



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 119 OF 2020

SIMON KIARIE GATIBA.....1ST PLAINTIFF/APPLICANT

JAMES M KARIUKI.....2ND PLAINTIFF/APPLICANT

SAMUEL KULOBA KIARIE.....3RD PLAINTIFF /APPLICANT

VERSUS

JANE WATIRI KIMANI (suing as the administrator of the Estate of

PIUS KIMANI MUTUA Deceased).....DEFENDANT/RESPONDENT

RULING

1. The Applicants moved the court with the instant application on the 27/11/2020 seeking the following orders;

a. **Spent**

b. **THAT** that pending the hearing and determination of this application this Honourable Court be pleased to grant an interim stay of eviction and humanitarian living of the Applicants and their families.

c. **THAT** that pending the hearing and determination of the Originating Summons filed herein this Honourable Court be pleased to stay the proceedings of Senior Principal Magistrate Court E.L.C No. E 7 of 2020 and or in alternative order the same to be consolidated with this matter as the lower Court lacks jurisdiction to determine adverse possession.

d. **THAT** the costs of this application be provided for.

2. The application is supported by the grounds annexed thereto together with the supporting affidavit sworn by Simon Kiarie Gatiba on the 27/11/2020. He avers that he and the Applicants have lived on the suit land for over 28 years exclusively, openly, continuously and without interruption and have developed the land extensively. In addition, that they have buried their kin on the said land without any objection from the Defendant. That the suit land belonged to the husband of the Defendant who has been sued as the legal representative of his estate. She averred that they have acquired title by way of adverse possession over the suit land.

3. She contended that the Defendant has initiated a case ELC 7 of 2020 - the SPM Court at Limuru seeking orders of eviction of the Plaintiffs and three other parties. She urged the court to stay the proceedings in the ELC 7 of 2020, Limuru or in the alternative consolidate the two suits seeing that the instant case is premised on adverse possession which the Magistrate court does not have jurisdiction.

4. While opposing the application the Respondent vide her Replying Affidavit dated the 24/3/2021 contended that the suit land belongs to her late husband for which she is the legal administrator.

5. She contends that the suit is resjudicata, on account of RMCCC No 131 of 2001 between PIUS KIMANI MUTUA V GATIBA KIARIE and HCCA NO 757 of 2002 – PIUS KIMANI MUTUA VS GATIBA KIARIE. Copies of the said decrees and judgement were annexed. That in SRMCC No 1312 of 2001 the trial court held that the suit land be divided equally between her husband and the father of the Plaintiffs which decision was reversed on appeal. That the Learned Judge set aside the judgement of the trial court and vested the suit land in her husband's name.

6. That after the death of the Plaintiffs father the Plaintiffs have adamantly refused to vacate the suit land despite being aware of the judgement of the High Court, hence the filing of the ELC 7 of 2020 at Limuru seeking orders of eviction of the Applicants.

7. Directions were taken by the parties on the 12/4/2021 that the motion be canvassed by way of written submissions. The Respondent failed to comply despite various accommodations by the court on the 9/6/2021 and 27/7/2021.

8. The Applicants submitted that they have satisfied the threshold of granting interim injunction going by the principles of the case in **Giella Vs Cassman Brown**. They faulted the affidavits of the Respondent on the ground that they appear unauthentic and urged the court to disregard them.

9. That the suit land is the only place they have known as home in their lifetimes and have occupied the land uninterrupted hence their plea for a claim of title in adverse possession. They urged the court in the spirit of the constitution to grant them the opportunity to be heard.

10. This court is being called upon to determine the following issues;

- a. Whether the Applicants are entitled to an interim injunction.
- b. Whether the proceedings in ELC 7 OF 2020 – SPMCC at Limuru should be stayed.
- c. In the alternative whether the two suits should be consolidated.

11. As to whether the Applicants are deserving of orders of stay of eviction or in other words interim injunction, the court will be guided by the classical case of **Giella Vs Cassman Brown Co. Ltd 1973 E.A. 358** where the Court held as follows;

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

12. It is not in dispute that the Plaintiffs occupy the suit land. This was conceded by the Respondent when she lamented that despite the Applicants being aware of the judgement vesting the suit land in the name of her late husband, the Applicants have stayed put on the land.

13. Guided by Order 40 Rule 1 of the Civil Procedure Rules which states as follows;

“1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

It is the view of the Court that status quo be maintained pending the hearing and determination of the suit. The Plaintiffs are restrained from selling charging disposing and or in any way parting with the possession of the suit land.

14. I will then discuss issue Number b and c together. It is the Applicants case that there exists another case filed by the Respondent to wit ELC 7 of 2020 at Limuru. That the subject matter is the same while the parties in that case are the Applicants together with other undisclosed third parties.

15. Section 18 of the Civil Procedure Act empowers this Court to withdraw and transfer a case instituted in the Subordinate Court. It states as follows:-

“1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

i. try or dispose of the same; or

ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

iii. retransfer the same for trial or disposal to the court from which it was withdrawn.

2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

16. The proceedings in ELC 7 of 2020 were not produced before the Court however what the Court was able to glean from the pleadings is that the two suits involve the same parties, suing under the same title. To forestall conflicting decisions and save on judicial time, it is the view of the Court that both suits be consolidated and tried together. It is to be appreciated that there will be no prejudice and or hardship in trying the two causes of action together.

17. Consequently, ELC 7 of 2020 and ELC 119 of 2020 be and are hereby consolidated with the lead file being ELC 119 of 2020.

18. In the end the application partially succeeds and I make no orders as to costs.

19. Final orders/disposition;

a. Spent

b. Prayer b is granted as per para 13 of this ruling.

c. Prayer c is granted by way of transfer of the file to this Court for consolidation with ELC 119 of 2020.

20. I make no orders as to costs.

21. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mshindi holding brief for Kahindi for the Plaintiffs

Mwinzi for the Defendant/Respondent

Ms. Phyllis Mwangi – Court Assistant