



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 145 OF 2013

In the matter of the Estate of MBUGI MATATA (Deceased)

JOHN NJERU MBUGI.....PETITIONER

V E R S U S

DAVIID NTHIGA.....APPLICANT

R U L I N G

1. In the application dated 14/03/2018 the applicant seeks for restraining orders against the respondent/petitioner his agents, servants or any other person acting on his behalf interfering with LR. No. Evurore/Nguthi/1265 pending the hearing and determination of this cause.
2. The parties by consent relied on their affidavits in this application.
3. The applicant in the supporting affidavit sworn on 14/03/2018 deposes that he is claiming adverse possession of the land which he is and has been in actual, physical and continuous possession. He further states that even after his title was cancelled reverting to the name of the deceased Mbugi Mbita, the applicant has continued in quiet possession of the land.
4. He states it was only recently that the respondent and his siblings started interfering with the land by entering therein and threatening to evict the applicant. The respondents are also carrying out some unknown activities on the land. The applicant states that he had already cultivated trees and crops on the land some of which are now mature.
5. The applicant states that his interest of the land began in 1980 after a successful land adjudication process of Nguthi area. This registration was later cancelled by the Land Registrar but the applicant continued being in possession. A legal dispute in form of Embu ELC case No. 49 of 2014 is pending before the court between the applicant and his clan where the cancellation of the applicant's title is being challenged.
6. The respondent's counsel has already served the applicant with an eviction notice since the respondent was authorized in this cause to distribute the said land to the beneficiaries. The applicant states that he risks being evicted from the land before the ELC case is resolved which may cause him damage and loss.
7. The respondent in his replying affidavit admits that there was a dispute of ownership of the land LR. Evurore/Nguthi/1265 involving the Mukera clan to which the deceased and the applicant belongs. The dispute was resolved after the applicant was ordered to surrender the title to the deceased by the Land Registrar. The Land Registrar later cancelled the applicant's title in 1989 but the applicant persists in trying to get the land back.
8. It is not in dispute that the applicant is in actual and physical possession of the land. The parties admit the existence of the land dispute that has not ended despite the cancellation of the title deed whereas the land reverted to the name of the deceased.
9. It is not in dispute either that there is a land case ELC No. 49 of 214 pending in Embu over the same land. I believe that this case is likely to put to an end to the dispute between the parties, of course subject to appeal in the event that one party may be aggrieved by the outcome.
10. The purpose of an injunction is to preserve the property in dispute pending hearing and determination of a case. The injunction also serves to avoid waste and damage to the property and keeps the parties from acrimony that may develop to violence before the dispute is resolved by a court of law.
11. As was held in the case of **GIELLA VS CASSMAN BROWN** the applicant is required to establish the following before the court: -

i. A prima facie case with a probability of success

ii. That he is likely to suffer irreparable injury which would not be adequately compensated by an award of damages

iii. If the court is in doubt, it will decide the application on the balance of convenience.

12. The land was earlier registered in the name of the applicant though it was later cancelled. The applicant was not satisfied with the decision of his Mukera clan that he surrenders the land to the deceased. It is not disputed that the ELC case is still pending in court.

13. The applicant has been served with the eviction notice which is not denied. Being the person who has been in actual possession of the land, he is likely to suffer irreparable loss before the dispute is resolved in the pending case. The developments he has made on the land for over 25 years is likely to go to waste. The eviction is likely to affect the applicant and his family.

14. In issuing injunctive orders, it is necessary to consider the totality of the circumstances and the entire history of the case as was held in the case of **STEPHEN KIATU NGANGA VS STANLEY KINDUGA & ANOTHER Civil Appeal No. 441 of 2012**. The applicant says he is claiming adverse possession based on his prolonged occupation. The title of the land was in his name until it was cancelled.

15. All considered, I find that the applicant has shown a prima facie case with a probability of success. There is therefore a need to preserve the *status quo* on the land.

16. If the orders are not granted, the applicant has demonstrated that he is likely to suffer irreparable damage not likely to be compensated in way of damages.

17. On the other hand, the family of the deceased whose shares have been confirmed in the grant on the land in dispute have never occupied the said land and will not suffer any prejudice if the orders sought are granted.

18. I find the application merited and it is hereby allowed as prayed with no order as to costs.

19. This is an old succession cause of 2013 which must be finalized by the end of the year in accordance with the Chief Justice Sustainable Judiciary Transformation.

20. For this reason, the applicant is given sixty (60) days from the date of this ruling to fast track the ELC matter to conclusion.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

J U D G E

In the absence of parties