



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 645 OF 2017 (OS)

VITALIS OKOTH NGESA.....1ST PLAINTIFF

CHARLES OWINO AWINO.....2ND PLAINTIFF

EVANS OCHIENG OTIENO.....3RD PLAINTIFF

(Suing on their own behalf and as Officials of Kasarani Youth Panorama Association)

VERSUS

KENYA BUILDERS AND CONCRETE LIMITED.....1ST DEFENDANT

NAMAN NDONJI MUKABANA.....2ND DEFENDANT

RULING

1. On 6/10/2017, the applicants, on their own behalf and on behalf of Kasarani Youth Panorama Association, took out an originating summons dated 6/10/2017 under Section 38 of the Limitation of Actions Act, seeking determination of the following questions:

a. Whether the plaintiffs have acquired right and title to all that parcel of land known as Land Reference Number 7086(Originally 6825/1) currently registered in the name of the 1st defendant by reason of adverse possession against the said 1st defendant

b. Whether the plaintiffs should be registered as the proprietors of the respective plots occupied by each of them with all those parcels of land known as Land Reference Numbers 7086(Originally 6825/1) on the ground that since 2003 or thereabouts the plaintiffs have been continuously and without interruption, openly and peacefully enjoying occupation thereof for a period of over twelve (12) years preceding the presentation of this summons.

c. Whether the 1st defendant should execute transfer and all acts necessary to convey the title of the property to the plaintiffs as the rightful proprietor to enable the said title be registered as such and in default the Deputy Registrar of this Honourable Court be authorized to sign the relevant documents on behalf of the 1st defendant.

d. Whether a permanent injunction should issue against the defendants restraining them either by themselves, their agent, servants and otherwise howsoever from entering, surveying, sub dividing, carrying out any or construction or development works, transferring, alienating, wasting, apportioning or in any other manner interfering with the plaintiffs' peaceful and quiet occupation and enjoyment of all the parcel of land known as Land Reference Number 7086 (Originally 6825/1) situated in Mihango, Embakasi within Nairobi County

e. Whether the defendants should pay the costs of this suit.

2. Subsequent to that, the applicants brought a notice of motion dated 23/10/2017, seeking an interim order restraining the respondents against evicting the applicants and/or demolishing the applicants' structures erected on Land Reference Number 7086 (the suit property) or interfering with their occupation and quiet enjoyment of the suit property. The respondents opposed the application and originating summons through a replying affidavit sworn on 30/12/2017 by Dinesh Premji Patel. The said notice of motion is the subject of this ruling.

3. The case of the applicants is that they have lived on the suit property as squatters for over twelve (12) years. They have built dwelling houses and business premises, and they rear livestock and poultry on the suit property. Upon being notified about filing of this suit, the respondents embarked on demolition of the applicants' premises without following the internationally laid down and accepted procedures and principles on forceful eviction and displacement. According to the applicants, the demolition is intended to frustrate and defeat the applicants' claim herein. Consequently, the applicants seek interim restraining orders.

4. The case of the 1st respondents is that it purchased the suit property from Lalji Devshi Patel and Premji Devshi Patel in 2010. Prior to that, it was a tenant of the said vendors and it was in actual occupation of part of the suit property. It further contends that the applicants have not been in occupation of any portion of the suit property for over 12 years as alleged. The position of the 1st respondent is that in 2013, one Naman Ndongi Mukabana encroached on a portion of the suit property and started demarcating it into small plots and selling them to unsuspecting purchasers. This prompted the 1st respondent to report the matter to the police and to the local administration. Further, the respondent promptly instituted Nairobi ELC 1001/2013 against Mr Mukabana whereupon he obtained restraining orders against Mr Mukabana and his cohorts.

5. The 1st respondent further contends that upon obtention of the said restraining orders, there was no activity on the suit property until October 2017 when persons purporting to be from Kasarani Youth Panorama Association started encroaching on the vacant portion of the suit property. This again prompted the 1st respondent to make a report to the police and to the local administration. In a meeting convened by the local administration, the plaintiff contended that they had been allocated a neighbouring piece of land known as Land Reference Number 6826/3 by the defunct Nairobi City Council and that they were lawfully dealing with their adjacent property. The meeting resolved that Government Surveyor and the Registrar of Lands would go to the ground to determine the actual locations and boundaries of the two adjacent properties. The 1st respondent added that the photographs exhibited by the applicants do not relate to the suit property.

