



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO 321 OF 2019

IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

IN THE MATTER OF HALF(1/2)PORTION OUT OF LAND PARCEL NO DAGORETTI/KANGEMI T.251

EDWARD MUCHIRI(Suing as the Administrator to the Estate of NELSON

MUCHIRI GITHINJI) PLAINTIFF

VERSUS

CHRISTOPHER NJOROGE KOMU(being sued as the Administrator of the

Estate of KOMU KIARIE) DEFENDANT

RULING

1. This suit was commenced by way of an Originating Summons dated 30th September 2019 under the provisions of **Order 37 Rule 7 of the Civil Procedure Rules and Sections 7 & 38 of the Limitation of Actions Act**. In the Originating Summons, the Plaintiff/Applicant has sought for a declaration that Nelson Muchiri Githinji (deceased) is entitled to half (½) a portion of land known as DAGORETTI/KANGEMI T.251 (the suit property) by adverse possession and should be issued with title documents to the said portion upon excision of the same from the suit property.

2. Contemporaneous with the Originating Summons, the Plaintiff filed the current application dated 30th September, 2019 in which he is seeking for the following orders:

i. That upon hearing this application interparties this Honourable Court do make orders to conserve and preserve the portion of land measuring half (1/2) of the property known as DAGORETTI/KANGEMI T.251 on which the Plaintiff/Applicant has possession pending the hearing and determination of suit.

ii. That the costs of this application be provided for.

3. The Application is premised on the grounds set out on the face of the Application and supported by the affidavit of Edward Muchiri dated 30th of September 2019 who deposed that he is one of the administrators of the estate of Nelson Muchiri Githinji (deceased) duly authorized by his co-administrators to swear the affidavit.

4. The Plaintiff deposed that sometimes in 1966, Nelson Muchiri Githinji (deceased) purchased half (1/2) of the property known as **DAGORETTI/KANGEMI/T.251** (herein the suit property) from Komu Kiarie (deceased); that upon purchase of the said portion of land, Nelson Muchiri (deceased) took possession of the suit property where he built his matrimonial home as well as rental houses and that the estate remains in possession of the suit property to date.

5. According to the Plaintiff, as at the time of Komu Kiarie's death in 1980, he had not transferred the portion of the property to Nelson Muchiri (deceased); that subsequently after his death, a dispute arose between Nelson Muchiri & his estate with respect to the suit property and that the dispute involved the Provincial Administration, village elders and other witnesses whereafter it was established that Nelson Muchiri had indeed lawfully purchased ½ of the suit property from Komu Kiarie.

6. It is deposed that as a result of the late Komu Kiarie's failure to transfer the portion of the suit property, Nelson Muchiri (deceased)

registered a caution against the property in 1987 and later on in 1995; that he thereafter continued demanding that a transfer of his portion be effected in his name by Komu Kiarie's estate, which demands bore no fruit; that as the estate had refused to disclose whether or not they had undertaken succession proceedings, the Plaintiff only became aware of the same upon instructing advocates and that although they are now aware of the proceedings being Nairobi Succession Cause No 1418 of 1992, they are not privy to any details regarding the same.

7. The Plaintiff deponed that as at the time of Nelson Muchiri's death, the portion of his property had yet to be transferred to him; that a recent search on the suit property shows that the same is still registered in the name of Komu Kiarie (deceased); that the late Nelson Muchiri had filed a civil suit in respect of that property being H.C.C.C No 180 of 1995 (O.S) and that he has been unsuccessful in determining the position of the file.

8. The Plaintiff maintains that they have information indicating that the estate of Komu Kiarie intends to dispose of the property in a bid to disentitle the estate of Nelson Muchiri; that the late Nelson Muchiri is entitled by way of adverse possession to be declared as the legal owner of the property and that the court should excise the ½ portion of land from the suit property.

9. In response to the application, the Defendant, as administrator of the estate of the late Komu Kiarie, filed a Replying Affidavit dated 15th January 2020 in which he deponed that no agreement was ever entered into between the late Komu Kiarie and the late Nelson Muchiri over the sale of any part of the suit property; that the alleged agreement dated 20th November 1966 was fraudulently crafted and does not bear the name nor signature of the late Komu Kiarie and that in any event, the deceased was illiterate and could only affix his thumbprint.

10. The Defendant deponed that although the late Nelson Muchiri was in possession of the property, he acquired the same through his mother who was granted permission to stay on the property albeit temporarily on humanitarian grounds and that such permission could not be adverse to the owner's title.

11. According to the Defendant, he is unaware of any demands with regards to the property; that the dispute referred to by the Plaintiff was commenced after the demise of the late Komu Kiarie and that there is no explanation as to why the title was never claimed during Komu's lifetime. It was deponed that H.C.C.C No 1803 of 1995 filed by the late Nelson Muchiri was dismissed for want of prosecution on 13th November 2001.

12. The Defendant contends that a finding by the Chief is not one capable of effecting interest in registered land; that the agreement relied on by the Plaintiff has only the late Nelson Muchiri's relatives as witnesses, neither of whom appended their signatures on the agreement and that the late Nelson Muchiri is not the Plaintiff herein and therefore there cannot be any claim for adverse possession.

