



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 15 OF 2019 (O.S.)

EMILY MWENDIA MUEMA.....1ST PLAINTIFF

FUNDI NJAGI.....2ND PLAINTIFF

VERSUS

DOMINIC MURAGE NJERU.....DEFENDANT

RULING

1. By a notice of motion dated 15th May 2019 brought under **Order 40 Rules 1 & 2 of the Civil Procedure Rules** the Plaintiffs sought two main orders, namely:

a) An injunction restraining the Defendant, his agents or servants from evicting or interfering with the Plaintiff's occupation of Title Nos. Nthawa/Siakago/2051 & 2203 (hereafter the suit properties) pending the hearing and determination of the suit.

b) A prohibitory order to prevent any dealings with the suit properties pending the hearing and determination of the suit.

2. The said application was based upon the grounds set out on the face of the motion and supported by the supporting affidavit sworn jointly by the Plaintiffs on 15th May 2019. It was contended that the Defendant had threatened to evict the Plaintiffs from the suit properties before their claim for adverse possession could be heard and determined. It was further contended that the Defendant might dispose of the suit properties during the pendency of the suit with the consequence that the suit might be rendered nugatory. It was the Plaintiff's case that they had been in occupation of the suit properties since 1998 and had extensively developed them by erecting houses and cultivating various crops thereon.

3. The Defendant filed a replying affidavit sworn on 21st June 2019 in opposition to the said application. The Defendant contended that he was an innocent purchaser for value of the suit properties and that there were no developments thereon except a temporary structure. It was denied that the Plaintiffs had planted any trees or crops on the suit properties. The Defendant contended that the application was an afterthought which was only filed when the Plaintiffs learnt of the Defendant's intention to evict them. It was his contention that the claim for adverse possession could not lie against him since he was registered as proprietor on 21st February 2019.

4. The Defendant contended that the Plaintiffs had failed to demonstrate their claim for adverse possession and that they had failed to demonstrate the grounds for granting an interlocutory injunction or prohibitory order in their favour. He considered the Plaintiffs application as frivolous, vexatious and otherwise an abuse of the court process. He, therefore, asked the court to dismiss the said application

with costs.

5. When the said application was listed for hearing on 10th June 2019 it was directed that the said application shall be canvassed 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 written submissions.

6. The court has considered the Plaintiffs' said application, the Defendant's replying affidavit in opposition thereto as well as the material on record. Although the Defendant denied knowledge of the Plaintiffs occupation in paragraph 3 of his replying affidavit, he contended in paragraphs 6 and 7 thereof that the Plaintiffs were granted possession by the previous owner and that the Plaintiffs had even sought his assistance in vacating the suit properties.

7. The court is satisfied from the material on record that the Plaintiffs are in possession and have been in occupation of the suit properties for some years now. The question of whether such occupation can satisfy the elements of adverse possession can only be determined at the trial upon evidence being tendered by all the concerned parties. The question of what effect, if any, the structures may have on the claim for adverse possession can only be conclusively determined at the trial.

8. The court has also taken note of the Defendant's averment in paragraph 10 of his replying affidavit that the Plaintiffs only came to court upon hearing of his intention to evict them from the suit properties. The court is of the view that the said averment validates the Plaintiffs' apprehension that the Defendant may evict them from the suit property before the hearing and determination of their claim for adverse possession.

9. Without making any definitive findings on the issues of fact which shall be determined at the trial hereof, the court is reasonably satisfied that the Plaintiffs have demonstrated a *prima facie* case with a probability of success at the trial. The court is further satisfied that the Plaintiffs may otherwise suffer irreparable injury should they and their family members be evicted before the conclusion of the suit. The balance of convenience would also tilt in favour of the Plaintiffs who are in possession. The court is thus satisfied that the Plaintiffs have met the requirements for the grant of an interim injunction as set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**.

10. The second issue for consideration is whether the Plaintiffs have made out a case for the grant of a prohibitory order. The purpose of a prohibitory order is to preserve the suit properties 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 property the subject of a dispute is alienated before a pending suit is determined the substratum of the suit may be eliminated.

11. The upshot of the foregoing is that the court finds merit in the Plaintiffs' notice of motion dated 15th May 2019. The same is accordingly allowed in terms of order Nos. 3 and 5 thereof. Costs of the application shall be in the cause.

12. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **7TH DAY** of **NOVEMBER, 2019**.

In the presence of Mr. Kimanzi holding brief for Ms. Muthoni for the Plaintiffs and Ms. Nzekele holding brief for Mr. Mogusu for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

07.11.19