



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 262 OF 2016

PASQUALE CEINO.....PLAINTIFF

VERSUS

ALEX SHUHULI KATANA..... DEFENDANT

RULING

1. Before me is an application dated 4th October 2016. The Plaintiff/Applicant is seeking for orders:-

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to issue an order of eviction against the defendant from all that parcel of land known as Portion No. 2214(Original No. 1935/86), Malindi

4. THAT this Honourable Court be pleased to issue a mandatory injunction to compel the Defendant to give vacant possession to the Plaintiff of all that parcel of land known as Portion No. 2214 (Original No. 1935/86)Malindi.

5. THAT the Officer Commanding Malindi Police Station supervises compliance of the above.

6. THAT the Court be pleased to make any other order fit in the circumstances of this case.

7. THAT costs be provided for.

2. The application is supported by an Affidavit sworn by the Applicant Pasquale Ceino on 4th October 2016 and is premised on the grounds that:-

(i) The Plaintiff is the registered proprietor of the suit property which comprises a storey building with five (5) self-contained residential houses.

(ii) Sometime in the year 2006, the Plaintiff out of his own free will invited the defendant as a licensee to his property and offered the Defendant and his family a house.

(iii) The defendant has now overstayed his welcome and has without any colour of right went

ahead to receive rent proceeds from the tenants.

(iv) As a result of the defendant's unbecoming behavior and action to unsuccessfully try to frame and implicate the Plaintiff to the Police that the Plaintiff abused drugs, the plaintiff has since moved out of the suit property and rented a house.

(v) That the property was transferred to the Plaintiff when he was a minor but he has since 3/9/2016 turned to be 21 years of age.

(vi) That it is in the interest of justice that the Orders sought be granted.

3. The Defendant Alex Shughuli Katana is however opposed to the grant of the orders sought. In Grounds of Opposition dated and filed herein on 8th November 2016, the Defendant opposes the grant of the orders on 10 Grounds framed as follows:-

(i) That the application is a non-starter incompetent and an abuse of the Court process.

(ii) That the application is an after-thought meant to frustrate an application that the Defendant made in succession Cause No. 140 of 2016 for dependency pursuant to Section 26 of the Law of Succession Act.

(iii) That by the mere fact that the Plaintiff is registered as the owner of the suit premises is just prima facie evidence of ownership as stipulated in Section 26 of Land Registration Act (sic).

(iv) That the Orders sought by the Plaintiff are substantive in nature and cannot be issued at the interlocutory stage.

(v) That the Orders sought in the application are at variance with the orders prayed (for) in the Plaintiff to note the Plaintiff has not prayed for an order of mandatory injunction in (the) plaintiff rendering the application incompetent.

(vi) That the Defendant is in possession of the suit premises as a defendant of his late father Cosmas Damiano Franco Ceino, who was married to his mother.

(vii) That it was not possible for the Plaintiff to have created a licence in the year 2006 and yet he was only 11 years old and had no capacity in law since he was a minor.

(viii) That the Plaintiff has not alleged that the Defendant is in the process of disposing the suit premises and as such the issue of rental income is quantifiable and can be compensated by way of damages.

(ix) That the balance of convenience tilts in favour of the Defendant in the circumstances.

(x) That the Plaintiff is not entitled to the orders sought in the application.

4. I have considered the application as well as the Grounds of Opposition. I have also considered the submissions and authorities placed before me by the Learned Counsels appearing for the Parties.

5. Through this application, the Applicant in a nutshell desires that this Court issues final orders to compel the defendant to vacate all that parcel of land known as Portion No. 2214(Original No. 1935/86)Malindi and to give vacant possession thereof to the Applicant. From Annexure "PQ 1" of the Applicant's Supporting Affidavit, it is clear that the Applicant is the beneficiary and registered proprietor of the suit property by virtue of an Indenture dated the 30th day of March 2000 and registered at the Mombasa Land registry on 4th April 2000.

6. It is apparent that the suit property was transferred to the Applicant by his father one Ceino Cosma Domiano (now said to be deceased) on the said 30th day of March 2000. Again from the documents annexed including his birth certificate, it is apparent that on 3rd September 2016, the Applicant attained the age of 21 years and as provided in Rule 61 of the First Schedule of the Law of Succession Act, Cap 160 of the Laws of Kenya, the suit property hence forth vests upon the Applicant.

7. Courtesy of his newly acquired status, the Applicant now wants the Defendant/Respondent out of the suit premises on the basis that he has overstayed his welcome and is now purporting to collect rent from the Applicant's tenants. Under Section 26 (1) of the Land Registration Act, 2012, a certificate of title issued by the registrar upon registration is prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner.

8. By choosing to file Grounds of Opposition and not a Replying Affidavit, the Respondent has denied himself a better opportunity to explain the circumstances under which he came into the Suitland and whether or not he is collecting rent as stated by the Plaintiff. I note however that he states that he is in possession of the suit premises as a dependant of Cosma Damiano Franco Ceino who presumably is also the Plaintiff's father and the one who transferred the property to the Plaintiff. Indeed the Respondent contends that this application is an after-thought and is meant to frustrate an application that the Defendant has made in Succession Cause No. 140 of 2016 for dependency.

9. While it is not clear to me where the said Succession Cause is filed and/or its current status, I note that the Plaintiff does not deny its existence. Again while the Plaintiff states that he invited the defendant into the premises as a licensee out of his own free will in the year 2006, I note from the records that the Applicant was about 11 years old in the year 2006, and would barely have capacity to effect such an act however magnanimous he may have felt toward the Respondent then.

10. In my view, the Succession Cause would be the best place to deal with the issue of the distribution of the Estate of Cosma Damiano Ceino and to issue an order at this stage evicting the Defendant may not be in the interest of justice.

11. However in view of the fact that the property has in the meantime vested upon the Plaintiff, I think it is fair and proper that he be allowed to collect rent from the other tenants of the suit premises, save for the Defendant. Accordingly, I hereby grant orders as follows:-

(i) That pending the hearing and determination of the suit herein, an injunction does issue restraining the Defendant from interfering with the Plaintiff's collection of a rental proceeds from tenants in the suit property known as Portion No. 2214(Original No. 1935/86) Malindi.

(ii) Each Party to bear their own costs.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE