



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 218 OF 2016

AGNES NANJALA WILLIAM.....PLAINTIFF/APPLICANT

-VERSUS-

RENE BROUWER.....DEFENDANT

RULING

1. The application for determination is dated 10th August 2016 and filed on the same day. The plaintiff/applicant prayed for the following orders:

a) Spent

b) Spent

c) That pending inter parties hearing of this Application the Defendant be compelled by way of mandatory injunction to open and surrender vacant possession of the suit property and allow the plaintiff free, immediate and unconditional access and/or entry by opening the gate and other locked parts of the suit property.

d) That in the event the Defendant fails to open and surrender the suit property in accordance with prayer (3) above the officer commanding Nyali Police Station (OCS) be authorized to assist and/or supervise the plaintiff break into the suit property and take vacant possession thereof.

e) That pending hearing and determination of this suit the Defendant either by himself, his agents, servant proxies or any other person acting or claiming through him be restrained from by an injunction from trespassing entering staying, remaining developing, constructing and/or interfering or dealing in any other manner whatsoever with the property known as Plot No. 8832/1/MN (Original No. 1296/1) CR. No. 26148 situate at Simba Road Nyali within Mombasa County.

f) That costs of this suit be provided for.

2. The application is premised on the several grounds listed on the face of it inter alia that the plaintiff is a joint registered owner of the suit property. Secondly that no legitimate activities should take place on the suit property and that the defendant is maliciously wasting the property. The application is further supported by the applicant's supporting affidavit and further affidavit sworn on 10.8.2016 & 17.8.16 respectively. She deposed that she is advised by her advocate that a trespasser should give way pending

determination of a dispute. She deposed that she co-owned the property with the late Jacobus Nicolas Petrus who was her husband until 2012.

3. The applicant deposed further that following their divorce in 2012, the Court of Appeal shared the property between them at the ratio of 55: 45 and sanctioned that it be sold. That they agreed that the deceased lives in the suit premises as they were looking for a purchaser. The deceased died in unclear circumstances hence police investigations were involved. The applicant deposed that she made efforts to access the suit property in July 2016 vide correspondences exchanged between her advocates and the deceased advocate but they were denied entry as stated in paragraph 23 & 24 of her affidavit. That she could confirm while waiting at the gate that there were activities going on in the house. From this behavior she felt she was being treated in a spiteful and hostile manner by the defendant necessitating this application.

4. In opposing the application, the defendant filed a replying affidavit on 15.8.16 and a further affidavit on 27.9.16. He stated that he is the deceased son in-law and was in Kenya to follow up with investigations on the death of Jacobus after he disappeared around January 2016. That until 16th June when a body was found in the septic tank and DNA conducted to confirm if it was Jacobus body the statusquo remained. The defendant stated being aware of the consent judgement and efforts to sell the house and divide the proceeds since 2013. The defendant felt this application was filed in a rush as the deceased had not been buried and succession process undertaken.

5. The defendant deposed further that he lived at the Reef Hotel while the suit plot was secured by the police for investigations. He denied refusing the plaintiff access which he avers she would have gotten if she went through the C.I.D. It's his belief that this application was prematurely filed. Further he deposes that it is in the interest of justice that a joint property manager be appointed to safe guard the proprietary rights of both parties until finalization of the succession matter. He states that the plaintiff will not suffer irreparable loss as each proprietor's worth is known and can be compensated in damages. In the further affidavit, he deposed that he has no problem ***“allowing the plaintiff access to the property since the C.I.D has finalized their investigations.”***

6. The court urged the advocates for the parties to attempt an out of Court settlement during the inter partes hearing but none was reached. Consequently they filed written submissions which were highlighted on diverse dates. Mr Kinyanjui advocate for the applicant submitted that a party claiming ownership of a deceased estate must do so under the provisions of Section 45 of the Succession Act. That this provision has not been followed and the applicant filed this suit to assert her rights. That the plaintiff has demonstrated that she has met the threshold in the case of **Giella vs Cassman Brown**. What is remaining is for the plaintiff to take charge of the property pending filing of the succession of the deceased estate.

