



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC NO. 6 OF 2013

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT
IN THE MATTER OF REGISTERED LAND ACT AND CIVIL PROCEDURE RULES
IN THE MATTER OF PIECE OF LAND NO. GATURI/NEMBURE/7993, 7994, 7995
IN THE MATTER OF ADVERSE POSSESSION
MICHAEL GICOVI NYAGAAPPLICANT

VERSUS

JOHANA IRERI SIMON1ST RESPONDENT

STEPHEN KIBE2ND RESPONDENT

RULING

The applicant has moved this Court under ***Section 38 of the Limitation of Actions Act*** seeking orders that this Court make a declaration that he has obtained title to parcels of land GATURI/NEMBURE/7993, 7994 and 7995 being resultant sub-division of GATURI/NEMBURE/1142 by adverse possession having lived there together with his family, mother, brothers and their families and great and grand children since 1963. He further seeks orders that the respondent's registration as proprietors of the said parcels of land be cancelled.

Simultaneously with the filing of that Originating Summons, the applicant filed a Notice of Motion under ***Order 40 of the Civil Procedure Rules*** seeking that the respondents be restrained from trespassing, mortgaging, alienating, sub-dividing or in any manner interfering with the suit land GATURI/NEMBURE/1142 or its sub-divisions GATURI/NEMBURE/7993, 7994 and 7995 until the Originating Summons is heard.

The application is supported by the applicant's affidavit in which he depones, inter alia, that his late father bought the suit land over 40 years ago from the respondents' father and since then, he and his family have lived on the land and developed it and they would therefore be rendered homeless and suffer irreparable damage if they lost the land.

The application is opposed and by a replying affidavit sworn by the 2nd respondent on behalf of the 1st respondent, it is deponed, inter alia, that the respondents are the owners of the suit land as purchasers for value without notice and have the title deeds. It is deponed further by the 2nd respondent that the applicant is only in illegal possession of one parcel i.e. L.R. GATURI/NEMBURE/7993 and not

the other two portions and in any case, the applicant's claim of adverse possession stands no chance of succeeding as he has not been occupying the land openly and as of right since there has been a dispute over his occupation.

The parties counsel have made submissions which I have considered together with the relevant affidavits and other documents placed before me.

In the course of the application, the applicant has alluded to some Criminal Case pending against him in Embu and his fear that if he is convicted, he would suffer illegally and be evicted from his land. I wish to point out from the outset of this ruling that whatever orders I issue herein have no bearing whatsoever on any Criminal Charge facing the applicant in any Court in relation to the suit property as this Court is only sitting as a Civil Court and not a Criminal Court. I cannot therefore issue any orders in relation to the Criminal Case. That jurisdiction lies elsewhere.

Having said so, this is an application for an injunction pending the hearing of the applicant's Notice of Motion seeking orders that he is entitled to land parcels GATURI/NEMBURE/7993, 7994 and 7995 being the resultant sub-division of GATURI/NEMBURE/1142. In his affidavit in support of his Notice of Motion, he has deponed in paragraph 4 that he and his family have been living on GATURI/NEMBURE/1142 since 1963 having bought it from the original owner one NJUE NYAGA (deceased). And in his affidavit in support of this application, he depones that he and his family have fully developed the land. The respondents argue that infact the applicant is only illegally occupying GATURI/NEMBURE/7993 and not the other two portions. The principles upon which a Court grants an injunction are that:-

- a. ***The applicant must show that he has a prima facie case with a probability of success.***
- b. ***An interlocutory injunction will not normally be granted unless it can be shown that the applicant would otherwise suffer irreparable injury which cannot adequately be compensated in damages.***
- c. ***If the Court is in doubt, it will decide the application on a balance of convenience – see GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.***

Whereas the applicant contends that he and his family live on GATURI/NEMBURE/114 which has been segmented into GATURI/NEMBURE/7993, 7994 and 7995, it is the respondent's case that infact the applicant only lives illegally on GATURI/NEMBURE/7993. It is not in dispute that infact the land GATURI/NEMBURE/7993 is registered in the names of the 1st respondent while GATURI/NEMBURE/7994 is registered in the names of the 2nd respondent as per the copies of the title deeds annexed to the applicant's Originating Summons. Therefore, going by the replying affidavit of the respondent's herein, the applicant's occupation of the suit land is not really disputed. In his Originating Summons, he has only annexed copies of title deeds in respect of GATURI/NEMBURE/7993 and 7994. It is a requirement of the law that a party moving the Court for orders to be declared as having become entitled by adverse possession to land shall support such an application with a certified extract of the title to the land in question – see ***Order 37 Rule 7 Civil Procedure Rules***. In this case, the applicant has annexed titles to GATURI/NEMBURE/7993 and 7994 and the respondents concede that indeed the applicant occupies GATURI/NEMBURE/7993 though illegally. Of course whether or not the applicant's occupation of GATURI/NEMBURE/7993 meets the requirement of adverse possession is a matter that will be determined by the trial Court after hearing evidence. For now, however, his contention that he and his family have occupied the said land and which is really confirmed by the respondents' establishes, in my view, a prima facie case to warrant the grant of the orders sought. The applicant has therefore surmounted the first rule in the ***GIELLA*** case (supra).

As to whether the applicant would suffer irreparable injury which cannot adequately be compensated in damages, the applicant has deponed that the land has been the ancestral home of his family for the last 50 years some of who are buried on the said land. Given those circumstances, if the applicant and his family were to be dispossessed of the suit land in any manner and yet succeed in the Originating Summons in which he seeks a declaration that he has become entitled to the land by

adverse possession, damages would not, in my view, be an adequate compensation.

Finally, if I were to decide this application on a balance of convenience, the scales would tilt in favour of the applicant who is in occupation of the land in dispute.

Ultimately therefore, upon considering the application before me seeking injunctive orders, I find that the same is well merited and I grant the orders restraining the defendants by themselves, their servants or agents from trespassing, mortgaging, alienating, sub-dividing or in any manner interfering with the applicant's peaceful possession of the suit land GATURI/NEMBURE/1142 or its subdivisions GATURI/NEMBURE/7993, 7994 and 7995 pending the hearing of the Originating Summons filed herein. Costs in the cause.

B.N. OLAO

JUDGE

4/7/2013

4/7/2013

Before B. N. OLAO – JUDGE

CC – Muriithi

Mr. Ngari for Mr. Mugo for Plaintiff present

No appearance for Defendant

COURT: Ruling delivered this 4th day of July 2013 in open Court.

B. N. OLAO

JUDGE

4/7/2013