



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 18 OF 2017 (O.S)

AUGUSTUS KIURA NGARI.....PLAINTIFF

VERSUS

JAMES NGUYU MAKOTHE.....DEFENDANT

RULING

1. By an originating summons dated 16th October 2017 brought under **section 38 of the Limitation of Actions Act (Cap 22)**, the Plaintiff sought a declaration that he had become entitled to the entire 4 ha of *Title No. Embu/Kithunthiri/1016* (hereinafter called *the suit property*) by virtue of adverse possession. The Plaintiff also sought two other consequential orders in the said motion as well as costs of the action.

2. By a notice of motion dated 2nd May 2018 brought under **section 3A of the Civil Procedure Act (Cap 21), Order 40 Rules 1, 2, 3, 4, & 10 of the Civil Procedure Rules and all enabling provisions of the law**, the Plaintiff sought the following interim orders pending the hearing and determination of the said originating summons;

a. Spent

b. That the Defendant by himself, his servants, agents, workmen be restrained by an interim injunction from trespassing upon, entering into, constructing upon, alienating by way of sale or by public auction, private treaty, leasing or creating any other interests over or in any manner howsoever interfering with the quiet seisin and enjoyment of the property, that is to say all that parcel of land namely Embu/Kithunthiri/1016 pending the hearing and determination of the suit herein or any further orders of this honourable court.

c. That the Defendant/Respondent do forthwith remove himself, his agents and workmen together with any of his structures and possessions pending the hearing of this suit.

d. That the OCS Kiritiri police station and County Commander Embu do ensure compliance of the said orders.

e. That costs of this application be provided for.

3. The said motion was based upon the several grounds enumerated on the face of the motion. The gist of the said grounds was similar to the ones on which the originating summons dated 16th October 2017 was based. It was contended that the Plaintiff had been in possession of the suit property since 1992 and that the Defendant had recently threatened to evict him from the suit property. It was further contended that the Defendant had forcibly trespassed into the suit property and commenced developments thereon.

4. The said application was supported by an affidavit sworn by the Plaintiff on 2nd May 2018 in which he reiterated and expounded upon the grounds set out in the notice of motion.

5. The Defendant filed a replying affidavit sworn on 5th June 2018 in opposition to the Plaintiff's said application. The Defendant stated that the Plaintiff had trespassed into the suit property sometime in 2014 owing to the Defendant's absence. It was his case that the Plaintiff was a fraudster who had attempted to sell the suit property without any legal basis and that he (the Defendant) had sued him in *Siakago SPMCC No. 79 of 2017* which suit was still pending determination.

6. It was the Defendant's further case that sometime in 2015 he made an effective entry into the suit property, constructed a permanent house thereon, cultivated cash crops and food crops and constructed a dam for water storage. The Defendant also stated that he had effectively settled on the suit property on which he also reared domesticated animals.

7. The Defendant finally stated whilst undertaking the said developments, the Plaintiff did not take any legal steps to prevent him from doing so and he did not file any suit for injunctive orders against him. He, therefore, asked the court to dismiss the said application.

8. The Plaintiff, with leave of court, filed a further affidavit sworn on 14th June 2018 in response to the Defendant's replying affidavit of 5th June 2018. The Plaintiff stated that the dam on the suit property was a community project and that it was not constructed by the Defendant. It was further stated that the Defendant's children had been charged in court for allegedly destroying the property of one John Kamau Githinji to whom the Plaintiff intended to sell a portion of the suit property.

9. When the said application was listed for hearing on 26th June 2018, the Advocates for the parties consented to canvass the same through written submissions. The parties were consequently given 30 days within which to file and exchange their respective submissions. By the time of preparing this ruling, however, only the Defendant had filed his submissions. The submissions were filed on 17th October 2018.

10. The court has considered the Plaintiff's said application for interim orders, the Plaintiff's further affidavit sworn on 14th June 2018 as well as the Defendant's replying affidavit sworn on 5th June 2018. The court has also considered the Defendant's submissions on record. The court is of the opinion that the main issues for determination are as follows;

- a. Whether the Plaintiff is entitled to the order of interim injunction sought in prayer (2) of the application.
- b. Whether the Plaintiff is entitled to the eviction order sought in prayer (3) of the said application.
- c. Who shall bear the costs of the application.

11. On the 1st issue, the court needs to consider whether or not the Plaintiff has satisfied the requirements for the grant of an order of interim injunction as enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The court has considered the material on record on this issue. In the first limb of the prayer for injunction, the Plaintiff seeks to restrain the Defendant from trespassing upon, entering and constructing upon the suit property. The court is not satisfied from the material on record that the Plaintiff has demonstrated a *prima facie* case with respect to the prayer for injunction. The evidence on record demonstrates that the Defendant is already in possession of the suit property, that he has constructed a permanent house thereon, and cultivated various cash crops and food crops thereon. There is adequate photographic evidence of such developments on record. It would be futile for the court to issue an order to prevent something which has already taken place.

12. The second limb of the prayer seeks an injunction to restrain the Defendant from alienating the suit property and from interfering with the Plaintiff's quiet seisin and enjoyment of the suit property. The court is not satisfied from the material on record that the Plaintiff is in possession of the suit property for at least the statutory minimum period of 12 years. The court is aware that the Plaintiff is not required to prove his claim for adverse possession at this interlocutory stage but there must be some *prima facie* evidence in support of his claim. The court finds such evidence lacking in the instant application.

13. The court is, therefore, not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success at the trial hereof to warrant issuance of the orders of injunction sought in prayer (2) of the application. In those circumstances, there is no need for the court to consider the 2nd and 3rd principles for the grant of an injunction. The Plaintiff's application has simply failed at the first hurdle.

14. The 2nd issue for determination is whether the Plaintiff has made out a case for the grant of an eviction order in terms of prayer (3) of his application. The court has noticed that the Plaintiff framed the prayer for eviction in such a manner as to disguise it as something else. It was couched as a prayer for the Defendant to "remove himself, his servants and workmen together with any of his structures and possessions." The court is aware that such an order is a final order which cannot be granted pending the hearing and determination of the suit. It can only be granted upon the conclusion of suit and upon final adjudication of the rights of the disputing parties. The court finds no merit in the prayer for an eviction order at this interim stage.

15. The 3rd issue is on costs. Although the general rule is that costs shall follow the event, the court has a discretion to make any appropriate order as to costs. In respect of applications for injunction, it was held in the case of **Giella Vs Cassman Brown & Co Ltd** (supra) that the proper order on costs in such an application is for costs to be in the cause where the application is allowed and for costs against the applicant where the application is dismissed. The court has no reason to depart from that general rule.

16. Although the Plaintiff has not succeeded on his application for injunction, the court is aware that there is a risk of the suit property being alienated before the conclusion of the suit. The court is, therefore, inclined to make an order for preservation of the suit property pending the hearing and determination of the suit.

17. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 2nd May 2018 and makes the following orders;

- a. The Plaintiff's notice of motion dated 2nd May 2018 is hereby dismissed in its entirety with costs to the Defendant.
- b. An order of inhibition is hereby issued under section 68 of the Land Registration Act, 2012 forbidding registration of any transactions with respect to *Title No. Embu/Kithunthiri/1016* pending the hearing and determination of the suit.

18. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **22nd** day of **JANUARY, 2019**.

In the presence of Mr Ithiga for the Defendant and in the absence of the Plaintiff.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.01.19