



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 24 OF 2020 (O.S.)

PETER KARIUKI NJUE.....PLAINTIFF

VERSUS

SEVERINA NJIRA KITHUMBU.....1ST DEFENDANT

JACINTA NGITHI MICHAEL KITHUMBU.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 20th August, 2020 brought under **Order 57 Rules 7 and 8 of the Civil Procedure Rules (the Rules) and Sections 17, 37 and 38 of the Limitation of Actions Act (Cap. 22)** the Plaintiff sought a declaration that he had become entitled to be registered as proprietor of Title No. Nthawa/Riandu/772 (the suit property) on account of adverse possession. He also sought an order that the Defendant do transfer the suit property to him in default of which the Deputy Registrar of the court be ordered to sign all necessary documents to facilitate transfer thereof into his name.

2. Pending the hearing of the said summons, the Plaintiff filed a notice of motion dated 31st August, 2020 under **Order 40 Rules 1 and 2 of the Rules and Section 68 of the Land Registration Act, 2012** seeking the following orders;

a. Spent

b. Spent

c. That the Defendants/Respondents their agents, servants, employees and anybody acting through them be and hereby restrained from evicting, demolishing houses, entering, fencing, cutting down trees, cutting down miraa and/or interfering in any way with land parcel No. Nthawa/Riandu/772 pending the hearing and determination of this suit.

d. That an order for inhibition be issued inhibiting any dealings with land parcel No. NTHAWA/RIANDU/772 pending hearing and determination of this suit.

e. That costs of this application be provided for.

B. THE PLAINTIFF'S CASE

3. The Plaintiff's application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit and the annexures thereto. The Plaintiff contended that he had peacefully, openly and continuously occupied the suit property for over 26 years and that he had extensively developed the same.

4. It was contended that upon being served with suit papers herein the Defendants had commenced cutting down trees and destroying some crops on the suit property. It was also contended that the Defendants had threatened the Plaintiff with eviction. The Plaintiff, therefore, desired to have the interim orders sought in order to protect his perceived rights over the suit property.

C. THE DEFENDANTS' RESPONSE

5. The 2nd Defendant filed a replying affidavit sworn on 22nd September, 2020 in opposition to the said application for interim orders. She swore the said affidavit on her own behalf and on behalf of the 1st Defendant. The Defendants disputed the Plaintiff's claim for adverse possession and stated that the Plaintiff who was their relative entered the suit property in 2010 with their permission. They further stated that the Plaintiff had no exclusive possession of the suit property since the 2nd Defendant's son EMILIO NYAGA, had been cultivating it alongside the Plaintiff.

6. The Defendants further stated that the house on the suit property was constructed by them and that they allowed the Plaintiff to reside therein merely for the purpose of taking care of the suit property. They annexed a copy of a letter from the Location Chief indicating that EMILIO NYAGA MICHAEL had been cultivating part of the suit property for a long period of time.

D. PLAINTIFF'S REJOINDER

7. The Plaintiff did not file any further or supplementary affidavit in response to the Defendant's allegations in the replying affidavit.

E. DIRECTIONS ON SUBMISSIONS

8. When the said application was listed for hearing on 1st October, 2020 it was directed that the same shall be canvassed through written submissions. The Plaintiff was granted 14 days to file his submissions and further affidavit. On the other hand, the Defendants were to file and serve their submissions within 14 days upon the lapse of the Plaintiff's period. The record shows that the Defendants' submissions were filed on 29th October, 2020 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.

F. THE ISSUES FOR DETERMINATION

9. The court has perused the Plaintiff's notice of motion dated 31st August, 2020, the Defendants' replying affidavit in opposition thereto as well as 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 the interim injunction sought.

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

c. Who shall bear costs of the application.

G. ANALYSIS AND DETERMINATION

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

10. The court has considered the submissions and material on record on this issue. The basis of the Plaintiff's claim is that he is entitled to the suit property on account of adverse possession. He claimed to have exclusively occupied the suit property openly and continuously for over 26 years in a manner hostile to the owner's title. Although the court is not required to make any definitive findings on the issue of adverse possession, the plaintiff is obliged at least to demonstrate a *prima facie* case with a probability of success at the trial.

11. The court has considered the Defendant's response to the application. They contended that the Plaintiff did not enjoy exclusive possession of the suit property since the 2nd Defendant's son, EMILIO NYAGA, had also been cultivating the suit property for a very long period of time. They exhibited a copy of a letter from the Chief of Riandu Location to that effect. They also contended that the Plaintiff was their relative who entered the suit property with permission. The court has noted that the Plaintiff did not dispute any of those two matters even though he was accorded an opportunity to file a further affidavit within 14 days with effect from 1st October, 2020.

12. The requirements which an applicant for an interim injunction must satisfy were enunciated in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. First, the applicant must demonstrate a *prima facie* case with the probability of success at the trial. Second, an injunction will not normally be granted unless the applicant demonstrates that he shall otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. Third, where the court is in doubt, it shall decide the matter on a balance of convenience.

13. The court has considered the entire material on record. The court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. There is uncontroverted evidence on record that the Plaintiff has not been in exclusive possession of the suit property as alleged. The Plaintiff has not controverted the Defendants' claims that he was a relative who was allowed into the suit property by the owner or his representative.

14. In the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** Bosire JA described a *prima facie* case as follows;

“So what is a *prima facie* case? I would say that in civil cases it is 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 ...

... But as I earlier endeavored to show, and I cited ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the

applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

15. The court, therefore, finds and holds that the Plaintiff has failed to satisfy the first requirement for the grant of an interim injunction. Since the Plaintiff has failed to satisfy that requirement it shall not be necessary to consider the second and third principles because the three requirements are to be considered sequentially.

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

16. The court has considered the submissions and material on record on this issue. The court is aware that the Plaintiff is claiming adverse possession of the suit property which claim is disputed by the Defendants. The court is of the opinion that even though the Plaintiff has failed to demonstrate a *prima facie* case at the interlocutory stage, he shall still have his day in court during trial.

17. The purpose of an order of inhibition is to prohibit further dealings with the suit property. The court is thus of the opinion that it has a duty to preserve any property which is the subject of a dispute to prevent the risk of its alienation before the suit is heard and the rights of the parties conclusively determined. That legal duty was recognized in the case of **Shivabhai Patel v Manibhai Patel [1959] EA 907**. Accordingly, the court is inclined to grant an order of inhibition to preserve the suit property pending the hearing and determination of the suit.

c. Who shall bear costs of the application

18. 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)**. As such, a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise. Since the Plaintiff has partly succeeded and partly failed in his application, the court is of the opinion that costs of the application should be in the cause.

H. CONCLUSION AND DISPOSAL ORDER

19. The upshot of the foregoing is that the Plaintiff's application succeeds only in part. Accordingly, the court makes the following orders for disposal of the Plaintiff's notice of motion dated 31st August, 2020.

a. The Plaintiff's prayer for an interim injunction in terms of order No. (c) of the application is hereby declined.

b. An order of inhibition under Section 68 of the Land Registration Act, 2012 is hereby issued to prevent further dealings with Title No. Nthawa/Riandu/772 pending the hearing and determination of the suit.

c. Costs of the application shall be in the cause.

Orders accordingly.

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

In the presence of:

Ms. Nzekele holding brief for Mr. Mogusu for the Plaintiff

Mr. Kariuki holding brief for Mr. Andande for the Defendant

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.12.2020