



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KILGORIS

ELC O.S NUMBER E004 OF 2021

NTETIA ENE KORTOT.....1ST PLAINTIFF/APPLICANT

NONKOKWA ENE KORTOM.....2ND PLAINTIFF/APPLICANT

-VERSUS-

WILLIAMSON ONYANCHA GISORE.....DEREFENDANT/RESPONDENT

RULING

The Application before court is the one dated 1st July 2021 filed by the 1st and 2nd Plaintiffs/Applicants seeking for inter-alia;-

a) An Order of injunction against the Defendant restraining him, his agents, his relatives or any other person acting on his behalf from trespassing into, encroaching upon, destroying sugarcane, alienating or in any other manner dealing with the portion measuring 4.1 Hectares parcel number TRANSMARA/MAPASHI/329 in which the Applicants have had uninterrupted possession and utilization/usage for over 30 years pending the hearing and determination of the main suit.

b) Costs of the Application.

The Application is supported by the Affidavit of the 1st Plaintiff/Applicant dated 1st July 2021 of which it provides the following grounds in support of the Notice of Motion Application dated 1st July 2021.

1. The 1st and 2nd Plaintiffs/Applicants depone that they are co-wives to the late JOHN NJEROINE KORTOM who was the registered owner of the suit property known as TRANSMARA/MAPASHI/329 MEASURING APPROXIMATELY 4.1 Ha.

2. Prior to the death of the Late JOHN NJEROINE KORTOM, the suit property known as TRANSMARA/MAPASHI/329 was sold to the Defendant pursuant to an Agreement for Sale dated 12th May 1988.

3. The Defendant's/Respondent's name was endorsed in the Green Card as the registered owner of the suit property on the 3.4.1997 and the Title Deed issued formally issued on the 28.10.2013.

4. However, the 1st and 2nd Plaintiff aver that the Defendant/Respondent has never taken possession of the suit property known as TRANSMARA/MAPASHI/329 measuring 4.1 Ha since the same was purchased and therefore has not been in any meaningful occupation thereof.

5. On the other hand, the 1st and 2nd Plaintiffs/Applicants even after the sale of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha continued to occupy the same beyond the year 1988 when the Defendant/Respondent purchased the suit property without any interruption thereof.

6. As a result of the 1st and 2nd Plaintiff's/Applicant's occupation, the suit property known as TRANSMARA/MAPASHI/329 has been leased out to other persons for commercial purposes mainly planting of sugar cane which is still growing in the suit property known as TRANSMARA/MAPASHI/329.

7. Nevertheless, the Defendant/Respondent is now demanding for vacate possession of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha from all those in occupation or using the said suit property known as TANSAMARA/MAPASHI/329 measuring approximately 4.1 Ha hence the filing of this Application as well as the Originating

Summons herein.

8. The 1st and 2nd Plaintiffs/Applicants are seeking a declaration to the effect that they are the beneficial owners through Adverse possession having occupied the property for over 30 years with the knowledge of the Defendant/Respondent and therefore the Defendant's/Respondent's title should be cancelled and instead issued to the 1st and 2nd Plaintiffs/Applicants herein.

9. Similarly, pending the hearing and determination of the claim for adverse possession, this Honourable Court to issue an injunction against the Defendant/Respondent restraining him, his agents, his relatives or any other person acting on his behalf from trespassing into, encroaching upon, destroying sugarcane, alienating or in any other manner dealing with the portion measuring 4.1 Hectares parcel number TRANSMARA/MAPASHI/329 in which the Applicants have had uninterrupted possession and utilization/usage for over 30 years.

The Respondent on the other hand opposes the Application through a Replying Affidavit sworn on the 29th July 2021 and filed in Court on the 10th August 2021.

The Grounds the Defendant/Respondent relies upon in opposition of the 1st and 2nd Plaintiffs/Applicants application are as follows:-

1. Indeed, the Defendant/Respondent purchased the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha from the Late JOHN NJEROINE KORTOM in the year 1988.

2. The Defendant/Respondent confirms that his name was entered into the Green-Card in the year 1997 but was unable to process the Title Deed due to a land dispute which was mediated by the local District Officer in the concerned area.