6. Lastly, the 1st respondent contends that, not aware that the applicants had instituted this suit, it instituted Nairobi ELC 645 of 2017 against the respondents seeking, *inter alia*, an order restraining them against trespassing on the suit property.

7. Although the 2nd respondent entered appearance through M/s Otieno Arum & Company Advocates, he did not file a response to the application. The application was canvassed through written submissions.

8. I have considered the application together with the response thereto. I have also considered the parties' rival submissions and the relevant legal framework and jurisprudence. The single issue falling for determination in this application is whether the applicants have satisfied the criteria for grant of an interlocutory injunction. That criteria was spelt out in **Giella v Cassman Brown (1973) EA 358**. In summary, the applicants were required to demonstrate a prima facie case with a probability of success. Secondly, they were required to demonstrate that in the absence of an injunction, they stand to suffer damage that cannot be indemnified through an award of damages. Lastly, were the court to be in doubt as to the above requirements, the application would be determined on a balance of convenience.

9. The present application is predicated on an originating summons taken out under Section 38 of the Limitation of Actions Act and Order 37 rule 7(1), (2) and (3) of the Civil Procedure Rules. The said originating summons was taken out against two respondents: (i) Kenya Builders and Concrete Limited; and (ii) Naman Ndongi Mukabana. The notice of motion similarly seeks restraining orders against the said two respondents.

10. To support its plea for orders of adverse possession and for interim restraining orders, both directed against the respondents, the applicants have annexed to the originating summons and to the present application a copy of a conveyance dated May 1990 between Nyoike Holdings Limited and Lalji Devshi Patel and Premji Devshi Patel. At this point, no extract of a title in the name of the two respondents has been presented to the court to support the plea for an order of adverse possession under Section 38 of the Limitation of Actions Act.

11. Section 38 of the Limitation of Actions Act under which this court's jurisdiction is sought contains the following legal framework:

38. Registration of title to land or easement acquired under Act

1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in the lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the registry which has not been extinguished under this Act.

3. A proprietor of land who has acquired a right to an easement under Section 32 of this Act may apply to the High court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

4. The proprietor, applicant and other person interested may apply to the High Court for the determination of any question arising under this section.

5. The minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

12. The above jurisdiction is exercisable within the framework of Order 37 Rule 7(1), (2) and (3) which the applicants correctly cited. The said legal framework provides as follows:

7. Adverse possession

1. An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been

annexed.

3. The court shall direct on whom and in what manner the summons shall be served.

13. Regrettably, whereas the applicants have invited the court to exercise its jurisdiction under the above legal framework, they have not presented a certified extract of a title in the joint names of the above two defendants against whom the originating summons was taken out.

14. In my view, it cannot be said that the applicants have demonstrated a *prima facie* case with a probability of them ultimately obtaining orders of adverse possession against the two respondents in the absence of a certified extract of the title bearing the names of the two respondents. An order of adverse possession under Section 38 of the Limitation of Actions Act would direct the land registrar to expunge the name of the registered proprietor and insert the names of the applicants. In the absence of the certified extract of title in the names of the two respondents, which is a mandatory legal requirement, the present interlocutory application cannot be granted.

15. Secondly, it was contended by the applicants that they have developed dwelling and business premises on the suit property. The 1st respondent contested that allegation and contended that the photographs exhibited by the applicants do not reflect the developments on the suit property. At this point, no single approval of developments plans has been exhibited by the applicants to demonstrate that lawful developments exist on the suit property.

16. Thirdly, there is no evidence that the 146 persons itemized as members of Kasarani Youth Panorama Association authorized the applicants to bring this suit on their behalf because the list annexed to the originating summons does not bear signatures of the itemized persons.

17. The totality of the foregoing analysis is that the applicants have not placed before this court sufficient evidential material to warrant grant of the injunctive orders sought against the respondents. It is therefore my finding that the applicants have not satisfied the criteria for grant of an interlocutory injunction. Consequently, the notice of motion dated 23/10/2017 fails for lack of merit. The 1st respondent shall have costs of the application, to be borne by the applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Wambua holding brief for Mr Kenyatta for the plaintiff

June Nafula - Court Clerk