



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 868 OF 2013

NJIHIA NJOROGE.....PLAINTIFF

VERSUS

SULEIMAN NDUKIA KIANEDEFENDANT

RULING

The Plaintiff's Application

The Plaintiff in his application by way of a Notice of Motion dated 18th July 2013 is seeking orders that the Defendant be evicted from the land known as Limuru/Kamirithu/T101 (hereinafter “the suit property”) and that any illegal structures erected thereon be demolished. The grounds for the application are that the Plaintiff is the registered proprietor of the suit property, and is anxious to possess and enjoy his property. However, that the Defendant has refused to vacate the said property despite demand being made.

The Plaintiff in a supporting affidavit sworn on 18th July 2013 states that he became the registered proprietor of the suit property in 1967, and attached a copy of the suit property’s title deed in his name. Further, that in 1968 he constructed a rental house comprising of ten rooms on the property, which the Defendant rented. The Plaintiff averred that the Defendant started defaulting in the rental payment from 1998, and that after having been given verbal and written notices, he declined to vacate the suit premises. The Plaintiff thereupon proceeded to seek eviction orders in Limuru Principal Magistrate Court Case No. 257 of 2009, and the said Magistrates court ruled that it had no jurisdiction and referred him to the Land Disputes Tribunal.

Further, that the Limuru Land Dispute Tribunal thereafter heard the parties and gave an award favourable to the Plaintiff which he attached. However, that in the meantime the Defendant also filed a suit in this Court in Nairobi ELC Suit No. 495 of 2009 for orders that he be declared the owner of the suit property through adverse possession, and also proceeded to the High Court under Judicial Review ELC 22 of 2010 to block the award by the Limuru Land Dispute Tribunal from being adopted by the Limuru Principal Magistrate Court. The Nairobi ELC Suit No. 495 of 2009 was dismissed for want of prosecution, while the High Court in Judicial Review ELC 22 of 2010 found that the Limuru Land Dispute Tribunal had the mandate to determine the case, but overstepped the same by awarding damages. The Plaintiff stated that as a result the Defendant is still occupying the suit property.

The Defendant's Response

The Defendant opposed the application in a Replying Affidavit sworn on 3rd September 2013. He denied ever being a tenant of the Plaintiff, and stated that he purchased the suit property from the said Plaintiff for Kshs.370,000/= in the year 1990, and has continuously lived on the said parcel of land with his family since the year 1980. Further, that the Plaintiff thereafter declined to transfer the suit property to him, and he then filed ELC Suit No. 459 of 2009 in this Court against the Plaintiff claiming ownership of the suit property by way of adverse possession, which suit was dismissed by this Court on the 25th February 2012 for want of prosecution.

The Defendant further stated that there is pending in this Court ELC Suit No. 844 of 2013 which he has filed against the Plaintiff claiming ownership of the suit property through adverse possession, and he annexed a copy of the Originating Summons in the said suit. He also stated that this Court in Judicial Review Application No. 22 of 2010 held that the Limuru Land Disputes Tribunal lacked jurisdiction to determine ownership of the suit property. Further, that the orders sought in the Plaintiff's application cannot be granted as the Defendant is lawfully living on suit property as the beneficial owner thereof through adverse possession.

The Submissions

This Court issued directions that the parties do file and exchange submissions on the Plaintiff's Notice of Motion. The Advocate for the Plaintiff filed submissions dated 14th January 2014, wherein he argued that the Plaintiff had shown he is the legal owner of the suit property and produced evidence of his title, and that the Defendant had not shown any evidence that he bought the said property as claimed. Further, that the intentions of the Defendant are to continue residing on the suit property. The Plaintiff relied on the decisions in **Johnstone Amulioto Ayub vs Peter Mwangi (2012) e KLR** and **Peris Osengo Oyoko vs James Ambula Oyoko (2007) e KLR** where evictions of the Defendants were ordered by the court after the Plaintiffs were found to be the registered owners of the suit properties.

The Advocate for the Defendant filed submissions dated 10th February 2014 wherein he contended that the Plaintiff has admitted that the Defendant took possession of the suit property in 1978 and is still in the suit premises, and is also aware of ELC Suit No 844 of 2013 (OS) as he filed a reply thereto. Further, that the suit herein is statute barred as it contravenes section 7 of the Limitation of Action Act, and that under section 17 of the said Act the Plaintiff's title to the suit property got extinguished in the year 1992. The Advocate also sought to distinguish the judicial authorities relied upon by the Plaintiff on the ground that unlike in the present case where the Defendant is claiming adverse possession, the Defendants in the cited cases had no legal and/or equitable rights over the suit properties.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the mandatory injunction of eviction that he seeks. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases

where the court thinks that the matter ought to be decided at once. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 as follows:

“a prima facie case in a civil application includes but 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 or rebuttal from the latter.”

The Plaintiff has brought evidence of his title to the suit property, and to this extent I find that he has shown his rights in the suit property and therefore has *prima facie* case. The only question remaining to be answered is whether this is a clear case for a mandatory injunction to issue. I find that it is not a clear case in light of the Defendant’s competing claim to ownership of the suit property by way of adverse possession, and the pending case in this regard in ELC Suit No. 844 of 2013 which fact is not disputed by the Plaintiff. The prayer sought in the Plaintiff’s Notice of Motion dated 18th July 2013 is therefore denied for this reason, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4th day of August, 2014.

P. NYAMWEYA

JUDGE