



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LANDS COURT
AT MALINDI
ELC NO. 39 OF 2015

JANE M. KIANO.....PLAINTIFF/RESPONDENT

=VERSUS=

CHEMA NGOLENYA MUDZI.....DEFENDANT/APPLICANT

RULING

1. I have before me an application dated 2nd August 2016. The same is brought under the provisions of Order 40 Rules 1, 4 and 10 and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The application is seeking for orders: -

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to issue a temporary injunction restraining the Plaintiff herself, her servants, employees, assignees and/or agents from disposing of, transferring, advertising for sale or interfering in any way with the suit property pending hearing and determination of this suit.

4. THAT the costs of this application be in the cause.

2. The application is supported by the annexed affidavit of John Muthami Ngolanya Mudzi the 3rd Defendant herein sworn on 2nd August 2016. The application is premised on the grounds, *inter alia*, that the 1st and 3rd Defendants are the Administrators of the Estate of the late Ngolanya Mudzi who according to them was a proprietor of the suit property. Following a Ruling delivered herein by the Honourable Angote J. on 1st April 2016, the Defendants are now apprehensive that the Plaintiff will evict them from the suit property and thereby dispossess them of their inheritance without having been accorded a hearing.

3. In Grounds of Opposition filed herein on 6th October 2016, the Plaintiff is opposed to the grant of the Orders sought on the grounds that: -

1. The Court lacks jurisdiction to review its own orders

2. The court has no jurisdiction to grant orders of injunction against its own orders of injunction

3. The court's refusal to set aside the orders of injunction can only be appealed against in the

Court of Appeal.

4. I have considered the application and the Grounds of Opposition. I have also studied the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.

5. From the records and pleadings availed to me, it is clear that the Plaintiff filed the suit herein against the 1st Defendant-Chema Ngolenya Mudzi- for trespass. Contemporaneous with the filing of the suit, the plaintiff moved under Certificate of Urgency and sought orders of injunctions as against the 1st Defendant. Having heard the said application dated 10th March 2015, in the absence of the 1st Defendant, the Honourable Angote J. granted orders as follows: -

- 1. That a temporary injunction be and is hereby issued restraining the defendant either by himself, his agents and/or anybody acting on his behalf and any other person from interfering with the Plaintiff's possession, occupation, access and or development of sub-division number 1650 (original number 427/42) Section III Mainland North or any part thereof or at all.*
- 2. That an order of injunction be and is hereby issued restraining the defendant either by himself, his agents and/or servants from trespassing or being on plot sub-division Number 1650(Original Number 427/42) Section III Mainland North or any part thereof or at all.*
- 3. That the County Commissioner and the County Police Commanding Kilifi County to enforce the orders of the court and ensure peace prevails.*

6. Subsequently by an application dated 27th July 2015, the 1st Defendant sought to set aside the orders granted ex-parte on 9th June 2015 while the 2nd to 6th Defendants who describe themselves as Administrators and beneficiaries of the Estate of the late Ngolanya Mudzi Kitavi applied within the same application to be enjoined as additional defendants in the suit. In a Ruling delivered on 1st April 2016, the Honourable Angote J declined to discharge the injunctive orders but proceeded to enjoin the 2nd to 6th Defendants "for the purpose of ascertaining whether they are entitled to the property."

7. The 2nd to 6th Defendants are now apprehensive that the execution of the orders of injunction would lead to their eviction from the suit premises without their having been heard. I have perused the Ruling by my brother Judge delivered on 1st April 2016 as aforesaid. Explaining his decision to allow the 2nd to 6th Defendants to be enjoined in the suit, the Learned Judge observes as follows at Paragraphs 27 and 28 of the decision: -

"27. I say so because Mombasa HCCC No. 192 of 2008(OS) was between the Plaintiff and the Defendant.

28. To enable this court to conclusively deal with the issue of ownership of the suit property and to avoid the filing of numerous suits by parties, the proposed Defendants should be allowed to file a Defence and to participate in these proceedings."

8. In my view, what my brother Judge was saying here is that the 2nd to 6th Defendants ought to be given a hearing before a conclusive decision can be made in regard to the ownership of the suit property. As the Court of Appeal sitting at Mombasa observed in **JMK -vs- MWM & Another (2015) eKLR (AT PG 7);**

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

9. A perusal of the injunction orders granted by Angote J. on 9th June 2015 clearly reveals that they were of a mandatory nature. If the same were to be executed against the 2nd-6th Defendants who were at the time not parties to the suit, it would occasion them great prejudice.

10. To borrow the words of Justice Sila Munyao in *Solomon Odira Okello & Another -vs- Esther Loboso(2014) eKLR*, I would say that although the 2nd-6th Defendants have not filed a defence and/or sought to join the suit earlier, I think from what I see, it will be in the interest of justice that the suit property be preserved, as it is , pending the hearing of the suit. The Defendants have deponed that they have been residents of certain portions of the suitland. This has not been disputed by the Plaintiff. I think it will be fair that the status quo be maintained pending the hearing and determination of this suit. Accordingly, I vary the initial order of injunction to the above extent.

11. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J. O. OLOLA

JUDGE