



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 13 OF 2020

MARY WANGU NJAGI.....PLAINTIFF/APPLICANT

VERSUS

NANCY WANJIRA NJAGI.....1ST DEFENDANT/RESPONDENT

JANE WANJIRU NJAGI.....2ND DEFENDANT/RESPONDENT

JOSEPH MWANIKI KARIUKI.....3RD DEFENDANT/RESPONDENT

RULING

1. Introduction

i. This is an application dated 27.04.2020 for an injunction to stop the eviction of the plaintiff/applicant from the land parcel No. KABARE/GACHIGI/2380 or the damaging/cultivating and interfering with the said land.

ii. The application was premised on the grounds that:

a. The applicant's claim to the suit property is by way of adverse possession

b. That he applicant has been in possession of the suit property for over 60 years

c. That the applicant has built permanent houses on the said land and planted 3000 tea bushes, 100 coffee stems and bananas

d. That the 3rd defendant issued a verbal notice to the applicant to vacate the property

e. That the defendants should be restrained from evicting the applicant until the suit is heard and determined.

iii. In response the respondent filed their replying affidavit dated 20.5.2020 in which the 1st defendant averred that the application was misleading and filled with false assertions.

iv. The application was heard inter-partes on 14.07.2020 parties consented to dispose of the application by way submissions

2. Statement of the facts

i. The applicant claims she is the wife of the late Njagi Munyi while the 1st and 2nd respondent is her child and grandchild respectively; the third respondent is a purchaser for value that also claims title to the land.

ii. The late Njagi Munyi passed away in March 2020 and his properties were subject to numerous civil cases. In Kerugoya CMCC No. 285 of 2014 the court ordered on distribution of his properties. The parcel of land in dispute was apportioned to Njagi Munyi, Nancy Wanjira Njagi, Jane Wanjiru Njagi and Grace Kimandi Njagi jointly as per the decree dated 31.3.2015.

iii. In Kerugoya CMCC No. 23 of 2020, the court ordered that the 3rd respondent had legitimate proprietary right over the land in dispute parcel No. KABARE/GACHIGI/2380 and that third parties were restrained from interfering on his rights as per the decree dated 27.3.2020.

iv. The 1st respondent alleges that the applicant and her late husband relocated to live with her in a constructed family house on another parcel of land INOI/MBETI/913 as her father Njagi Munyi was ill at the time and that after the death of Njagi Munyi her other sibling Douglas Muriuki forcibly took the applicant from the 1st respondent's custody and claimed back LR KABARE/GACHIGI/ 2380.

v. The applicant claims right of ownership on the said parcel KABARE/GACHIGI/2380 where she resided with her late husband for over 60 years and invested in its development.

3. Analysis

The issue that the Court must decide is whether the applicant has met the threshold for an order of an injunction. What comes to mind in such an application for injunction is the celebrated case of *Giella Vs Cassman Brown Co. Ltd (1973) E.A. 358* which sets out the prerequisite for an order of injunction as follows:-

(a) The applicant must establish a prima facie case.

(b) He must show that he will suffer irreparable loss and

(c) Where the Court is in doubt, the matter to be decided on a balance of convenience.

The applicant in her supporting affidavit is laying claim to the suit property based on adverse possession. For adverse possession to crystallize, one has to demonstrate that he/she is in occupation of the suit property and that he/she has been in occupation of the same for not less than twelve (12) years. The applicant in paragraph 6 of the supporting affidavit has stated that she has lived on the suit land for more than 60 years and that she is an old woman who does not have anywhere to go if evicted from the suit land. She has also deponed that she has built permanent houses on the land where she lived with her husband Njagi Munyi (deceased) until he passed on. The applicant also stated that they have planted 3000 tea bushes, 100 coffee stems and bananas on the disputed land. These developments in my view are substantive evidence in a claim for adverse possession.

The respondent in response has stated that the intention of the applicant's husband the late Njagi Munyi was not to leave the property to the applicant and that she had ceased to occupy the land as her permanent structures were done away with when the 3rd respondent set up his own in March 2020.

The test for granting an interlocutory injunction was considered in the American case of *CYNAMID COMPANY VS ETHICOM LIMITED (1975) A.A.E.R 504* where three elements were noted to be of great importance namely:-

(i) There must be a serious/fair issue to be tried.

(ii) Damages are not an adequate remedy;

(iii) The balance of convenience lies in favour of granting or refusing the application.

Flowing from these two celebrated decisions, the circumstances for consideration before granting a temporary injunction under **Order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in grave danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of the property in dispute or evict the applicant from the disputed land where his claim is based on *Limitation of Actions Act* thereby interfering with the status quo. The Court in such situation is enjoined to grant a temporary conservatory order to ensure that the status quo is maintained until the suit is heard and determined.

A prima facie can not only be determined by the holder of a title to property but the existence of a right which has been or likely to be infringed by the opposite party as was held in the case of *MRAO LIMITED VS FIRST AMERICAN BANK OF KENYA AND 2 OTHERS (2003) K.L.R 125* where the Court of Appeal defined a prima facie as follows:

“A prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

I agree entirely with the binding decision by the Superior Court.

Disposition

For all the reasons given hereinabove, I find the Notice of Motion dated 27th April, 2020 meritorious and grant a temporary injunction for 90 days from today. The costs of the application shall be costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 18th day of September, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

Ms Waweru holding brief for Kahiga for Defendant/Respondent

Applicant in person – present

Mbogo, Court clerk – present