



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 277 OF 2019

DR. GICHAMBIRA GIKENYE.....1ST PLAINTIFF

WANGARI GIKENYE.....2ND PLAINTIFF

VERSUS

PAUL WANYIRI NDERITU.....1ST DEFENDANT

MUYA WANYIRI.....2ND DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion application dated 27th August 2019 by the Plaintiffs and a Preliminary Objection dated 26th October 2021 by the Defendants.

2. The notice of motion seeks orders that the Defendants by themselves, their servants and/or agents be restrained from interfering, trespassing, alienating, advertising, offering for sale, charging, mortgaging, transferring, assigning or otherwise dealing or disturbing quiet possession of the Plaintiffs in Land LR No. 5842/17 one acre thereof occupied by the plaintiffs (suit premises), pending the hearing and determination of this suit.

3. The application is premised on the grounds set out on the face of the application and in the affidavits of the 1st Plaintiff dated 15th August 2019 and 27th August 2019. The Applicants contend that they are the *bonafide* purchasers of one acre of land excised from LR No. 5482/17 following a sale agreement executed on 21st June 1995 where payment of due consideration of Kshs. 1,057,000 was made. The balance of Kshs, 93,000 was to be paid for processing of title. The Applicants averred that they took vacant possession of the suit land on 1st August 1995 and have been in occupation since then planting eucalyptus trees which they harvest as timber for sale.

4. They detailed that on 12th August 2019, the 1st Defendant together with his son the 2nd defendant trespassed into the land and threatened to evict them. Upon follow up, the 1st defendant indicated that they intended to sell the suit land at the current market value of Kshs. 60,000,000 and that they would refund the purchase money that the Plaintiffs paid.

5. The Applicants stated that if the orders sought were not granted, they stood to suffer irreparable harm and damage of land they had utilised for over 24years.

6. The Respondents/ Defendants have opposed the application vide the Replying affidavit dated 26th October 2021 sworn by **Paul Wanyiri Nderitu**. They aver that the Plaintiffs have never been in possession / occupation of the said property stating that they had attempted to invade the property in 2001 and 2016 but this was stopped by the farm manager, his sons and the police. They state that there was a sale agreement reached with the Plaintiffs whose completion date was 31st July 1995 and there was never a mutual agreement entered between the parties to extend that completion date and as such, the sale abated. The Respondent stated that the alleged trees on the property were planted by him and were already on the said land at the time of sale.

7. He added that the impediment in sub-dividing the land was as a result of a boundary dispute between the Respondent and his neighbour which when settled will affect the property size, sale and its sub-division. He stated that the Plaintiff was well aware of this fact when he entered into the agreement. He also pointed out that the government had declined to approve the land's sub-division asking for surrender of a road while yet another neighbour had declined to do so and thus the sub-division was hampered.

8. The Respondent averred that the Applicant did not complete payment of the purchase price indicating that he only received Kshs. 677,000

and attempted to secure the balance unsuccessfully. As such, there was an unpaid amount of Kshs. 473,000.

9. He concluded that by the court allowing the Applicants' ingress into the suit land at the application stage, this would be tantamount to issuing final orders at an interlocutory stage. Adding that they had not satisfied grounds for issuance of interlocutory injunctions.

10. The Respondents/Defendants in a preliminary objection dated 26th October 2021 are raising seventeen grounds where in summary, they claim that the suit is statute barred under the **Limitation of Actions Act, Cap 22 Laws of Kenya**, as the Plaintiff is attempting to enforce a contract entered into on or around 21st June, 1995 with a completion date of 31st July, 1995 falling short of the six (6) year rule by the Act. That even by dint of **Section 7** of the **Limitation of Actions Act**, this suit is still time barred by virtue of the fact that it is an action for recovery of land more than twelve (12 years) after the cause of action arose and that the cause of action arose in the year 2001 which is close to eighteen (18years) of inaction.

11. The application and preliminary objection were to be canvassed by way of written submissions to be filed by the applicant and respondent on 6th December 2021 and 6th January 2022 respectively but there is no evidence on the court file or the CTS of this compliance.

Analysis and determination

12. This court having considered the application, grounds of objection, rival affidavits, legal framework and the prevailing jurisprudence finds that the issues for determination are:

i. Whether the grounds of objection in the preliminary objection dated 26th October 2021 by the respondent are merited;

ii. Whether the applicant has met grounds for issuance of interlocutory injunctions.

