



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 335 of 2011

PETER NGANGA
NGURIMU.....PLAINTIFF

-VERSUS-

JOSPHINE
WANJIKU.....DEFENDANT

AND

DISTRICT LAND REGISTRAR
KIAMBU.....INTERESTED PARTY

RULING

The Plaintiffs application by way of Notice of Motion dated 8th July 2011 is seeking orders that a permanent injunction do issue restraining any further dealings whatsoever over the suit parcel of land herein known as KARAI/GIKAMBURA/581 (hereinafter referred to as the suit property) pending the hearing and determination of the originating summons filed herein. The application is brought under the provisions of Order 40 of the Civil Procedure Rules of 2010, section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The grounds for the application are that the Plaintiff has been in possession of and resident in the suit property for the last thirty one years, and that his possession is valid under the Registered Land Act, the parent statute of the suit property, and the Limitation of Actions Act. Further, that the District Land Registrar of Kiambu District has, by failing to register the Plaintiff's caution, put the Plaintiff's livelihood as well as that of his family in jeopardy.

The said grounds are given detail in the Plaintiff's Supporting Affidavit sworn on 1st July 2011, wherein he states that his family has been cultivating the suit property since 1973 after his father bought the said land from one Njuguna Githere, and that when the Plaintiff got married in 1980, his father instructed him to build a house thereon which he did, and whereon he has lived with his family to date.

The Plaintiff further stated that during the time he has lived on the suit property, no one has claimed the same other than his father. However, that after conducting searches and obtaining an extract of title of the suit property he discovered that the suit property was until April 2011 registered in the name of Kinuthia Wakukura, and that on 13th April 2011 the said property was transferred to one Josephine Wanjiku, who is the Defendant herein, pursuant to orders given in Succession Cause No. 185 of 2009 Kiambu. The Plaintiff has attached as evidence copies of Certificates of Search dated 22nd September 2009 and 21st April 2011, and a copy of the extract of title of the suit property certified as a true copy on 7th June 2011, which corroborate his statements.

The Plaintiff avers that having lived on the suit premises since 1980, the prescribed period of twelve years to recover the suit premises from him under the Section 7 the Limitation of Actions Act (Cap 22) expired in 1992. Further, that the Defendant's deceased father's title to the suit premises was therefore extinguished in 1992, and since the suit property did not form a part of the Deceased's estate, the transfer of the suit premises by whatever means to the Defendant in 2011 is null and void. The Plaintiff also averred that the Defendant now holds the suit property in trust for him, and that unless the Defendant is enjoined by this court his Originating Summons would be rendered nugatory as he had been seeing the Defendant visiting the suit property frequently with different persons, and believes that she is the process of selling the said property.

The Defendant's response is in a Replying affidavit she swore on 22nd August 2011, wherein she states that she is the registered owner of the suit property, and inherited the said property from her father one Kinuthia Wagakura who died on 6th July, 1973. Further, that she was issued with a Certificate of Confirmation of a Grant on 26th May 2010 *vide* succession cause number 185 of 2009 filed in the Chief Magistrates court at Kiambu, and to which the Plaintiff did not object. The Defendant also states that her late father Kinuthia Wagakura had always been the registered owner of the suit property until she inherited the same, and at no time did he ever sell it to Njuguna Githere or any other person.

The Defendant deponed that on 28th August 1973 after her father's death, one James Njuguna Githere put a caution on the suit property claiming a purchaser's interest, and that the said caution was removed by the Land Registrar Kiambu on 4th March 2010. The Defendant denied holding the suit property as a trustee for the Plaintiff and annexed as evidence is a copy of the title deed to the suit property in her name and of the said Certificate of Confirmation of Grant issued to her on 26th May 2010.

The Defendant deponed that after the death of her father, her brother by the name of Njogu Kinuthia lived on the suit property until he died and was buried on the suit property. The Defendant states that she came to the suit property in the year 2004 whereupon the Plaintiff chased her away, and threatened to kill her. She thereupon reported the Plaintiff's trespass to the Chief of Karai location, one James Njuguna Mburu, who summoned the Defendant and Plaintiff orally to a meeting at the said Chiefs office. Further, that the said meeting was attended by the Defendant, Plaintiff, and three elders who are residents of Gikambura in Karai location namely Mwangi Kago, Peter Kamau Gachina and Gichui Ndagi, and that the Plaintiff was thereupon told not to trespass on the suit property anymore. The Defendant has annexed Affidavits sworn by the said James Njuguna Mburu, Peter Kamau Gachina and Gichui Ndagi all sworn on 22nd August 2011, wherein they depone to the said events.

The Defendant averred that after the said meeting at the Chief's office the Plaintiff kept off the suit property until the year 2007, when he forcefully built a house for his two grandsons who are the sons of the Plaintiff's son called Muthemba Ng'ang'a (Deceased). The Defendant however also stated in the same affidavit, that the person whose grand children have been trespassing on the suit land since 2007 in is one Leonard Ngurimu Njuguna who is a different person from the Plaintiff. Further, that the Plaintiff does not live on the suit property and has never lived there, has not fenced the suit property or any part thereof, has

not planted any crops thereon and has not been in possession as he claims.

