



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 49 OF 2016 (OS)

NGUNGI NTHUKIRE.....1ST APPLICANT

PETERSON NTHIGA KARANJA.....2ND APPLICANT

PIUS ERNEST NJIRU.....3RD APPLICANT

CHARLES NYAGA BIRICI.....4TH APPLICANT

VERSUS

JOSEPH MBUGI NGARI.....1ST RESPONDENT

DAVID MUCHUNGU GERISHON.....2ND RESPONDENT

NYAGA GERISHON MICHAEL NGARI.....3RD RESPONDENT

WILSON MURIUKI MUTEGLI.....4TH RESPONDENT

SAMUEL NJIRU KAGIO.....5TH RESPONDENT

NGUNGI NGARI.....6TH RESPONDENT

MURIUKI NJERU.....7TH RESPONDENT

RULING

1. By a notice of motion dated 13th March 2018 brought under the provisions of **Order 40 Rule 1 (A) and (B) of the Civil Procedure Rules, section 1A and 3B of the Civil Procedure Act and section 68 of the Land Registration Act and all other enabling provisions of the law**, the Applicants sought the following orders;

a. That the honourable court be pleased to issue an order of inhibition against L.R Mbeere/Mbita/1830, 2511, 2578, 2593, 2510, 2596 and 2802.

b. That the honourable court be pleased to issue a temporary injunction restraining the Respondents by themselves, their agents and/or servants from interfering with the Applicants' quiet possession of L.R. Mbeere/Mbita/1830, 2511, 2578, 2593, 2510, 2596 and 2802.

c. That the honourable court be pleased to grant the Applicants leave to amend their originating summons.

d. That cost of this application be provided for.

2. The said application was based upon the several grounds set out in the motion. It was stated that there was a need to preserve the suit property and to maintain the existing *status quo* pending the hearing and determination of the suit. It was also contended that it was necessary to amend the originating summons so as to bring out all the issues in controversy for resolution by the court.

3. By consent of the parties, the order for leave to amend the originating summons was granted on 31st May 2018. The parties thereafter agreed to canvass the remaining orders through written submissions.

4. The Applicants filed an amended originating summons on 22nd June 2018 whereby they introduced additional Respondents and also sought additional prayers. When the said application was listed for hearing on 4th July 2018, it was directed that the parties were to file and exchange their written submissions within 60 days whereas the new Respondents were to file and serve their responses and submissions within a similar period.
5. The Applicants' said application was supported by an affidavit sworn by the 1st Applicant on 13th March 2018. He swore the said affidavit on his own behalf and on behalf of the rest of the Applicants. It was the Applicants' case that they had been in open, continuous and exclusive possession of the various suit properties for periods in excess of 12 years and that as a result they had acquired adverse ownership thereof by operation of law. They claimed to have developed the suit properties or portions thereof by planting various trees, mangoes, fruits and miraa stems. They also claimed to have erected dwelling houses thereon. They exhibited photographs of some houses and some vegetation.
6. The 4th Respondent, Wilson Muriuki Mutegi, filed a replying affidavit sworn on 4th April 2018 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of his co-Respondents. It was denied that the Applicants or any of their family members were in possession of any of the suit properties. They invited the court to visit the suit properties for the purpose of verifying the issue of possession.
7. The Respondents claimed to be in possession of the suit properties and disputed that the Applicants had erected any dwelling houses thereon. It was stated that the houses in the photographs annexed by the Applicants were actually on a different parcel of land namely *Title No. Mbeere/Mbita/1926* which borders *Title No. Mbeere/Mbita/1830*.
8. The 6th Respondent, Ngungi Ngari, also filed a replying affidavit sworn on 23rd January 2019 in opposition to the Applicants' aforesaid application. He disputed that any of the Applicants were in possession of any of the suit properties i.e. *Title Nos Mbeere/Mbita/5450 of 5451*. The 1st Respondent, Joseph Mbugi Ngari also filed his own replying affidavit sworn on 23rd January 2019 in opposition to the said application. He stated that he had no proprietary interest over *Title No. Mbeere/Mbita/1830*.
9. It also emerged from the affidavits filed in opposition to the said application that some of the Respondents were deceased and that their personal representatives were yet to be joined in the proceedings.
10. The court has considered the Applicants' notice of motion dated 13th March 2018, the replying affidavits in opposition thereto as well as the Applicant's submissions on record. There is no indication of the Respondents having filed any written submissions.
11. The court has noted that the issue of the Applicants' alleged possession of the various suit properties or parts thereof is greatly contested. It was disputed that the houses appearing in the annexed photographs stand on any of the suit properties. The Applicants did not file a further affidavit to respond to the allegation that the houses were actually on a different parcel of land i.e. *Title No. Mbeere/Mbita/1926*. There was no report from a surveyor, land valuer or other expert to demonstrate where those houses actually lie.
12. The court is aware that it is not required at this interlocutory stage to determine whether or not the Applicants have demonstrated the elements of adverse possession. That is the function of the trial court. However, the court must be satisfied that a *prima facie* case with a probability of success has been demonstrated by the Applicants. The court is not satisfied on the basis of the material on record and the reasons given in the immediately preceding paragraph that such a *prima facie* case has been established. Accordingly, the court is unable to grant an order of **injunction under Order 40 of the Civil Procedure Rules**.
13. The court has considered the prayer for an order of inhibition to preserve the suit properties pending the hearing and determination of the suit. The court is inclined to make an order for preservation of the suit properties in order to accord the Applicants a chance to ventilate their case at the trial. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907** it was held, *inter alia*, that;

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”
14. Although the court has declined to grant an order of injunction, the court is inclined to make an order for the maintenance of the existing *status quo* pending the hearing and determination of the suit. The parties shall consequently continue to reside upon and to cultivate the parcels and portions which they were peaceably in possession of at the time of delivery of this ruling.
15. The upshot of the following is that the Applicants' notice of motion dated 13th March 2018 succeeds only in part. Consequently, the court makes the following orders;
 - a. An order of inhibition is hereby issued preventing the registration of any transactions with respect to *Title Nos Mbeere/Mbita/1830, 2578, 2593, 2596, 2802, 5450 & 5451* pending the hearing and determination of the suit.
 - b. The prayer for a temporary injunction against the Respondents is hereby declined.
 - c. The *status quo* obtaining as at 31st January 2019 shall be maintained pending the hearing and determination of the suit.
 - d. Costs of the application shall be in the cause.

16. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **31ST** day of **JANUARY, 2019**.

In the presence of Ms Githaiga holding brief for Mr Magee for the Applicants and Mr Mosongo holding brief for Mr Munene Muriuki for the Respondents.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

31.01.19