



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 955 of 2012

ESTHER MUTHONI GATHANGU.....PLAINTIFF

VERSUS

LUCY NJERI.....DEFENDANT

RULING

The Plaintiff filed an application dated 6/12/2012 seeking orders that:

1. Spent
2. An order does issue compelling the Defendant to file a petition for the grant of letters of administration of the estate of Kamau Gathangu who is her husband and the Plaintiff’s brother.
3. (No prayer indicated as No. 3)
4. Spent
5. The Honorable Court do issue a permanent injunction, restraining the Defendant, her children, agents, servants and or any other party claiming title under her or otherwise connected with her howsoever from evicting the Plaintiff from alienating or in any other way interfering with the Plaintiff’s occupation and enjoyment of Ngong/Ngong/55464 pending the determination of the suit.
6. Costs of the application be provided for

The application is premised on grounds that the Plaintiff is a sister to the Defendant’s husband – Kamau Gathangu. The Plaintiff states that her brother Kamau Gathangu is deceased from 5/12/2012 and a grant has not been issued in his estate. Further that the deceased is the registered owner of the property known as Ngong/Ngong/55464 (suit property). She has lived on the suit property since November 1997 and that the Defendant has been her neighbor since then.

Further that the Plaintiff has occupied the same peacefully without interruption for 16 years. On 21/2/2012 the Plaintiff received a demand letter from the Defendant’s Advocates purporting to issue her with notice to vacate the premises, within 14 days thereof, allegedly in execution of a Will purportedly left by the deceased.

The application is supported by an affidavit sworn on 6/12/2012 by the Plaintiff. She deposes that herself and the Defendant have lived peacefully as neighbours in Ngong/Ngong/55463 and 55464 respectively. That they have built homes and business premises on the said properties which have been let to various tenants. She deposed that since her brother’s death, the Defendant and her children have been hostile to her threatening to evict her.

The Plaintiff referred to the letter of demand sent to her by the Defendant's advocates. It is her disposition that from the said letter, she is apprehensive that the Defendant is keen to evict her from the said property. She deposed further that during the deceased's lifetime, he gave her the suit property to do as she wished in the presence of her siblings and the Defendant and for the 16 years she has been residing thereon, there has never been an issue of her being in possession. She also stated that she had never been drawn to the Will allegedly left by her deceased brother. Consequently, any attempted eviction would be in contravention of the law.

It was her disposition that she had a good claim of adverse possession by virtue of being in possession of the suit property which has been open and without interruption for over 16 years. However, she cannot file for adverse possession unless the Defendant obtains letters of administration on the estate of the deceased.

This application was opposed by the Defendant who filed a Replying Affidavit sworn on 29/1/2013. It was her disposition that herself and her family have never co-existed peacefully with the Plaintiff as alleged or at all. Further that during her husband's lifetime, he was in constant arguments over the suit property with the Plaintiff and he was dissatisfied with the structures that she had constructed thereon. Further that her husband only allowed her to construct for she promised that they were temporary. The Defendant contended that the Plaintiff is a mere licensee of the said property.

The Defendant deposed that she was not being hostile to the Plaintiff but merely informed her of the existence of the Will and the contents thereto. She stated further that she was willing to obtain letters of administration to the estate of the deceased but that she had no funds to initiate the process. She contended that her husband to his death expressed his intentions for the suit property to be for his two wives and their children even though he allowed the Plaintiff to reside thereon. In that regard, the Defendant maintained that the Plaintiff did not meet the essential requirement of uninterrupted possession.

This application was canvassed by way of submissions. The Plaintiff filed submissions dated 14/2/2013 wherein she reiterated the contents of her application. It was her submission that there was no grant of probate of the alleged Will left by her brother and therefore the Will lacked the force of the law and therefore could not be enforced.

She submitted that it was not in dispute that she had been in occupation for over 16 years and therefore had a good claim of adverse possession which could only be asserted against the registered owner or where the said owner is deceased, the administrator(s) of their estates. The Plaintiff urged the Court to allow their application and grant the prayers as sought.

The Defendant filed her submission dated 6/3/2013. She submitted that the Plaintiff could not claim ownership by adverse possession in view of the fact that she resided on the suit property by consent from the registered owner.

On the issue of the letters of administration, the Defendant submitted that this court lacked jurisdiction to issue prayer no. 2 as the same could only be issued by the Family Division of the High Court. With respect to injunctive orders, the Defendant submitted that the Plaintiff had not met the threshold as stated in the case of **Giella v Cassman Ltd (1973) EA 358**.

The first point I want to address is whether this court can grant prayer no. 2 of the application. The Defendant is of the view that this Court lacks jurisdiction to do so. The Court finds that its jurisdiction on matters in respect to land is clearly stated in the Constitution at Article 162(2)(b), the Land Act at Section 150 and the Land Registration Act at Section 101.

However, despite the Court having jurisdiction over this matter, the question is whether it can grant the order as prayed. It is the view of this Court that this is not the appropriate forum and procedure to grant such an order. The Law has provided a mechanism to cure instances where there is unwillingness to represent an estate of a deceased. (Refer to the Law of Succession Act, 5th Schedule Rule 14). Counsel

should refer to the relevant provisions and file the requisite proceedings.

It is to be noted that this dispute is between relatives. Some facts are not in dispute to wit; the property in dispute is registered in the name of the deceased-Kamau Gathangu who is the link between the Plaintiff and Defendant.

Secondly, the Plaintiff has resided on the suit property for well over 16 years. Whatever is in dispute is whether the Plaintiff has resided there with the permission of the deceased or whether the Plaintiff was given the suit property as a gift by the deceased during his lifetime. There is also an issue of acquiring a right over the suit property by way of adverse possession. These issues can only be determined on trial when parties will have had an opportunity to give evidence and call for witnesses.

At this juncture what the Court is called to determine is whether the Plaintiff has met the threshold to warrant the grant of an injunction pending the hearing and determination of the suit. The factors to be considered by a Court in an application for an interlocutory injunction are well settled. The Court of Appeal for East Africa in the case of **Giella v Cassman Ltd (1973) EA 358** gave three requirements.

Firstly, an applicant has to demonstrate a *prima facie* case with probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss which cannot be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the matter on a balance of convenience.

The Plaintiff is not the registered owner of the suit property. Nevertheless, she has been in occupation thereon for a period of 16 years. From the foregoing, it is unclear to this court whether her occupation was meant to be temporary or whether she had been given the said property as a gift. It is the view of this Court that the Plaintiff has failed to meet the first requirement of *prima facie* case.

However, this Court has a duty to preserve the property and safeguards the interests of each party pending the hearing and determination of the suit. It would be detrimental to the Plaintiff if she were evicted before the suit is determined. I am guided by the decision in the case of **Ougo & another v Otieno (1987) KLR 1** wherein the Court of Appeal stated that “*the general principle where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in trial*”. I hereby issue a ***status quo order*** in the following terms:

- The Plaintiff shall remain on portion(s) she occupies in the suit property known as Ngong/Ngong/55464 pending the hearing and determination of the suit.
- Further, the Defendant her children or agents shall not interfere with the suit property until the suit is determined.
- Costs of this application shall be in the cause.

Dated, signed and delivered this **18th day of April, 2013**

L.N. GACHERU

JUDGE

In the Presence of:-

Inyangu holding brief Kiarie for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Anne : Court Clerk