



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 87 OF 2015 (O.S)

JANE WANJIRA MUCHIRA.....APPLICANT

VERSUS

WILSON TUMBO THAMBO.....RESPONDENT

RULING

By an Originating Summons dated and filed herein on 23rd July 2015, the plaintiff citing **Section 38 of the Limitation of Actions Act** and **Order 37 of the Civil Procedure Rules** moved the Court seeking the substantive orders that she be declared to have become entitled by adverse possession of over 12 years to all that parcel of land known as L.R No. MWEA/TEBERE/B/1067 (herein the suit land) measuring approximately 6.06 hectares.

Simultaneously with the filing of the said Originating Summons, the plaintiff moved this Court vide a Notice of Motion under **Order 40 Rule 1 of the Civil Procedure Rules, Sections 1A 1B and 3A of the Civil Procedure Act** and **Section 68 of the Land Registration Act** seeking the following orders:-

1. Spent.

2. Spent.

3. Spent.

4. That the Honourable Court be pleased to issue an interim inhibition against any transactions relating to L.R MWEA/TEBERE/B/1067 pending the hearing and determination of the main suit.

5. That the Honourable Court be pleased to issue an interim temporary injunction restraining the respondent by himself, his agents and/or servants from interfering with the plaintiff's quiet possession of L.R MWEA/TEBERE/B/1067 pending the hearing and determination of the main suit herein.

6. That the costs of the application be provided for.

The Notice of Motion which is the subject of this ruling is premised on the following grounds:-

(a) That the suit land is registered under the names of the respondent but she has been in continuous and un-interrupted occupation thereof for more than 12 years.

(b) That the plaintiff has instituted this suit so that she can be registered as proprietor of the

same.

(c) That the plaintiff has learnt that the defendant intends to invade the suit land and destroy her property.

(d) That it is in the interest of justice for the suit and the status quo in respect of possession of the suit land to be preserved pending the hearing of the claim herein.

The said Notice of Motion is supported by the plaintiff's affidavit in which she has deponed, inter alia, that she entered the suit land in August 2002 having purchased it on 3rd July 2002 at an auction for Ksh. 810,000 of which she paid 25% being Ksh. 202,500 and entered into an agreement with the Auctioneers namely Nguru Enterprises who were then acting under instructions from **CO-OPERATIVE MERCHANT BANK LTD** which was later taken over by **CO-OPERATIVE BANK OF KENYA LTD**. The said Bank was exercising its power of sale as the defendant who was the registered proprietor of the suit land had defaulted in repayment. A certificate of public auction was issued but she could not immediately have the suit land transferred in her names since a caveat had been lodged against it. She however planted trees, fenced the suit land and constructed a permanent house thereon. She also grows rice and on 26th July 2011, she buried her sister **NAOMI WARUGURU** on the suit land which she has now acquired through adverse possession. That the **CO-OPERATIVE BANK OF KENYA** filed at the **MILIMANI COMMERCIAL COURT, NAIROBI, CIVIL CASE No. 6289 of 2005** (herein the **MILIMANI CASE**) against the defendant seeking payment of the loan arrears and the suit was determined in favour of the defendant. She was not aware about the existence of that suit and when she did, she filed an application for review which was however dismissed on the grounds the case had already been finalized. That the defendant is still the registered proprietor of the suit land. It is therefore in the interest of justice that the suit land be preserved as she is in possession thereof and if the same is alienated, she will suffer substantial loss and damages as it is her sole livelihood. Annexed to the Notice of Motion is a Public Auction Notice in respect to the suit land, a receipt for Ksh. 202,500, a description of the suit land, several deposit slips at the **CO-OPERATIVE BANK**, transfer form in favour of the plaintiff, Certificate of Sale, a letter by the **CO-OPERATIVE BANK** dated 14th June 2006 addressed to **WARUHIU & GATHURU Advocates**, photographs of house, a grave and a rice field, burial permit in the names of **NAOMI WARUGURU**, plaint and defence in **NAIROBI HIGH COURT CIVIL CASE No. 87 of 2007** with proceedings showing that it was later on 9th June 2005 transferred to the subordinate Court thus giving rise to the **MILIMANI CASE** and title deed in respect to the suit land showing it is registered in the names of the defendant – see annexures **JWM 1 to 18**.

The defendant filed a replying affidavit in opposition to the Notice of Motion in which he deponed, inter alia, that the **CO-OPERATIVE BANK** had sued him in the **MILIMANI CASE** for recovery of Ksh. 2,712,887.30 being loan arrears and the plaintiff was joined as an interested party. The Court declared that he did not owe the **CO-OPERATIVE BANK** any money and the Chief Magistrate authorized the Executive officer to sign any documents discharging the title to the suit land and hand it to the defendant. Therefore, since the Court in the **MILIMANI CASE** found that the defendant herein did not owe the **CO-OPERATIVE BANK** any money, the said **BANK** could not sell the suit land to the plaintiff herein and the only honourable thing that the Bank can do is refund the plaintiff her money. That the plaintiff's occupation of the suit land amounts to a criminal offence under the **Land Control Act**. That this matter is res-judicata under **Section 7 of the Civil Procedure Act** as the same issues were determined in the **MILIMANI CASE**. That the issue of adverse possession lapsed when the Court awarded the suit land to the defendant in 2010 which is less than 12 years ago. That the plaintiff has not been occupying the suit land and only started building thereon in 2012. Annexed to that replying affidavit is a judgment dated 30th April 2015 - it actually ought to have been a ruling not a judgment, as will become clear later on in this ruling.

The application was canvassed by way of written submissions which have been filed by **Magee wa Magee advocate** for the plaintiff and **P.N. Mugo advocate** for the defendant.

I have considered the Notice of Motion, the rival affidavits and the submissions by counsel.

Before I interrogate the merits or otherwise of that Notice of Motion, I must determine whether this suit and the application are infact res-judicata and therefore caught up by the provisions of **Section 7 of the Civil Procedure Act**. This is because in his replying affidavit, the defendant has deponed in paragraph 7 (a) thereof as follows:-

“That since this matter has been determined by Court between defendant Co-operative Bank and plaintiff and the issue of ownership were directly in issue then these issues are under Section 7 of Civil Procedure Act barred for further or any other trial as they are Res-judicata”

In deponing to the above, the defendant had in mind the **MILIMANI CASE** referred to earlier. Res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”

For res-judicata to apply, it must be shown that:-

- (a) The matter in issue in both the former and the subsequent suits in the same.***
- (b) The parties in both suits are the same or litigate under the same title.***
- (c) There is a concurrence of jurisdiction.***
- (d) The matters in dispute have been heard and finally decided.***

I have looked at the pleadings and orders in the **MILIMANI CASE**. The plaintiff therein was **CO-OPERATIVE BANK OF KENYA LIMITED** suing the defendant herein **WILSON TUMBO THAMBO**. The plaintiff Bank sought judgment against the defendant in the sum of Ksh. 2,712,887.30 being an outstanding loan together with interest. The defendant however filed a defence and counter-claim in which he denied the plaintiff Bank’s claim and sought an order declaring that he owned the plaintiff Bank no money at all. After hearing the case, the trial Court dismissed the plaintiff Bank’s claim and instead entered judgment for the defendant as per his counter-claim. A decree was issued in those terms on 10th November 2010.

The plaintiff herein who had taken possession of the suit land in 2002 came to learn about the judgment in the **MILIMANI CASE** and filed an application therein on 16th December 2014 seeking to be enjoined as a party. That application was however dismissed on 30th April 2015 in a judgment (should have been a ruling) delivered by **Mr. OBULUTSA SENIOR PRINCIPAL MAGISTRATE**. A copy thereof is annexed to the defendant’s replying affidavit.

It is clear from the above that res-judicata is not available to the defendant in this case for the reasons that firstly, the plaintiff herein was not a party in the **MILIMANI CASE**. Indeed her application to be enjoined in those proceedings came very late in the day and was accordingly dismissed. Secondly, the claim in the **MILIMANI CASE** was for payment of a loan due to the **CO-OPERATIVE BANK** by the defendant. The claim herein is for orders that the plaintiff has become entitled to the suit land by adverse possession. In the circumstances, the doctrine of res-judicata does not apply to bar this suit or the Notice of Motion.

Having found that this suit is not caught up by the provisions of **Section 7 of the Civil Procedure Act**, I can now consider the plaintiff’s Notice of Motion on its merits.

The application seeks two substantive remedies as indicated above.

1. An order of temporary injunction pending the hearing and determination of this suit.

2. An order of inhibition pending the hearing and determination of this suit.

In considering the application for temporary injunction, this Court will be guided by the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

“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”

As to what amounts to a prima facie case, this was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002** as follows:-

“A prima facie case in a civil application is not confined to “a genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter”

Further, a party approaching the Court for such a remedy must do so with clean hands and as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 3 ALL. E.R 776**, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong. I must also bear in mind that at this stage, I must not make definite findings of fact particularly where the affidavit evidence is contradictory.

The plaintiff's possession and occupation of the suit land is not really in dispute. Indeed it is conceded by the defendant who claims that the plaintiff's occupation of the same was obtained **“unlawfully”** and is **“criminal”** – see paragraphs 11, 12 and 13 of the defendant's replying affidavit. Photographs of the suit land together with the trees thereon, houses and a grave have also been exhibited in the plaintiff's affidavit. She bought the suit land in a public auction in June 2002 and took possession thereof in August 2002. This suit was filed on 23rd July 2015. Whether or not the plaintiff will mount a successful claim to the suit land by virtue of adverse possession will be a matter for trial. Prima facie, however, she has been on the suit land now for over 14 years well beyond the statutory period of 12 years having developed the same which is registered in the defendant's names since September 1999. In my view, therefore, the plaintiff has surmounted the first limb of the principles set out in the **GIELLA** case (supra).

On the second limb of whether the plaintiff might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, the plaintiff has deponed in paragraph 4 (e) of her supporting affidavit that she buried the remains of her sister **NAOMI WARUGURU** on the suit land. She has also deponed in paragraph 9 (b) of the same affidavit that the suit land is her only livelihood and that she will suffer substantial loss if it is alienated. I am persuaded from the above averments that indeed the loss she would suffer cannot adequately be compensated in damages. I also get guidance from the Court of Appeal's decision in **MUIRURI VS BANK OF BARODA (KENYA) LTD 2000 K.L.R 183** that:-

“..... disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

In the circumstances of this case, I am satisfied that the plaintiff has met the second requirement in the **GIELLA** case (supra).

Even if this Court was to determine this application on the balance of convenience, the balance would tilt in favour of the plaintiff who is in occupation of the suit land following an auction in 2002. A greater injustice would ensue to the plaintiff if the order sought is not granted and she succeeds at the trial. I am therefore satisfied that the application for a temporary injunction is well merited in the circumstances of

this case.

The second prayer is that of an inhibition. **Section 68 (1) of the Land Registration Act 2012** empowers the Court to inhibit dealings in registered land. It states as follows:-

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealings with any land, lease or charge”

An order of inhibition is similar to an injunction as it seeks to preserve the property in dispute and in considering whether or not to grant it, the Court will take into account the following:-

- 1. Whether the applicant has good grounds for the grant of the order.***
- 2. Whether the property in dispute is at risk of being alienated or transferred to the detriment of the applicant.***
- 3. Whether the failure to grant the application may render the suit nugatory.***
- 4. What prejudice, if any, will be caused to the other party.***
- 5. The conduct of the parties.***

Guided by the above, it is clear that the plaintiff is in occupation of the suit land which is however registered in the names of the defendant. The plaintiff went into occupation of the suit land following a successful auction. She has developed the suit land and buried a sister thereon. These are certainly good grounds for the inhibition sought. On the other hand, the suit land is registered in the names of the defendant and only he can transfer it. Should he do so during the pendency of this suit, the substratum of the plaintiff's claim will be lost. That would be a greater injustice to the plaintiff. The interest of justice will best be served by inhibiting any dealings on the suit land pending the hearing and determination of this suit.

Ultimately therefore, upon considering all the evidence herein, I allow the plaintiff's Notice of Motion filed herein on 23rd July 2015 in the following terms:-

- 1. An order of inhibition is issued against any transactions on land parcel No. L.R MWEA/TEBERE/B/1067 pending the hearing and determination of this suit.***
- 2. An order of temporary injunction is issued restraining the respondent by himself, his agents and/or servants from interfering with the plaintiff's quiet possession of land parcel No. L.R MWEA/TEBERE/B/1067 pending the hearing and determination of this suit.***
- 3. Costs in the cause.***
- 4. It is further directed that the parties do expedite compliance with the pre-trial directions and have the suit heard and determined within twelve months from today.***

B.N. OLAO

JUDGE

14TH OCTOBER, 2016

Ruling dated, delivered and signed in open Court this 14th day of October 2016 in presence of:-

Mr. Nyangayo for Mr. Magee for Applicant present

Mr. Mugo for the Respondent absent

Mr. Gichia Court Clerk present.

B.N. OLAO

JUDGE

14TH OCTOBER, 2016