



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 614 of 2011

JANE FRANCIS NGUGI..... PLAINTIFF

VERSUS

STEPHEN KAMURI NG'ANG'A.....1ST DEFENDANT

DANIEL KABUGI NG'ANG'A.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 4th November 2011 under sections 1A, 1B, 3A, and 63(e) of the Civil Procedure Act; and Order 37 Rules 7 and 8; Order 40 Rule 1(a), 2, 3, 4 and 11; Order 51 Rules 1, 3, and 5 and Order 5 Rule 17 of the Civil Procedure Rules. The said application is supported by an affidavit of even date sworn by the Plaintiff, and is seeking the following orders:

1. That pending the hearing and determination this suit or until further orders:-

a) The Defendants whether by themselves, agents, servants or by any other person whomsoever be restrained by an order of injunction from offering for sale, selling, transferring (other than to the Plaintiff), charging, mortgaging, leasing, assigning, disposing, advertising or in any other manner whatsoever from dealing with the suit property, namely, DAGORETTI/RIRUTA/1608.

b) The Defendants whether by themselves, agents, servants by any other persons whomsoever be restrained by an order of injunction from trespassing upon, evicting, developing, building upon, damaging, wasting, utilizing or in any manner whatsoever from interfering with Plaintiff's quiet possession and occupation of the suit property, namely DAGORETTI/RIRUTA/1608.

The grounds for the application are detailed therein and in the supporting affidavit, and in summary are as follows. The Plaintiff claims that she took occupation and possession of the suit property in February, 1981, pursuant to a judgment delivered in her favour in **Jane Ngugi –vs- Samuel Wachira Chege, HCCC No. 1324 of 1979**. The Plaintiff had sued the Defendant in the said proceedings for specific performance of a sale agreement made between the parties therein in June 1973. Further, that the Defendant in the above-noted proceedings executed the relative instruments of transfer and consent to transfer was obtained from Dagoretti Land Control Board on 16th August, 1982. The Plaintiff states that the said documents could not be acted upon, as the suit property was secretly and fraudulently transferred to and registered in the name of one Ng'ang'a Kabugi, the Advocate who had been retained by the Defendant in the proceedings aforesaid. The said registration took place on 30th November, 1981 and a land certificate was subsequently issued to him on 10th December, 1981.

The Plaintiff averred that she subsequently lodged a caution on the title of the suit property and filed various civil proceedings being **Jane Ngugi –vs- Ng’ang’a Kabugi, HCCC No. 3698 of 1982** and **Jane Ngugi –vs- Samuel Wachira Chege & Samuel Muchiri Kabugi ELC Civil Case No. 624 of 2009**. Further, that the above cited cases were however not finalized because of the death of the said Ng’ang’a Kabugi together with his wife in a road accident on 2nd January, 1984 in the case of the first suit, and for mistakenly suing wrong parties as administrators of his estate in the second suit.

It has now come to the Plaintiff’s knowledge that the suit property was transmitted and registered in the joint names of the Defendants on 11th May, 2011, and the caution removed at the instance of the Defendants without any notice being given to her. It has also now come to her knowledge that the Defendants filed proceedings at Chief Magistrate’s Court, Nairobi in **Stephen Kamiri Ng’ang’a & Daniel Kabugi Ng’ang’a –vs- Patrick Waweru, Sylvia Zaituni, Martin Moko & Maji Abdi, CMCC NO. 51 of 2011**, and obtained *ex parte* orders of eviction from the suit property. They then proceeded to use the said orders to demolish the houses the Plaintiff had erected on the suit property.

The Plaintiff lastly states that unless the Defendants are restrained by an order of injunction, they will continue to deal with the suit property in a manner inconsistent with the Plaintiff’s rights and interests therein. She also states that she is ready, able and willing to furnish a suitable undertaking as to damages, if any, may be suffered by the Defendants as a condition for the grant of the orders sought herein.