Finally, the Defendant denied that she had intentions of selling the suit property and stated that the Plaintiff had not exhibited a sale agreement or an application for consent to the Land Control Board to show that intention. On the contrary the Defendant stated that whenever she goes to the suit property and tries to cultivate it, the Plaintiff chases her away threatening her with dire consequences, and thus forcing her to stay with her daughter.

A supplementary affidavit sworn by one Daniel Njenga Njunge on 16th November 2011 was also filed by the Plaintiff, wherein the Deponent states that he is a resident of Gikambura village, and that he knows the Plaintiff very well as they grew up together, and because he was also the Sub-Chief of Gikambura sub-location between 1987 and 2011. The said Deponent also stated that the claim by the Defendant that her brother Njogu Kinuthia resided and was buried on the suit property is strange, for reasons that firstly he was not aware that there was any other person other than the Plaintiff who had been living and residing on the suit property, and secondly, because having served as the Sub-chief of the area, he would have known about a burial on the suit property. The Plaintiff also reiterated these facts in a Further Affidavit he swore on 16th November 2011, and stated that he was a stranger to the averments in the affidavits sworn by James Njuguna Mburu, Peter Kamau Gachina and Gichui Ndagi that were annexed to the Defendant's Replying Affidavit.

The foregoing facts were repeated by the Advocates for the Plaintiff and Defendant at the hearing of the application on 27th February 2012. The Plaintiff's Advocate, Mr. Mungai submitted that the Plaintiff had shown that his father had bought the land from one James Githere, as the copy of Certificate of Official Search dated 22nd September 2009 annexed as evidence by the Plaintiff to his Supporting Affidavit shows a caution registered against the title of the suit property on 28th March 1973 by a purchaser by the name of James Njuguna Githere. The Advocate also submitted that the Defendant seems to have in mind a different person from the Plaintiff since the Leonard Ngurimu Njuguna referred to by the Defendant, Peter Kamau Gachina and Gichui Ndagi in their affidavits is the Plaintiffs father and not the Plaintiff.

The Plaintiff's Advocate relied on the reference in **Southern Credit Banking Corporation v Salim Manji and Another, Nairobi Civil Appeal No. 201 of 2002** to the conditions for grant of an injunction as stated in **Giella vs Cassman Brown & Co. Ltd 1973 E.A 358**, and contended that the Plaintiff had shown he had lived on the suit property since 1980, and therefore had a *prima facie* case as there is limitation of actions. The Advocate also contended that the Plaintiff and his family are still living on the suit property, and the balance of convenience tilts in their favour.

Mr. Wamwai appeared as the Defendant's Advocate, and opposed the application. In addition to the averments made in the foregoing by the Defendant, the said Advocate submitted that the issue of the correct names of the Plaintiff and who is the right party in the suit filed herein can only be canvassed at the hearing of the main suit. The Advocate also relied on the authority of **Chimba Mbeyo Mokunga vs Ahmed Abdulla Mombasa H.C.C. C O. 144 OF 2004(O.S.)** for the submission that the Plaintiff had not produced any photographic evidence to show developments on the suit property or of his home on the same, and had not thereby shown a *prima facie* case.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** for an injunction to issue. On the first requirement of a *prima facie* case, the Plaintiff's claim in the Originating Summons he filed on 8th July 2011 is that he has acquired an overriding interest over the suit property under section 30(f) of the Registered Land Act and by virtue of Section 7 of the Limitation of Actions Act, having lived on the suit property for more than twelve years. It is also not disputed that the Defendant is the registered owner of the suit property and is not in possession of the same.

The Plaintiff's possession is disputed by the Defendant who claims that she has reported him to the area Chief as a trespasser, and that it is not the Plaintiff in possession but his grandsons. The Plaintiff also at

the same time states that the person in possession is not the Plaintiff but one Leonard Ngurimu Njuguna who she states has been trespassing on the suit property since 2007. Both parties have gone to great lengths to bring evidence on the issue of possession, which can only be subjected to detailed examination during trial and not this stage.

However, as the Plaintiff's possession of the suit property is disputed and he has not produced any evidence of the said possession, I am inclined to find that he has not established a *prima facie* case, since uninterrupted possession is essential for a claim for adverse possession. I will therefore decide the Plaintiff's application on the basis of convenience. The Defendant has already admitted that she is not in possession of the suit property, and that relatives of the Plaintiff are the ones in possession. In addition the need to preserve the suit property pending the hearing of the Plaintiff's suit also tilts the balance of convenience in the Plaintiff's favour.

For the reasons given in the foregoing, I hereby order that the *status quo* be maintained as follows pending the hearing and determination of this suit or until further orders:

1. The Plaintiff and Defendants either by themselves or through their representatives, agents or servants, are restrained from transferring, leasing, charging, or undertaking any construction on the suit parcel of land herein known as KARAI/GIKAMBURA/581
2. The Defendant either by herself or through her representatives, agents or servants not to interfere with the Plaintiff's occupation and possession of the suit premises.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE