



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 30 OF 2020 (O.S.)

LYDIA KINA NJERU.....PLAINTIFF/APPLICANT

VERSUS

MISHECK IRERI NJIRU.....DEFENDANT/RESPONDENT

RULING

1. The application before me is a motion on notice dated 9/9/2020 and filed on 10/9/2020. It is expressed to be brought under **order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 68 of the Land Registration Act, 2012 and all other enabling law**. The applicant – **Lydia Kina Njeru** – is seeking both injunctive and inhibitory orders against the respondent – **Misheck Ileri Njiru** – against whom she is involved in an ownership tussle over land parcels **Nos. Kyeni/Kigumo/7848, Kyeni/Kigumo/7847 and Kyeni/Kigumo/7848**. The substratum of the application is an originating summons filed by the applicant on 10/9/2020 claiming ownership of the three parcels of land as an adverse possessor.

2. The application came with six prayers but three (3) of them – prayers 1, 2 and 3 – are now moot, all having been considered at the *ex parte* stage. The prayers for consideration now are also three (3) – prayers 4, 5 and 6 – and I proceed to set them out *ipssisma verba*.

Prayer 4: That the respondent either by himself, his agents and/or servants and anybody claiming through the respondent be restrained from evicting and/or interfering with the applicants peaceful occupation of land parcels Nos. Kyeni/Kigumo/7846, 7847 and 7848 or in any manner dealing or interfering with the status quo of the said land parcels pending the hearing and determination of this suit.

Prayer 5: That the court do inhibit any dealings with land parcels No. Kyeni/Kigumo/7846, 7847 and 7848 pending hearing and determination of the suit.

Prayer 6: That costs of this application be provided for.

3. The application is anchored on the grounds, *inter alia*, that since 1975 the applicant has been in occupation of land parcel No. Kyeni/Kigumo/2097 now subdivided into Kyeni/Kigumo/7846, 7847 and 7848; that the original land parcel No. 2097 was registered in the name of the applicant's late husband; that the applicant does not know how the respondent became the current registered owner; that the respondent has never been in occupation; that the respondent has threatened to sell the three land parcels; that the applicant has extensively developed the land parcels; and that if the prayers sought are not granted, the respondent might dispose of the parcels and thus render the outcome of the suit nugatory.

4. The depositions that came with the supporting affidavit accompanying the application amplify, reiterate and/or extrapolate the grounds relied on by the applicant.
5. The respondent gave a response via a replying affidavit dated 16/10/2020. The replying affidavit however seems targetted at both the application under consideration and the originating summons. The substance of the replying affidavit seem to be more focused on the originating summons than the application at hand. In fact, the request made at the end is that the suit be dismissed. The desired fate of the application is infact not mentioned or asked for.
6. But the substance of the response is nevertheless worth highlighting. According to the respondent, the crucial issue is who was the legal owner of parcel No. 2097 and whether the transfer done was legal. The respondent deposed that the law was followed in all the process leading to change of ownership and the applicant was faulted for feigning ignorance of the process. The applicant was further faulted for not telling the court that the land had been the subject of various litigation in different courts all of which she knew or ought to have known.
7. The respondent then annexed various documents to show how the land changed hands. To the respondent, the applicant is playing mischief. She is aware of the various suit filed in relation to the parcels of land. The existence and determination of those suits was said to make this matter **Res-Judicata**.
8. The applicant filed a supplementary affidavit on 4/12/2020. She reiterated that she does not know how the respondent acquired the land. She emphasized that she is the one in occupation and she pleaded lack of knowledge of other existing or decided suits relating to the land.
9. The application was canvassed by way of written submissions. The applicants submissions were filed on 22/12/2020. In the submissions, the applicant expressed her fear that the respondent might sell the land or even evict her. She said that she was not privy to any sale that might have taken place between the applicant and her late husband. She asked that the status quo be maintained by granting the orders sought so that the land may not be alienated.
10. The applicant then turned attention to the applicable law and cited the case of **Giella Vs Cassman Brown & Co. Limited [1973] EA 358**, pointing out that arising from it, the applicant is required to demonstrate a prima facie case with a probability of success; show or prove that there is real likelihood of suffering irreparable loss that damages cannot compensate; and/or opt for consideration of balance of convenience if doubts arise regarding the first two requirements. The applicant submitted that she has complied with all this. To drive home the point further, the applicant also cited the case of **Robert Mugo Wa Karanja Vs Eco Bank (Kenya) Limited & Another: HCC No. 221 of 2018, Nairobi**. This is a case that invoked and applied the principles in **Giellas case** (supra).
11. The respondent's submissions, were filed on 27/1/2021. Like the response to the application filed earlier, the submissions seem aimed at the suit itself rather than the application. In the submissions, the respondent gives a highlight of the salient aspects of both sides of the case. He then canvasses the issue of res-judicata, which is clearly focused on the suit and not the application. Res-judicata seems to be hinged on the fact that there was a case – **ELC No. 15/2019 – at Runyenjes** between the respondent herein and the brother of the late husband of the applicant – Ndwiga Njoka. The contention in that suit revolved around the burial place of the applicant's husband, with the defendant in the case – Ndwiga Njoka – intending to bury him on the disputed land while the plaintiff, who is now respondent here, was against it. The court ruled in favour of the respondent.
12. It is clear that in that case the respondent, as plaintiff then, was seeking an order of permanent injunction against the defendant – Ndwiga Njoka – to restrain him from burying the applicant's late husband on the disputed land. It is that case which forms the basis of the issue of res judicata raised here. According to the respondent, it matters not that the applicant was not a party in the matter. It is enough that she is the sister in law to the defendant in the case and that the person sought to be buried was her own husband. Two cases – **Mbeyu Wangombe & Another Vs Patani Virpal & 2 Others [2015] eKLR**