The 1st and 2nd Defendants filed Grounds of Opposition dated 20th January 2012 and a Replying Affidavit sworn by the 1st Defendant on 19th January 2012. The 1st and 2nd Defendants stated that they did not know the Plaintiff and had never met her. They further stated that when their father Ng’ang’a Kabugi passed away they were young children, and that they filed Succession Cause Number 1389 of 2008 at the High Court of Kenya at Nairobi and were granted Letters of Administration intestate in respect of his estate.

The 1st and 2nd Defendants aver that when they registered the letters of administration at the Lands Registry, they learnt that the Plaintiff had lodged a caution against the suit property and the Land Registrar subsequently issued a notice to the Plaintiff to show cause why the caution should not be removed. The said caution was removed when the Plaintiff did not respond, and the 1st and 2nd Defendants were then registered as proprietors in common of the suit property on 11th May 2011 after following the necessary procedures. The 1st and 2nd Defendants admit filing Nairobi CMCC No. 51 of 2011 against the people who were staying on the suit property, and that they were issued with eviction orders and got vacant possession. Further, that the said orders are still in force and have not been set aside.

The 1st and 2nd Defendants further stated that they have approval from the City Council of Nairobi to put up a building on the suit property, and that the same is mortgaged to Equity Bank for a loan of Kshs.3 Million. They denied being party to or aware of any of the civil suits filed by the Plaintiff, namely HCCC No. 1324 of 1978, HCCC No. 3698 of 1982 or ELC Civil Case NO. 624 of 2009 (O.S.)

The 3rd Defendant responded in a replying Affidavit sworn on 23rd May 2012 by Purity Kinyanjui, the head of its Debt Recovery Unit, wherein she stated that the 1st Defendant approached the 3rd Defendant in September 2011 and applied for a loan of Kshs.3,000,000/= on the security of title number Dagoretti/Riruta/1608. Further, that the 3rd Defendant conducted its searches and valuation and upon being satisfied with the security, it proceeded to grant to the 1st Defendant the said applied-for loan. The Deponent stated that that the subject property was subsequently charged with the 3rd Defendant, and she annexed a copy of the registered charge document and copy of certificate of official search dated 1/11/2011.

The Plaintiff’s Advocate filed detailed submissions dated 22nd August 2012, wherein it was argued that her claim is based on trust and adverse possession, which it was contended are not mutually exclusive as held in **Teresa Wachuka Gachira vs Mwangi Gachira, Civil Appeal No. 325 of 2003 (2009) eKLR**.

The Plaintiff contended that she had shown a *prima facie* case as the Defendants have not disputed her peaceful, exclusive and continuous possession of the suit property from February 1981 consequent upon the delivery of the judgment in H.C.C. No. 1324 of 1979. She further argued that she had provided the copies of the ruling and judgment in the said case as evidence, as well as photographic evidence of various housing units erected on the suit property which were under the occupation of various tenants.

It was also argued on behalf of the Plaintiff that her right to adverse possession could not be defeated by the change of ownership of the suit property from the deceased Ng'ang'a Kabugi to the 1st and 2nd Defendant, or by the charge over the property as was held by the Court of Appeal in **Samwel Nyakenogo vs Samwel Orucho Onyaru, Civil Appeal No. 24 of 2004 (2010) eKLR** and by this Court (G.B.M Kariuki J.) in **Kipkoech arap Langat & Another vs Kipn'geno Arap Laboso, Kericho Civil Case No. 124 of 2004 (OS) (2011) e KLR** respectively. Further, that the suit property was also subject to the overriding rights of prescription under section 30(f) of the Registered Land Act, which has since been repealed. Various other judicial authorities were cited by the Plaintiff's Advocate on her right to adverse possession, and it was also submitted that the Plaintiff could regain possession of the suit property despite the Defendants' acts of demolition, relying on the authority of **Frederick Wambari Chege vs James Karume Wanjama & 2 Others, Civil Application No. Nai 338 of 2004 (2004) eKLR**.

The Plaintiff's Advocate further argued that the Plaintiff would suffer irreparable loss and damage as the houses built on the suit property were her only source of income, and there was the risk of the Defendants alienating the suit property. It was further argued that it was observed in the case of **Ezekiel Osugo Angwenyi vs Housing Finance Company of Kenya, HCCC No. 187 of 2006 (2006) eKLR**, that there are instances an injunction can issue even if damages were an adequate remedy. Lastly, it was submitted that the possession of the suit property by the Plaintiff for thirty years whilst deriving income therefrom tilted the balance of convenience in her favour.

