



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 108 OF 2004(O.S)

ANDREW MUNYINYI1ST PLAINTIFF
EDWARD NJENGA2ND PLAINTIFF
ALLAN MBUGUA3RD PLAINTIFF

VERSUS

KIBERI MUNYINYI IGOGUDEFENDANT

RULING

The Plaintiffs in the suit herein filed an application by way of Notice of Motion dated 30th November 2011 seeking the following substantive orders:

1. That this Court be pleased to stay proceedings in Misc. Civil Application No. 14 of 1972 pending *interpartes* hearing and determination of this Application.
2. That pending the hearing and determination of the suit herein an order for a temporary injunction be issued restraining the Defendant whether by himself, servants, agents employees or anyone claiming through him or on his behalf from doing the following acts or any of them, that is to say from further trespassing on, encroaching, invading, occupying, developing, leasing, letting, removing the cautions, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiffs' possession of, entitlement to and/or interest in the land known as L.R. Number Kiambaa/Ruaka/221 (hereinafter referred to as the suit property), and this order be noted in the Kiambu District Land Registry.

The grounds for the application are that this matter is partly heard before this Court and it relates to the suit property, and that there is Misc. Civil Application 14 of 1972 in Kiambu Chief Magistrate's Court which relates to the suit property in which the Plaintiffs are not parties, neither were they aware of until recently. The Plaintiffs then made an application under certificate of urgency to be enjoined as interested parties in Misc. Civil Application 14 of 1972, and the said lower court dismissed the said application in a ruling delivered on 24th November, 2011. Further, that the Defendant in the said suit in the lower court had earlier made an application to have the cautions on the suit property removed, which application was to come up for hearing on 1st December 2011 and the Plaintiffs herein will have no audience. Further, that once the said Application is allowed, the Defendant herein will move to transfer the suit property rendering this suit a mere academic exercise.

The Plaintiffs claim that their grandfather, grandmother, sister and mother were all buried in the suit property without contest, and that they have occupied the suit property all their lives, have invested and have their matrimonial homes thereon, and that no other land can compensate them. Further, that the Defendant's father, siblings and aunts were all buried in their respective properties which they inherited and the Defendant has never occupied the suit property under reference.

A detailed history of the above grounds is provided in the supporting affidavit sworn by 1st Plaintiff on 30th November 2011, wherein he states that his grandfather, Munyinyi Igogo (Deceased), had six wives, who are now all deceased, namely Wanjiru Munyinyi, Muthii Munyinyi, Kahaki Munyinyi, Wangui Munyinyi, Nyambura Munyinyi and Nyandia Munyinyi. The Plaintiff also states that his grandmother was Nyandia Munyinyi who had had five daughters, and his mother Tabitha Wambui Munyinyi was the fourth born and remained unmarried until her death. Further, that him and the other Plaintiffs who are his brothers were brought up by their mother and grandmother on the suit property together with the sons of Nyambura Munyinyi.

The Plaintiffs also state that the dispute in Misc. Application No. 14 of 1972 is essentially between the trustees of the houses of Wanjiru Munyinyi, Muthii Munyinyi, Kahaki Munyinyi and the Defendant herein on behalf of the house of Wangui Munyinyi who are seeking removal of cautions on the land the Plaintiffs occupy to enable them dispose the same. The pleadings in the applications filed in Misc. Application No. 14 of 1972 are attached as evidence.

The Defendant filed a Replying Affidavit sworn on 13th December 2011 and states he is one of the original applicants in Misc. Civil Application 14 of 1972, which matter was originally filed in the District Magistrate Court at Kiambu as a succession suit, and the said court delivered its judgment on 9th September, 1978. Further, that two appeals, being appeals No. 17 and 18 of 1978 were filed against the said judgment in the Senior Resident Magistrate's Court in Kiambu. The judgment of the Senior Resident Magistrate Court was delivered on 24th July, 1992, and the court ordered that the suit land be shared equally amongst the 5 houses as the 6th house's wife had since died. An appeal against the judgment of

24th July, 1992 was filed in H.C.C.A No. 254 of 1992, which appeal was dismissed on 4th June, 2002, and the High Court directed that the matter be referred back to the Senior Resident Magistrate Court to execute its decree of 24th July, 1992.

The Defendant further states that the Kiambu Chief Magistrate's Court delivered a ruling on 5th April, 2011 directing how the decree is to be executed. Further, that in attempting to give effect to that ruling, it was discovered that the title could not be transferred as ordered until some cautions on the parent title were removed. The Defendant and his co-applicants then filed an application on 8th August, 2011, in the Kiambu Chief Magistrate's Court to have the cautions removed to facilitate execution of the said Court's order of 5th April, 2011. The Defendant also states that the said application is yet to be heard and determined. The Defendant has annexed as evidence copies of the afore-mentioned judgments, ruling, order and decrees.

