



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC NO. 2 OF 2020 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22

AND

IN THE MATTER OF LAND PARCEL

NO. OTHAYA/KIHUGIRU/398 REGISTERED

IN THE NAME OF WAMBUGU NGERA (DECEASED)

AND

IN THE MATTER OF APPLICATION BY JOSEPH WANG'ONDU

WAMBUGU TO BE REGISTERED AS HAVING ACQUIRED TITLE TO

LAND PARCEL OTHAYA/KIHUGIRU/398 BY

VIRTUE OF ADVERSE POSSESSION

BETWEEN

JOSEPH WANG'ONDU WAMBUGU.....PLAINTIFF

AND

CECILIA THONGORI WANJERU

(Sued in her personal and Representative capacities as

the legal administrator of the estate of Wamburu Ngera, Deceased).....DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 14th January, 2020 brought under **Section 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules, 2010** the Plaintiff sought adverse possession of 0.1 acres out of *Title No. Othaya/Kihugiru/398 (the suit property)* and an order for his registration as owner in place of the current registered proprietor. The Plaintiff contended that he had been in open, quiet and uninterrupted possession thereof for a period exceeding 12 years since his entry thereon in 1998.

B. THE PLAINTIFF'S APPLICATION

2. Simultaneously with the filing of the said originating summons the Plaintiff filed a notice of motion of even date under **Order 40 Rule 1 of the Civil Procedure Rules** seeking two pertinent orders. The first was an injunction to restrain the Defendant from developing, transferring, charging or alienating the suit property pending the hearing and determination of the suit. The second was an order of inhibition to prohibit any dealings with the suit property pending the hearing and determination of the suit.

3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 14th January, 2020. The Plaintiff reiterated the matters set out in the originating summons for adverse possession and contended that unless the interim orders were granted he was at risk of being forcefully evicted from the suit property before his originating summons could be heard and determined. He further contended that he had developed the suit property by constructing a permanent house thereon. He further stated that when his wife died in 2009 she was buried on the suit property without objection from any quarters. The Plaintiff was also apprehensive that since the Defendant had been appointed administrator of the estate of the registered owner there was a risk that she could distribute the suit property pursuant to the grant with the risk that his interest in the suit property might be affected.

C. THE DEFENDANT'S RESPONSE

4. The Defendant filed a replying affidavit sworn on 10th August, 2020 in opposition to the said application. The Defendant stated that she was the administrator of the estate of the registered owner of the suit property. She contended that the Plaintiff had illegally settled on a portion of the suit property and that all the developments thereon were undertaken illegally by the Plaintiff.

5. The Defendant disputed that the Plaintiff had acquired any portion of the suit property through adverse possession. She disputed that the Plaintiff had enjoyed quiet possession or uninterrupted possession of the suit property since there was a pending succession cause (No. 142 of 1992) before the High Court over the suit property. It was the Defendants' contention that the Plaintiff was guilty of intermeddling with the estate of the deceased within the meaning of **Section 45 (1) of the Law of Succession Act (Cap. 160)**.

D. THE PLAINTIFF'S REJOINDER

6. The Plaintiff filed a supplementary affidavit sworn on 4th March, 2021 in reply to the Defendant's replying affidavit. He reiterated the contents of his supporting affidavit and stated that he only became aware of the existence of the aforesaid succession cause when it was nearing conclusion. He further stated even if his occupation was illegal, the Defendant had never issued him with a notice to vacate the suit property despite having been in occupation openly.

D. DIRECTIONS ON SUBMISSIONS

7. When the matter was listed for directions on 23rd July, 2020 it was directed that the said application shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their submissions. The record shows that the Plaintiff filed his submissions on 4th March, 2021 whereas the Defendant filed hers on or about 16th March, 2021.

E. THE ISSUES FOR DETERMINATION

8. The court has perused the Plaintiff's notice of motion dated 10th January, 2020 together with the supporting affidavit and supplementary affidavits, the Defendant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Plaintiff has made out a case for the grant of an interim injunction.*

(b) *Whether the Plaintiff has made out a case for the grant of an order of inhibition.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has made out a case for the grant of an interim injunction

9. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that he had satisfied the requirements for the grant of an injunction, the Defendant contended otherwise. Interestingly, both parties relied on the case of **Giella v Cassman & Brown & Co. Ltd. 1973 [EA] 358** to urge their respective positions.

10. It is evident from the material on record that the Plaintiff's claim in the originating summons is based upon adverse possession. The Plaintiff claimed to have satisfied the elements of adverse possession whereas the Defendant claimed that the Plaintiff's occupation was illegal and that his occupation was not uninterrupted since there was a succession cause pending before the High Court at the material time.

11. The court is aware that at this interlocutory stage it is not required to make any definitive conclusions on the matters in controversy since that function is reserved for the trial court. The court is merely required to satisfy itself on a *prima facie* basis and without going into the matter in great depth that the Plaintiff has made out a case for the grant of an injunction pending the hearing of the case. The court is of the opinion that on the basis of the material on record the Plaintiff has demonstrated that he has been in possession of the suit property for a very long time without the permission of the registered owner or the administrator of his estate.

