



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 10 OF 2020 (O.S.)

EUNICE WANGUI MBOGO.....1ST APPLICANT

JUSTIN NDARU NJIRU.....2ND APPLICANT

VERSUS

MARGARET MBUCU MATHURI (Sued as Administrator of

ADRIANO MATHURI NGONDI1ST RESPONDENT

PITHON NJIRU NGIRI.....2ND RESPONDENT

PRISCILLA WANTHIGA NGUYU (Sued as Administrator of

LAMECK NGUYU KARANJA3RD RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 9th April 2020 and amended on 19th May 2020 brought under **Order 40 Rules 1 & 3** of the **Civil Procedure Rules and all enabling legal provisions** the Applicants sought an interim injunction to restrain the Respondents, their servants, agents and anyone claiming under them from disposing, transferring or interfering with the Applicants' occupation of *Title No. Embu/Kithunthiri/1484* (now subdivided into *Embu/Kithunthiri/3569-3571*) or from evicting them therefrom pending the hearing and determination of the suit. In the alternative, the Applicants sought an order for maintenance of *status quo* pending the hearing and determination of the suit.

B. THE APPLICANTS' CASE

2. The said application was based upon the grounds set out on the face of the motion. The Applicants contended that they had been threatened with eviction whereas they had a pending claim for adverse possession which was filed contemporaneously with the filing of the application. They contended that they had been in uninterrupted occupation of the suit properties for a period exceeding 12 years hence they wanted to ventilate their claim whilst in possession.

3. The said application was supported by affidavits sworn by the 1st and 2nd Applicants respectively on 19th May 2020. The 1st Applicant claimed to have occupied the suit properties for 35 years whereas the 2nd Applicant claimed to have been in possession for 26 years. Both Applicants conceded that they were aware of *Embu ELC No. 5 of 2017 – Juliana Mbuya Njiru V Pithon Njiru Ngiri & 2 Others* which was heard and concluded before this court on 27th February 2020.

4. The material on record indicates that the said Juliana Mbuya (*Juliana*) was the mother and mother in law of the 2nd and 1st Applicants respectively. The Applicants, however, denied having authorized their mother to file *ELC No. 5 of 2017* on their behalf. They contended that they were not party to the said suit in which the court dismissed their mother's claim for adverse possession. The Applicants, therefore, wanted to advance their own claim for adverse possession against the same parties whom their mother had sued in *ELC No. 5 of 2017*.

C. THE RESPONDENTS' RESPONSE

5. The Respondents filed grounds of opposition dated 22nd May 2020 raising the following grounds:

a) *The application lacks merit.*

b) *The application is res judicata in view of Embu ELC No. 5 of 2017.*

c) *The suit land does not exist.*

d) *The suit is vexatious, bad in law and an abuse of the court process.*

6. The Respondents also filed a replying affidavit sworn by the 1st Respondent on 2nd June 2020 in opposition to the said application. It was contended that the instant suit and application were *res judicata* in view of the judgment in *Embu ELC No. 5 of 2017*. It was further contended that the Applicants had failed to meet the requirements for the grant of an interim injunction as set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358** and that the Applicants' motive was merely to defeat execution of the decree in *Embu ELC No. 5 of 2017*. The court was consequently urged to dismiss the application.

D. DIRECTIONS ON SUBMISSIONS

7. When the said application was listed for hearing on 26th May 2020 it was directed that the same be canvassed through written submissions. The Applicants were granted 7 days to file and serve their written submissions whereas the Respondents were given 7 days upon the lapse of the Applicants' period to file and serve theirs. The record shows that the Applicants filed their submissions on 5th June 2020 but the Respondents' submissions were not on record by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

8. The court has considered the notice of motion dated 9th April 2020 and amended on 19th May 2020, the grounds of opposition and replying affidavit in response thereto and the entire material on record. The court is of the view that the following issues arise for determination in this matter:

a) *Whether the Applicants have satisfied the requirements for the grant of an interim injunction.*

b) *Whether the Applicants have made out a case for the grant of an order for maintenance of status quo.*

c) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Applicants should be granted an interim injunction

9. The court has considered the material and submissions on record on this issue. The Applicants filed their originating summons dated 9th April 2020 for adverse possession on 15th April 2020 seeking an order that they have become entitled to 5 acres out of the suit properties. However, in the body of the originating summons they pleaded that they had been in occupation of 4½ acres. The supporting affidavits indicate that the 1st Applicant is seeking 2 acres whereas the 2nd Applicant is seeking 2½ acres out of the suit properties.

10. In paragraph 8 of the affidavit in support of the originating summons the 2nd Applicant deposed that he was authorized by the deceased to build upon and utilize part of the suit properties. On the other hand, the 1st Applicant swore in paragraph 6 of her affidavit in support of the originating summons that it was the deceased who authorized her and her late husband to utilize part of the suit properties.

11. The court is aware that in *Embu ELC No. 5 of 2017* Juliana had sued the current Respondents seeking cancellation of their titles on account of alleged fraud. Juliana had also included an alternative claim for adverse possession against the Respondents. By its judgement dated 27th February 2020, the court dismissed Juliana's suit and allowed the Respondents' counterclaim for eviction. The court found and held that Juliana had failed to prove her claim for adverse possession not because she and her family members were not in possession but because the court found that such possession had not met the statutory threshold of 12 years.

12. The court took the view that it was the deceased who was all along in possession of the suit properties during his lifetime and that Juliana was simply in occupation as a spouse of the deceased. Since there was evidence to demonstrate that the deceased died in 2012, then Juliana's exclusive possession could only run with effect from 2012 and not earlier. Consequently, the court found that the claim for adverse possession was prematurely filed.

13. It is apparent from the material on record that the Applicants have mounted a separate suit for adverse possession on the ground that they were not privy to the earlier suit and that they did not authorize Juliana to file or prosecute the said claim on their behalf. They have, therefore, mounted the claim in their own right as adults. There is no doubt from the evidence tendered in the earlier suit that the deceased moved into the suit properties together with his wife (Juliana) and family members a long time ago. The accompanying family members settled on the suit properties by virtue of being part of the family of the deceased and not in their own right. The evidence tendered by Juliana in the earlier suit was that it is the deceased who permitted his adult sons to occupy parts of the suit properties. Such permission was confirmed by the Applicants in their respective affidavits. The court, therefore, takes the view that Applicants' exclusive possession of the suit properties could only have begun upon the death of the deceased or Juliana, or both. The material on record shows that the deceased died in 2012 whereas Juliana died in 2020. Accordingly, whether time is computed from 2012 or 2020, it is evident that the statutory period of 12 years has not been attained.

14. In the case of **Situma V Cherongo [2007] 2 KLR 85** the Appellant, who was the son and administrator of the estate of his late father

(who was a purchaser), sued the vendor of the suit property seeking adverse possession thereof. When the action failed before the High Court, he lodged an appeal to the Court of Appeal in which he also asserted his own claim for adverse possession on account of his lengthy occupation of the suit property. In dismissing the appeal, the court held, *inter alia*, that:

“In the circumstances, we are of the view that the appellant did not have independent possession of the land from his father and that the appellant’s possession of the land was through his father in his capacity as his son. Moreover, the appellant did not demonstrate that he had the requisite intention to possess the land to the exclusion of all persons including the respondent during that period.”

Although the court found that time for purposes of limitation started running in favour of the Appellant upon the demise of his father, it was found that such period was for about 9 years only hence it fell short of the statutory minimum period of 12 years.

15. In the circumstances, the court is of the opinion that even if time for purposes of adverse possession were to be reckoned with effect from 2012 when the deceased died, that would make it a period of about 8 years which falls short of the statutory minimum of 12 years. Accordingly, the court is not satisfied that the Applicants have made out a *prima facie* case with a probability of success at the trial. However, this opinion is merely provisional hence the Applicants shall be at liberty to persuade the trial court otherwise.

16. Since the Applicants have failed to satisfy the first principle for the grant of an interim injunction it shall not be necessary to consider the 2nd and 3rd principles in the circumstances. The Applicants’ case has simply failed at the first of the three hurdles.

b) Whether the Applicants should be granted a status quo order

17. The court is of the opinion that since the Applicants have failed to demonstrate a *prima facie* case with a probability of success at the trial there would be no basis for granting a *status quo* order. Accordingly, the 2nd issue is answered in the negative.

c) Who shall bear costs of the application.

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of a suit or action unless, for good reason, the court directs otherwise. See **Hussein Jammohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful Respondents should not be awarded costs of the application. Accordingly, the Respondents shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

19. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 9th April 2020 and amended on 19th May 2020. The same is accordingly dismissed in its entirety with costs to the Respondents. It is so ordered.

RULING DATED and SIGNED in Chambers at **EMBU** this **18TH DAY** of **JUNE 2020** via zoom platform in the presence of Ms. Anne Thungu for the Applicants and in the absence of the Respondents.

Y.M. ANGIMA

JUDGE

18.06.2020