



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. E 24 OF 2021 (O.S)

IN THE MATTER OF LAND PARCEL NO. BARAGWE/GUAMA/196 MEASURING 7.40 ACRES

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

BETWEEN

1. ANDREW MUCHIRI MURIUKI

2. CYRUS KARIITHI MURIUKI.....PLAINTIFFS/APPLICANTS

VERSUS

NANCY WAGUAMA KARIITHI.....RESPONDENT

RULING

1. The Applicants filed a Notice of Motion dated 8th July, 2021 on 9th July, 2021 whereby they are seeking the following orders: -

a. SPENT.

b. SPENT.

c. That pending the hearing and determination of this suit or until further orders of this Honourable Court, there be issued orders of temporally injunction restraining the Respondent by herself, servants, agents or anyone claiming under her from evicting, wasting, trespassing, selling, charging, leasing, transferring, sub-dividing, blocking access to or in any way interfering with the Applicants quiet and peaceful possession and enjoyments of a portion of 4.0 Acres comprised of L.R Baragwe/Guama/296 measuring 7.40 Acres registered in the names of the Respondent herein.

d. That the Honourable Court be pleased to issue orders of inhibition or prohibition against the Respondent, servants, agents or anyone claiming under her from disposing off, charging, leasing, assigning, transferring or in anyway interfering with the registration status of L.R Baragwe/Guama/296 pending the hearing and determination of this suit or until further orders of this Honourable Court.

e. That the costs of this Application be provided for.

2. The application is premised on the following grounds on the face of the application: -

a. The affidavit of Andrew Muchiri Muriuki duly sworn and filed herein.

b. That the Applicants and their families have settled on a portion of 4.0 Acres out of L.R Baragwe/Guama/296 and which portion is very well developed on the ground in that, there is an all-weather road Kimunye – Kamugunda which passes through the suit land demarcating the same into 2 portions of 4.0 Acres and the suit land is registered in the names of the Respondent herein.

c. That the Applicants and their families moved into L.R Baragwe/Guama/296 in 1995 and have extensively developed the same by constructing a homestead consisting of 4 residential houses, a kitchen, pit latrine, bathrooms, cattle grazing units, goats grazing units,

chicken pens, 6500 tea bushes, 450 old coffee stems, assorted mature trees, assorted fruit trees and staple food crops and hence not known any other home apart from the portion of 4.0 out of L.R Baragwe/Guama/296.

d. That the Respondent and her family have occupied the other portion of 3.40 Acres out of L.R. Baragwe/Guama/296 and planted over 10,000 tea bushes.

e. That the Applicants have been in open, exclusive, notorious, continuous and uninterrupted occupation of the portion of 4.0 Acres and even buried thereon a brother who passed away and which funeral arrangements were assisted by the Respondent and local community and have therefore acquired the suit land by way of Adverse possession for a period of over 26 years in occupation.

f. That lately the Respondent has secretly been threatening to evict the Applicants from the portion of 4.0 Acres by sub-dividing the same and alienating it to 3rd parties notwithstanding the applicants' interest over the suit land and has even started harvesting mature trees owned and planted by the Applicants and converting the same to own use.

g. That unless the suit land is preserved by granting of conservatory orders herein, the same shall be transferred and alienated to 3rd parties to defeat the Applicants' claim and the suit land will be wasted and Applicants suffer irreparable damages.

APPLICANTS' CASE: -

3. The application premised on the supporting as well as the supplementary affidavit of the 1st Applicant sworn on and 4th October, 2021 respectively.

4. The Applicants' case is that L.R Baragwe/Guama/296 was registered in the name of their late grandfather KITHUKU NGARE on 20.1.1959 but was later transferred to Andrew Muchiri Cyrus on 28.10.1967. The said land is currently registered in the name of the respondent who acquired the same by way of transmission on 7.12.2015.

5. They have deponed that they entered the suit land in 1995 and duly took possession of one side of the suit land measuring 4.0 acres out of the whole land whereby they have constructed and extensively developed the land with a homestead consisting of 4 residential houses, a pit latrine, bathroom, cattle grazing unit and a chicken pen.

6. They also deponed that they have each planted 3000 and 3500 tea bushes respectively which they sell at Thumaita Tea Factory, mature assorted trees, mango trees, avocado trees, fruit trees, Napier grass, staple food crops and coffee stems whose berries they sell at the local coffee factory.

7. They further deponed that they have a grave yard where they buried their brother Laban Muriuki in the year 2018 whereby the local community including the Respondent assisted in the burial preparations.

8. They deponed that the respondent and her family live in the neighbouring farm but cultivates a portion of 3.0 acres directly opposite the demarcation road and that they meet daily as they tend their respective tea bushes.

9. They deponed that the Respondent has tried to evict them from the suit land by attempting to subdivide and alienate it to 3rd parties and has harvested some mature trees owned by the applicants in order to frustrate them out of the land.

10. They deponed that there is a danger that the Respondent can waste the suit land and alienate it to 3rd parties which act will dispossess them and that they will suffer irreparably since they know no other home apart from the 4.0 acres out of the suit land where they have occupied for a period of 26 years, openly, exclusively, notoriously, peacefully, continuously and without any interruptions.

11. They prayed that conservatory orders do issue as prayed in their application to preserve the suit land pending the hearing and determination of the suit or until further orders of the court.

RESPONDENT'S CASE: -

12. The respondent opposed the application by way of a Replying Affidavit sworn and filed on 17th August, 2021 and 23rd August, 2021 respectively.

13. She stated that she is the registered proprietor of the suit land upon inheriting it from her son Andrew Muchiri Kariithi vide Gichugu P.M. Succession Cause No. 16 of 2012.

