



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 289 OF 2017

LYNETTE LUCY BUDDERY.....PLAINTIFF

VERSUS

LORNA BUDDERY.....1ST DEFENDANT

DIANNE HUGGINS.....2ND DEFENDANT

THE KISUMU LAND REGISTRAR.....3RD DEFENDANT

RULING

1. Lorna Buddery and Dianne Huggins, the 1st and 2nd Defendants respectively, vide notice of motion dated 5th December 2017, seeks for staying, varying, discharging and or vacating all proceedings and or execution process, including the execution of the orders given on the 4th December 2017, pending the confirmation of grant of the estate of Asha Robi Buddery in Succession Cause No. 407 of 2005 and the hearing and determination of this suit. The application is based on the seven (7) grounds on its face and is supported by the affidavit sworn by Lorna Buddery on the 5th December 2017.

2. The application is opposed by Lynette Lucy Buddery, the Plaintiff, through the replying affidavit sworn on the 11th December 2017.

3. The application came up for hearing on the 13th December 2017 when Mr. Oduor and Mweisigwa, the learned counsel for the 1st and 2nd Defendants and the Plaintiff respectively consented to file and exchange written submissions. The learned counsel for the 1st and 2nd Defendants then filed the submissions dated 3rd April 2018 while that of the Plaintiff filed theirs dated 8th May 2018.

4. The following are the issues for the court's determinations;

a) Whether the 1st and 2nd Defendants have presented a reasonable explanation of their failure to file and serve a reply to the Plaintiff's motion dated 25th September 2017 in time.

b) Whether the 1st and 2nd Defendants have made a good case for the court to vary or set aside the orders of 4th December 2017.

c) Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, written submissions, the decided cases cited therein, the record and come to the following determinations;

a) This suit was commenced by the Plaintiff through the plaint dated the 25th September 2017. The Plaintiff seeks for a declaratory order that she is the rightful proprietor of the suit property, that is Kisumu Municipality/Block II/85; eviction order against the 1st Defendant from the said land; a declaration that the caution lodged against the title of the suit land is wrongful and without reasonable cause and should be removed; general damages and interest at court's rates and costs.

b) That filed contemporaneously with the plaint is the notice of motion under certificate of urgency of even date seeking for mandatory and prohibitory injunctions against the 1st Defendant pending the hearing and determination of this suit. The suit and application papers were served on the 1st Defendant on the 24th October 2017 as confirmed by the affidavit of service sworn by Cosmas Oyoo Laja on the 2nd November 2017. That on the 31st October 2017, the 1st and 2nd Defendants entered appearance through M/s Menezes & Partners Advocates through their Memorandum of Appearance dated 30th October 2017. When counsel

appeared for hearing of the application on the 4th December 2017, the request by Counsel for the 1st and 2nd Defendants for more time to file and serve their replying papers was declined and the motion taken as unopposed and granted in terms of prayers 3 and 4 with costs in the cause. That order is the one being challenged through the notice of motion dated 5th December 2017 which is the subject matter of this ruling.

c) That the Plaintiff's pleadings show that the dispute is over land parcel Kisumu Municipality/Block II/85 which according to the copy of certificate of lease issued on the 14th May 1996 and certificate of official search of 29th June 2017, was registered in her name on the 14th May 1996. That the main basis of this application as discerned from the grounds on the motion and the 1st Defendant's supporting affidavit are that the suit property is part of the estate of the late Asha Robi Buddery which is subject matter of Kisumu H. C. Succession Cause No. 407 of 2005 that is yet to be distributed. That the 1st and 2nd Defendants are beneficiaries of the said estate and that the Plaintiff has ***"intermeddled with and has been collecting rents from Kisumu Municipality/Block II/84 which are due to the estate and will continue to do so unless restrained by the Court."*** That among the annexures to the supporting affidavits are copies of page 2 of the certificate of lease for Kisumu Municipality/Block II/84 and 85. That the former shows clearly that it was registered in the name of Asha Robi Buddery (As personal Representative) on the 24th October 1984, while the latter was registered on 14th May 1996 in the name of Lynette Lucy Buddery, the Plaintiff. That before that date, the land was registered with Asha Robi Buddery (As Personal Representative) on the 24th October 1984.

