



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 102 OF 2019(OS)

IN THE MATTER OF CHAPTER FIVE OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT

AND

**IN THE MATTER OF A CLAIM ON ADVERSE POSSESSION OF A
PORTION OF THE PROPERTY KNOWN AS KABETE/KIBICHIKU/208**

AND

IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTIONS 7, 9, 10, 17 OF LIMITATION OF ACTIONS ACT

BETWEEN

GEORGE MBUGUA NJUGUNA.....1ST PLAINTIFF/APPLICANT

BERNARD WANGIGE NJUGUNA.....2ND PLAINTIFF/APPLICANT

GRACE NJUHI NGUGI.....3RD PLAINTIFF/APPLICANT

ROSE WANJIKU NGUGI.....4TH PLAINTIFF/APPLICANT

AND

JOSEPH GACHUHI MUTHANJI.....1ST DEFENDANT/RESPONDENT

JAMES MBUGUA MUTHANJI (*Sued as Administrators of the Estate of*

GEORGE MUTHANJI WANGIGE).....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application**, dated **4th June 2019**, by the Plaintiffs/Applicants seeking for orders that;

1) That the Defendants/Respondents jointly and severally either by themselves, agents, servants, employees, assigns or any persons acting or claiming under their authority, consent or permission be barred from initiating any developments, subdivision,

transfer, disposition, erecting any developments whatsoever, offering for sale either by private treaty, auction or advertisement, alienating, charging, mortgaging or in any way dealing with the property known as LR.No. Kabete/ Kibichiku/208, situate within Kiambu County pending the hearing and determination of this suit.

2) That the Land Registrar be directed to register an inhibition in respect of the title for LR. No. Kabete/ Kibichiku/208, situate within Kiambu County barring any disposition, alienation, subdivision, or undertaking any intended dealings whatsoever during the pendency of this suit or pending any further orders of the Honourable Court.

The Application is premised on the grounds that the suit abated due to the death of the Plaintiffs (**Mbugua & Nyoro**), and attempts to revive the same were met with opposition and resistance by the Administrators leading to a litany of suits and Court proceedings ending with the former suit being heard and determined. That the former suit had been commenced seeking declaratory and compelling reliefs, whereby the suit property would be registered in the names of the three joint owners, all of whom were siblings.

Further that the occupation of all the three families has been since **1951**, to date and that there have been clear mapped out boundaries markings indicating where each family resides and that the families have each developed, improved on and cultivated their respective portions of the land on the suit property.

The Application is supported by the Affidavit of **George Mbugua Njuguna**, in which he averred that the Defendants/ Respondents are the Administrators of the Estate of **George Muthanji Wangige**. He further averred that the Co-Plaintiffs are children of the late **Mbugua Wangige**, and **Leonard Ngugi**, and that both families live in the portion of land situate in the suit property. It was his contention that the Defendants/Respondents have threatened to evict the Plaintiffs/Applicants, their families and family members from the suit property. Further that the parties are cousins and that their occupation of the suit property dates back to the colonial period and that the suit property was originally owned by **Wangigi Kimotho (Deceased)** who had **4 wives** and **3 sons** who are all deceased. Further that the late **Wangigi Kimotho**, had a wife known as **Wairimu** with whom he sired **three sons** and that they have children who reside on the suit property.

It was his contention that during their grandfather's lifetime, there were Court proceedings commenced against the deceased **Muthanji Wangige**, by his brothers **Mbugua & Nyoro** relating to Customary trusts and the suit abated due to their deaths.

He further averred that the occupation of the families is at risk of eviction and that the same became apparent when the **High Court** delivered its ruling on **6th May 2019**, and observed that it would not make a determination on who owns the suit property. He contended that the three siblings had lived and raised their families on the suit property and that none has ever been evicted from the suit property. He also averred that there was a suit filed in **1974**, where the suit property had been the subject of the dispute, but that the suit only addressed the issue of continuous long occupation of the land dating back to the period of demarcation, whereby it was recorded that the suit property was to be registered in the name of **Muthanji**, and brothers. However, without other peoples knowledge, the deceased procured a title in his name claiming that he had an indefeasible ownership stake on the suit property. That even at the time the deceased had an ongoing suit with his siblings, they had lived on the suit property for a considerable period.

It was his contention that the issue of ownership has never been canvassed on merit and that the issues raised over time relate to the deceased having a title which was the subject of the **succession proceedings** which eventually ended up with issuance of a grant and distribution of his Estate to the Administrators. He further averred that he has been advised by his Advocate, which advise he believes to be true that the **Succession Court** is not ceased with jurisdiction to determine issue of ownership or the manner in which the property was acquired. He further averred that the brothers, **Mbugua & Nyoro** had never been accused of trespass during their lifetime. That if the Defendants/Respondents are left to actualize their actions, it would lead to destruction as they could be evicted anytime, notwithstanding the improvements and developments on the suit property and the elderly and sick nature of their parents.

He further contended that their efforts to reach out to the Defendants/Respondents have not been fruitful and that their occupation of the suit property has been since birth. That he is 52 years, the 2nd Applicant is 42 years, 3rd Applicant is 58 years and the 4th Applicant is 44 years. He also averred that the portion occupied by the **Mbugua's** is approximately **2 acres** whereas the **Nyoro Wangige** is also approximately **2 acres**.

