



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 385 OF 2019 (OS)

1. BENSON MBITHI WAMBUA
2. FRASHIA NYAMBURA MAINA
3. MWINZI SYANDA
4. TEXAS NJENGA WAMBUI
5. CHARLES MWANIKI MACHUNGU
6. PATRICK MOI
7. HELLEN KHAMENDE
8. MARY WAIRIMU MURAYA.....APPLICANTS

(Suing on their own behalf and on behalf of the squatters and residents of land registration numbers 209/9945, 209/9947, 209/9946, 209/9949 and 209/11975 also known as Deep Sea Settlement Scheme)

VERSUS

- SHERATON APARTMENTS LTD.....1ST RESPONDENT
- ELDAMA RAVINE VIEW POINT ESTATE LTD.....2ND RESPONDENT
- ZXAHIR ABDUL MANJI.....3RD RESPONDENT
- MANSUKHLAL JUTHALA SHAH.....4TH RESPONDENT
- MARY JACINTA NJERI.....5TH RESPONDENT
- MEHMOOD REHMAT KHAN.....6TH RESPONDENT

RULING

The Applicants who claim to be occupants of an informal settlement constructed on land reference numbers (L.R. No.) 209/9945 to 209/9949 and 209/11975 situated in Westlands within Nairobi (“the Suit Property”) filed the Originating Summons on 29/11/2020, seeking an injunction to restrain the Respondents from interfering with their quiet possession and use of the Suit Property. They also sought a declaration that they had become entitled to ownership of the Suit Property by way of adverse possession.

The Applicants also filed the application dated 28/11/2019 seeking an injunction to restrain the Respondents from interfering with their possession and use of the Suit Property pending hearing and determination of the suit. The application was made on the ground that the Applicants had resided on the Suit Property for more than twelve years and have a right to become the registered proprietors of the Suit Property by prescription under the Limitation of Actions Act. Further, that the Respondents had acquired titles over the Suit Property and were making arrangements to evict the Applicants who stood to suffer irreparable loss and damage which could not be compensated by damages.

Benson Mbithi Wambua, who described himself as the Chairman of Deep Sea Settlement Scheme which he deponed houses in excess of

10,000 people, swore the affidavit in support of the application. He deponed that the settlement had been in existence from the 1970 and added that he had been on the Suit Property with his family from 1968. He averred that the residents in the settlement scheme had built semi-permanent residential homes, churches, schools, dispensaries and that they had carried out other general developments on the land. He deponed that their occupation and development on the Suit Property had been open, exclusive, continuous and uninterrupted for over twelve years hence they had a beneficial interest in the Suit Property based on the doctrine of adverse possession. He averred that the Respondents had threatened to evict them from the Suit Property which would render the Applicants, their families together with other residents in the area, who according to him were more than 10,000 in number, destitute as the Suit Property was the only home they knew. He added that they would suffer irreparable loss if their homes were demolished. He attached copies of titles issued to or which were transferred to the Respondents.

Manmohan Singh Chawla, a director of the 2nd Respondent swore the affidavit in opposition to the application for injunction. He referred to **Nairobi ELC No. 620 of 2005** which the Respondents in this suit filed against Miriam Wanjiru, Cecilia Wahu, Evans Enekea, Joseph Muema and Virginia Njeri. He averred that the court delivered judgement in that case on 4/12/2018 and ordered the eviction of the Defendants from the Suit Property. Further, that the decree was issued on 14/11/2019 and that the Respondents were in the process of executing it. He added that an eviction order had been issued against the Applicants. He maintained that the judgement issued by the court regarding the Suit Property had not been appealed against, varied or set aside and that it was directed towards the Suit Property against the agents, servants or other persons claiming through the Defendants in that suit. He averred that this suit was an abuse of the court process and that it was duplicitous because the Applicants should have joined the other suit as parties because they knew and were aware about that suit. He referred to the proceedings filed in the former suit and added that the Applicants had not adduced any evidence to corroborate their claim that they had been on the Suit Property continuously and uninterrupted for more than twelve years. He urged that the Respondents were the registered proprietors of the Suit Property and that they therefore held indefeasible titles over the land. He argued that the averments of Benson Mbithi Wambua in support of the application for injunction were baseless and unfounded.

Mehmood Rhemat Khan, sued as the 6th Respondent swore the replying affidavit in opposition to the application for injunction. He averred that he was the registered owner of L.R. No. 209/11975 pursuant to a grant registered on 27/9/1993, a copy of which he produced, and that prior to the grant being issued to him, the suit land was vacant government land and was not occupied by any person. He maintained that due process was followed in the allocation of the land to him. He pointed out that some of the Respondents filed **ELC Suit No. 620 of 2005** seeking to evict Miriam Wanjiru, Cecilia Wahu, Evans Enekea, Joseph Muema and Virginia Njeri who invaded the Suit Property in 2005. That these five people put up structures on the suit land and rented them out to tenants besides inviting other persons to unlawfully settle upon the suit land. He clarified that he was not part of that suit because there were no squatters on his land in 2005.

Mr. Khan averred that some squatters started spilling into his land in 2014 claiming to be agents of the five persons, which prompted him to apply to be joined to that suit. The court directed that an advertisement be placed in the newspapers hence the Applicants were aware of that suit and would therefore be bound by the judgement in that case. He averred that having lost the case in **ELC No. 620 of 2005** they had now mutated and that as an afterthought were claiming adverse possession of the Suit Property to subvert execution of a lawful decree and an eviction order issued by the court. He annexed a copy of the judgment in **ELC No. 620 of 2005**. He argued that the Applicants had not placed any evidence of their alleged occupation and possession of the 6th Respondent's property and added that even if there was such occupation, it was fully interrupted in 2005 when the Applicants were evicted from the Suit Property.