13. It has been stated that a preliminary objection should be raised on a matter of law and not facts as was pronounced in the *locus classicus* case of **Mukisa Biscuit Company – vs- West End Distributors Limited (1969) EA. 696** and buttressed by the Supreme Court case of **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR**.

14. The Respondent's 17 grounds of objection include matters of law as well as issues of fact. This court shall only make a pronouncement on grounds of objection on law compressed into one main ground as: *whether the court lacks jurisdiction to determine the suit since it is time barred under Section 4(1)(a), Section 7, Section 27 of the Limitation of Actions Act*. The said sections stipulate that actions of contract cannot be brought after the end of six years; an action to recover land should not be brought after the end of twelve years.

15. To determine whether the suit is time barred as claimed by the Respondent, this court duplicates the prayers sought by the Plaintiff as:

1. A permanent injunction against the Defendants, their servants and/ or agents from interfering, trespassing, alienating, advertising, offering for sale, charging, mortgaging, transferring, assigning or otherwise dealing or disturbing quiet possession of the Plaintiffs in land LR No. 5842/17 Karen one acre thereof occupied by the Plaintiff (suit premises.)

2. A declaration that there is a proprietary/ constructive trust in favour of the Plaintiffs over the suit premises.

3. An order of specific performance directing the 1st Defendant to transfer the suit premises to the Plaintiffs, that is to say; transfer of one acre of land out of parcel No. 5842/17 Karen being the portion of land occupied by the Plaintiffs, failing which the Registrar of Court do sign the necessary transfer documents transferring the suit premises to the Plaintiffs.

16. Without getting into the merits of the case at this interlocutory stage, this court notes that there is a prayer for proprietary/ constructive trust in the plaint. **Section 20(1)** of the **Limitation of Actions Act** stipulates that: "**None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust.**" Similarly, the Court of Appeal in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** held that:

*"... In **Mwangi & another –vs– Mwangi (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In **Mutsonga – vs- Nyati (1984) KLR 425** and **Kanyi – vs- Muthiora (1984) KLR 712**, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity... Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention..."*

17. In **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, the Court of Appeal stated thus;

" a person put in possession by the proprietor and claiming an equitable interest cannot be in occupation of land illegally pending the determination of the nature and extent of the equitable rights by a court" .

18. The doctrine of constructive trust is anchored on equitable rights. The Applicant contends that they have been utilizing the suit land for the last 24 years. The Respondents disputes this averment. This far it is quite apparent that the nature and extent of occupation by either party is a contested issue of fact which elicits arguments requiring production of evidence. In that regard and keeping in mind the claim of the

Applicants as captured in paragraph 15 of the plaint, I find that the Preliminary objection is not merited. The parties ought to be given an opportunity to canvass their issues at the main trial.

19. On the issue of injunction, this court has already made a pronouncement that the nature and extent of occupation by either party is not yet known to this court, thus I will not belabor rehashing the principles set out in **Giella v Cassman Brown Co Ltd [1973] EA 358**. I have seen the photographs availed by the Applicant which depicts the existence of relatively mature trees. I see no structures on the land. This court is not expected to make conclusive findings of law and facts at this infancy stage of the suit. However, justice and fairness calls upon this court to preserve the property in dispute from being wasted or alienated pending a final determination by giving an order of maintenance of *status quo*, as well as an order of inhibition. In **Daniel Kinyanjui Gitau & 227 Others v Mary Ruguru Njoroge [2020] eKLR**, the court stated that;

“The order for the maintenance of status quo therefore meant that things were to remain as they were as at the date of the delivery of the Ruling”

20. In light of the acrimony regarding who and how the land is being utilized, the court directs that the land is to be preserved as it is.

21. The disposal orders are thus:

i. The preliminary objection is hereby dismissed;

ii. The application dated 27.8.2019 is marked as SPENT in lieu of maintenance of status quo.

iii. That status quo on THE ONE ACRE PORTION IN

LR No. 5842/17 be maintained pending the hearing and determination of this suit whereby none of the parties is to alienate, waste or utilize the portion of that land in any manner, including cutting trees.

iv. An order of inhibition is hereby issued against the Land LR. No. 5842/17 to prevent alienation of the same.

v. Each party shall bear their own costs of the application and the preliminary objection.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

F. N. Nyaga for the Plaintiff

Nyaguthii for the Defendant

Court Assistant: Eddel Barasa