3. In the year 2013, the Defendant/Respondent was finally issued with a Title Deed by the Transmara District Registry.

4. In addition to the challenge in obtaining the Title Deed to the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha, the Defendant/Respondent has been unable to effectively take possession and occupation of the suit property due to the recurring land clashes within the Transmara region and family challenges which he has clearly outlined in the Replying Affidavit.

5. The Defendant/Respondent states having not taken full possession and/or occupation of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha, the 1st and 2nd Plaintiffs/Applicants cannot claim adverse possession against him.

6. The allegation made by the 1st and 2nd Plaintiffs/Applicants to the effect that the Defendant/Respondent is intending to forcefully evict them and destroy their sugar cane is unfounded because the Defendant/Respondent has always engaged amiable ways of resolving the matter through the relevant administrative channels.

7. Nevertheless, the 1st and 2nd Plaintiffs/Applicants have made it difficult to the Defendant/Respondent to take possession by leasing out the suit property to third parties for commercial purposes of planting Sugar Cane to the detriment of the true registered owner who is the Defendant/Respondent.

The 1st and 2nd Plaintiffs/Applicants filed their submissions on the 7th of September 2021 while the Defendant/Respondent filed their submissions on the 7th of October 2021.

ANALYSIS & THE LAW.

The Application dated 1st July 2021 is a straight forward one as it seeks an interlocutory injunction pending the hearing and determination of the main suit.

In dealing with interlocutory injunctions, the Courts must always desist the temptation of determining issues regarding the substantive suit at this stage.

In this present matter, the issue of Adverse possession is an issue of determination at the hearing of the Originating Summons filed herein.

What the Honourable Court is invited to adjudicate in this present Application dated 1st July 2021 is whether or not the 1st and 2nd Plaintiffs/Applicants have satisfied the settled and guiding principles in the renowned case of **GIELLA-VS- CASSMAN BROWN (1973) E.A at Page 358.**

The Settled and guiding principles provided in the above citation are as follows; -

a) The Applicant Must Show a prima facie case with a probability of success.

b) 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.

c) If the Court is in doubt, it will decide the application on the balance of convenience.

The Honourable Court will now embark to evaluate the 1st and 2nd Plaintiffs/Applicants application dated 1st July 2021 against the above-mentioned principles.

A) The Applicant Must Show a prima facie case with a probability of success.

The 1st and 2nd Plaintiffs/Applicants case in this proceeding is of adverse possession.

The 1st and 2nd Plaintiffs/Applicants aver that indeed their late husband known as JOHN NJEROIKE KORTOM sold the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha to the Defendant sometime in 1988.

The 1st and 2nd Plaintiffs/Applicants view is that after the successful alienation of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha to the Defendant/Respondent, all the proprietary interests and rights thereof passed on to the Defendant/Respondent.

In other words, the possession and/or occupation of the suit property known as TRANSMARA/MAPASHI/329 was exclusively in the hands of the Defendant/Respondent therein and was entitled to enforce that right against anyone the Defendant/Respondent felt was unlawfully and illegally in the said suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha.

The 1st and 2nd Plaintiffs/Applicants case is that the Defendant/Respondent being the registered owner of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha knew of their presence and occupation of the suit property known as TRANSMARA/MAPASHI/329 for a period of over Twelve Years as prescribed in law and therefore the 1st and 2nd Plaintiffs/Applicants have a prima facie case on the issue of adverse possession contained in the Originating Summons herein.

The Defendant/Respondent on the other hand indeed acknowledges purchasing the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha from the Late JOHN NJEROINE KORTOM in the year 1988.

The Defendant/Respondent has not denied that the 1st and 2nd Plaintiffs/Applicants are the wives of the Late JOHN NJEROINE KORTOM.

Similarly, the Defendant/Respondent has not denied that the 1st and 2nd Plaintiffs/Applicants reside, use and/or occupy the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha.

The Defendant/Respondent in Paragraph 12 and 13 alludes that the 1st and 2nd Plaintiffs/Applicants have made it difficult for him to take possession by leasing out the said suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha to third parties who have planted sugar cane for commercial purposes.

It is therefore clear to this Honourable Court with the above analysis that indeed although the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha is registered in the name of the Defendant/Respondent, the occupation and use of the said suit property is with the 1st and 2nd Plaintiffs/Applicants.