d) That Plaintiff's response to the application is that Kisumu Municipality/Block II/85 is not part of the estate of the late Asha Robi Buddery, which is subject matter of Kisumu H. C. Succession Cause No. 834 of 2105 and not 407 of 2005; and that no reasonable explanation has been tendered why the 1st and 2nd Defendants did not file and serve any replying papers before the orders complained of were made. The Plaintiff has annexed among others copy of the certificate of death No. 851929 issued on the 16th May 2005 showing that Asha Robi Buddery died on the 29th March 2005; copies of notice of appointment of Advocate dated 12th June 2014, consent to making of a grant signed by Roger Franson, Rosemary Susan Rashid and Mary Juliana Coleman in respect of Kisumu H.C. Succession Cause No. 407 of 2005 for the estate of Asha Robi Buddery; and copies of the petition and affidavit by the Public Trustee in Kisumu H.C. P&A Cause No. 834 of 2015 and the grant issued on the 4th November 2015 in the said cause. That though the Plaintiff appear to disown Kisumu H. C. Succession Cause No. 407 of 2005 and more so that it does not concern the estate of the late Asha Robi Buddery, the copies of the notice of appointment of advocate dated 12th June 2014 and the consents by the three named persons that she annexed to her replying affidavit confirms the 1st and 2nd Defendants position that it exists. That the court is however surprised as no explanation has been offered to date why two Succession causes over the same estate are being pursued side by side. That the decision on that issue will have to wait for the main hearing when oral evidence will be called before final determination on the issues raised on merit can be made.

e) That the Plaintiff's suit is over Kisumu Municipality/Block II/85 and not Kisumu Municipality/Block II/84, from which the 1st and 2nd Defendants claims the Plaintiff has been intermeddling in by collecting rent. That as there is no counterclaim filed against the Plaintiff over Kisumu Municipality/Block II/84, the issues relating to that plot would not in any way affect the orders made on 4th December 2017 which relates to Kisumu Municipality/Block II/85.

f) That the claim by the 1st and 2nd Defendants that Kisumu Municipality/Block II/85 is part of the estate of the late Asha Robi Buddery, and hence subject matter of Kisumu H.C. Succession Cause No. 407 of 2005 has been successfully rebutted or controverted by the Plaintiff. That the 1st and 2nd Defendants own annexure of page 2 of the certificate of lease for Kisumu municipality/Block II/85 confirms that it was registered in the name of the Plaintiff during the life time of the late Asha Robi Buddery. That there is no evidence tendered so far that the registration of the Plaintiff with the said land has been successfully challenged and obviously it has not been raised in this proceedings. That further, the affidavit in support of the petition filed by the Public Trustee in respect of the Asha Robi Buddery sworn on 4th August 2015, and filed in Kisumu H.C. P & A Cause No. 834 of 2015 at paragraph 6 on the assets has only one parcel being Kisumu Municipality/Block II/84. That accordingly, and from the evidence so far tendered, there is nothing to show that Kisumu municipality/Block II/85, which is the suit land in this case, is part of the estate of the late Asha Robi Buddery or that it is subject matter in Kisumu H. C. Succession Cause No. 407 of 2005 or P&A Cause No. 834 of 2015.

g) That though the 1st Defendant has deponed that she has resided at the suit property for over 20 years, the Plaintiff has rebutted that and annexed a letter by her advocates to the 1st Defendant dated 20th July 2017 in which she is among others accused of having forced herself onto the suit premises sometimes in late December 2016. That as prima facie the Plaintiff has through the documents of title established that she is the registered proprietor, this is an appropriate case where possession of the suit property may be restored to her through mandatory injunction and the 1st Defendant restrained from interfering with her use of the property pending the hearing and determination of the suit. That the only element of the orders of 4th December 2017 that should be reviewed and which is hereby done is to set aside the involvement of the police in the execution of prayer 3.

6. That flowing from the foregoing, the court finds no merit in the motion by 1st and 2nd Defendants dated 5th December 2017. The court therefore orders as follows;

a) That the notice of motion dated 5th December 2017, is hereby dismissed with costs to the Plaintiff.

b) That the court on its own motion reviews prayer 3 of the notice of motion dated 25th September 2017 by deleting all the words after "Kisumu municipality/Block II/85" so as to remove the involvement of the police in the execution of the order.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Mweisigwa for Plaintiffs.

Mr. Osodo for Menezes for 1st and 2nd Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE