



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 52 OF 2017 (O.S)

JOHN NJUE NJAGI.....1ST APPLICANT

BERNARD NDWIGA.....2ND APPLICANT

LUCY KINA NJAGI.....3RD APPLICANT

PETER MURIITHI NJAGI.....4TH APPLICANT

JEREVASIO NDWIGA NJAGI.....5TH APPLICANT

ANGELA NJOKI NJAGI.....6TH APPLICANT

ANN NDIA NJAGI.....7TH APPLICANT

VERSUS

SPORTLIGHT INTERCEPTS AUCTIONEERS.....1ST RESPONDENT

JOYCE KAGECI GITHUIYA.....2ND RESPONDENT

NATIONAL BANK OF KENYA.....3RD RESPONDENT

RULING

1. The Applicants herein filed an originating summons dated 8th March 2017 under Order 37 Rule 7 Civil Procedure Rules, sections 37 and 38 of the Limitation Act and all other enabling provisions of the law seeking the following reliefs;

a. That the application herein be certified as urgent and be heard ex-parte in the first instance.

b. That pending hearing and final determination of this application a temporary injunction be issued barring the Respondents by themselves, their agents auctioneers or anyone claiming through them from selling by way of public auction L.R Kyeni/Kigumo/1723.

c. That pending hearing and determination of the originating summons herein the temporary injunction be issued barring the Respondents by themselves, their agents auctioneers or anyone claiming through them from selling by way of public auction L.R Kyeni/Kigumo/1723.

d. A declaration that the applicants are entitled to be registered forthwith as the owners of LR Kyeni/Kigumo/1723 which the applicants have been in adverse possession for more than (12) years immediately preceding the prosecution of this suit and which they have used openly and continuously as of right and in adverse possession and without any interference from the Respondents title L.R. Kyeni/Kigumo/1723 has been extinguished in favour of the applicants. (sic)

e. An order that the 2nd Respondents do transfer L.R. Kagaari/Kigaa/1723 to the applicants and in default the Deputy Registrar be authorized to sign all the documents to effect the transfer to the applicants.

f. That costs of this application be borne by the Respondents.

