



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 80 OF 2014

ROMINA PAULA PUGLIESE.....PLAINTIFF

VERSUS

CHRISTINE ANYANGO ABAYO.....DEFENDANT

RULING

1. In the Application dated 2nd March, 2016, the Plaintiff is seeking for the following orders:

a. This Honourable Court be pleased to grant a mandatory injunction compelling the Defendant/Respondent to surrender to the Plaintiff/Applicant the original Indenture for Plot No. 2090 (Original No. 422/16) Malindi dated the 2nd day of August, 2002 and registered on the 15th day of August, 2002 in Volume LT 36 Folio 36/9 Folio 4419 (hereinafter referred to as “the suit property”).

b. This Honourable Court be pleased to grant a mandatory injunction compelling the Defendant/Respondent to deliver vacant possession of the suit property to the Defendant.

c. The Officer Commanding Malindi Police Station supervises compliance of the above.

d. The costs of this Application be provided for.

e. The Honorable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. The Application is premised on the grounds that the Plaintiff is the beneficiary and the registered owner of the suit property; that this court has already ruled that its the Plaintiff who is entitled to the suit land and that the orders sought should be granted.

3. In response, the Respondent filed Grounds of Opposition in which she averred that the Application lacks the requisite substratum to survive; that there is nowhere in the Plaint that the Plaintiff sought for injunctive orders and that the Application is a back door attempt to evict the Defendant.

4. The Defendant did not file a Replying Affidavit.

5. The Plaintiff’s advocate submitted that the Application before this court has been made pursuant to the provisions of Section 3A of the Civil Procedure Act and not Order 40 Rule 2 of the Civil Procedure Rules.

6. Counsel submitted that this is a clear case in which a mandatory injunction should issue.
7. The Defendant's counsel submitted that a mandatory injunction cannot issue at the interim stage.
8. Both the Plaintiff's and Defendant's advocate relied on authorities which I have considered.
9. The Plaintiff commenced this suit by way of a Plaint. In the Plaint, the Plaintiff averred that Plot No. 2090 Malindi was a gift that was donated to her by one Rosa Antonia Pugliese; that the said Pugliese and the Defendant signed an Indenture dated 1st August, 2002 as Trustees for the Plaintiff because she was a minor and that the Defendant was to be the custodian of the Indenture and the plot until the Plaintiff attains the age of majority which she has.
10. It is the Plaintiff's claim in the Plaint that although she has attained the age of majority, the Defendant has declined to hand over to her the original Indenture and the suit premises.
11. In the Plaint, the Plaintiff has prayed for an order that the original Indenture should be surrendered to her together with the plot.
12. After filing the Plaint, the Plaintiff filed an Application dated 28th April, 2014 in which she prayed for an order that the Indenture for Plot No. 2090 Malindi should be deposited in court until the suit is heard.
13. That Application was heard and a Ruling was delivered by this court on 27th February, 2015.
14. In the said Ruling the court directed the Defendant to deposit in court the original Indenture for the suit land pending the hearing of the suit.
15. The Plaintiff has filed an Application for contempt in respect to the orders that were made by the court on 27th February, 2015. That Application is still pending.
16. On the issue of whether the Plaintiff should be evicted from the suit land at this stage, I am of the view that this matter should proceed for trial to enable the court interrogate and investigate the circumstances under which the Defendant is insisting that she should be allowed to live in the house.
17. Although this court in its Ruling held that the Defendant was to hold the suit property for the Plaintiff until she reaches the age of majority, and that the Defendant ought to relinquish the property, it is only just that the Defendant is given an opportunity to state her case before an order of eviction can be issued.
18. I say so because in her counter-claim, the Defendant has averred that she is the foster mother of the Plaintiff since she found her dumped in the bush; that she has always lived in the suit property with the Plaintiff and that she has overriding interest over the suit property.
19. In the circumstances, I decline to issue a mandatory injunction at this stage.
20. For those reasons, I dismiss the Application dated 2nd March, 2016 with no order as to costs.
21. The Plaintiff is at liberty to fix the Application for contempt dated 2nd March, 2016 for hearing.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE