



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 31 OF 2019 (O.S.)

NAZARIO NJERU NJIRU.....1ST PLAINTIFF

MBUGI NJIRU.....2ND PLAINTIFF

VERSUS

EUSTACE NJIRU MITUKI.....DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 24th July 2019 expressed to be brought under **Sections 28 (h) of the Land Registration Act No. 3 of 2012, Order 37 Rule 7 (a) (b) & (c) of the Civil Procedure Rules (the Rules) and Sections 7, 17, 18, 37 & 38 of the Limitation of Actions Act (Cap. 22)** the 1st & 2nd Plaintiffs sought a declaration that they had become entitled to be registered as proprietors of *Title No. Evurore/Nguthi/79 (the suit property)* by virtue of adverse possession. In the alternative, they sought an order that the Defendant was holding the suit property in trust for them.

B. THE PLAINTIFFS' APPLICATION

2. Vide a notice of motion dated 9th March 2020 brought under **Section 68 (1) of the Land Registration Act No. 3 of 2012, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Plaintiffs sought an order of inhibition to prevent any dealings with the suit property pending the hearing and determination of the suit. They also asked the court to make such further orders as shall meet the ends of justice in the circumstances.

3. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Plaintiff on 9th March 2020 and the annexures thereto. The Plaintiffs claimed to have acquired an interest in the suit property on account of adverse possession even though the Defendant had been declared the legitimate owner thereof in *Embu CMCC No. 274 of 2014 – Eustace Njiru Mituki V Kinyatta Njiru*. It was contended that the issue of adverse possession was not determined in the said suit hence the reason for filing the instant originating summons.

4. The Plaintiffs further contended that it would be just in the circumstances to preserve the suit property until the suit is heard and concluded since they were apprehensive that the Defendant may dispose of the suit property before the instant suit is heard and determined. The Plaintiffs also contended that the Defendant had intimidated and threatened them with eviction even though they did not seek any protective orders in that regard.

C. THE DEFENDANT'S RESPONSE

5. The Defendant filed a replying affidavit sworn by himself on 21st May 2020 in opposition to the said application. The Defendant denied that the Plaintiffs were in adverse possession of the suit property and stated that if they were in occupation then they were in occupation through their brother Kinyatta Njiru whom the Defendant had granted permission to occupy the suit property. The Defendant further stated that the only structure on the suit property was a mud structure hence the Plaintiffs had not adequately demonstrated occupancy.

6. The Defendant further stated that the Magistrates' court had declared him the rightful owner of the suit property in *Embu CMCC No. 274 of 2014* and that if the Plaintiffs had any legitimate claim on the suit property they ought to have joined that suit. The Defendant was of the view that the instant application was frivolous and an afterthought which should be dismissed with costs.

D. DIRECTIONS ON SUBMISSIONS

7. When the said application was listed for hearing on 29th June 2020 it was directed that the same shall be canvassed through written submissions. The Plaintiffs were granted 21 days to file and serve a further affidavit and written submissions whereas the Defendant was granted 21 days upon the lapse of the Plaintiffs' period to file and serve his submissions. By the time of preparation of the ruling, however, none of the parties had filed submissions.

E. THE ISSUES FOR DETERMINATION

8. The court has considered the Plaintiffs' application, the Defendant's replying affidavit in response thereto and the material on record. The court is of the opinion that the main question for consideration is whether or not the Plaintiffs have made out a case for the grant of an order of inhibition under **Section 68 (1)** of the **Land Registration Act**.

F. ANALYSIS AND DETERMINATION

9. The court has considered the entire material on record on this issue. The Plaintiffs have lodged a claim for adverse possession against the suit property. They claimed to have been in occupation of the suit property for a very long time and that they had developed it by building dwelling houses and cultivating crops thereon. The affidavit in support of the originating summons has exhibited photographs of some houses and other developments said to belong to the Plaintiffs.

10. Although the Defendant disputed the Plaintiffs' possession of the suit property in his replying affidavit, he contradicted himself in paragraph 9 of his affidavit as follows:

“9. THAT the applicants have no claim over the sit land, they have unlawfully encroached on the suit land occasioning loss and damage on the land.” (underlining added)

11. The court is of the opinion that the Plaintiffs have laid a reasonable basis for their claim since they appear to be in possession of the suit property or part thereof. As to whether or not their claim will eventually succeed at the trial is a matter for the trial court to determine upon evaluation of the evidence tendered at the trial. The Plaintiffs are at this stage seeking an interim measure of protection to preserve the suit property pending the hearing and determination of their claim on merit.

12. The court is satisfied on the basis of the material on record that it would be just and prudent to preserve the suit property pending the hearing and determination of the suit. As was held in the case of **Shivabhai Patel V Manibhai Patel [1959] EA 907**, it is not only prudent but it is also the duty of the court to preserve property which is the subject of a dispute pending adjudication of the rights of the parties. In the circumstances, the court is satisfied that the Plaintiffs have made out a case for the grant of an order of inhibition under **Section 68 (1)** of the **Land Registration Act, 2012**.

G. CONCLUSION AND DISPOSAL ORDER

13. The upshot of the foregoing is that the court finds merit in the Plaintiffs' notice of motion dated 9th March 2020 and consequently the same is hereby allowed in terms of order (c) thereof. Costs of the application shall be in the cause.

RULING DATED and SIGNED in Chambers at EMBU this 24TH DAY of SEPTEMBER 2020 and delivered via Microsoft Teams platform in the presence of Miss Mutege for the Plaintiffs and in the absence of Eddie Njiru & Co. Adv. for the Defendant.

Y.M. ANGIMA

JUDGE

24.09.2020