He contended that their occupation has been over **12 years** and any attempt to evict or cause their eviction from the suit property would lead to adverse action against lawful occupants. That their rights and occupation to property should be protected and that there is need for the Court to consider visiting the suit property to fully appreciate how the occupation, usage and or the manner the families reside on the suit property as the Defendants/Respondents also reside on the suit property.

The Defendants/ Respondents did not respond to the Application and therefore the Application is unopposed. However, the Plaintiffs/Applicants still have the onus of proving their case.

The Plaintiffs/ Applicants filed their written submissions dated **27th October 2020**, through the Law Firm of **Wokabi Mathenge & Co Advocates** and submitted that they have demonstrated a **Prima facie** case which would lead the Court to grant the injunctive orders sought and that further, that they have satisfied the requirements for issuance of an injunctive orders and thus the Application is merited. The Court was urged to allow the application.

The Court has carefully read and considered the pleadings of the parties, the Application and the written submissions by the Plaintiffs/ Applicants. It is not in doubt that the Plaintiffs/Applicants have sought for injunctive orders. The threshold for the grant of the said orders was set out in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, where the court held:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless

the applicant might otherwise suffer irreparable injury which might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.

Further in the case of Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002, the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria”

The Court finds the issues for determination are:-

1. *Whether the Applicants have established a prima facie case.*
2. *Whether the Applicants will suffer irreparable harm.*
3. *In whose favour does the balance of Convenient tilt.*

1. Whether the Applicants have established a prima facie case

A prima-facie case was described in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

“A case in 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.

It is the Applicants contention that they have lived on the suit property for a period of over **12 years** and that they were all born on the said property, with the 1st Applicant being 52 years and that that has been his home ever since. It is not in doubt that the Applicants are claiming **Adverse Possession**, over the suit property. Further the Applicants have averred that the Defendants/ Respondents have threatened to evict them from the suit property, and have even sent people to interfere with the boundaries that have been marked to separate where they live with where the Defendants/ Respondents live.

Section 38 of the Limitations of Actions Act gives, the Applicants the right to bring a claim to the Court and seek to be register as an owner of the property having a claim that the have acquired the said property by way of Adverse possession. In this instant case, the Plaintiffs/ Applicants having laid claim for adverse possession, and having alleged that the Defendants/ Respondents have threatened to evict them from the suit property which allegations have not been controverted, then it follows that their rights over the suit property may be infringed and it therefore calls for a rebuttal by the Defendants/ Respondents. The Court finds and holds that the Plaintiffs/ Applicants have established a prima facie case with a probability of success.

4. Whether the Applicants will suffer irreparable harm

On whether the Plaintiffs/Applicants will suffer irreparable loss. **‘Irreparable loss’** was described in the case of Paul Gitonga Wanjau... Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, as **simply injury or harm that cannot be compensated by damages and would be continuous.**

It is the Applicants contention that their families entered the suit property in **1951**, and they have lived all their lives thereon and that their parents, children and grandchildren also live on this suit property. The Applicants have averred that they are aged **52, 42 and 44**, respectively and they have built structures on the suit property. As already noted, these allegations by the Applicants have not been controverted and therefore, there is no reason as to why the Court would not believe the same.

If indeed the Applicants were to be evicted from their only home that they have ever known and the Court does find that they are entitled to Adverse possession, then it is clear that they would have suffered irreparable harm which cannot be compensated by way of damages. This is coupled by the facts that the applicant have averred that the Defendants/ Respondents have already started interfering with the boundaries that had been established.

In the case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR, the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

Further in the case of Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR, the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction there must be evidence of immediate danger to property or sale or other disposition.”

This court finds and holds that the Plaintiffs/ Applicants have established that they will suffered irreparable loss that cannot be compensated

by way of damages.

3. In whose favour does the balance of Convenience tilt

The Court is required to decide in whose favour the balance of convenience lies if it's in doubt. The Court is not in doubt herein. However, if the Court was to decide on the same, the balance of convenience would tilt in favour of maintaining the status quo and the status quo herein is that the Plaintiffs/Applicants should remain on the disputed suit property until the matter is heard and determined.

4. Whether the Applicants are entitled to the orders Sought

The Plaintiffs/Applicants have sought for injunctive orders. The Court has already held that they have met the threshold for grant of the injunctive orders, which are equitable in nature. Consequently, the Court holds and finds that the Plaintiffs/Applicants are entitled to the orders of temporary injunction as sought.

The Applicants have also sought to have the **Land Registrar** register an **inhibition orders** barring any dealings in the said property. Having held that they are entitled to the injunction orders, the Court further finds that the applicants are entitled to the inhibition orders sought herein.

Having carefully considered the instant **Notice of Motion Application** dated **6th June 2019**, the Court finds it **merited** and the said application is allowed entirely with costs to the Plaintiffs/Applicants.

It is so ordered.

Dated, signed and Delivered at Thika this 12th day of November 2020

L. GACHERU

JUDGE

12/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mathenge for the Plaintiffs/Applicants

No appearance for the Defendants/Respondents

L. GACHERU

JUDGE

12/11/2020