



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 243 OF 2012

RICHARD KIMANI.....1ST PLAINTIFF
RICKY KILONZO NASON.....2ND PLAINTIFF
MUSYOKA DAVID MUTISO.....3RD PLAINTIFF
ROSE MUSEMBI.....4TH PLAINTIFF
EVANS ADELA.....5TH PLAINTIFF
AHMED OKOLO ADELA.....6TH PLAINTIFF
VICTOR GICHIRA KANGANGI.....7TH PLAINTIFF
JOSEPH MEMBA.....8TH PLAINTIFF
PETER NJUGUNA MUIRA.....9TH PLAINTIFF
TITUS KEEN MWANGI.....10TH PLAINTIFF
JOEL MUTURIA MUTURI.....11TH PLAINTIFF
ANDREW KAMAU NDEGWA.....12TH PLAINTIFF
SILAS MIRANDA ODERA.....13TH PLAINTIFF
EVERLYN KEMUNTO NYANGAU.....14TH PLAINTIFF
SYLVESTER JUMA.....15TH PLAINTIFF
JOHN NDUNGU MURENGWA.....16TH PLAINTIFF

DANIEL KITHOME.....17TH PLAINTIFF

NELSON KYALO MWIKYA.....18TH PLAINTIFF

JAMES MUTHEE MUREITHI.....19TH PLAINTIFF

JUSTUS NZIOKA MUTWIWA.....20TH PLAINTIFF

JONES NGETHE MUE.....21ST PLAINTIFF

VERSUS

ROSEMARY B. KOINANGE.....DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 9th May 2012 in which the Plaintiffs seek for orders of a temporary injunction restraining the Defendant from evicting them from the parcel of land known as L.R. No. 9042/133 (hereinafter referred to as the "Suit Property") or from demolishing or fencing in the Plaintiffs' buildings or interfering with the Plaintiffs' possession of the same or alienating, transferring, disposing off or dealing with the Suit Property in any manner whatsoever pending the hearing and determination of this application and of the main suit. They also seek for costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Musyoka David Mutiso sworn on 9th May 2012 in which he stated that in the beginning of 1992, his co-Plaintiffs and he occupied the Suit Property and put up structures thereon thinking the then unoccupied land belonged to the government or the City Council of Nairobi. He further averred that they were in continuous and uninterrupted possession of the Suit Property since their said entry save that in 1995 someone claiming to represent the owner thereof came to the land and demanded that they vacate but that he left after they demanded proof of ownership. He further averred that since that time, no one came to claim the Suit Property until on 27th April 2012 when the Defendant's representative in the company of goons came to the Suit Property claiming ownership thereof and issued to them an oral notice to vacate the Suit Property within ten days. He further stated that he believes that he and his co-Plaintiffs have acquired prescriptive rights over the Suit Property through adverse possession having been in occupation of the Suit Property for more than 12 years and that it is only fair and just to protect the status quo on the ground through an injunction before this dispute is finally determined.

The Application is contested. The Defendant filed his Grounds of Opposition dated 27th July 2012 and the Replying Affidavit of Dr. Rosemary B. Koinange sworn on 6th December 2012. In the Grounds of Opposition, the Defendant stated as follows:

- i. That the application is bad in law as it offends the rule in ***Karanja Matheri vs. Kanji (1976) KLR 140*** which requires that an applicant prove the alleged area of a big portion of land which he or she is allegedly in adverse possession of.
- ii. That on their own admission, the Applicants did not have in 1992 or thereafter the requisite intention of acquiring the Suit Property adversely as they occupied the same assuming it belonged to the Government or the City Council of Nairobi.
- iii. That the Defendant having acquired title to the Suit Property on 22nd July 1994, no account can be taken of the Plaintiffs' possession thereof before that date.

- iv. That if ever the Plaintiffs were in possession of the Suit Property, their possession was terminated in 2002 when they were all evicted by the Defendant.
- v. That the Suit Property having been charged to a bank between 17th November 1997 to 23rd July 2004, the Applicants cannot be said to have been in adverse possession.
- vi. That the suit is bad in law for offending the rule in **Research International East Africa Ltd vs. Arisi & Others (2007) I EACA 348** as the originating summons is not verified or supported by affidavits of all plaintiffs, as all the plaintiffs are required by law to individually verify the affidavit.

In her Replying Affidavit, Dr. Rosemary B. Koinange averred that by a court order issued on 15th October 2012, she was authorized to replace her late husband in this suit. She further averred that her late husband is the registered proprietor of the Suit Property and she produced a copy of the Certificate of title. She further stated that in 2002, all persons who were on the Suit Property were removed and the property was fenced but that sometime thereafter some people returned thereon. She further stated that her late husband exercised his right as owner of the Suit Property by evicting the Plaintiffs leading to the Plaintiffs filing this suit. She further stated that according to the land law of this country, permanent buildings are known as fixtures and are part of the land, that it is trespass to land for somebody to occupy another's land without the latter's permission, that trespassers are liable to pay mesne profits for the illegal occupation of another's land, and that an owner of land is entitled to evict trespassers.

In response thereto, the 1st Plaintiff filed his Further Affidavit sworn on 13th February 2013 in which he stated that both he and his co-plaintiffs had demonstrated their occupation of the Suit Property vide photos showing their developments on the Suit Property and that the specific area of occupation would be ascertained at the full hearing or upon a site visit. He admitted that when they first occupied the Suit Property, they assumed that the same belonged to the government or the City Council of Nairobi but that in 1995, when someone came claiming ownership thereof, they established that the Suit Property is private property. He, however, denied that they were ever evicted from the Suit Property.

The Plaintiffs and the Defendant filed their written submissions which have been read and taken into consideration by this court.

In deciding whether to grant the sought after temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

There is the danger of being drawn into determining the merits of this case at this interlocutory stage of

these proceedings. All that I am required to do at this stage is to establish whether the Plaintiffs have established a genuine and arguable case warranting them protection as we await the final determination of the main suit. It is evident that the Defendant has made an effort to evict the Plaintiffs out of the Suit Property which would put them out of possession thereof, thereby jeopardizing their suit. In the case of **BABER ALIBHAI MAWJI v SULTAN HASHAM LALJI & ANOTHER [2010] eKLR**, it was stated as follows:

“In our view, a registered owner in asserting his right cannot ride on the back of the possessor’s claims or suits, he must commence his own because where a possessor commences suit, one of the immediate effects of such a suit is on the ground, is a declaration to the world, that he is dispossessing the owner. This is because for the possessor to succeed, he must establish factual possession ... and that he, the possessor has the requisite intention (animus possidendi) to possess ... – see the English case of LITTLE DALE v LIVERPOOL COLLEGE (1900) C.A. 968.”

Looking at the facts of this case, the Plaintiffs have demonstrated, on a prima facie basis, that they have been in possession of the Suit Property for some time. The photographs produced in evidence show that the Plaintiffs have made substantial developments thereon. That being the case, I find that the Plaintiffs have established a prima facie case with chances of success. Further, owing to the fact that land is unique and no one parcel can be equated in value to another, I find that damages will be insufficient to compensate the Plaintiffs should they lose the Suit Property. Being in possession of the Suit Property, I find that the balance of convenience tilts in favour of the Plaintiffs.

The application is therefore allowed. Costs shall be in the cause.

SIGNED AND DELIVERED IN NAIROBI THE 4TH

DAY OF OCTOBER 2013

MARY M. GITUMBI

JUDGE