



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 791 OF 2017

IN THE MATTER OF ADVERSE POSSESSION

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

**IN THE MATTER OF LAND PARCEL NUMBER ENKARIAK/RONGENA/667 AND
ENKARIAK/RONGENA/668**

GRACE WAIRIMU GITHINJI.....1ST APPLICANT

JOHN NJENGA GITHINJI.....2ND APPLICANT

PETER GITHAE GITHINJI.....3RD APPLICANT

STEVEN KANYORO GITHINJI.....4TH APPLICANT

VERSUS

KARAU OLE SHONGE.....1ST RESPONDENT

GRACE LUCY WANJIRU.....2ND RESPONDENT

RULING

The application for determination is the Applicants' Notice of Motion dated the 27th June, 2017 brought pursuant to sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 68 (1) of the Land Registration Act. It is based on the following grounds, which in summary is that the Applicants have been in occupation of land parcel numbers ENKARIAK/RONGENA/667 and ENKARIAK/RONGENA/668 hereinafter referred to as the 'suit lands' for more than twelve (12) years. The Applicants' have been issued with a notice to vacate the suit land by the Respondents. The Respondents are in the process of selling or transferring their interests in favour of third parties thus prejudicing the Applicants' herein.

The application is supported by the affidavit of GRACE WAIRIMU GITHINJI the 1ST Applicant herein where she deposes that the Applicants have resided on the suit lands for over 20 years, have no other home and therefore entitled to be declared owners by virtue of adverse possession. She contends that the suit lands are registered in the names of the Respondents since a court order declaring that the same be transferred to GITHINJI KARANJA who is the Applicants' late father was not executed. Further that the

Applicants have been utilizing the suit lands for cultivation of various crops including maize and used the said lands as their source of livelihood as well as to generate income to cater for their children. She claims there are permanent structures on the suit lands which serve as residence for the Applicants' and their families. She confirms their parents have been buried on the suit lands, with dispossession of the same may lead to their graves being neglected or even destroyed all together and as their children, it is the Applicants' responsibilities to maintain and cater for the said graves. Further, that there is imminent possibility of the Applicants being evicted from the suit lands as a notice has already been given through the office of the Area Chief, and they are expected to vacate the said lands on or before 30th July, 2017. She reiterates that the Respondents have already taken possession of some parts of the suit lands with an intention of subdividing it and transferring to third parties. She reaffirms that such eviction will result to the Applicants' being rendered homeless as well as lose their source of livelihood which will adversely affect their wellbeing including their school going children.

The application is opposed by the Respondents who filed a replying affidavit sworn by GRACE LUCY WANJIRU the 2nd Respondent herein, where she deposes that she is the registered proprietor of land parcel number ENKARIAK/RONGENA/ 668 having purchased it for value from the 1st Respondent herein in the year 1978. She claims the application herein by the Applicants cannot succeed as it is based on an originating Summons that is fatally defective and hence bound to fail as they have not attached copies of title to the suit property to their supporting affidavit, yet this is mandatory under the law. She insists the Applicants have not indicated to the Court on when they dispossessed her of her land, and neither have they indicated whether the purported occupation if at all was continuous, peaceable and of right. She avers that from the face of the Application, the Applicants' never recognized her title and ownership of her land until the year 2016 and as such cannot claim adverse possession. Further that in 1981 she charged her land to the Ol Kejuado Trade Development Joint Loan Board under the Ministry of Trade to secure a loan. She reiterates that the loan remained unpaid upto 2016 and thus for the entire period from 1981 to 2016 there were third parties' rights over the charged property. She confirms that during the subsistence of the loan, her land was under use as security for the loan and thus did not fall under unused land that is open for alienation by way of adverse possession. Further that there is misstatement of facts on the part of the Applicants' to allege that they have been in actual possession of the suit land for a period of more than 12 years. She states that she purchased her land in 1978 and acquired title in 2011 and that the Applicants never occupied land parcel number ENKARIAK/RONGENA/668 that shares a common boundary with 667. She confirms that sometime in 2011 the 2nd Applicant NJENGA GITHINJI moved into ENKARIAK/RONGENA/668 and constructed a temporary dwelling and when she went to the land to protest, the Applicants confronted her with pangas as well as rungas compelling her to flee for her life. She reiterates that she reported the matter to the local District Officer but was told to avail the original title before she could be accorded any assistance which she could not surrender since she had given it to the Ministry of Trade to secure a loan. She reaffirms that in 2016 she commenced the legal process to remove the Applicants from her land where they held a series of meetings with the local administration and she has annexed the minutes to her replying affidavit. She denies that the Applicants' mother was buried on her land and also confirms their father was buried away from the suit lands. She insists that she took possession of her land since 2016 and cultivated it, hence the interim orders sought are inconsequential. Further that following the order of the local administration to vacate, the 2nd Applicant requested for seven (7) months within which to seek for alternative dwelling and vacate land parcel number ENKARIAK/RONGENA/668. She avers that the Applicants have not provided proof that the suit lands are supposed to be subdivided and sold to third parties.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

At this juncture the only issue for determination is whether the Applicants are entitled to the injunctive orders sought.

The Applicants contend they have resided on the suit land for over 20 years with their parents buried thereon. Further that their deceased father had already been granted orders of adverse possession but the

Respondents declined to give them title. They seek injunctive orders and claim the Respondents are in the process of subdividing the suit lands and transferring to third parties. They relied on various cases including the case of **Giella Vs Casman Brown** to support their application. The 2nd Respondent claims she is the registered proprietor of Land Parcel Number ENKARIAK/RONGENA/668 having purchased it for value from the 1st Respondent herein in the year 1978. She denies knowing the Applicants and states that at one point she even charged her land and that the 2nd Applicant moved into her land in 2011 and constructed a temporary structure. Further that in 2016 he was told to move out and he requested for seven (7) months to get alternative dwellings. She insists she has been on the suit land and cultivating it since 2016. She relied on various cases including **Symon Gatutu Kimamo & 587 others V. East Africa Portland Cement Co. Ltd (2011) eKLR**, **James Maina Gatundu Vs Francis Mwangi Waititu (2017) eKLR** and **Ravindranath Dahybai Bhagat Vs Hamisi Harod & 5 others (2014) eKLR** to support her claim.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In line with this principle, the Court will proceed to interrogate whether the applicants have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with a probability of success, it is applicants' contention they have been on the suit land for over 12 years and their parents are buried thereon. The 2nd Respondent denied this position and I note the Applicants did not controvert her averments. Section 38 of Limitations of Actions Act codifies the doctrine of Adverse Possession in Kenya. It provides:

'Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.'

I note the Applicants and Respondents had actually been in a meeting with the local administration on 14th December, 2016 as per annexure 'GWG 2, where the Applicants agreed to move out of the 2nd Respondent's land. The Applicants alleged their parents were buried on the suit lands but this was denied by the 2nd Respondent. The Applicants seek orders of adverse possession which require a high standard of proof. Adverse possession has been defined to mean "possession inconsistent with the title of the owner. But not for instance possession under licence from the owner or by way of trust on his behalf. There must be denial of the owner's title in one form or another for possession to be adverse." (**Mutiso v Mutiso [1998] LLR 3268 (CAK)**).

The Applicants have not disputed that the Respondents are the owners of the suit land. From the evidence in the supporting affidavit, I note they did not annex the documents of title.

I note the Applicants have annexed a Decree from Nairobi HCCC No. 1991 of 1978 where they claim their father GITHINJI KARANJA had been granted the suit lands but the Respondents failed to transfer the same to him. A cursory look at the Decree that was issued in 1978, I note there was indeed a Judgement issued against the Respondents. The Respondents have however not given a response as to whether the same was appealed from or review.

It is against the foregoing, that I find that the Applicants have established a prima facie case with a

probability of success.

On the second issue of Irreparable harm, I note that the applicants have been residing on the suit lands. Further there was even a decree in 1978 granted to their deceased father to reside hereon. They have undertaken farming thereon which is their source of livelihood and would suffer irreparable harm, which cannot be compensated by way of damages if the injunctive orders sought are not granted pending the outcome of the suit.

On the issue of Balance of convenience, I find that this tilts in favour of the Applicants who are currently residing on the suit land.

Since Applicants are staking claim over the suit lands through adverse possession, and the 2nd Respondent insisting they do not reside on it, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

1. Status quo be maintained pending the hearing and determination of this suit.
2. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel numbers ENKARIAK/RONGENA/667 and ENKARIAK/RONGENA/668, of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 13th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Odongo for 2nd Respondent

Wambui holding brief for Wairagu for Plaintiffs