



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 343 OF 2016

GETEMBE OMOI.....1ST PLAINTIFF

JOHN MOMANYI RAGIRA.....2ND PLAINTIFF

SIMEON MOSE.....3RD PLAINTIFF

SIMEON OARI.....4TH PLAINTIFF

MANGA RAGIRA.....5TH PLAINTIFF

VERSUS

PAULINA KEMUMA MOGENI.....DEFENDANT

RULING

1. The applicants by undated originating summons (OS) filed in court on 21st October 2016 brought under Order 37 Rule 7, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 38 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya prays for the following orders:-

1. That the Honourable court declares that the respondent's title over the whole of title number Nyaribari Chache/Birongo/47 measuring 4 acres has been extinguished in favour of the applicants jointly and severally who have since acquired the same by virtue of adverse possession and are therefore entitled for registration on the same in their favour against the Respondent.

2. That the honourable court be pleased to grant permanent orders of injunction restraining the respondent by herself, servants, agents or otherwise howsoever from interfering with the applicants' quite possession and ownership of the suit land number Nyaribari Chache/Birongo/47.

3. That the costs of the application be provided for.

2. The applicants in support of the originating summons claim that they have been in continuous uninterrupted possession of the suit land for a period of over 30 years and thus have acquired title by way of adverse possession to the suit land. They aver the respondent has threatened to recover possession of the suit land which she cannot lawfully do in view of their having acquired title to the land as aforesaid.

3. Simultaneously with the originating summons the applicants filed a notice of motion dated 21st October 2016 brought under Order 40 Rule 1(a) of the Civil Procedure Rules, Sections 3, 3A and 63(c) of the Civil procedure Act and sought an order of injunction to restrain the respondent from in any way interfering with the suit land until the originating summons was heard and determined. In support of the application the applicants averred that in the 1980s the applicants bought portions of land parcel **Nyaribari Chache/Birongo/47** from the original owner Moruri Kerongo and that they settled on the land and constructed permanent homes and have been using the land for cultivation and growing cash crops since the 1980's. The applicants aver they have occupied the whole of land parcel **Nyaribari Chache/Birongo/47** and that their occupation and possession has been continuous and uninterrupted for the entire period. They allege the respondent has caused the land registrar to issue a notice to the applicants allegedly to fix the boundaries between the applicants and the respondent. They claim that the respondent is using the land registrar as a guise to seek to recover land which the applicants have since acquired title to by way of adverse possession.

4. The 1st applicant, Getembe Omoi swore an affidavit dated 21st October 2016 on behalf of himself and the other applicants in support of the application. He deposed that in the early 1980s he brought the suit land from one, Moruri Kerongo and settled his family thereon and has annexed copies of agreements said to be marked "**G01 (a), (b), (c), (d) and (e)**". The attached agreements are however neither commissioned

and/or marked. The deponent further deposes that he and the other applicants have built permanent homes on the suit land as per annexures “G02 (a), (b), (c), (d) and (e)”. The annexures however are not commissioned or marked. The deponent further deposes that the respondent acquired title to the suit property in 1992 in unclear circumstances while she knew and was aware that the applicants were in occupation of the property. The applicants claim that they have occupied and used the suit property for over 30 years and the respondent’s title to the land has been extinguished as the applicants have acquired title by way of adverse possession.

5. Pauline Kemuma Mogeni the defendant/respondent in a replying affidavit dated 3rd November 2016 in opposition to the applicant’s application deposes that she is the daughter of the late Kerongo Moruri who was the registered owner of land parcel **Nyaribari Chache/Birongo/47** and who died intestate in 1979. She further deposes that her brother Moruri Kerongo who the applicant’s claim sold the suit land to them died in 1989 and that by the time of his death they had not filed any succession proceedings for grant of letters of administration to their late father’s estate.

6. The defendant further deposes that she filed Kisii HC Succession Cause No. 330 of 1992 and was issued with grant of letters of administration and the confirmed grant on 9th December 1992 as per annexures “PKM1” and “PKM2” respectively and was subsequently issued with a title deed for the suit land on 21st December 1992 as per annexure “PKM3”. The defendant further deposes, the plaintiffs are dishonest as they have failed to disclose that they had filed Kisii HCCC No. 38 of 1993 against the defendant relating to the same suit land and that their suit was dismissed by **Sitati, J.** on 16th February 2012 for failure to attend at the hearing and that a subsequent application to set aside the dismissal order was dismissed by **Okong’o, J.** on 28th February 2014. Copy of plaint, order and ruling marked “PKM4” and “PKM5” respectively.

7. The defendant/respondent avers that the respondents have encroached onto her parcel of land and they are trespassers and explains that is the reason she filed a boundary dispute at the Kisii Lands Office so that the land registrar could visit the land and establish the boundary of the suit land.

8. The applicants filed a further affidavit sworn on 28th June 2017 in reply to the defendant’s replying affidavit. The applicants aver that the respondent’s brother Moruri Kerongo had inherited his father before the Law of Succession Act, Cap 160 Laws of Kenya came into force and therefore had capacity to sell and dispose the suit land to the applicants. Further the applicants aver that the defendant having been married in 1962 she had no capacity to inherit her late father’s property. The applicants aver they have been in occupation of the suit land for over 30 years whereas the defendant has never occupied and/or been in the suit land.

9. The parties argued the application by way of written submissions. I have carefully reviewed and considered the pleadings and the submissions filed on behalf of the parties. The applicants claim to have been in actual possession of the suit property for over 30 years, in fact they claim to have their houses on the suit land as per the photographs they have exhibited. The defendant responds that she is the registered owner of the suit land and exhibits a title to fortify her assertion. She states the applicants are but encroachers and trespassers. She does not affirm whether or not the applicants have constructed houses on the suit property as they allege but discloses that she has filed a dispute at the lands office for the land registrar to visit the suit land to establish and fix the boundary.

10. It is evident that the applicants filed Kisii HCCC No. 38 of 1993 where they were challenging the grant of letters of administration to the estate of Kerongo Moruri (deceased) to the defendant on the basis that she failed to make disclosure that they had an interest in the estate of the deceased as purchasers. The applicants contend that the suit was not determined on its merits and assert that its dismissal cannot be a bar to the institution of the present suit.

11. The pertinent issues in this matter are contested. It is not possible at this stage to determine whether the applicants are in fact adverse possessors in the suit property as they assert or whether they are mere trespassers thereon as alleged by the defendant. The determination of those issues is dependent on the evidence that can only come during the trial. The applicants allege they have houses on the suit property where they have lived for over 30 years. The defendant is silent on that and she makes no admission. That fact can only be established by evidence at the trial.

12. Having regard to all the facts and evidence placed before the court and considering the attendant circumstances, my view is that this is an appropriate case where the court should make an order preserving the suit property and the status quo until the suit is heard and determined so that the parties can ventilate their claims at the trial. The court will in the premises be guided by the Environment and Land Court Practice Direction No. 32 which provides thus:-

32. During the inter partes hearing of any interlocutory application where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides, the judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

13. I accordingly make an order for the parties to maintain and observe the prevailing status quo as at the date of this ruling. The suit property shall not be sold, charged and/or transferred pending the hearing and determination of the suit. To facilitate the hearing and determination of the suit, the court directs the parties to comply with Order 11 of the Civil Procedure Rules within the next 45 days from the date of this ruling and thereafter to fix the suit for pretrial directions.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 9TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyawencha for Masese for the 1st, 2nd, 3rd and 4th plaintiffs

Mr. Omwega for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE