



**Kohler v Mohammed & another (Environment & Land Case
8 of 2024) [2024] KEELC 4990 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4990 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 8 OF 2024**

**MAO ODENY, J
JUNE 19, 2024**

BETWEEN

MRS ZAKIA NJAMBI KOHLER PLAINTIFF

AND

MR. HASSAN GASHOKA MOHAMMED 1ST DEFENDANT

MR. ABUBAKAR BILAL 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 31st January, 2024 by the Plaintiff/Applicant seeking the following orders:
 - a. Spent
 - b. That this Honourable court be and is hereby pleased to issue a mandatory injunction against the 1st defendant, his agents or assigns to deliver vacant possession of the premises & land situated at Nakuru under the Al-islamiya Estates Ltd being plot number 31 and 32 under the names- Zakia Njambi Kohler pending the hearing and determination of this application and the main suit.
 - c. That this Honourable court be and is hereby pleased to grant an order allowing the Plaintiff to enter and repossess the suit premises contained on plot number 31 and 32 as per the records under the Al-islamiya Estates Ltd wherein the 1st defendant's house be demolished, and the 1st defendant be evicted forthwith with assistance of the Ocs-bondeni Police Station to ensure compliance of this order.



- d. That the 2nd defendant herein proceed to register title documents of plot number 31 and 32 into the names of the Plaintiff-zakia Njambi Kohler upon full compliance of all the requisites payments as per the records under the Al-Islamiya Estates Ltd.
 - e. That this Honourable court be and is hereby pleased to grant the Plaintiff any other consequential relief it deems fit and just in the circumstances.
2. The application was premised on the grounds on the face of the application and the supporting affidavit of Zakia Njambi Kohler, sworn on 31st January, 2024 whereby she deponed that she purchased two plots being plot numbers 31 and 32 at a consideration of Kshs.35,000/= and Kshs.165,000/= respectively in 2000 and 2001.
3. It was her evidence that while residing in Germany and married to Diether Kohler, she sent her mother Rukia Muthoni Kamau money to buy the suit plots which money was given to the 2nd defendant for that purpose.
4. The Applicant further deponed that her mother passed away on 25th February, 2002 and that she travelled back to Kenya to attend her the burial. That the 2nd Defendant was aware that the two plots belonged to her and upon her return to Germany, she constructed a residential two bedroomed house on the said plots and allowed her sister Mohammed Saumu Nduta to reside on as she took care of the constructions.
5. It was her testimony that whilst in Germany, she was informed that the 1st Defendant, without her permission proceeded to construct a house on the adjacent plot which action she protested to.
6. The Plaintiff/Applicant deponed that the 2nd Defendant notified her that the sub-division was taking place and that they had engaged Wahome Werugia, licensed surveyors to carry out the survey work that would lead to issuance of title documents to the owners of said plot of which she paid Ksh.570,000/= for the process. She further stated that she continued making the requisite payments to the 2nd Defendant as instructed on the premise that she shall secure her title document for the two plots.
7. The Applicant stated that the 1st Defendant notified the 2nd Defendant that plot numbers 31 and 32 had a family dispute and no title should be issued on the same until the dispute is settled which action the Applicant terms as illegal hence the current application
8. The 1st Defendant/Respondent opposed the application vide a Replying Affidavit sworn on 9th February, 2024 by Mohamed who deponed that the suit plots were purchased by their late mother and share certificates issued in her name upon completion of payment. He further deponed that at no particular time did the applicant and their mother agree on purchase of the two plots.
9. It was his evidence that their late mother was a businessperson carrying out her trade at Wakulima market in Nakuru and was able to buy the plots on her own. That the Applicant has not demonstrated how and/or when she sent their mother money to buy her the plots or given reason why the suit parcels of land were not registered in her name when their mother was alive. He further stated that the suit parcels of land are in their deceased mother's name hence any dealings with the said parcels of land will amount to intermeddling with their late mother's estate.
10. The Applicant in a Supplementary Affidavit sworn on 7th May, 2024 deponed that she bought land parcel No. Dundor/Lanet Block 5/400 located in Lanet at a consideration of KSH 315,000/= for her mother and the title documents were registered in her name hence she has no beneficial interest on the suit parcels of land.



Plaintiff/Applicant's Submissions

11. Counsel submitted that it is trite law that for any person to be held culpable of intermeddling with the estate of a deceased person, the person alleging such a criminal act must prove the same beyond reasonable doubt since it is a criminal offence and the evidence of intermeddling must be strong.
12. Mr. Tindi further submitted that what belongs to the Plaintiff cannot form part of the estate of her deceased mother since she was not the owner but a bare trustee. Further that the Succession Cause No 54 of 2024 Re: The Estate of Rukia Muthoni (deceased), was mischievously filed to distribute the property plot number 31 and 32 as per the records under the Al-islamiya Estates Ltd that the Plaintiff owns.
13. Counsel stated that the Plaintiff has begun the process of filing appropriate application to stay the proceedings in Succession Case No 54 Of 2024 so that the question of ownership of the suit land is determined by this court.
14. It was Mr. Tindi's submission that the 2nd Defendant confirms that they are fully aware that the property was held in trust by their mother for the benefit of the Applicant owner-Zakia Njambi Kohler. Further that although the share certificates were in the names of the deceased, they were for the purposes of making payments which were being remitted from Germany directly to the plaintiff's mother for purposes of payments of the consideration.
15. Counsel relied on the cases of Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] eKLR, Tony Justus Ongale vs Catherine Lorna Mariati 2021 eKLR and Giela v Cassman Brown and submitted that mandatory injunctions should be granted only in clear cases where the guilty party has undertaken a blatantly illegal course of action which the court needs to remedy. Counsel urged the court to grant the orders as prayed.