A legal question therefore arises to the effect on whether or not the 1st and 2nd Plaintiffs/Applicants have a prima facie case of adverse possession.

In the Case of **Nguruman Limited-Versus- Jan Bonde Nielson & 2 Others (2014) eKLR**, the Court of Appeal stated as follows; -

“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..... 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.”

In this Honourable Court view, the 1st and 2nd Plaintiffs/Applicants have a prima facie case because they have been in occupation and use of the Suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha since the lifetime of their late husband JOHN NJEROINE KORTOM.

The estimated period in which the 1st and 2nd Plaintiffs/Applicants have been in possession and use of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha is more that Twelve (2) Years which is the minimum required in law.

Lastly, the 1st and 2nd Plaintiffs have also proved that the use and occupation of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha was with the knowledge of the Defendant/Respondent therein.

Consequently therefore, on the face of this present Application and the Originating Summons herein, the Honourable Court is satisfied that the 1st and 2nd Plaintiffs/Applicants have a prima facie case with a probability of success at the full hearing.

B) 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.

The Second principle in considering whether or not an injunction should be issued is the issue of damages.

The Plain reading of the above principle is that Courts will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy.

According to grounds pleaded in the Application dated 1st July 2021, the 1st and 2nd Plaintiffs/Applicants aver that they have been in occupation and use of the suit property known as TRANSMARA/MAPASHI/329 since 1988.

The 1st and 2nd Plaintiffs/Applicants aver that they have ploughed the suit property and when they are not in a capability to do so, the 1st and 2nd Plaintiffs/Applicants have leased out the said suit property to third parties and raised funds to educate their children and their own needs.

The 1st and 2nd Plaintiffs/Applicants have attached various handwritten Agreements that vary from the year 2001- 2018.

The Defendant/Respondent has also confirmed in the Replying Affidavit dated 29th July 2021 under paragraph 13 that the suit property known as TRANSMARA/MAPASHI/329 has been planted Sugar cane by third parties that have leased from the 1st and 2nd Plaintiff/Applicants herein.

The Question currently in the mind of this Honourable Court is if the Defendant's/Respondent's threat of evicting and taking possession of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha actually do occur, will damages be sufficient to the 1st and 2nd Plaintiffs/Applicants?

The Honourable Court is of the view that land is an emotive issue especially where a party has been in occupation and/or in use of the same.

The 1st and 2nd Plaintiffs/Applicants having been in occupation and use of the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha since the year 1988, such a period of time in usage and occupation cannot be compensated and/or remedied by way of damages.

Consequently, the Honourable Court finds that the 1st and 2nd Plaintiffs/Applicants has also discharged the burden of proof in this second principle.

C) If the Court is in doubt, it will decide the application on the balance of convenience.

The Honourable Court having found that the 1st and 2nd Plaintiffs/Applicants have satisfied the two earlier principles, the balance of convenience tilts in favor of the 1st and 2nd Plaintiffs/Applicants.

In Conclusion therefore, the Honourable Court makes the followings Orders;-

- a) That an Order of injunction do issue against the Defendant restraining him, his agents, his relatives or any other person acting on his behalf from trespassing into, encroaching upon, destroying sugarcane, alienating or in any other manner dealing with the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1. Ha pending the hearing and determination of the Originating Summons therein.
- b) Similarly, in an effort to preserve and avoid creation of other interests over the suit property known as TRANSMARA/MAPASHI/329 measuring approximately 4.1 Ha, the 1st and 2nd Plaintiffs/Applicants are forthwith prohibited in person and/or through their children, relatives, agents, servants, employees from entering into any new Lease with third parties either for subsistence farming and/or commercial farming pending the hearing and determination of this Originating Summons.
- c) The 1st and 2nd Plaintiffs/Applicants are directed to list the matter for hearing within the next THIRTY (30) DAYS from today's date failure to which Order No.1 hereinabove shall lapse and be vacated thereof.
- d) Costs of the Application will abide the outcome of the Originating Summons.

DATED, SIGNED & DELIVERED IN KILGORIS ELC COURT ON 4TH DAY OF NOVEMBER, 2021.

HON.EMMANUEL.M. WASHE

JUDGE

In the Presence of:-

1. Court Assistant – Matiko
2. Pion for 1st and 2nd Plaintiff/Applicant
3. Begi for Defendant/Respondent