12. There is ample evidence to demonstrate that the Plaintiff has extensively developed the portion of the suit property which he claims by constructing a permanent house thereon and fencing it. There is no indication on record that he was ever issued with an eviction notice. There is no indication on record that he was ever sued for eviction during his occupation. The mere fact that there was a pending succession cause over the suit property cannot, without more, stop time from running for purposes of limitation of actions. There is no indication that the succession cause was a suit for the eviction of the Plaintiff from the suit property. As was held in the case of **Githu v Ndeete [1984] KLR 776** interruption in the legal sense can only take place where the owner asserts his rights by making an effective entry into the suit property or by filing suit for recovery

thereof.

13. It was not contended by the Defendant that the Plaintiff forcibly entered the suit property through violent means. It was not contended that the Plaintiff had secretly sneaked into the suit property and that all his developments were undertaken secretly. It is doubtful whether the construction of a permanent house and the fence which the Plaintiff has exhibited could be conducted secretly and without notice by nearby residents. The Defendant did not dispute the Plaintiff's lengthy occupation only that she termed it illegal. The court is thus satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial.

14. The second principle for consideration is whether or not the Plaintiff shall suffer irreparable loss unless the interim injunction is granted. Irreparable loss refers to the kind of loss which cannot be adequately compensated by an award of damages or the kind of loss which is incapable of monetary quantification. See **Nguruman Limited v Jan Bonde Nielsen & 2 Other [2014]eKLR**. The Plaintiff did not specifically contend that he would suffer irreparable loss. He was merely apprehensive that unless the orders sought are granted he might be evicted and his house demolished hence rendered homeless. He did not contend that monetary damages could not adequately compensate him or that the Defendant would not be able to afford such damages. The court, nevertheless, has noted that the Plaintiff has been in occupation of the suit property for a long time and that he has substantially developed it. The court is thus in doubt as to whether or not the Plaintiff has satisfied the second principle for the grant of an injunction.

15. The third principle requires that where the court is in doubt as to the second principle it shall decide the application on a balance of convenience. The court, therefore, has to weigh the hardship to be borne by the Plaintiff by refusing the injunction against the hardship to be borne by the Defendant by granting the injunction. The material on record here indicates that the Plaintiff has been in possession of the suit property for long time and has substantially developed it. He has constructed a permanent house and settled thereon. The court is thus of the opinion that it would cause the Plaintiff greater hardship by declining to grant the injunction than it would cause the Defendant by granting it. Accordingly, the balance of convenience tilts in favour of the Plaintiff in the instant suit.

16. The court is, however, of the opinion that it would be unfair to grant an injunction to prevent the transfer or alienation of the entire suit property whereas the Plaintiff's claim is for a portion of 0.1 acres out of the suit property. Accordingly, the court shall restrict the injunction order to the portion of 0.1 acres. The Defendant should be at liberty to deal with and, if necessary, distribute the rest of the suit property in accordance with the confirmed grant.

(b) Whether the Plaintiff has made out a case for the grant of an order of inhibition

17. The court has considered the material and submissions on this issue. Although it is desirable to preserve property which is the subject of a dispute, the court ought to be cautious not to scuttle or delay the implementation of a confirmed grant which has already been granted by the succession court. Accordingly, the court finds no lawful justification for stopping any dealings with the entire suit property whereas the Plaintiff's claim is restricted to 0.1 acres only. The Plaintiff's interest in the portion he is claiming in the originating summons will be taken care of by the interim injunction. The Defendant should be allowed to deal with the balance of the suit property as per the certificate of confirmation of grant excluding only the portion of 0.1 acres claimed by the Plaintiff. Accordingly, the court is not satisfied that an order of inhibition should be granted in the circumstances.

G. CONCLUSION AND DISPOSAL

18. The upshot of the foregoing is that the court finds merit in the Plaintiff's application for an interim injunction. The court has noted, however, that even though the Plaintiff was apprehensive that he might be evicted from the suit property and his house demolished, he did not pray for an order to prevent his eviction probably due to an oversight. The court shall, nevertheless, make an appropriate order in order to prevent a multiplicity of applications. Accordingly, the court makes the following orders for disposal for the notice of motion dated 14th January, 2020:

(a) An interim injunction be and is hereby granted restraining the Defendant from developing, transferring, charging or alienating the portion of 0.1 acres out of Title No. Othaya/Kihunguru/398 in actual occupation of the Plaintiff or from evicting him from that portion of land pending the hearing and determination of the suit. For the avoidance of doubt, the Defendant shall be at liberty to deal with the remainder of the suit property.

(b) The prayer for an order of inhibition or prohibition is hereby declined.

(c) Costs of the application shall be in the cause.

19. It is so decided.

RULING DATED, SIGNED AND DELIVERED AT NYERI VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY 2021.

In the presence of:

Ms Machiri for the Plaintiff

Mr. Makura holding brief for Mr. Gori for the Defendant

Court assistant - Wario

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Y. M. ANGIMA

JUDGE

19.05.2021