



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 149 OF 2011(O.S)

IN THE MATTER OF L.R NOS. 9312, 9313, 3760 AND 252 NAIROBI

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

DAVID MWATHI KIBE, KIBARU MWAI

AND SALOME MWIHAKI NJENGA (SUING AS THE

TREASURER, SECRETARY AND CHAIRLADY

ON THEIR OWN BEHALF AND ON BEHALF OF

TWIGA ESTATE SQUATTERS SOCIETY).....PLAINTIFFS

=VERSUS=

MBOI-I-KAMITI FARMERS COMPANY LIMITED.....DEFENDANT

RULING

What is before the court for determination is the plaintiff's Notice of Motion application dated 7th November, 2018 seeking a temporary injunction restraining the defendant, its servants, successors or assigns howsoever from excavating, working on, constructing on, fencing, alienating, building on, subdividing and/or transacting in all those parcels of land known as L.R No. 9312, L.R No. 9313, L.R No. 3760 and L.R 252 ("the suit properties") pending the hearing and final determination of the suit. The application was brought on the grounds that the plaintiffs had occupied and lived on the suit properties openly from 1950s until 20th December, 2012 when they were forcefully evicted therefrom by the defendant. The plaintiffs averred that they brought this suit for a declaration that they had acquired the suit properties by adverse possession prior to the date when the same was sold and transferred to the defendant and that they had become entitled to the same.

The Plaintiffs averred further that while this suit was pending, the defendant commenced excavation, fencing, subdivision and quarrying on the suit properties thereby subjecting the same to waste to the prejudice of the plaintiffs. The plaintiffs averred that the activities complained of were intended to defeat the cause of justice. In their affidavit in support of the application sworn by David Mwathi Kibe on 6th November, 2018, the plaintiffs annexed photographs showing the various activities allegedly being undertaken by the defendant on the suit properties.

When the plaintiff's application came up for hearing on 24th January, 2019, it was adjourned to 23rd September, 2019 at the instance of the defendant which had not responded to the same. The defendant was granted leave to respond to the application within 14 days from the date of the order. By the time the application came up for hearing once again on 23rd September, 2019, the defendant had not responded to the same. Mr. Anyoka advocate who appeared for the plaintiffs urged the court to allow the application as prayed since the same was not opposed. Mr. Wachira advocate who appeared for the defendant left the matter to the court. Mr. Wachira contended however that the defendant's advocates were not served with the application a contention that was overruled by the court. Mr. Wachira also contended from the bar that the Court of Appeal had dismissed an appeal that had been brought by the plaintiffs against a decision that had been made in favour of the defendant in respect of the suit properties. At the request of the court, Mr. Wachira supplied the court with a copy of the decision of the Court of Appeal in Nairobi Civil Appeal No. 23 of 2015, Twiga Estate Squatters Society v. The Municipal Council of Ruiru & 8 Others.

I have considered the plaintiff's application together with the supporting affidavit. What is sought by the plaintiffs is a temporary injunction pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of Giella v. Cassman Brown & Co. Ltd (1973) E.A 358, it was held that an applicant

for an interlocutory injunction must show a prima facie case with a probability of success and that, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR, the court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

The plaintiffs’ application is based on the amended Originating Summons dated 23rd December, 2013. I have noted that the plaintiffs did not seek any injunctive relief in that amended Originating Summons which could form a basis for the present application. There is also no sufficient evidence before the court showing that the defendant is committing waste on the suit property. The photographs annexed to the affidavit in support of the application show that there are some activities taking place on the suit property. It is however not clear from the photographs as to the nature of the activities being undertaken.

The plaintiffs had contended that they had occupied the suit properties from 1950s up to 2012 when they were forcefully evicted from the said properties. The plaintiffs did not place any evidence before the court in support of these allegations. There is therefore no evidence before the court in support of the plaintiffs’ adverse possession claim. I have perused the judgment of the Court of Appeal in Nairobi Civil Appeal No. 23 of 2015, Twiga Estate Squatters Society vs. The Municipal Council of Ruiru & 8 Others that was relied on by the defendant. The decision is relevant to the application before the court in that it casts doubt on the merit of the plaintiffs’ claim herein.

Due to the foregoing, I am not satisfied that the plaintiffs have a prima facie case against the defendant with a probability of success. I am also doubtful whether the plaintiffs are likely to suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted. In the circumstances, the plaintiffs’ application is not for granting. I am however of the view notwithstanding that finding that the interest of justice would be served if the suit properties are preserved pending the hearing of this suit.

In conclusion, I decline to grant the prayers sought by the plaintiffs but order that, pending the hearing and determination of this suit or further orders by the court, the status quo prevailing as of the date hereof relating to the ownership or title of L.R No. 9312, L.R No. 9313, L.R No. 3760 and L.R No. 252 shall be maintained. For the avoidance of doubt, the suit properties shall not be sold, transferred, leased or charged pending the hearing and determination of this suit or further orders by the court. As a condition for this order, the plaintiffs shall deposit in court as security a sum of Kshs. 500,000/= within 60 days from the date hereof in default of which the order shall stand discharged. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 31st day of October 2019

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Bodo h/b for Mr. Anyoka for the Plaintiffs

Mr. Wachira h/b for Mr. Mutiso for the Defendant

C. Nyokabi-Court Assistant