Both parties filed written submissions, and those filed by the Plaintiffs' Advocate were dated 30th January 2012, and the Defendant's Advocate's submissions were dated 23rd February 2012. The Plaintiffs, Advocate relied on the doctrine of *lis pendens* as articulated in section 52 of the Indian Transfer of Property Act and the decisions in Mawji v US International University & Another (1976) KLR 185, Surinder Kumari Mediratta v Kenya Commercial Bank & 2 others (2005) eKLR and other decisions and argued for the preservation of the *status quo* pending the determination of the suit.

The Defendant's Advocate argued that the Plaintiffs have not shown a *prima facie* case for reasons that the Defendant is wrongly sued as he is not the registered owner of the land, neither is he a legal representative of Munyinyi Igogo, the registered proprietor of the land. The Advocate cited the decision in Trouistic Union International & Anor v Jane Mbeyu & Anor, Civil Appeal No. 145 of 1990, in this regard. The Advocate also argues that no case has been shown by the Plaintiffs for reasons of the court decree in existence as to how the suit property is to be shared, and there are other parties to be registered as owners of the suit property in their capacity as trustees of their houses, who have not been made parties to this suit.

The Defendant's Advocate also submitted that the application is *res judicata* as a similar application was dismissed by the Kiambu Court on 24th November 2011 and the Plaintiffs have been indolent as they filed suit on 9th February 2004 and it has taken them over 7 years to apply for an injunction. It was also submitted that the Indian Transfer of Property Act does not apply to land registered under the Registered Land Act (Cap 300), and the doctrine of *lis pendens* does not therefore apply.

After consideration of the pleadings filed in this case and submissions by the parties, I find that there are two main issues for consideration. The first issue is whether this Court can stay the proceedings in Misc. Civil Application No. 14 of 1972. On this issue, I do find that the same has already been decided by the Kiambu Chief Magistrate's Court pursuant to the Plaintiffs' application in the said Court dated 19th August 2011 seeking the same prayer, and their admission that the said Court dismissed the application in a ruling delivered on 24th November 2011. The right course of action for the Plaintiffs would have been to appeal against the said decision. I am also of the view that there are no proceedings capable of being stayed in the said suit as what is outstanding is execution of the Court's decree.

The second issue for determination is the whether Plaintiffs have met the conditions for the grant of an injunction as set by Giella vs Cassman Brown & Co Ltd (1973) EA 358. The first condition is whether the Plaintiffs have demonstrated a *prima facie* case in relation to the suit they have filed herein by way of Originating Summons. The suit seeks orders for adverse possession, and the Plaintiffs claim to have been in possession of the suit property since their birth, which claim is not disputed by the Defendant. I also find that if the suit property is not preserved, the suit filed herein which is already part heard will be rendered nugatory. In addition, I do not find that the Plaintiffs have been indolent, as the act giving rise to this application is the application filed by the Defendant and his co-applicants on 8th August, 2011 in Misc. Civil Application 14 of 1972 at the Kiambu Chief Magistrate's Court to have the cautions on the suit property removed.

It is also my finding that this suit is not *res judicata* as the parties herein are different from those in Misc. Civil Application No. 14 of 1972, and the issue herein is one of adverse possession, while Misc. Civil Application No. 14 of 1972 and the appeals therefrom dealt with the issue of succession. The Defendant has also made the argument that he is wrongly sued and that there is already a court decree on the suit property. I am of the opinion that these are arguments which ought to have been raised much earlier by the Defendant as preliminary objections, and which can now only to be argued in his Defence at the full trial which has already commenced. In any event as no evidence was brought of any subdivisions of the suit property, the orders of this court will have to be as against the suit property as presently registered.

It is therefore hereby ordered as follows:

1. Prayer 2 of the Plaintiffs application dated 30th November 2011 is denied.
2. Pending the hearing and determination of the suit herein an order for a temporary injunction is granted restraining the Defendant whether by himself, servants, agents, employees or anyone claiming through him or on his behalf from trespassing on, occupying, developing, leasing, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiffs' possession of the land known as L.R. Number Kiambaa/Ruaka/221.
3. The Plaintiffs to serve this order on the Kiambu District Land Registrar within 14 days, and the order to be noted against the title of L.R. Number Kiambaa/Ruaka/221 in the Kiambu District Land Registry forthwith.

Dated, signed and delivered in open court at Nairobi this ____19th____ day

of ____April____, 2012.

P. NYAMWEYA

JUDGE