14. She stated that the applicants are her nephews as their father Johnson Muriuki Wambugu was the younger brother to her late husband Cyrus Kariithi Wambugu.

15. She stated that the said Johnson Muriuki Wambugu had his own parcel of land known as Baragwe/Guama/309 whereby he used to live with the applicants until 2006 when they were evicted from the said parcel upon sale by their father.

16. She stated that upon the eviction the applicants and their two brothers Laban Chomba and Richard Mwendia Muriuki requested to be accommodated in the suit land and the Respondent's husband granted the said request. however, before of the respondent's husband death he instructed that the applicants and their brothers do stay on the suit land until they acquire their own lands and was adamant that she should

not give them title lest they'll sell as their father did.

17. She stated that she had not subdivided the suit land, threatened to evict the applicants, harvested any tree planted nor alienate the suit land.

18. She prayed that the Notice of motion be dismissed with costs.

PARTIES' SUBMISSIONS: -

19. When the application came up for hearing on 7th October, 2021, the parties through their advocates on record agreed that it be disposed of by way of written submissions.

20. The applicants filed theirs dated 29th October, 2021 on 3rd November, 2021. The Respondent on the other hand filed hers dated 10th November, 2021 on 11th November, 2021.

APPLICANTS' SUBMISSIONS: -

21. The applicants submitted that there is evidence to establish a prima facie case with a high probability of success to warrant the issuance of conservatory orders over L.R Baragwe/Guama/296 in their favour.

22. They submitted that they have tabled evidence to prove that they entered the suit land and extensively developed it by building permanent homesteads, planting cash crops, mature trees, assorted fruit trees, zero grazing units and has grave yards dating back to 1995 when the suit land was still registered in the names of the Respondent's deceased son.

23. They submitted that the Respondent's replying affidavit was full of falsehoods in that there is evidence of the Plaintiff's occupation since 1995 and that by the time their father was evicted from land parcel number L.R Baragwe/Guama/309 in 2006 they had long occupied the suit land.

24. They submitted that unless the orders sought are granted, they'll suffer irreparable damages since they know no other homes apart from the portion of 4.0 Acres out of L.R Baragwe/Guama/296.

25. They submitted that they have satisfied all the legal ingredients for granting of orders of temporally injunction and prohibition to preserve the suit land as laid down in the case of *Giella versus Cassman Brown & Another* and prayed their application be allowed as prayed.

RESPONDENT'S SUBMISSIONS: -

26. The Respondent submitted that the applicants have to provide evidence that the suit property is in danger of being wasted, damaged or alienated by any party to the suit.

27. She submitted that the applicant was not candid and has not come to court with clean hands as at paragraph 9 of the supporting affidavit, the applicant had deponed that the Respondent is a distant relative whereas he is the nephew of the respondent.

28. She submitted that though the applicant contended that they had entered occupation in the year 1995 the permit to operate a tea nursery dated 30th July 1996 annexed as annexure AMM5 (A) indicated that the said permit was in respect of Baragwe/Guama/309 and not Baragwe/Guama/296.

29. She submitted that the applicants had not disclosed to court that their brother Richard Mwendia Muriuki is also living on the same portion of land having been permitted by the Respondent and her husband and thus were misleading this Honourable Court that they were the only ones living on the land.

30. She also submitted that the applicants had failed to provide any particulars of the alleged attempts to subdivide or alienate the suit land and/or harvest trees.

31. She submitted that the applicants have not demonstrated what damage or loss they would suffer if the orders sought are not granted especially in view of the fact that she is ready to accommodate the Applicants until they acquire property of their own.

32. She prayed that the application be dismissed with costs to the respondent.

ANALYSIS: -

33. The applicant has brought the application under ***Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules*** which provides 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 y g 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.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. (3) An application under this rule shall be made by notice of motion in the same suit.

34. The prerequisites for a grant of the orders sought by the applicants have been set out in the locus classicus case of **Giella vs. Cassman Brown (1973) E.A 358** whereby the court held as follows;

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

35. Firstly, the applicants are mandated to demonstrate that they have a prima facie case with the probability of success.

36. A prima facie case was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** where the Honourable Court held that:-

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

37. In **Habib Bank AG Zurich v. Eugene Marion Yakub (Nairobi Civil Application No. 43 of 1982) (UR)** the Court of Appeal defined probability of success as follows:

“Probability of success means the court is only to gauge the strength of the plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

38. From the above authorities, it is clear that at an interlocutory stage, this Honourable Court is only required to gauge the strength of the plaintiffs’ case and not to adjudge the main suit since proof is only required at the hearing stage.

39. In this case, the plaintiffs claim is that they have acquired a portion of 4.0 out of L.R Baragwe/Guama/296 by way of adverse possession.

40. From the material placed before this me, it is evident that the applicants are the ones in occupation of the suit land and have developed it extensively.

41. From the replying affidavit of the Respondent, the bone of contention seems to be when time started to run, the exclusivity of the plaintiffs’ occupation and whether they entered occupation with the permission of the respondent and her husband.

42. I am of the view that these contentions can only be ventilated during full hearing of the case.

43. At this juncture, I am persuaded from the materials placed before me that there is need to preserve the subject matter of this suit pending the main Hearing. I therefore find the Notice of Motion dated 8th July, 2021 merited and the same is allowed as prayed. Costs shall be in the cause.

Ruling READ, DELIVERED and SIGNED in open Court at Kerugoya this 3rd day of December, 2021.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. P.M. Muchira for the Defendant/Respondent*
2. *Mr. Macharia Wambui holding brief for Kahigah for the Plaintiff/Applicant*
3. *Kabuta – Court clerk.*