



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 22 OF 2020 (O.S.)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NO. KYENI/KATHUNGURI/T43

AND

IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCEL

NO. KYENI/KATHUNGURI/T43

BETWEEN

RACHAEL WAMBURA NGONDI.....PLAINTIFF

VERSUS

JUSTA MUTITU MURIUKI (Sued as the personal representative of the

Estate of Henry Muriuki Kuviuva.....**1ST DEFENDANT**

CYPRIAN NDWIGA (Sued as the legal beneficiary of the

Estate of Henry Muriuki Kuviuva.....**2ND DEFENDANT**

LUKA MURIUKI (Sued as the legal beneficiary of the

Estate of Henry Muriuki Kuviuva.....**3RD DEFENDANT**

RULING

A. INTRODUCTION

1. By an originating summons dated 5th August 2020 the Plaintiff sought adverse possession of *Title No. Kyeni/Kathunguri/T.43* (the *suit property*) against the Defendants who were sued as legal administrators and beneficiaries of the estate of Henry Muriuki Kuviuva (*the deceased*). The Plaintiff contended that she had been in occupation of the suit property since 2004 and that she had extensively developed it by constructing a permanent house and cultivating various crops thereon.

2. Simultaneously with the filing of the said originating summons the Plaintiff also filed a notice of motion of even date expressed to be brought under **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act**, **Sections 63 (c) and (e)** of the **Civil Procedure Act**, **Section 68(1)** of the **Land Registration Act** and **Order 40 Rule 1, 2, 3 & 4** of the **Civil Procedure Rules 2010** seeking the following pertinent orders:

a) *Spent*

b) *Spent*

c) That the Respondents by themselves, their agents, servants or anybody acting under the Respondents instructions be restrained from entering upon, taking possession of, occupying, utilizing, selling, transferring, charging, alienating, interfering with the Plaintiff's occupation or in any other way dealing with land parcel No. Kyeni/Kathunguri/T43 pending the hearing of this suit.

d) That an order of inhibition be issued inhibiting the registration of any dealings with land parcel No. Kyeni/Kathuguri/T43 pending the hearing and determination of this suit.

e) That costs be provided for.

B. THE PLAINTIFF'S CASE

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 Plaintiff on 5th August 2020 and the annexures thereto. It was contended that the Defendants had forcibly entered the suit property and demolished the Plaintiff's house. It was also contended that the Defendants had started felling trees on the suit property and fencing it off. It was further contended that the Defendants were likely to sell, charge or alienate the suit property with a view to defeating the Plaintiff's claim for adverse possession.

C. THE DEFENDANTS' RESPONSE

4. The Defendants filed a replying affidavit sworn by the 4th Defendant on 8th September 2020 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of his co-defendants. The Defendants denied the Plaintiff's factual allegations in the application in their entirety. They denied that the Plaintiff has been in possession of the suit property and that she had any permanent structures or developments thereon.

5. The Defendants stated it was the Plaintiff's late mother, one Rebecca John who was living on the suit property and that she vacated after the Land Disputes Tribunal (*the Tribunal*) determined that the suit property belonged to the deceased. The Defendants further stated that at all material times the Plaintiff was residing with her husband and family on a different parcel of land known as *Kyeni/Kigumo/1138*.

6. The Defendants denied that they were intending to sell the suit property but stated that they merely intended to distribute it to one of the beneficiaries of the estate of the deceased. They, therefore, prayed for dismissal of the Plaintiff's application for interim orders with costs.

D. THE PLAINTIFF'S REPLY

7. The Plaintiff filed a further affidavit sworn on 25th September 2020 in response to the Defendants' replying affidavit. The Plaintiff stated that the Defendants only invaded the suit property and forcibly evicted her after she filed the originating summons. She stated that she had been enjoying exclusive possession of the suit property since 2004 when her late mother died. It was her contention that even her late mother was buried on the suit property and that the Defendants had wrongfully destroyed her grave in order to destroy evidence of occupation.