and **Mary Igandu Kigotho Vs Michael Wangombe Gatitu [2018] eKLR** – were cited to drive the point home.

13. On the issue of adverse possession, the respondent submitted that it cannot hold as he was only registered as owner of the land in the year 2015. Twelve (12) years have not expired, he submitted. For this, he cited the case of Sophie **Wanjiku John Vs Jane Mwihaki Kimani: ELC No. 490 of 2010, Nairobi.**

14. Ultimately, the court was asked to strike out the suit.

15. I have considered the application, the responses made, and the rival submissions. I have also had a look at the suit as filed. I feel impelled to point out that what is for consideration at this stage is the applicant's interlocutory application dated 9/9/2020 and not the suit contemporaneously filed with it.

16. In this regard, the respondent was duty bound to specifically respond to the application and address both the issues and the law relevant to the application. It was a procedural blunder on the part of the respondent to purport to respond to the suit and the application at the same time and in the same response. Each required its own response. More curious indeed is the fact that the response seems more focused on the suit itself and not the application. The respondent seems to have given the application a wide berth, with his pre-occupation clearly being the dismissal or striking out of the suit.

17. As things stand, it seems clear to me that the applicant is in occupation of the land. The orders sought are clearly meant to maintain the status quo pending determination of the suit. When the application first came to court *ex parte*, the court saw the need to maintain status quo and granted the orders sought for granting at that stage.

18. The fact of occupation of the disputed land by the applicant is not disputed by the respondent. The respondent has also not responded to issues of alleged intended sale of the disputed land by him or even the alleged intention to evict the applicant.

19. I will not comment much on the issues raised in the respondent's response or submissions. Such issues are in my view better left for consideration at the trial and/or determination of the action. In **Shitakha Vs Mwamodo and 4 others [1986] KLR 445**, the court expressed the position I have adopted here when it observed that substantive issues are not for consideration at the interlocutory stage. They ought to be left for trial. This same position emerged in the case of **Mbuthia Vs Jimba Credit Finance Corporation & Another [1988] KLR 1** where the Court of Appeal held, *inter alia*, that the correct approach in deciding an application for injunction is not to decide issues of fact, but rather weigh up the relevant strength of each side proposition. The High Court in that case was faulted for going beyond its proper mandate when it made final findings of fact on a disputed affidavit.

20. The need to maintain status quo has been the basis of many decisions on injunctions at the interlocutory stages. In **Otieno Vs Ougo & Another (No. 2) [1987] KLR 400**, the court held, *inter alia*, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. One may go further in time and cite the case of **Noor Mohamed JanMohamed Vs Kassim Ali Virji Madhani [1953] 20 LRK 8** and **Erinford Properties Ltd Vs Chesire [1974] 2 ALL ER 448** or have a look at much more recent cases such as **St. Patricks Hill School Vs Bank of Africa: HCC No. 7 of 2017, Kajiado [2018] eKLR.**

21. As I pointed out, when the application herein came before the court *ex parte*, the court saw the need to grant orders that would ensure the maintenance of status quo. I still see that need. The response and the submissions made available by the respondent do not lessen or obviate that need. True, some weighty issues are raised in both the response and the submissions. But they are for consideration during trial or determination of the suit, not for the application. I am persuaded that it is right and proper to maintain the status quo pending determination of the action.

22. The upshot, when all is considered, is that the application herein should be allowed and I hereby allow

it in terms of prayers 4 and 5. Costs, which is prayer 6, are to be in the cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **3RD DAY** of **MAY 2021**.

In the presence of M/s Nzekele for Muthoni Ndeke for the Plaintiff and Mogaka for the Defendant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

3.5.2021