



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 55 OF 2016 (O.S)**

MARTIN NJIRU NAMU.....1<sup>ST</sup> PLAINTIFF/APPLICANT

DAVID IRERI NAMU.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

PIUS KARIUKI NJUE.....1<sup>ST</sup> DEFENDANT/RESPONDENT

HAZRON NJIRU NAHASHON.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

The applicants **MARTIN NJIRU NAMU** and **DAVID IRERI NAMU** filed an Originating Summons in this Court on 18th August 2016 seeking the substantive order that they have obtained proprietorship of the land parcels No. EVURORE/NGUTHI/2705 and EVURORE/NGUTHI/2706 (the suit properties) by way of adverse possession having been born thereon in 1961 and 1978 respectively. They also claim to have extensively developed the suit properties by building houses and planting 700 mangoe trees, 300 avocado trees, 120 banana trees, 500 pawpaw trees and 100 eucalyptus trees among others.

Simultaneously with the Originating Summons, the applicants filed a Notice of Motion seeking the following orders:-

***(a) Spent***

***(b) Spent***

***(c) That the defendants/respondents jointly and severally by themselves, their agents, servants or anybody acting under them be restrained from entering upon, taking possession of, occupying, utilizing, selling, transferring, charging or evicting the plaintiffs/applicants and their families or in any way dealing with the land parcels No. EVURORE/NGUTHI/2705 and EVURORE/NGUTHI/2706 which are occupied by the plaintiffs/applicants and their families and/or interfering with the plaintiffs/applicants and their families use and occupation of the said parcels of land pending the hearing and determination of this suit.***

***(d) That an order of inhibition be issued inhibiting the registration of any transfer, charge or any dealings whatsoever with land parcels No. EVURORE/NGUTHI.2705 and EVURORE/NGUTHI/2706 pending the hearing and determination of this suit.***

***(e) That costs be provided for.***

The application was supported by the affidavit of the two applicants and based on the grounds set out therein.

In brief, it is their case that they have lived on the suit properties since they were born and have extensively developed the same yet the respondents are now threatening to evict them and their families and if that happens they will suffer irreparable damage and loss.

In opposing the Notice of Motion, the respondents have filed a joint replying affidavit in which they have deponed, inter alia, that they are the registered proprietors of the suit properties having bought them from one **MUNYI KIVUANA** (deceased) who was the original owner of land parcel No. EVURORE/NGUTHI/2240 which was sub-divided into two portions being the suit properties. That the said **MUNYI KIVUANA** had sued one **NAMU NDUMO** the father to the applicants in **EMBU C.M.C.C No. 340 of 1900** seeking eviction orders against him which orders were granted and an appeal against those orders was dismissed via **EMBU H.C.C.A No. 31 of 1996**. However, the said **NAMU NDUMO** and the respondents have refused to vacate from the suit properties. They also claimed that this dispute has been the subject of **EMBU C.M.C.C No. 340 of 1990** and **EMBU H.C.C.A 31 of 1996**.

The respondents similarly filed a Preliminary Objection dated 24th August 2016 in which they claimed that this suit is bad in law, fatally defective and an abuse of the Court process.

As the respondents are acting in person, it was agreed that both the applicants' Notice of Motion and the respondents' Preliminary Objection be canvassed together orally. That was done on 30th November 2016.

I have considered the applicants Notice of Motion, the respondents' Preliminary Objection and the oral submissions by **Ms NJIRU** advocate for the applicants and those of the 2nd respondent who addressed the Court on his behalf and also on behalf of the 1st respondent.

On the respondents' Preliminary Objection, the 2nd respondent left it to the Court to decide. That is not surprising. The respondents being lay persons may not appreciate what a Preliminary Objection really is. From their pleadings however, they seem to suggest that this suit is res-judicata because the issues herein were canvassed in **EMBU C.M.C.C No. 340 of 1990** and also **EMBU H.C.C.A No. 31 of 1996**. They also claim that the suit is an abuse of the process of this Court.

Having looked at the pleadings herein, I do not discern anything in them to suggest that this suit is an abuse of the process of the Court. The claim is one of adverse possession and is properly premised under **Section 38 of the Limitation of Actions Act**. It has the applicant's supporting affidavit and also annexed thereto are the Green Cards of the suit properties and photographs of the land in dispute showing the crops therein and the applicants' homes. Clearly, the claim that this suit is an abuse of the process of the Court, bad in law or defective is a bare allegation which has not been substantiated. I must therefore reject it.

On the claim that this suit is res-judicata in view of **EMBU C.M.C.C No. 340 of 1990** and **EMBU H.C.C.A No. 31 of 1996**, I have looked at the decrees in those two cases which are annexed to the replying affidavit. The parties in that case were **MUNYI KIVUANA** from whom the respondents purchased land parcel No. NGUTHI/EVURORI/2240 and **NAMU NDUMO** the father to the applicants. It is clear from that decree that the plaintiff therein (**MUNYI KIVUANA**) was seeking an order of eviction of **NAMU NDUMO** from land parcel No. NGUTHI EVURORI/2240 together with damages. The parties in this suit are different and most importantly, the claim in this case is one on adverse possession which was not, and could not have been, canvassed in the **EMBU C.M.C.C No. 340 of 1990** as the Subordinate Court would have no jurisdiction to adjudicate such a claim. Res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

***“No Court shall try a 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 a plea of res-judicata to be up-held therefore, the following must be established:-

- 1. The parties in the two suits are the same or litigate under the same title.***
- 2. The matter in issue must have been directly and substantially in issue in the former suit.***
- 3. The matter must have been heard and finally decided in the former suit.***
- 4. The Court which heard and determined the previous suit must have been a competent Court.***

It is clear from the record herein that **EMBU C.M.C.C No. 340 of 1990** involved different parties and the issues therein were eviction and damages from land parcel No. NGUTHI/EVURORE/2240 (as per the decree). I think that is an error in the decree because from the Green Card, the land is described as EVURORE/NGUTHI/2240. That land no longer exists as the title was closed to give rise to the suit properties. This suit involves a claim for adverse possession which, as I have already stated, could not be canvassed in the Chief Magistrate’s Court. The plea of res-judicata cannot therefore be sustained and must be dismissed which I hereby do.