13. The Plaintiff swore a Further Affidavit on the 4th of March 2020 in which he reiterated that the sale agreement between the late Komu Kiarie & the late Nelson Muchiri was genuine; that the allegations of fraud were unfounded; that there was no evidence that the late Komu Kiarie was illiterate and unable to sign the sale agreement and that by the time Nelson Muchiri (deceased) took occupation of the property in 1966, Komu Kiarie (deceased) was still alive having passed on in 1980.

14. It was deponed that the Defendant's allegations of temporary accommodation on the suit and are false; that upon purchase of the property, Nelson Muchiri (deceased) took possession thereof, build his matrimonial home together with other properties and has been in actual possession and occupation for over 50 years and that that there was no evidence to show that HCCC No 1803 of 1995 filed by Nelson Muchiri was dismissed.

15. The application was canvassed by way of written submissions. Counsel for the Plaintiff submitted that the Plaintiff has demonstrated that their family has been in un-interrupted occupation of the suit property since 1966; that the Plaintiff wishes to sell the property but the Defendant like his father before him, has refused to issue the Plaintiff with the requisite completion documents to enable them register a title deed in their favor and that it is imperative that the conservatory orders be granted.

16. Counsel submitted that whereas they sought for orders to preserve and conserve the property and not an injunction, the two are one and the same. Counsel cited the case of ***George Orango vs. Liewa Jagalo & 3 Others (2010) eKLR*** where the court stated as follows:

"The purpose of an injunction is to conserve or preserve the subject matter/property pending determination of a suit concerning the property."

17. Counsel averred that the Plaintiff has established a *prima facie* case by virtue of producing the sale agreement for the property which was executed in 1966; that the late Nelson Muchiri lived on the property uninterrupted till his death in 2016 and that his estate is in possession of the suit property to date.

18. Counsel submitted that should the suit property herein be sold by the Defendant, there would be a great imbalance of convenience as the Plaintiff and his family will be rendered homeless and will be denied their constitutional right of shelter and that the Defendant herein will suffer no prejudice as the estate has not occupied the portion of the property since 1966.

19. The Respondent's counsel submitted that the main issue for consideration is whether or not the Plaintiff had satisfied the legal requirements necessary to warrant the granting of the orders sought in the application; that from the material placed before the court, the Plaintiff has not met the necessary requirement and that the application has no merit.

20. With regard to the claim by the Plaintiff of living on the suit property, it was submitted that the same was with the permission of the late Komu Kiarie and that as such, their possession cannot be said to be adverse to the owner's title; It was submitted that in any event, the Plaintiff's reliance on the sale agreement removes the matter from the ambit of adverse possession. To buttress this argument, counsel cited the case of ***Gabriel Mbui vs Mukindia Maranya (1993) eKLR*** where the court stated as follows:

“Moreover if the basis of the claim under adverse possession is a sale agreement, the doctrine will not apply because the sale agreement postulates consent and a sale agreement adverse possession are not held as fellows.”

21. It was submitted by counsel that the Defendant disputes the validity of the sale agreement relied on by the Plaintiff because the same does not bear the name or signature of the late Komu Kiarie who was in any event illiterate and could not have signed documents. Counsel submitted that the agreement was contrary to **Section 3(3) (a) of the Law of Contract Act** which states;

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

i. The contract upon which the suit is founded,-

ii. Is in writing

iii. is signed by all the parties therein.”

22. Counsel submitted that the present application is an abuse of the court; that the Plaintiff has admitted the existence of another suit being **HCCC No. 1803 of 1995** and that the Plaintiff herein should have applied to be substituted as Plaintiff and proceeded with the matter.

Analysis & Determination

23. From the pleadings and submissions by parties, the following issues arise for determination by this court.

i. Whether the present suit is an abuse of the court process?

ii. Whether the Applicant has met the necessary conditions to warrant the grant of the orders sought?

24. It has been submitted by counsel for the Defendant that the present application is an abuse of the court process due to the existence of another suit relating to the suit property being HCCC No. 1803 of 1995. According to the Defendant, the said suit was dismissed in the year 2001 for want of prosecution and that if the matter was not dismissed as alleged by the Plaintiff, then the Plaintiff ought to have pursued his claim in the earlier suit instead of filing this suit.

25. Although not specifically pleaded, the Defendant’s argument is that the present suit contravenes either the doctrine of *res-judicata* or *sub-judice*. On whether this suit is *res-judicata*, Section 7 of the Civil Procedure Act states:

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. In **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR** the Court of Appeal defined *res judicata* thus;

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

27. It is apparent from the foregoing that courts are prohibited from determining matters in which the same parties have litigated on issues which were substantially similar and adjudicated upon to their finality, including matters which have been dismissed by the court for want of prosecution.

28. In the instant case, although the existence of HCCC No. 1803 of 1995 is undisputed, there is no evidence before the Court to show what the precise nature of the suit was or the proceedings thereto or what the Plaintiff therein sought. This court does not therefore have the benefit of perusing the pleadings to determine what was sought therein *vis a vis* what is now being sought. Therefore, the court declines to find that this suit is an abuse of court process.