1st Defendant's/Aespondent's Submissions

16. Counsel identified the following issues for determination:
 - a. Whether the applicant has capacity to litigate over the suit parcel of land?
 - b. Whether the applicant can be granted orders sought?
17. On the first issue, counsel relied on Section 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya and submitted that only the personal representatives of the deceased have the power to sue and/or enforce any cause of action in respect to the deceased.
18. Counsel submitted that the applicant claims ownership of the suit parcels of land on her own behalf, however it is clear from the records that the suit parcels were registered in the name of the deceased hence the applicant cannot therefore claim to enforce a right over the deceased property if the applicant is not an administrator more so on the issue sought against the 1st Respondent.
19. Mr. Mukira relied on the case of Kipng'etich Kalya Kones (suing as the administrator of the *Estate of Kipkalya Kones (deceased) vs William Kiplangat Kones* [2012] eKLR.
20. On the second issue, counsel submitted that the prayers sought by the applicant will amount to intermeddling of a deceased estate which this Honourable court should not countenance and relied on the case of *Shericks Homes vs Santham* [1970] 3W/R, and *Maber Unissa Karim vs Edward Oluoch Odumbe* [2015] eKLR. Counsel urged the court to dismiss the application with costs.



Analysis and Determination

21. The issue for determination is whether the Applicant has met the threshold for grant of a mandatory injunction and the orders sought in the application.
22. By a Plaint dated 31st January, 2024 the PLAintiff/ApplicAnt sought the following orders:
 1. Declaration that the occupation and construction of the 1st defendant's residential premises within plots number 31 and 32 are illegal and the 1st defendant is a trespasser.
 2. That this Honourable Court be and is hereby pleased to issue a Mandatory Injunction against the 1st defendant, his agents or assigns to deliver vacant possession of the premises & land situated at Nakuru under the Al-islamiya Estates Ltd being plot number 31 and 32 under the names- ZAKia Njambi Kohler and delivery ought to be done within 14 days or a period as the court may specify or even forthwith.
 3. That this Honourable Court be and is hereby pleased to allow the Plaintiff to enter and repossess the suit premises contained on plot numbers 31 and 32 as per the records under Al-islamiya Estates Ltd wherein the 1st defendant's house be demolished and the 1st defendant be evicted forthwith with the assistance of the OCS-Bondeni Police Station or any other Police Station that the court directs to secure compliance of this order.
 4. That the 2nd defendant herein proceed to register the title documents of plot number 31 and 32 into the names of the Plaintiffs-Zakia Njambi Kohler upon full compliance of all the requisites payments as per the records under the Al-islamiya Estates Ltd.
 5. Punitive Damages occasioned to the plaintiff especially the entire period of illegal occupation be calculated at a rate the court deems fit.
 6. Further or better relief that this Honourable court may deem fit and just.
 7. Costs of the suit.
23. The above are the same orders that the Applicant is seeking in this current application. The applicant wants the court to determine the issues in the main suit vide an interlocutory application without evidence being tendered by both sides. This can only happen if parties enter into a consent to compromise the suit or withdraw the same altogether.
24. In the case of *Witmore Investment Limited V County Government of Kirinyaga & 3 Others* [2016] eKLR the court held as follows:

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”



25. Further both parties admit that the share certificates in respect of the suit parcels of land are in the name on their deceased mother Rukia Muthoni Kamau whose estate is pending in a Succession Cause No 54 of 2024 Re: The Estate of Rukia Muthoni (deceased).
26. With such admission, it would be prudent to deal with the issue of administration of the estate first before coming to this court on the issue of ownership. Furthermore, the orders that the applicant is seeking cannot be granted at this stage, as they are of a final nature. The Applicant urges the court to issue orders for entry and repossession of the suit premises, for demolition of the 1st Defendant's house and eviction of the 1st defendant with the assistance of the OCS Bondeni Police Station, and registration of the title documents in the Plaintiff/Applicant's name.
27. The question is, can the court issue such orders now/interlocutory stage? The answer is a resounding no. The court will not belabor to deal with the issue whether the Applicant has met the threshold for grant of mandatory injunction, as the Applicant still has to sort out the issue of administration of her mother's estate first. Having said that, I find that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF JUNE 2024.

M. A. ODENY

JUDGE

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