The 1st and 2nd Defendants' Advocate filed submissions dated 5th September 2012. It was submitted therein that the application has been overtaken by events as the 1st and 2nd Defendants have already dealt with the suit property, evicted squatters who were residing thereon and mortgaged the same. It was also argued that the Plaintiff has failed to demonstrate the principles that apply to the grant of an injunction as set out in the case of **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**.

It was contended by the 1st and 2nd Defendant's Counsel that the Plaintiff has no *prima facie* case, as she had not disclosed any cause of action as her claim for adverse possession does not meet the test required to prove adverse possession. This test according to the 1st and 2nd Defendants is that the possession must be in denial of the true owner and must be peaceful, open and continuous. It was further argued that the Plaintiff has admitted that her possession was not peaceful as a result of the cases she filed in court, and the Defendants have also taken over the property.

The 3rd Defendant's Counsel adopted the 1st and 2nd Defendants submissions and also relied on his client's Repeating Affidavit.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The requirements are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's claim in the Amended Originating Summons is for adverse possession to the suit property and a declaration that the 1st and 2nd Defendants hold the same in trust on her behalf. The Plaintiff has brought evidence of her claim to the suit property and judgment given in her favour, and she annexed the pleadings, a judgment given on 18th February 1981 and decree issued on 26th June 1998 in **Jane Ngugi –**

vs- Samuel Wachira Chege, HCCC No. 1324 of 1979.

It is not disputed by the Defendants that Ng'ang'a Kabugi since deceased, was an Advocate for the Defendant in the said suit, and that the suit property was registered in the Deceased's name after the said judgment. It is also not disputed that the Plaintiff took possession and that she has built structures on the suit property. What the Defendants allege is that the said possession was not peaceful, but they nonetheless admit to the said possession. Lastly, the Defendants admit to have been aware of the Plaintiff's interest in the suit property, by admitting to having removed the caution she placed on the suit property.

In my opinion the evidence outlined in the foregoing is sufficient to raise a *prima facie* case in favour of the Plaintiff. I also note that the suit property was the source of the Plaintiff's livelihood, and she will suffer irreparable damage if an injunction is not granted. The issues raised as to whether the nature of the Plaintiff's possession is sufficient for adverse possession to attach, and the effect of the civil suits brought by the Plaintiff cannot be decided at this stage, but after evidence and arguments by the parties at full hearing. In addition, as an injunction is an equitable remedy, the exercise of this Court's discretion has been influenced by the fact that judgment had already been delivered by this Court in the Plaintiff's favour, and that the suit by the 1st and 2nd Defendants in **Stephen Kamiri Ng'ang'a & Daniel Kabugi Ng'ang'a –vs- Patrick Waweru, Sylvia Zaituni, Martin Moko & Maji Abdi, CMCC NO. 51 of 2011,** was brought against different parties from the Plaintiff. In the circumstances it would be inequitable to dispossess the Plaintiff of the suit property.

In light of the foregoing reasons, the orders of this Court are therefore as follows:

1. The Defendants whether by themselves, agents, servants or by any other person whomsoever be and are hereby restrained from offering for sale, selling, transferring, leasing, further charging or mortgaging, constructing on, or in any manner disposing of or dealing with the suit property, namely DAGORETTI/RIRUTA/1608, pending the hearing and determination of the suit filed herein or until further orders.
2. The Defendants whether by themselves, agents, servants by any other persons whomsoever be and are hereby restrained from trespassing upon, evicting or in any manner whatsoever from interfering with Plaintiff's quiet possession and occupation of the suit property, namely DAGORETTI/RIRUTA/1608, pending the hearing and determination of the suit filed herein or until further orders.
3. The Plaintiff shall file and serve an undertaking as to payment of damages to the Defendants within 30 days of the date of this ruling.
4. The costs of the application dated 4th November 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____November____, 2012.

P. NYAMWEYA
JUDGE