29. The prerequisites to the grant of an interim injunction as stated in the case of **Giella vs Cassman Brown [1973] EA 358** are to be considered in determining whether the Plaintiff has met the required threshold for an injunction or conservatory orders pending the hearing

of the suit. In the said case, the court stated as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

30. It is trite that the Plaintiff ought to meet these three principles and surmount them sequentially. This was set out by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Ors [2014] eKLR* where the Court stated thus;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

- (a) Establish his case only at a prima facie level,**
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and**
- (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

31. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR* defined *prima facie* thus;

“...So what is a prima facie case? I would say that in civil cases it is a case in 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.”

32. More recently, the Court of Appeal in the *Nguruman Limited vs Jan Bonde Nielsen & 2 others (supra)* while agreeing with the definition of a *prima facie* case in the *Mrao case* went ahead to further expound thus;

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

33. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for a temporary injunction has a right which has been or is threatened with violation.

34. In the Originating Summons, the Plaintiff is seeking for an order of this court that Nelson Muchiri (deceased) be registered as the proprietor of part of the suit property by way of adverse possession. The said registration is pursuant to the provisions of **Section 38 (1) and (2) of the Limitation of Actions Act** which provides as follows:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

35. The Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR* cited with approval the case of *Mbira vs Gachuhi, (2002) IEALR 137* where the law and requirements for adverse possession were reiterated thus;

4 “... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

36. The Plaintiff contends that Nelson Muchiri (deceased) purchased the suit property from Kome Kiarie (deceased) in 1966; that after purchase, the late Nelson Muchiri took over possession and occupation of the property where he remained un-interrupted for over a decade until his demise and that the estate is still in possession of the suit portion. According to the Plaintiff, the estate of Nelson Muchiri is claiming the property by virtue of adverse possession.

37. In support of his case, the Plaintiff produced a copy of an agreement of sale dated 20th November, 1966. The said agreement states that Komu Kiarie (deceased) will sell to Nelson Muchiri (deceased) his plot at Kangemi at the price of Ksh2,300. The Plaintiff has also produced a letter from the Chief of Kangemi Location dated 23rd May, 1995 in which the Chief stated that indeed Muchiri purchased the suit property.

38. On his part, the Defendant avers that the sale agreement is at best fraudulent; that the late Nelson Muchiri's possession of the property was due to permission granted to his mother to stay on the premises, albeit temporarily and that the claim of adverse possession does not arise. The Defendant further contends that the sale agreement is fraudulent and contra-statute for failure to meet the threshold set out in **Section 3(3) of the Law of Contract Act**.

39. It is not in dispute that the late Komu Kiarie is the registered proprietor of the suit land. It is further not in dispute that the late Nelson Muchiri and his family took possession of the suit property and have been in open, continuous, and un-interrupted possession/occupation thereon till his death in 2016.

40. The sale agreement between the parties was purportedly entered into in 1966. The amendment to the **Law of Contract Act** requiring signature and attestation of both parties in respect to land transactions came into effect in 2003. The law pertaining to agreements in respect to land before the amendments of 2003 was considered by the Court of Appeal in the case of ***Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR*** as follows:

“25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.”

41. To the extent that the Plaintiff's claim is that the deceased took possession of the land after buying it prior to the year 2003, and that being already in possession of the suit property, he continued in possession in part performance of the contract, whether oral or written, it does not matter that the purported sale agreement was not signed by the parties to the transaction.

42. Counsel for the Defendant submitted that one cannot claim to have bought land at and the same time seek for orders of adverse possession. That is not true. There are instances where purchase of land can lead to a claim of adverse possession. The Court of Appeal in the case of ***Peter Mbiru Michuki Vs Samuel Mugo Michuki (2014) eKLR*** held as follows:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

43. Whether the present suit meets the circumstances enunciated in the ***Public Trustee case (supra)*** is a matter for trial. The bottom line is that the Applicant has been residing on a portion of the suit land for over a decade. This in itself denotes that the Plaintiff has an interest in the suit land, which interest has to be protected pending the hearing and determination of the suit. Consequently, it is the finding of this court that the Applicant has established a *prima facie* case with chances of success.

44. It is also the finding of this court that the Plaintiff will suffer irreparable damage if the property herein is not preserved pending determination of the suit as his family has been and is still in occupation of a portion of the suit property. Indeed, as was held by the Court of Appeal in ***Margaret Njeri Muiruri (Being the Administrator of the Estate of Joseph Muiruri (Deceased)) v Bank of Baroda (Kenya) Ltd [2001] eKLR***, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.

45. From the above, it is clear that the Plaintiff has met the threshold for the grant of orders of injunction. The court finds that the Plaintiff's Notice of Motion dated 30th September 2019 is merited and makes the following determination;

i. Pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the

Defendant whether by himself or representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the portion of the property known as DAGORETTI/KANGEMI T.251 currently occupied by the Plaintiff.

ii. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY NOVEMBER, 2021

O. A. ANGOTE

JUDGE

In the presence of:

Ms Kagwe for the Plaintiff

Mr. Kingera for the Defendant

Court Assistant – Waweru