The Respondents filed a notice of preliminary objection on 17/2/2020 claiming that the suit was hopelessly misconceived, frivolous and devoid of merit for being *res judicata* because there is a judgement of the court relating to the same suit land and the same parties delivered on 4/12/2018.

The court directed parties to file submissions which they did. The Applicants submitted that proceedings are to indicate that the persons sued represent all other persons with an interest in the cause of action before the court and urged that **ELC No. 620 of 2005** did not bind the Applicants because the pleadings did not indicate that that suit was brought in a representative capacity. The Applicants maintained that the Defendants in that suit were sued in the individual capacity and that the eviction order was directed against those Defendants and not against the whole world. The Applicants argued that technically, that judgement was *in personam*.

The Applicants submitted that they had established a *prima facie* case based on their claim for adverse possession of the Suit Property which they urged that they had openly lived on and had built their homes there for more than twelve years. They contended that the Respondents titles had been extinguished. Further, that their eviction from the Suit Property pursuant to the eviction order issued in **ELC No. 620 of 2005** would be illegal and an infringement of their proprietary rights for which no damages would be sufficient to compensate the human right abuses, destruction of houses and the psychological devastation that would be occasioned to the Applicants if they were evicted from their only homes. They argued that the balance of convenience tilted in their favour and urged the court to allow their application.

A.G.N Kamau Advocates filed submissions on behalf of the Respondents. The court presumes that they relate to the 1st to 5th Respondents because the 6th Respondent, who is represented by a different firm of advocates filed a separate response to the application together with his written submissions. The Respondents submitted the Applicants in this suit were agents, servants, employees or relations of the Defendants in **ELC No. 620 of 2005**. Further, that the Applicants were aware of those proceedings and had access to the documents filed in the case including copies of the titles over the Suit Property which they used to institute this suit. The Respondents pointed out that the Applicants did not take any proceedings for their claim for adverse possession in respect of their allegation that they had occupied the Suit Property from the late 1970s. The Respondents argued that the Applicants had not registered the amorphous group which they called Squatters of Deep Sea Settlement Scheme and that they could not identify which portions of the land belonging to the Respondents they occupied. Additionally, that the Applicants had not disclosed when time actually started running for purposes of their claim for adverse possession.

The Respondents relied on Section 7 of the Civil Procedure Act in arguing that this suit was *res judicata* and added that the decree issue was directed at the Defendants in that suit, their agents, servants and other persons who laid claim to the land under those Defendants. They submitted that the issue of eviction was heard and finally determined in the former suit. They argued that the Applicants in these proceedings and the Defendants in the former suit had concealed their identities in abuse of the process of the court so that if they fail in this suit another set of "squatters" will take out fresh proceedings which will lead to an absurd situation where litigation does not end. They argued that there was a nexus between the Applicants and the Defendants in the former suit and that the doctrine of *res judicata* applied.

The 1st to 5th Respondents submitted that the claim for adverse possession was vague and could not found a cause of action because it did not specify the time when the Applicants claim to have taken possession of the Suit Property. They maintained that the trespass started in 2005 which is when the Respondents asserted their rights to the Suit Property by taking legal proceedings and that time did not therefore run from 2005. They submitted that it was they who continued to suffer as they do not have possession of the Suit Property yet they should enjoy the sanctity of their titles over the land.

The 6th Respondent submitted that the Applicants had failed to demonstrate evidence of their occupation of the Suit Property, when time started running for their claim of adverse possession and that there was no evidence of the developments they claimed to have put up on the Suit Property. Further, that they had failed to demonstrate the circumstances under which they entered the Suit Property for them to prove that they entered the land with the intention of dispossessing the owners of the land. He submitted that the Applicants had failed to demonstrate that they had a *prima facie* case with a probability of success. He submitted that the balance of convenience tilted in favour of the court not granting the orders sought by the Applicants.

The issue for consideration is whether the court should grant the orders of injunction and restrain the Respondents from evicting the Applicants from the Suit Property pending hearing and determination of this suit. Put differently, do the Applicants have a *prima facie* claim to the Suit Property and will they suffer irreparable loss which cannot be compensated by damages if the injunctive orders are not granted?

It is not in dispute that the Respondents are registered as proprietors of the Suit Property. It is also not contested that the court gave judgement in favour of the Respondents in **ELC No. 620 of 2005** and that pursuant to that judgement eviction orders were issued. The Applicants contend that the judgement in that case is not binding on them and that those who were sued as Defendants in that case did not represent the Applicants in that suit. The Respondents contend that the judgement delivered in that suit binds the Applicants who they claim were aware of that suit and ought to have joined those proceedings. At this stage it is difficult to determine what the nexus is between the Applicants and the Defendants in **ELC No. 620 of 2005**. Evidence will have to be led to establish that nexus. It cannot therefore be proved at this stage that the Applicants are agents of the Defendants in **ELC No. 620 of 2005** for the doctrine of *res judicata* to apply. The Applicants claim that they have lived on the land for more than twelve years and are now entitled to the Suit Property having acquired prescriptive rights over the land. When time started running for purposes of the claim for adverse possession will have to be determined at the trial while taking into account the suit the Respondents filed in 2005 against the trespassers on their land.

The Applicants did not adduce any evidence to show which portions of the Suit Property they occupy. There is no evidence of that occupation. They have failed to prove that they have a *prima facie* case against the Respondents for the court to grant the orders of injunction that they seek.

The court declines to grant the orders sought in the application dated 28/11/2019. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF AUGUST 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Fiona Ade for the Applicants

Ms. Faith Mbirwe for the 1st to 5th Respondents

Mr. V. Owuor- Court Assistant

No appearance for the 6th Respondent