



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC (O/S) NO. 13 OF 2020

BENEDICT ONYANCHA.....APPLICANT

-VERSUS-

BENJAMIN KAKUTI KISILU.....1ST RESPONDENT

MARY WAMBUI NDUNGU.....2ND RESPONDENT

RULING

1. By a notice of motion dated 7th July, 2020 brought under **Section 63(e) of Civil Procedure Act (Cap. 21), Order 40 Rules 1 & 2 of the Civil Procedure Rules and any other enabling provisions of the law**, the 2nd Respondent sought the following orders:

1. ...spent.

2. ...spent.

3. *That pending the hearing and determination of this suit and/or further orders of the honourable court, there be an order of temporary injunction restraining **Benedict Onyancha** by himself, his servants, staff, employees, agents, proxies or any other person acting under or on his authority or claiming through or under him from entering, remaining, using a portion of land **more than 1 acre** out of the parcel of land known and described as **L.R Nyandarua/Kaimbaga/480**.*

Alternatively

*That pending the hearing and determination of this suit and/or further orders of this Honourable court Status quo whereby **Benedict Onyancha** is in possession of 1 acre whereas **Mary Wambui Ndungu** is in possession of the other portion of land **L.R Nyandarua/Kaimbaga/480** be maintained.*

4. *That the costs of this application be provided for.*

2. The application was based upon the grounds set out on the face of the motion and contents of the supporting affidavit sworn by the 2nd Respondent on 7th July, 2020 and the exhibits thereto. The 2nd Respondent contended that she was the owner of the suit property having acquired same through adverse possession vide Nyahururu ELC No. 457 of 2019. She contended that since 2017 the Applicant had been in occupation of just one (1) acre out of the suit property but that he had since the filing of the suit started expanding the area under his possession hence the application.

3. The Applicant filed a replying affidavit sworn on 4th September, 2020 in which he denied the 2nd Respondent's allegations in the application. He stated that he had been in possession of the suit property since 1991 and that it was not true that he was in occupation of only one (1) acre. He further contended that he was not served with suit papers in Nyahururu ELC No. 457 of 2017 and that he did not participate in the hearing.

4. The Applicant contended that out of the entire suit property of 63 acres he had leased out 6 acres whereas he was in occupation of 10 acres. It was contended that the 2nd Respondent occupied only a small portion of land whereas a large portion of suit property was unutilized. He contended further that granting the orders sought might result into his eviction from the suit property.

5. When the application was listed for hearing, it was directed that the same shall be canvassed through written submissions. The record

shows that the 2nd Respondent filed her submissions on 16th July, 2021 whereas the Applicant filed his on 6th July 2021. The 1st Respondent did not file any response or submissions in the matter.

6. The court has considered the 2nd Defendant's application, the Applicant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main issues for determination are as follows:

(a) Whether the 2nd Respondent is entitled to the order of interim injunction sought.

(b) Whether the 2nd Respondent is entitled to the *status quo* order.

7. The court has considered the material on record and the submissions of the parties on the first issue. The principles to be considered in an application for an interim injunction were summarized in the case of **Giella v Cassman Brown & Co Ltd [1973] JEA 358** as follows:

(a) The applicant must demonstrate a *prima facie* case with a probability of success at the trial.

(b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage.

(c) If the court is in doubt on (b), it shall determine the application on a balance of convenience.

8. The court has considered the material on record against the first principle. There is no doubt that the 2nd Defendant is the registered proprietor of the suit property having acquired it through adverse possession in Nyahururu ELC No. 457 of 2017. The fact of registration, however, is not sufficient to establish a *prima facie case* with a probability of success at the trial. It must be remembered that the Applicants' case is a claim for adverse possession under the **Limitation of Actions Act**. The title of the registered owner is thus not under challenge.

9. The court has noted from the material on record that the 2nd Respondent is aggrieved because the Applicant has allegedly expanded his occupation beyond one (1) acre since the filing of the instant suit in 2010. If that be so, then an order of injunction would not be an effective remedy to undo what has already taken place. An injunction looks to the future and not the past. The court is of the opinion that what may probably be of assistance to the 2nd Defendant would be an eviction order or mandatory injunction but not a restraining injunction. Accordingly, the court is not satisfied that the 2nd Defendant has made out *prima facie case* with a probability of success at the trial. There is no need to consider the other two principles for the grant of the injunction in view of the 2nd Respondent's failure to satisfy the first principle.

10. The court has considered the material on record against the second issue. The 2nd Respondent prays for an order for maintenance of *status quo* pending the hearing and determination of the suit. The 2nd Respondent contended that the status was that the Applicant was in possession of only 1 acre whereas she was in possession of the balance of 62 acres. The material on record shows that the Applicant seriously contested the alleged status on the ground. He claimed to be in occupation of at least 10 acres out of the suit property whereas a significant portion was unutilized. The court is not satisfied that the *status quo* at the time of filing suit has been established. The current status of occupation on the ground is also unclear. Accordingly, the court is not inclined to grant the *status quo* order sought by the 2nd Respondent.

11. The upshot of the foregoing is that the court is not satisfied that the 2nd Respondent has made out of case for the grant of the orders sought. Accordingly, the court is not inclined to grant the application. The 2nd Respondent's notice of motion dated 7th July, 2020 is consequently dismissed for lack of merit. Costs shall be in the cause.

Orders accordingly.

Ruling dated and signed at Nyahururu and delivered via Microsoft Teams platform this 30th day of September, 2021.

In the presence of:

Mr. Nderitu Komu for the 2nd Respondent

No appearance for the Applicant

No appearance for the 1st Respondent

.....

Y. M. ANGIMA

ELC JUDGE