I will now consider the applicants’ Notice of Motion dated 17th August 2016 on its merits.

The application seeks two substantive orders being:-

- 1. Temporary injunction and***
- 2. Inhibitory orders.***

In determining the application for temporary injunction pending the hearing of this suit, this Court will be guided by the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** where it was stated 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”.***

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

***“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”.***

Similarly, when considering such an application, 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 should not make definite findings particularly where the affidavit evidence is contradictory.

The applicants’ claim is founded on adverse possession. They argue that they have been on the suit properties since they were born which is in 1961 and 1978 respectively. This suit was filed in August 2016 which means that the applicants have been on the suit properties for some fifty five (55) years or so. Their occupation of the suit properties is not really denied and neither is the fact that the respondents are the registered proprietors of those properties. As to whether or not the applicants will prove their case that they are entitled to the suit properties by adverse possession is a matter for the trial Court. They will

obviously have to meet the test set out in the case of **KASUVE VS MWAANI INVESTMENTS LTD & FOUR OTHERS 2004 1 K.L.R 184**. For now, the test that they have to surmount for orders of a temporary injunction is as prescribed in the **GIELLA** case (supra). In my view, they have met that test and established that they have a prima facie case with a probability of success on the basis of that long occupation and possession of the suit properties.

On the issue of irreparable loss that cannot be adequately compensated by an award of damages, it is clear from the applicant's supporting affidavit that they live on the suit properties with their families having extensively developed the same. Their advocate **Ms NJIRU** submitted that in total, there are about fifty (50) members of the applicants' families on the suit properties and they have no other land. It is my findings, therefore, that if they are evicted, they could be rendered homeless and such loss would not be capable of compensation by an award of damages. The applicants have therefore also met the second principle in the **GIELLA** case (supra).

And even if this application is to be determined on the balance of convenience, it would tilt in favour of the applicants who are in possession. Generally, where there is evidence of occupation of the land in dispute, it is prudent to stay any intended eviction pending a full hearing – **EDWIN KIRUAI VS PETER GICHOMO C.A CIVIL APPLICATION No. 256 and 178 of 2009**. See also **BETH KAARI & ANOTHER VS M'RIMUNYA C.A CIVIL APPLICATION No. 352 of 2009**. It is not in dispute that the respondents are in possession of an order of eviction issued in **EMBU H.C.C.C No. 340 of 1990** which they may use against the applicants although they were not parties to that suit. Indeed in his submission, the 2nd respondent left no doubt that he intends to execute that order. He said:-

***“We never allowed them to stay on our land. We never allowed them to develop the land parcels. They are supposed to vacate the land and we even have a Court order for the Police to assist us”.***

If that eviction is executed, the applicants and their families will suffer great prejudice, hardship and will be rendered destitute. That would be a great injustice. The balance of convenience dictates that they remain on the land until this case is heard and determined. After all, as I have indicated above, they have lived thereon for the last fifty five (55) years. I am therefore persuaded that the applicants have met the threshold of an interlocutory injunction pending the hearing and determination of the suit.

The applicants also seek an order of inhibition. Such an order is provided for under **Section 68 (1) of the Land Registration Act** which provides 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 future 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 pending trial. In determining whether or not to grant such an order, the Court will take into account the following:-

- 1. Whether the applicants have 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 applicants.***
- 3. Whether failure to grant the application may render the suit nugatory.***
- 4. What prejudice, if any, will be occasioned to the other party and***
- 5. The conduct of the parties.***

Taking all the above into account, I find that the applicants are currently in possession of the suit

properties and have been for a long time and therefore have good grounds for the grant of the order. If the land is sold, that will render the suit nugatory. On the other hand, the respondents who are the registered proprietors of the suit properties will not suffer prejudice as, in any event, they have not been in occupation thereof for a long time. An order of inhibition is therefore well merited in the circumstances of this case.

Ultimately therefore and upon considering all the evidence herein, I would allow the applicants Notice of Motion dated 17th August 2016 and make the following orders:-

***1. The respondents jointly and severally by themselves, their agents, servants or anybody acting under them is restrained from entering upon, taking possession of, occupying, utilizing, selling, transferring, charging or evicting the applicants and their families from and/or in any other way dealing with land parcels No. EVURORE/NGUTHI/2705 and EVURORE/NGUTHI/2706 which are occupied by the applicants and their families and/or interfering with their use and occupation of the said land parcels pending the hearing and determination of this suit.***

***2. An order of inhibition is issued inhibiting the registration of any transfer, charge or dealings whatsoever with the land parcels No. EVURORE/NGUTHI/2705 and EVURORE/NGUTHI/2706 pending the hearing and determination of this suit.***

***3. Costs shall be in the cause.***

***4. The parties to expedite compliance with the pre-trial directions so that this suit can be heard and determined in the next twelve (12) months from today.***

***5. It is further directed that this file be returned to the Environment and Land Court at Embu where parties can take dates for further directions once a Judge is posted there hopefully in January 2017.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**

Ruling dated, delivered and signed in open Court this 9<sup>th</sup> day of December, 2016

Mr. Muyodi for Plaintiff/Applicants present

Defendant/Respondents present in person.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**