



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 37 OF 2019 (O.S.)

LUCY WANJIRA NYAGA.....1ST APPLICANT

CHARLES NJUE.....2ND APPLICANT

VERSUS

GRN.....1ST RESPONDENT

(also being sued as a guardian of IMN minor)

DAVID GICHANGI GATHURI.....2ND RESPONDENT

JOE KINGFORD MACHARIA GATHURI.....3RD RESPONDENT

CLEMENT DENIS NGARI GATHURI.....4TH RESPONDENT

KENNEDY NDWIGA NJAGI.....5TH RESPONDENT

JOHN IRERI KINANI.....6TH RESPONDENT

LAND REGISTRAR EMBU.....7TH RESPONDENT

RULING

1. By a notice of motion dated 23rd August 2019 brought under **Order 51 Rule 1, 40 Rule 1 of the Civil Procedure Rules, Section 68 (1) of the Land Registration Act, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap. 21) of the Laws of Kenya, Section 16 of the High Court (Organization and Administration (General) Rules, 2016, High Court (Practice and Procedure Rules) and other enabling provisions of the Law**, the Plaintiffs sought the following orders for purposes of this ruling:

a. That pending hearing and determination of the suit a temporary injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents whether by themselves, their agents, their servants or any person acting under their instruction from subdividing, transferring, disposing, leasing, wasting, damaging, alienating or trespassing upon the whole or any portion of the parcels of land comprised in Titles No. Gaturi/Nembure/16489, Gaturi/Nembure/16490, Gaturi/Nembure/16491, Gaturi/Nembure/16492, and Gaturi/Nembure/16493 that were sub-divided from Gaturi/Nembure/2900.

b. That this honourable court do inhibit the registration of any dealing(s) with the parcels of land comprised in Titles No. Gaturi/Nembure/16489 Gaturi/Nembure/16490, Gaturi/Nembure/16491, Gaturi/Nembure/16492, and Gaturi/Nembure/16493 that were sub-divided from Gaturi/Nembure/2900 pending the hearing and determination of this suit or until further orders.

c. That the costs be provided for.

2. The said application was based upon the grounds set out on the face of the motion and the supporting affidavit sworn by the 1st Plaintiff on 23rd August 2019. The Plaintiffs contended that they had been in exclusive, open and continuous possession of Title No. Gaturi/Nembure/2900 which was subsequently sub-divided into *Title Nos. Gaturi/Nembure/16489-16493* (hereafter *the suit properties*) since 1974. It was further contended that the 1st Defendant's suit for recovery of the suit property being *Embu CMCC No. 189 of 1996* dismissed

for want of prosecution way back in 2001.

3. It was further contended that the 1st Defendant had thereafter secretly initiated legal proceedings involving the suit properties without serving the Plaintiffs. The Plaintiff's case was that the 1st Defendant was now determined to evict them from the suit properties whereas they had acquired a legal interest therein.

4. The 1st Defendant filed a replying affidavit sworn on 10th September 2019 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of the 2nd - 6th Defendants. The 1st Defendant conceded that he was the registered owner of the original parcel No. 2900 which he sub divided into the suit properties and transferred some of them to the 2nd - 6th Defendants. He stated that he is the one who allowed the 1st Plaintiff to occupy the suit property in the 1970s and that her occupation was with his permission hence could not be termed as adverse.

5. The 1st Defendant further contended that contrary to the terms of the oral agreement for her occupation, the 1st Plaintiff had constructed a semi-permanent house, planted coffee stems and invited strangers into the suit properties. It was contended that the 1st Plaintiff had also secretly buried the bodies of some of her relatives on the suit properties without his permission.

6. The 1st Defendant also contended that the 1st Plaintiff had defaulted in payment of the purchase price on at least two sale agreements for the purchase of the suit properties. The last agreement was made on 1st February 2010 and that the 1st Plaintiff had failed to honour the terms of the agreement. He denied that the Plaintiffs had demonstrated their claim for adverse possession and asked the court to dismiss the said application for interim orders.

7. The Attorney General appearance for the 7th Defendant on 18th September 2019 but did not file any response to the said application for interim orders.

8. When the said application was listed for hearing on 11th September 2019, it was directed that the said application be canvassed through written submissions. The Plaintiffs were granted 14 days to file a further affidavit and written submissions whereas the Respondents were granted 14 days to file their submissions upon service by the Plaintiffs. By the time of preparation of the ruling, however, none of the parties had filed written submissions. The Plaintiffs had also not filed a further affidavit.

9. The court has considered the Plaintiffs' said application, the replying affidavit in opposition thereto as well as the material on record. The material on record indicates that the Plaintiffs have been in occupation of the suit properties for a considerable period of time beginning the 1970s. The Plaintiffs contended that they have since acquired adverse possession of the suit properties whereas the Defendants contend that possession was with the consent of the owner.

10. There is no doubt from the material on record that the Plaintiffs have undertaken various developments on the suit properties including construction of a house and cultivation of coffee and other crops. The question of whether or not such lengthy occupation and development of the suit properties can constitute adverse possession can only be conclusively determined upon a full hearing of the suit. Nevertheless, the court is satisfied on the basis of the material on record that the Plaintiffs have demonstrated a *prima facie* case with a probability of success within the meaning of the principles enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 258**.

11. The court is further of the opinion that the Plaintiffs may suffer irreparable damage should they and their families be evicted from the suit properties before their claim for adverse possession is heard and determined. A premature eviction may cause serious disruption to the Plaintiffs' lives and their livelihood before their rights are conclusively determined at the trial hereof. An evaluation of the principle on the balance of convenience also tilts in favour of the Plaintiffs who are in possession. The court is thus satisfied that the Plaintiffs have demonstrated the three principles for the grant of an interlocutory injunction.

12. The court has considered the Plaintiffs' prayer for an order of inhibition to prohibit further dealings with the suit properties. The court is of the opinion that the claim for adverse possession may be rendered nugatory if the suit properties are alienated before the suit is heard and the rights of the parties conclusively determined. The court is of the view that it has a duty to preserve any property which is the subject of a legal dispute so that it is available to the successful party upon conclusion of legal proceedings. 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...”

13. The upshot of the foregoing is that the court is satisfied that the Plaintiffs' notice of motion dated 23rd August 2019 has merit. Accordingly, the same is hereby allowed in terms of order Nos. 4 and 5 thereof. Costs of the application shall be in the cause.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST DAY** of **NOVEMBER, 2019**.

In the presence of Ms. Nzekele holding brief for Mr. Kigen for the Applicants, Mr. Odhiambo holding brief for Mr. A.P. Kariithi for 1st-6th Respondents and Mr. Mayaka for the 7th Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

21.11.19