2. The originating summons was supported by the affidavit of John Njue Njagi sworn on 8th March 2017. He stated that Title No. *Kyeni/Kigumo/1723* (hereinafter known as the 'suit property') was their ancestral land which was given to his late father in 1958. It was his case that the entire family of his father had resided there for over 50 years.
3. The Applicants further stated that the 2nd Respondent, who was a total stranger to them, had somehow obtained registration of the suit property and charged it to the 3rd Respondent (hereinafter known as the "Bank") to secure payment of a loan facility of Kshs 100,000. It was further stated that it was on that basis that the bank had sought to auction the suit property in March 2017 under the statutory power of sale.
4. The Applicants contended that the amount owed by the 2nd Respondent was very little which could be covered by the developments on the land hence it was untenable to auction the suit property which was worth over Kshs 10,000,000/-.
5. The record shows that only the bank responded to the said motion and filed grounds of opposition and a replying affidavit. In its grounds of opposition, the bank contended that the application was bad in law because it violated mandatory provisions of Order 51 Rule 1 of the Civil Procedure Rules; that there were two other pending suits relating to the suit property viz NBI HCCC No. 5632 of 1991 and NBI HCCC No 2214 of 1995; and that the application had been filed after unreasonable delay.
6. The bank's replying affidavit was sworn by Samuel G. Kuria who stated that he was a Remedial Officer with the bank. He stated that sometime in 1984, the bank advanced two loan facilities to a company known as Mwassco Associated Ltd in the sum of Kshs 100,000/- and Kshs 150,000/- respectively. The said facilities were secured by a charge over two properties one of which was the suit property herein which was registered in the name of the 2nd Respondent.
7. It was further stated that various past attempts by the bank to realize its security were unsuccessful and that some of them resulted in the two civil suits referred to hereinbefore. However, the bank decided to conduct a fresh valuation in 2016 and to pursue its statutory remedy of sale by issuing fresh notices. The bank asserted that it conducted due diligence on the ownership of the suit property before registering a charge to secure payment of the said loan facility.
8. He denied being privy to details of how the Applicants may have taken possession of the suit property and indicated that a valuation conducted in 1984 indicated that there were simple structures of little significance on the suit property hence it could not be true that the Applicants had lived on the property for over 50 years.
9. When the said application came up for hearing on 11th October 2017, the Applicants and the bank agreed to dispose of the same through written submissions. The parties were given 28 days to file and exchange written submissions. By the time of preparation of the ruling, however, only the Applicants had filed their written submissions.
10. In my opinion, the entire originating summons is not coming up for determination at this stage. What is coming up for determination is prayer No. 3 which seeks an order of temporary injunction pending the hearing and determination of the originating summons. In that case, the main question for determination would be whether or not the Plaintiffs have established a *prima facie* case with a probability of success at the trial as enunciated in the case of ***Giella Vs Cassman Brown & Co Ltd [1973] EA 358***.
11. The Applicants are challenging the exercise of the bank's statutory power of sale on the basis that they have filed a claim for adverse possession against the bank and the registered owner. The chargor has not challenged or contested the bank's power to sell the suit property. The Applicants, although claiming the suit property to be their late father's ancestral land which was acquired by the chargor in suspect circumstances, have not challenged her title or sought revocation thereof.
12. In my opinion, the Applicants have implicitly acknowledged the 2nd Respondent's title and opted to pursue a claim for adverse possession instead. A claim for adverse possession necessarily means that the suit property belongs to another person other than the Applicant. It is not consistent with a claim for ownership on the basis that the suit property has always been one's family or ancestral land.
13. The record shows that the 2nd Defendant was registered as proprietor of the suit property in 1975. She charged the suit property to the bank in 1984. The copy of the green card annexed to the Applicants' originating summons shows that the charge was registered under the provisions of the Registered Land Act (now repealed) which reserved rights under sections 83 and 84 of the said Act.
14. The court is aware that under the provisions of ***section 30 of the Registered Land Act*** in force at the material time, various overriding interests were recognized under the law and one such interest related to an interest acquired or in the process of being acquired under any law relating to the limitations of actions. The material provisions of ***section 30 of the Act*** provides as follows;

"30: Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and effect the same, without their being noted on the register -

a) ...

b)...

c)...

d)...

e) ...

f) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Whereas the charge herein was registered in favour of the bank in 1984, the Applicants herein commenced the process of asserting their right under the **Limitation of Actions Act** in 2017 when the instant suit was filed.

15. So, have the Applicants demonstrated a *prima facie* case with a probability of success in the circumstances of this case? In the case of **Mrao Vs First American Bank of Kenya Ltd & 2 others [2003] KLR 123** a *prima facie* case was described as follows;

“A prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. Bearing the above description in mind, the court is far from satisfied that the Applicants have demonstrated any violation or threatened violation of their legal rights by the Bank with respect to the suit property. Their father lost the suit property way back in 1975. It was charged to the bank in 1984. There were some attempts to sell the suit property in the 1990s which did not materialize. The Applicants did not take steps to vindicate any rights they may have had. They waited until the bank sought to exercise their right of sale again in 2017 for them to file a suit for adverse possession. In my view, the Applicants have failed to satisfy the 1st principle for the grant of an order of injunction. It would not be necessary to consider the 2nd and 3rd principles since their case has failed at the first hurdle.

17. Although the bank filed grounds of opposition raising 3 objections to the Applicant’s originating summons, the same were not argued or prosecuted since the bank did not file any submissions thereon. In that case, the court shall not make any determinations thereon.

18. The upshot of the foregoing is that the court finds no merit in the prayer for a temporary injunction contained in the originating summons dated 8th March 2017. Accordingly, prayer No. 3 of the said motion is hereby dismissed with costs to the 3rd Respondent.

19. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 8th day of MARCH 2018.

In the presence of Ms Wambugu holding brief for Mr Mugambi for the Applicants and in the absence of the Respondents.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

08.03.18