E. DIRECTIONS ON SUBMISSIONS

8. When the said application was listed for hearing on 9th September 2020, it was directed that the same shall be canvassed through written submissions. The Plaintiff was granted 7 days to file her written submissions whereas the Defendants were granted a similar period to file theirs upon the lapse of the Plaintiff's period. The record shows that the Plaintiff filed her submission on or about 20th October 2020. However, the Defendants' submissions were not on record by the time of preparation of the ruling.

F. THE ISSUES FOR DETERMINATION

9. The court has considered the Plaintiff's notice of motion dated 5th August 2020, the Defendants' replying affidavit in opposition thereto, the Plaintiff's further affidavit as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

a) *Whether the Plaintiff has made out a case for a temporary injunction.*

b) *Whether the Plaintiff has made out a case for an order of inhibition.*

G. ANALYSIS AND DETERMINATIONS

a) Whether the Plaintiff has made out a case for the grant of a temporary injunction

10. The court has considered the material on record and the submissions on record on this issue. The principles for the grant of an interlocutory injunction were settled in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. First, an applicant must demonstrate a *prima facie* case with a probability of success. Second, an injunction will not normally be granted unless the applicant has demonstrated that he will suffer irreparable injury which cannot be adequately compensated by an award of damages. Third, if the court is in doubt, it shall decide the matter on a balance of convenience.

11. Although the Plaintiff's late mother had laid a claim over the suit property, it was not a claim for adverse possession. In any event, the Tribunal did not have jurisdiction to deal with such a matter. The Plaintiff in the instant application has sued in her own right to vindicate

her perceived rights. There is some evidence on record to demonstrate that her mother died in 2004 hence the Plaintiff's claim is based on her occupation after that date.

12. The court has considered the photographs which were tendered by the Plaintiff and the Defendants herein. The court is not required at this juncture to determine with finality the issues raised in the suit as to occupation, the period of occupation and the legal consequences thereof. That is the sole function of the trial court. However, the court is satisfied from the material on record that the Plaintiff has been in occupation for a reasonably long period and that she has some buildings and crops on the suit property. The Defendants did not contend that those developments belonged to them or the deceased. The court is thus satisfied that the Plaintiff has made out a *prima facie* case with a probability of success at the trial.

13. The court is further satisfied from the material on record that the alleged violations by the Defendants are such that they cannot be adequately compensated by an award of damages. The disruption of the Plaintiff's occupation and the destruction of trees and crops are not always easy to remedy by an award of damages. The court is thus of the opinion that Plaintiff has satisfied the second principle for the grant of an injunction. In the premises, it shall not be necessary to consider the balance of convenience since the court is not in doubt on the first two principles.

b) Whether the Plaintiff has made out a case for the grant of an order of inhibition

14. The court has considered the material and submissions on record on this issue. The purpose of an order of inhibition is to preserve property which may be in dispute until the rights of the disputing parties are adjudicated upon and determined. As was held in the case of **Shivabhai Patel v Manibhai Patel [1959] EA 907**, it is prudent for a court to preserve property which is the subject of a dispute. The Defendants have admitted that they intend to distribute the suit property to one of the beneficiaries of the estate of the deceased in accordance with the grant. The court is of the opinion that a transfer of the suit property to a beneficiary is a form of alienation thereof which should be suspended pending the hearing and determination of the suit. The court is thus satisfied that the Plaintiff has made out a case for preservation of the suit property.

H. CONCLUSION AND DISPOSAL ORDER

15. The upshot of the foregoing is that the court finds merit in the Plaintiff's application for interim orders. Accordingly, the Plaintiff's notice of motion dated 5th August 2020 is hereby allowed in the following terms:

- a) A temporary injunction be and is hereby granted restraining the Defendants, their agents, servants or anybody acting through them from occupying, utilizing, selling, leasing, transferring, charging, alienating, or interfering with the Plaintiff's occupation of *Title No. Kyeni/Kathunguri/T43* until the hearing and determination of the suit.
- b) An order of inhibition is hereby granted preventing registration of any dealings with *Title No. Kyeni/Kathunguri/T43* pending the hearing and determination of the suit.
- c) Costs of the application shall be in the cause.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **22ND DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Kimanzi for the Plaintiff and Mr. Njiru Mbogo for the Defendants.

Y.M. ANGIMA

JUDGE

22.10.2020