



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 1 OF 2020

NJIRU MWONDU.....APPLICANT

VERSUS

NAOMI WAMBETI JOHN.....1ST RESPONDENT

JIM MURIITHI M'NJAUH.....2ND RESPONDENT

RULING

1. By a notice of motion dated 13th January 2020 brought under the provisions of **Section 68 (1) of the Land Registration Act, 2012, Order 40 Rule 1 (a) Order 51 of the Civil Procedure Rules, Rule 10 of the Civil Procedure Rules, Sections 3A of the Civil Procedure Act, Cap 21 and all other enabling provisions of the Law**, the Applicant sought two main orders pending the hearing and determination of the suit. First, he sought a temporary injunction restraining the Defendants, their agents or servants from forcibly evicting him and his family members from *Title No. Kagaari/Kanja/3867* (hereafter the *suit property*). Second, he sought an order of inhibition to prevent any dealings with the suit property pending the hearing and determination of the suit.

2. The said application was based upon the grounds set out on the face of the notice of motion and supported by an affidavit sworn by the Applicant on 13th January 2020 together with the annexures thereto. The Plaintiff contended that he had resided on the suit property for over six (6) decades and that he had extensively developed it by cultivating tea, coffee, and bananas over the years. The Plaintiff further contended that the Respondents had threatened him with eviction from the suit property hence he was apprehensive that in the absence of interim orders he might be evicted or the suit property alienated before his suit could be heard and determined.

3. When the said application was listed for hearing on 4th February 2020 the Respondents requested for more time to file a response to the application. The Respondents were given 7 days to file their response. It was directed that the said application be canvassed through written submissions and the parties were given 14 days within which to file and exchange their respective submissions.

4. The material on record shows that the Respondents did not file a replying affidavit but they filed a response styled "Notice of preliminary objection and grounds of objection" dated 7th February 2020 raising the following grounds:

a. That a period of 12 years has not lapsed since the 1st and 2nd Respondents' names were entered in the proprietorship section of the register as the owners of land parcel Kagaari/Kanja/3867.

b. The 1st Respondent, Naomi Wambeti John was registered as the owner of land parcel Kagaari/Kanja/3867 on 21st March 2013 as per the green card marked exhibit "NM1" annexed to the supporting affidavit dated 13th January 2020 sworn by Njiru Mwondu (the Applicant) – therefore, only 6 years have lapsed whilst the Applicant has been in the alleged possession.

c. The 2nd Respondent, Jim Muriithi M'Njau was registered as the owner of land parcel Kagaari/Kanja/3867 on 22nd August 2014 as per the said exhibit "NM1" – therefore only 5 years have lapsed whilst the Applicant has been in the alleged possession.

d. In a claim for adverse possession time is deemed to have commenced running from the date the Respondents became registered as the owners of the "suit land" and not from the date the Applicant occupied the suit land from the former registered owners.

e. In the present case the Applicant's occupation of the suit land was interrupted by the following events:

i. Registration of the 1st Respondent as the owner in 21st March 2013.

ii. Registration of the 2nd Respondent as the owner in 22nd August 2014.

iii. *The proceedings of the Runyenjes Magistrate Court Civil Case No. 2 of 2014 between the Applicant and the 1st Respondent.*

iv. *The proceedings of the Embu High Court Succession Cause No. 62 of 2012.*

f. *The 1st Respondent, Naomi Wambeti John is not the present registered owner of the suit land and hence a claim of adverse possession against her is frivolous, misconceived, unsustainable and an abuse of the court process.*

5. It is evident that the matters raised in the said response are all factual matters which should have been brought to the attention of the court through a replying affidavit. The grounds raised do not constitute pure points of law which could be canvassed as preliminary objections (see **Mukisa Biscuits Manufacturing Co. Ltd V WestEnd Distributors Ltd [1969] EA 696**). They do not raise points of law which can be canvassed as grounds of opposition as known to law either. The Respondents were simply trying to introduce evidence through a short cut.

6. The material on record further indicates that whereas the Applicant filed his written submissions on 13th February 2020 the Respondents' submissions were not on record by the time of preparation of the ruling.

7. The court has considered the Applicant's said notice of motion, supporting affidavit and annexures thereto. There being no replying affidavit by the Respondents to controvert or rebut the Applicant's averments, the court accepts the Applicant's case. The contents of the Applicant's supporting affidavit remain unchallenged hence the court accepts them as true.

8. The court accepts that the Applicant has been in possession of the suit property for a very long period of time. The court also accepts that the Applicant has undertaken some developments on the suit property. The question as to whether or not such possession and development would constitute adverse possession of the suit property is a question to be fully investigated and conclusively determined by the trial court. At this juncture, the court is satisfied that the Applicant has demonstrated a *prima facie* case with a probability of success at the trial within the meaning of the principles enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA. 358**.

9. The court is further satisfied on the basis of the material on record that unless the interim order of injunction is granted the Applicant might otherwise suffer irreparable loss and damage. The court is of the opinion that the kind of disruption, anxiety and hardship which the Applicant might suffer if evicted before his suit is heard and determined may not be easily quantifiable in monetary terms. Accordingly, the court finds that the consequences attendant upon a premature eviction may not be adequately compensated by a monetary award of damages.

10. Even if the court were to consider the principle of balance of convenience, the court is of the opinion that the same would lie in favour of the Applicant who appears to have been in possession for a long period of time. The Applicant is likely to suffer greater hardship if the interim injunction were denied than the Respondents would if the order was granted. The lesser hardship, therefore, lies in granting the temporary injunction.

11. The court has also considered the prayer for an order of inhibition to prevent any dealings with the suit property. The court is of the opinion that it has a duty to preserve property which is the subject of a dispute pending resolution of the dispute. It was held in the case of **Patel V Patel [1959] EA 907** that it is not only right for the court to preserve such property but that it has a duty to do so. The court has a duty to prevent the outcome of a suit being rendered nugatory. Accordingly, the court is inclined to grant the order of inhibition sought under **Section 68 (1) of the Land Registration Act, 2012**.

12. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 13th January 2020. Accordingly, the said application is allowed in terms of Order Nos. 4 & 5 thereof. Costs of the application shall be in the cause. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 27TH DAY of FEBRUARY, 2020.

In the presence of Mr. Ithiga for the Applicant and Mr. Andande holding brief for Mr. Eddie Njiru for the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020