is supported by the Plaintiffs affidavit sworn on 4<sup>th</sup> August 2017 and is based on the grounds stated in the body thereof as follows:-

***a) The deceased Dinah Mshenga is the registered owner of Plot No. Kilifi/Mtwapa/1;***

***b) The Defendant has forcefully converted, entered/encroached, invaded(sic) the suit property and erected structures thereon;***

***c) The Defendant is hostile to the Plaintiff and has threatened the beneficiaries of the estate of Dinah Mshenga with unspecified harm if they set foot on the property;***

***d) The Defendant will not suffer prejudice in any way if the application is allowed.***

3. Responding to the said application the Defendant Karisa Jefwa Yaa avers that he has been occupying the suit property since 1966 and is the beneficial owner thereof. He states that when Mtwapa Settlement Scheme was initiated, he was either inadvertently or by design not allocated the suit property through he has lived thereon from the time he was young until now.

4. The Defendant further states that on 15<sup>th</sup> September 2015, he wrote to the Land Adjudication and Settlement Department seeking to be allocated the said property. In addition, he filed Malindi ELC No. 151 of 2016 against the National Land Commission and the District Land Registrar seeking inter alia a declaration that he is the legitimate owner of the parcel of land in question.

5. The Defendant avers that he was surprised in September 2017 when he received summons in regard to this matter. He denies that he has been an employee of the late Dinah Mshenga and state that he only stayed in the property as an employee of one Asian man.

6. While admitting that the late Dinah Mshenga was indeed allotted the suit property, he avers that no illegal interest passed to her because she did not accept the offer from the Settlement Fund Trustee and failed to make the required payments. Accordingly, he prays that the Plaintiff's application be disallowed.

7. I have considered the application and the response thereto. I have equally considered the Submissions and authorities referred to me by the Learned Advocates for the parties. The principles for the grant of an interlocutory injunction have since been settled as follows:-

***i) An applicant must show a prima facie case with a probability of success;***

*ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and*

*iii) Where the Court is in doubt, it will decide the application on a balance of convenience.*

*(See Giella –vs- Cassman Brown Company Ltd (1973) EA 358).*

8. From the material placed before me, the Applicant is the administrator of the Estate of one Dinah Mshenga. It is the Plaintiff's case that the said Dinah Mshenga is the registered owner of all that parcel of land known as Kilifi/Mtwapa/1(the suit property) measuring 12 acres. In proof of the alleged ownership, the Plaintiff has annexed a bundle of letters from the District Land Adjudication Officer Kilifi as well as the Director of Land Adjudication & Settlement which according to her confirm the fact that the land belonged to her deceased mother.

9. According to the Plaintiff, the Defendant herein was an employee of her mother and the caretaker of the suit property. It is the Plaintiff's case that upon learning that the said Dinah Mshenga and one John Wellington Ephraim had passed away, the Defendant forcefully and illegally took charge of the 12 acres piece of land claiming to be a beneficiary thereof.

10. On the other hand, the Defendant denies having entered the suit property as an employee of the said Dinah Mshenga. Instead, he states that he was only an employee of an Asian man whose name he does not give. While admitting that the said Dinah Mshenga applied to be allocated the suit property, the Defendant is categorical that no legal interests passed to the said Dinah Mshenga as he failed to honour the terms of offer as set out by the Settlement Fund Trustees.

11. I have considered the circumstances of this case. It may as well be that the Defendant was an employee of the Plaintiff's mother and a caretaker of the suit property. This is probably the reason the Defendant was not allocated the land when the Mtwapa Settlement Scheme was set up at a time he claims to have been living on the land.

12. As it were however, from the Certificate of Death annexed to the Plaintiff's Supporting Affidavit, her mother Dinah Mshenga died on 14<sup>th</sup> March 1980. It is not indicated when the said John Wellington Ephraim, presumably the Plaintiff's father, passed on. That being the case, it is not clear why the Plaintiff never took any action and instead waited until the year 2017 to apply for Letters of Administration to claim the proceeds of the Estate from the Defendant.

13. Indeed, while in one letter dated 21<sup>st</sup> October 1999 in the Plaintiff's bundles of documents indicates that the deceased Dinah Mshenga was allocated the land and repaid the loan owed to the Settlement Fund Trustees (SFT) in full and that the plot was thereafter discharged, I note from the transfer form also annexed that the SFT loan of Kshs 5,650/- was only paid and the plot was thereafter transferred on 13<sup>th</sup> May 2009. These and a number of other possible issues will need to be clarified by the parties herein before a proper determination may be made as to who is entitled to the suit property.

14. In the meantime, it is not disputed that the subject property is in occupation and possession of the Defendant. Arising from the foregoing and in the interest of justice, I think it is fair that the status quo, obtaining as of now in regard to the suit property remain as presently held by the Defendant pending the hearing and determination of the main suit.

15. Accordingly, while the Defendant may remain on the suit property and continue using the same to eke out a living as before, he is hereby expressly barred from constructing any further permanent structures, disposing of the same to third parties and/or in any manner adversely dealing with the said parcel of land pending the hearing and determination of this suit.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of June, 2018.**

**J.O. OLOLA**

**JUDGE**