



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 78 OF 2017

HELEN CHELEL DALTON (suing as the Executrix of the

Estate of **ELIZABETH CHEPKEMBOI**

DALTON (Deceased).....**PLAINTIFF/APPLICANT**

VERSUS

ANDERSON KAZUNGU KOI.....**DEFENDANT/RESPONENT**

RULING

1. Before me for determination is a Notice of Motion Application dated 4th April 2017. The Applicant Helen Chelel Dalton prays for an interlocutory injunction to restrain the Defendant, his agents and/or servants from interfering, meddling, dealing and/or in any manner trespassing upon land parcel Number Gede/Mijomboni/905.

2. The Application is premised on the fact that the Applicant is the executrix of the Estate of Elizabeth Chepkemboi Dalton (now deceased). Prior to her death, the said Elizabeth Chepkemboi Dalton was the registered proprietor of the said parcel of land. According to the Applicant, the Defendant, Anderson Kazungu Koi has since trespassed onto the said parcel of land and has cut down mango trees and commenced the building of certain structures thereon. Despite demand and notice given to the Defendant to cease the said activities, he has refused to comply thereby necessitating the filing of this suit and the present application.

3. In a Replying Affidavit sworn on 24th July 2017 and filed herein on 28th July 2017, the Defendant refutes the Applicant's contention and avers that the application herein is meant to legitimize the fraudulent actions of the late Elizabeth Chepkemboi Dalton. The Defendant who is the Administrator of the Estate of the late Kazungu Koi avers that the subject parcel of land which was originally Gede/Mijomboni/156 was at all material times registered in his father's name. The said Kazungu Koi died in 1981 and the family does not know the circumstances under which the Applicant's came to acquire title to a portion of their land in 1992, some 11 years after their father died.

4. In addition, the Defendant avers that the late Kazungu Koi's family has always been in occupation and possession of the subject parcel of land which comprises the family home and a grant of the orders sought herein would lead to their eviction from the said home.

5. I have considered the application and the response thereto. I have also considered the written submissions placed before me by the Learned Advocates for the parties.

6. The requisites for the grant of interlocutory injunctions have been stated times without number, having been aptly captured in the oft-cited cases of *Giella –vs Cassman Brown & Company Ltd(1973)EA 358* where it was held that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

7. From a copy of the Green Card annexed in the Plaintiff’s/Applicant’s List of Documents, it is evident that LR NO. Gede/Mijomboni/905 was sub-divided from LR No. Gede/Mijomboni/156 on 13th November 1992. The said Green Card further reveals that the original title had been registered in the name of Kazungu Koi on 6th June 1975.

8. Further, from the material placed before me, the said Kazungu Koi died on 26th March, 1981 and the Defendant/Respondent is indicated to be the interim administrator of his estate pursuant to a Limited Grant of Letters of Administration ad Litem issued by the High Court at Malindi on 11th February 2016. According to the Respondent, the family of the late Kazungu Koi occupies and has been in possession of the subject parcel of land since the time when the said Kazungu Koi was still alive. According to him, they are unaware of how the Applicant came to acquire title to the portion of land they claim as the family neither sold the land nor gifted the same to the Applicant.

9. According to the Plaintiff/Applicant, they acquired title to the property regularly and in the absence of any proof of fraud by the Respondent, this Court should take judicial notice that the Plaintiff has title and that pursuant to Section 26 of the Land Registration Act, the Court should consider the same as prima facie evidence that the suit property belongs to the Plaintiff and that the Defendant has trespassed thereon.

10. In my considered opinion, once the Defendant challenged the process through which the Plaintiff acquired title to the land which was admittedly previously registered in the name of the Defendant’s father, it was incumbent upon the Plaintiff to discharge the evidential burden to rebut the position taken by the Defendant. In this regard, I note from the Plaintiff and the Affidavit filed herein in support of the application that the Plaintiff is silent as to how she came to acquire interest in the land.

11. As the Court of Appeal stated in *Munyu Maina –vs Hiram Gathiha Maina(2013) eKLR:-*

“...when the registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

12. In any event, I note that the Plaintiff has not denied the fact that the Respondent is presently in occupation and possession of the suit premises. That being the case, the balance of convenience tilts, pending the determination of the suit, in favour of the Respondent who stands to be evicted from the land if the orders sought herein were granted.

13. Accordingly, I decline to grant the application. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE



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