



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO.16 OF 2020

NAZALIO KATHURI RIMUNYA.....PLAINTIFF

- V E R S U S -

JAMES MUGENDI KIMANI.....DEFENDANT

(Sued in his capacity as the legal representative of the

estate of SASIDA NJOKI KENRY KIMANI (DECEASED)

RULING

A. INTRODUCTION

1. By a plaint dated 3rd July, 2020, the Plaintiff sued the Defendant seeking *inter alia*, a declaration that the Defendant was holding Title No. Ngandori/Kirigi/16899 (*the suit property*) in trust for him and his family and an order for dissolution of the alleged trust. In the alternative, the Plaintiff sought a declaration that he had acquired the suit property through adverse possession.

2. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 3rd July, 2020 expressed to be brought under Sections 1A & 3A of the Civil Procedure Act (Cap.21), Order 40 Rule 1 of the Civil Procedure Rules and all enabling powers of the law seeking the following orders:

a.spent

b.spent

c. That the defendant by himself or his servants and/or agents be restrained by an order of this Honourable Court from evicting the plaintiff/applicant or alienating, transferring, subdividing, selling, charging, trespassing or in any manner interfering with the plaintiff/applicant's peaceful possession of the suit land namely Gaturi/Nembure/16899 or in any manner interfering with evidence in this case pending the hearing and determination of the main suit herein.

d. That a prohibitory order to do issue and be registered against land Gaturi/Nembure/16899 pending the hearing and determination of this suit or until further court orders.

e. That costs of this application 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 3rd July, 2020 and the annexures thereto. The Plaintiff contended that he had resided on the suit property for over 60 years and that he had acquired an overriding interest therein by virtue of the suit property being ancestral land and by the longevity of his occupation.

4. The Plaintiff further contended that the Defendant had threatened to evict him from the suit property and that there was a risk that the Defendant might sell, charge, alienate or dispose of the suit property during the pendency of the suit. Consequently, the Plaintiff wanted a restraining injunction to be issued to prevent his eviction and to preserve the suit property.

C. THE DEFENDANT'S RESPONSE

5. The Defendant filed a replying affidavit sworn on 1st September, 2020 in opposition to the said application. The Defendant disputed the Plaintiff's claim for adverse possession and stated that he was his uncle who was occupying the suit property with permission. The Defendant also denied that he was holding the suit property in trust for his uncle whom he claimed was much older than him.

6. The Defendant further stated that he acquired the suit property from the estate of his late mother through succession proceedings and that the Plaintiff had also acquired his share of the estate through succession proceedings. The Defendant, therefore, contended that the Plaintiff was simply being greedy in seeking to grab the suit property which was initially part of the estate of the Plaintiff's late mother. Consequently, he urged the court to dismiss the said application with costs.

D. SUBMISSIONS ON THE APPLICATION

7. When the said application was listed for hearing on 23rd September, 2020, it was argued orally by the parties. The Plaintiff's advocate prosecuted the application on the basis of the grounds set out in the notice of motion and the contents of the supporting affidavit. It was submitted that the Plaintiff had satisfied the requirements for the grant of an interim injunction as set out in the case of *Giella vs Cassman Brown & Co. Ltd [1973] EA 358*. It was further submitted that the suit property was ancestral land which was of sentimental value to the Plaintiff hence it was not replaceable. Accordingly, the court was urged to allow the application.

8. The Defendant's advocate opposed the application on the basis of the replying affidavit and the annexures thereto. It was submitted that the Plaintiff had not satisfied the legal requirements for the grant of an interim injunction. It was submitted that the Plaintiff was in possession with permission hence the issue of adverse possession could not arise. It was further contended that the Plaintiff was given his own share of land during the succession proceedings hence he had no legitimate claim over the suit property. Consequently, the court was urged to discuss the application.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the Plaintiff's application, the Defendant's replying affidavit in opposition thereto as well as the oral submissions of the parties. The court has also considered the material 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 the grant of an injunction.
- b. Whether the Plaintiff has made out a case for the grant of an inhibition.
- c. Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

a. Whether the Plaintiff has made out a case for an interim injunction:

10. The court has considered the submissions and material on record on this issue. The Plaintiff claims to be entitled to the suit property on account of either trust or adverse possession. The Defendant did not dispute that the Plaintiff has been in possession for over 60 years but he contended that such possession was consensual. At this interlocutory stage, the court is not required to make any conclusive findings on the merits of the Plaintiff's claim. It shall be the function of the trial court to establish whether or not possession was with or without permission and indeed whether or not all the other elements of adverse possession have been demonstrated to the required standard. The court takes the same view on the issue of trust.

11. On the basis of the material on record and without making any definitive findings on the matters in dispute in the main suit, the court is satisfied that the Plaintiff who has been in possession for a long period of time has demonstrated a *prima facie* case with a probability of success at the trial within the principles enunciated in the case of *Giella vs Cassman Brown & Co. Ltd (supra)*. The court is further of the view that the loss the Plaintiff may suffer as a result of eviction or disposal of the suit property cannot be adequately compensated by an award of damages.

12. Even if the court were to consider the balance of convenience, the same would still tilt in favour of the Plaintiff. The court is of the opinion that the Plaintiff would suffer greater hardship if he were to be evicted and the suit property alienated than the Defendant would suffer by the granting of the injunction. Accordingly, the court is inclined to grant the interim injunction sought pending the hearing and determination of the suit.

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

13. The court is of the opinion that the purpose of an order of inhibition is to preserve the suit property pending the adjudication of the right of the parties. The court has a duty to preserve property which is the subject of a dispute until the rights of the disputing parties are conclusively resolved. That was the holding in the case of *Shivabhai Patel v Manibhai Patel [1959] Ea 907*.

14. Since the court has already found that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial, there is no good reason why an order of inhibition should not be granted to preserve the suit property pending the hearing and determination of the suit. Accordingly, the court finds and holds that the Plaintiff has made out a case for the grant of the order sought.

c. Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). However, the court is aware that in the case of Giella vs Cassman Brown & Co. Ltd (supra) the court held that in an application for injunction it is appropriate to order for costs to be in the cause where the injunction is granted and for the applicant to pay costs where the application is dismissed. Accordingly, the court is inclined to order that costs of the application shall be in the cause.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds merit in the Plaintiff's application for interim orders. Accordingly, the court makes the following orders for disposal of the notice of motion dated 3rd July, 2020:

- a. An order of interim injunction be and is hereby granted restraining the Defendant by himself, his agent or servants from evicting the Plaintiff from the suit property, and from alienating, selling, charging or howsoever dealing with Title No. Gaturi/Nembure/16899 pending the hearing and determination of the suit.
- b. An order of inhibition under Section 68 of the Land Registration Act, 2012 is hereby granted to prevent any dealings with Title No. Gaturi/Nembure/16899 pending the hearing and determination of the suit or until further orders
- c. Costs of the application shall be in the cause.

It is so ordered.

RULING DATED and SIGNED at NYAHURURU this 18th of December, 2020, and DELIVERED via Microsoft Teams Platform.

In the presence of:

Ms. Nelima holding brief for Ms. Mukami for the Plaintiff

Ms. Agnes Maina for the Defendant

Carol – Court Assistant

Y.M. ANGIMA

JUDGE

18.12.2020