7. Ms Okata advocate for the respondent on her part submitted that the defendant did not require the consent of the plaintiff as the deceased lived in the property since 2004. That this suit is premature as the defendant and the deceased family have hardly mourned. Further that the consent entered in the case No C. A 127 of 2011 takes care of the plaintiff's interest and that they will file succession cause. He denied refusing the plaintiff access and also denied that he is a trespasser. The defendant further submitted that the plaintiff will not suffer any irreparable loss. He urged the Court to dismiss this application with costs. He also prayed that the Court do give directions for both parties to preserve the property until the succession cause is finalized.

8. From the pleadings, it is established that both the deceased and the plaintiff had an identifiable interest in the suit property that was already apportioned at the ration of 45: 55. The deceased who was in possession of the suit property met his death in mysterious and unfortunate circumstance necessitating the police to conduct investigations probably to unearth the killers. According to the defendant, the plaintiff came to access the premises while the investigations were still on-going.

9. I have looked at the correspondences exchanged between the advocates for the parties on record annexed as **ANW5, ANW6, ANW7, ANW8** and **ANW9** in the applicant's affidavit and note that the

applicant started demanding for access long before the deceased body was recovered and subsequently after the recovery of the body. The body was recovered on 14th June 2016 (ANW-4). The defendant explained in detail the processes that were undertaken to identify the body annexing even gory pictures to this application and that the applicant was aware the suit property was being treated as a crime scene going by the contents of her advocate's letter dated 31st May 2016 addressed to the **Divisional Criminal Investigations Officer (DCIO) Mombasa**.

10. Further prior to his death, the applicant and the deceased had entered a consent judgement on how to share the proceeds of the sale of the suit property. That they were both sourcing for a buyer is not in dispute. This suit was filed before the deceased was buried is also not in dispute as deposed in paragraph 4 of the applicant's supplementary affidavit. The defendant has alluded to the fact that he did not deny the applicant access to the suit premises given that investigations are complete and that she is at liberty to go. This is stated in his further affidavit sworn on 27th September 2016. I do not therefore understand why the parties herein could not reach an out of court settlement on the issue of access.

11. Be that as it may, taking the background of this case and the nature of the deceased death which was a police case and that this suit was filed before those investigations were complete (see paragraph 20 of the applicant's supplementary affidavit), I do hold the view that indeed this suit was prematurely filed. Further the defendant as sued is not the administrator of the estate of the deceased who it is not denied was in lawful possession until his demise. Accordingly this defendant in my view has no capacity and is rightly pointed by the applicant herself to surrender vacant possession of the suit premises to the plaintiff/applicant.

12. It is a well established principle of law that mandatory injunction can only be granted at an interlocutory stage in very clear cases. The defendant having stated that he was living at the Reef hotel and there being no legal administrator duly appointed the orders as sought is incapable of being granted. Further the plaintiff does not live in the country and does not require possession as a matter of necessity to warrant issuing a mandatory order of injunction. At this point, she can only enjoy access to the property but the issue of possession must change by consent between her and the legal administrator of the deceased duly appointed since possession is still assumed to be in favour of the deceased as per their previous arrangements. Where such consent cannot be reached then the appropriate way is for that this Court can only make such orders once a legal administrator is appointed.

13. The apprehension by the applicant that the property is being wasted was not supported by any evidence. As submitted by the defendant, the loss if any that is likely to be suffered by the applicant cannot be said to be irreparable. I say so because the share of both sides is already determined and the property value can easily be ascertained. Consequently it is my finding that this application was premature and lacks merit. The same is dismissed with costs to abide the determination of the main suit.

Dated & delivered at Mombasa this 12th day of JULY 2017

A. OMOLLO

JUDGE