



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 64 OF 2017

ANDREW NGARI KAUMBUTHU.....CLAIMANT

VERSUS

MOSES GACHOKA NJUGUNA.....DEFENDANT

RULING

1. By an originating summons dated 30th March 2017 filed under section 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules, the Applicant sought the following reliefs against the Respondent;

a. That the Plaintiff is entitled to be declared as proprietor of land reference No. Evurore/Nguthi/1112 which he has acquired by adverse possession, having lived on and worked the same for over 12 years since late 1979 and used it peacefully and without any interference from the Defendant and or any other person.

b. That the Plaintiff is entitled to be registered and issued with certificate of title over land reference No. Evurore/Nguthi/1112 in the place of the Defendant/Respondent.

c. The costs of this suit be awarded to the Plaintiff.

2. Simultaneously with the filing of the originating summons, the Applicant filed a notice of motion dated 30th March 2017 under **section 63 (8), 1A, 3A of the Civil Procedure Act, Order 51 Rule 1 of Civil Procedure Rules, section 13 of the Environment & Land Act 2011** and all enabling provisions of the law seeking the following orders;

a. Spent

b. Spent

c. That pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the Defendant whether by themselves, employees, servants and/or agents or otherwise assigns and/or any other person whatsoever acting on his behalf and/or their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner interfering land reference No. Evurore/Nguthi/1112. (sic)

d. That the Defendant be condemned to pay the costs of this application and of the suit generally.

3. The said notice of motion was based upon the grounds stated on the face thereof and supported by the supporting affidavit sworn by the Applicant on 30th March 2017. It was contended that the Applicant had been in open and uninterrupted possession of *Title No. Evurore/Nguthi/1112* (hereinafter known as the "suit property") since 1979. It was further contended that the Defendant had interfered with his possession by entering the suit property and destroying crops and a house thereon. It was also alleged that the Defendant had threatened to sell the suit property.

4. The Respondent filed a replying affidavit sworn on 26th September 2017. The Respondent contended that he bought the suit property from the Applicant's father in 1984 who also gave vacant possession thereof. He further stated that the Applicant took advantage of his physical absence to erect some illegal structures on the suit property at around 2015. He further stated that he had already entered into a sale agreement with ACK Emmanuel Cianthia Secondary School for the sale of the suit property. The Respondent considered the Applicant as a mere trespasser and asked the court to dismiss his application for injunction.

5. The Applicant filed a further affidavit sworn on 23rd October 2017 in which he stated that he was put in possession of the suit property by his father in 1979. He denied being aware of the sale of the suit property to the Respondent. He questioned why the Respondent never moved to court for possession of the suit property since 1984.

6. When the said notice of motion came up for hearing on 28th September 2017, the parties agreed to dispose of it by written submissions. Consequently, the Applicant filed his submissions on 2nd November 2017 whereas the Respondent filed his on 6th December 2017.

7. The Applicant submitted that he had established a *prima facie* case with a probability of success at the trial within the meaning of the principles enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The Applicant also submitted that being the party in possession, he would suffer irreparable damage unless the interim orders sought are granted. It was further submitted that even the balance of convenience was in his favour on account of his possession and utilization of the suit property.

8. The main plank of the Respondent's submission in opposition to the said application is that the Applicant has not established or is unlikely to establish his claim for adverse possession. It was submitted that the Applicant had not demonstrated that he had either dispossessed the Respondent or that the Respondent had discontinued possession of the suit property for the minimum statutory period. The Respondent cited several authorities on the elements of adverse possession and what a successful claimant must establish.

9. The court has considered the Applicant's notice of motion, the replying affidavit in opposition thereto, the supplementary affidavit and the respective submissions of the parties. It is evident that there are various factual elements of adverse possession which are contested. The period of taking possession is disputed. The length of possession is also disputed.

10. The court is, however, satisfied that the Applicant has been in possession of the suit property. The fact of possession was not denied by the Respondent. The court is of the view that the other elements of adverse possession are evidentiary matters for the trial court. The court is satisfied that the Applicant has demonstrated a *prima facie* case with a probability of success.

11. The 2nd requirement relates to adequacy or otherwise of monetary damages. An order of injunction will not normally be issued unless the Plaintiff might otherwise suffer irreparable damage. Bearing in mind the nature of the subject matter of litigation and the fact that the Applicant is in possession of the property, the court is satisfied that an award of damages would not be an adequate remedy. The court adopts the reasoning of the court in the case of **Jane Wanjira Muchira Vs Wilson Tumbo Thambo [2016] eKLR and Muiruri Vs Bank of Baroda (Kenya) Ltd 2000 KLR 183** in that respect. In the latter case, it was observed that;

“disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.”

12. In view of the foregoing the court finds merit in the Applicant's notice of motion dated 30th March 2017 and the same is hereby allowed in terms of prayer No. 3 thereof. Costs of the application shall be in the cause.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22nd day of FEBRUARY, 2018

In the presence of Ms Mureithi holding brief for Mr Mugendi for the Claimant and Ms Beth Ndorongo holding brief for Mr I. Muchiri for the Respondent.

Court clerk Njue/Leadys.

Y. M. ANGIMA

JUDGE

22.02.18