



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 25 OF 2019 (O.S.)

BERNARD NGARI NJOKA.....PLAINTIFF

VERSUS

JOHN NGUNGI MUTHAKIE.....DEFENDANT

RULING

1. By a notice of motion dated 17th July 2019 brought under **Order 40 Rules 1 & 2 of the Civil Procedure Rules**, the Plaintiff sought the following orders:

a) Spent.

b) Spent.

c) *That the Respondent either by himself, his agents and or servants be restrained from evicting and or interfering with the Applicant's peaceful occupation of 2 acres out of land parcel No. Nthawa/Riandu/5215 pending the hearing and determination of this suit.*

d) Spent

e) *That a prohibitory order be issued and the same be registered against land parcel No. Nthawa/Riandu/5215 pending the hearing and determination of this suit.*

f) *That costs of this application be provided for.*

2. The said application was based upon the grounds set out in the notice of motion and the supporting affidavit sworn by the Plaintiff on 17th July 2019. The Plaintiff contended that sometime in 1999 he settled upon a portion of two (2) acres out of *Nthawa/Riandu/1993* which portion upon sub-division became *Title No. Nthawa/Riandu/5215* (hereafter *the suit property*) pursuant to a sale agreement made between the parties. The Plaintiff contended that he had developed the suit property over the years without interference from the Defendant who is still the registered owner thereof. He claimed to have planted some trees, miraa stems and food crops thereon.

3. The Plaintiff further contended that the Defendant had failed to obtain the consent of the Land Control Board for the purpose of transferring the suit property to him. The Plaintiff was apprehensive that the Defendant might evict him from the suit property and dispose of it hence the suit and application for interim orders.

4. The Defendant filed a statement of grounds of opposition dated 23rd September 2019 in opposition to the said application. It was contended that the application was incompetent and bad in law; that it was incurably defective; and that it was frivolous, vexatious and otherwise an abuse of the court process. The Defendant did not provide any particulars to back up those general grounds which may be applicable to thousands of different situations.

5. When the said application was listed for hearing on 24th September 2019 the Defendant sought additional 10 days to file a replying affidavit in response to the said application. The parties also consented to canvass the said application through written submissions. The parties were granted 28 days to file and exchange their respective submissions. By the time of preparation of the ruling, however, none of the parties had filed their respective submissions. The Defendant had also not filed any replying affidavit in response to the said application.

6. The court has considered the Plaintiff's said application, the Defendant's grounds of opposition as well as the material on record. The

court has noted that the Defendant did not file any replying affidavit to refute the allegations contained in the Plaintiff's supporting affidavit. Those allegations are unchallenged at this stage. The court is entitled to hold them as true. The court is thus satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial of the action within the meaning of the principles enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**.

7. The court is further satisfied that the Plaintiff might otherwise suffer irreparable damage should he be evicted from the suit property before his claim for adverse possession is heard and determined. The court is of the opinion that the Plaintiff may suffer great hardship and inconvenience should he be evicted and his trees and crops destroyed before the suit is heard and concluded. The court is also persuaded that the balance of convenience tilts in favour of the Plaintiff who is in possession of the suit property.

8. The second aspect for consideration is whether or not the Plaintiff has made out a case for a prohibitory order for the preservation of the suit property. It is evident from the material on record that the Plaintiff is seeking a declaration to the effect that he has acquired the suit property on account of adverse possession under **section 38 of the Limitation of Actions Act (Cap. 22)**. The purpose of a prohibitory order is to preserve the suit property pending the hearing and conclusion of a suit. As was held in the case of **Shivabhai Patel V Manibhai Patel [1959] EA 907**, it is the duty of the court to preserve property which may be in dispute. The court is of the view that if the suit property is alienated before the pending suit is determined, the substratum of the suit may be eliminated.

9. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 17th July 2019. The same is accordingly allowed in the following terms:

a. An injunction be and is hereby issued restraining the Defendant either by himself, his agents and servants from evicting or interfering with the Plaintiff's occupation of a portion of 2 acres out of Title No. Nthawa/Riandu/5215 pending the hearing and determination of the suit.

b. An order of inhibition under Section 68 of the Land Registration Act, 2012 be and is hereby issued to prevent any further dealings with Title No. Nthwa/Riandu/5215 pending the hearing and determination of the suit.

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

10. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28TH DAY of NOVEMBER, 2019.

In the presence of Ms. Mutegi holding brief for Ms. Muthoni for the Plaintiff and the Defendant present in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19