



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 107 OF 2017**

**MATHEW NJENGA NJOGU.....PLAINTIFF**

**VERSUS**

**MARY RITA IRERI.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY MUTHONI NJUE.....<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff herein filed suit against the Defendants seeking the following reliefs;

*a. A permanent injunction restraining the Defendants, their agents, servants, employees and/or anybody else claiming through them from interfering with the management, occupation and or from entering, trespassing, selling, transferring, alienating, damaging, developing and or interfering in any way with plot No. Embu/Municipality 1112/831 also known as plot No. 62, Embu Site and Service Scheme as the same is the property of the Plaintiff herein.*

*b. In the alternative a declaration that the Plaintiff be registered by way of adverse possession with plot No. Embu/Municipality 1112/831 also known as plot No. 62, Embu Site and Service Scheme as the Plaintiff has been in quiet and uninterrupted possession of the same for over twenty eight (28) years. (sic)*

*c. An order directing the Chief Officer, Ministry of Lands, Water, Environment and Natural Resources, Embu County to register the Plaintiff with plot No. Embu/Municipality 1112/831. (sic)*

*d. Costs of this suit.*

*e. Interest on (b) above at court rates.*

*f. Any other relief that this honourable court may deem just to grant.*

2. The Plaintiff pleaded that he had purchased the suit property in 1989 from one Njue Karanga for a consideration of Kshs 87,000/- which was paid in full. The Plaintiff thereafter took possession and developed rental houses thereon from which he has been collecting rent.

3. It was further pleaded that sometime in May 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants instructed an advocate to write a letter to all his tenants directing them to begin depositing the monthly rent at the advocate's office failing which they would face distress for rent and eviction proceedings.

4. It was also the Plaintiff's case that although he had purchased and taken possession of the suit property, the transfer had not been formally effected into his name by the defunct Municipal Council of Embu. The Plaintiff had, however, continued paying land rent and rates in the name of the vendor.

5. Contemporaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 12<sup>th</sup> June 2017 under certificate of urgency for interim orders. The application was based upon **Order 40 and Order 51 of Civil Procedure Rules, sections 3A, 3B and 63 (e) of the Civil Procedure Act (Cap 21)** and all enabling provisions of the law. The said application sought the following orders;

a. Spent

b. Spent

c. Spent

d. That this honourable court be pleased to make an order that pending the hearing and determination of this suit, the Defendants/Respondents, their agents, servants, employees and/or anybody else claiming through them be restrained by way of temporary injunction from interfering with the management, occupation and or from entering, trespassing, selling, transferring, alienating, damaging, developing and or interfering in any way with Plot No. Embu/Municipality 1112/831 also known as plot No. 62, Embu Site and Service Scheme as the same is the property of the Plaintiff/Applicant.

e. That the OCS Embu Police Station be served with the order and do ensure compliance of the court orders.

f. That costs of this application be provided for.

6. The said application was supported by the Plaintiff's own affidavit sworn on 12<sup>th</sup> June 2017 together with the annexures thereto. The Plaintiff basically reiterated his averments in the plaint in asserting his ownership of the suit property. He stated that the firm of Waweru Gatonye & Co Advocates had acted for both parties to the sale transaction and that payment of the purchase price was done through the said law firm. He attached copies of the relevant letters from the said law firm.

7. The Plaintiff further stated that he paid for water and electricity connection to the suit property and annexed copies of relevant documents. He also exhibited copies of receipts for payment of various outgoings to the defunct Municipal Council of Embu.

8. The Plaintiff contended that the Defendants have never been in occupation, management and control of the suit property and that they had no colour of right over the same hence should not be allowed to harass his tenants. He, therefore, urged the court to grant the orders sought.

9. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 29<sup>th</sup> June 2017 in which she denied all the allegations in the plaint and application for interim orders. She stated that she had never claimed ownership of the suit property but had only assisted the 2<sup>nd</sup> Defendant in tracing the property. She urged the court to dismiss the application against her.

10. The 2<sup>nd</sup> Defendant filed a replying affidavit sworn on 26<sup>th</sup> May 2017 in opposition to the Plaintiff's said application. She stated that the suit property belonged to her late husband, Njue Karanga and that she was the administratrix of his estate. She stated that her late husband never informed her of the alleged sale of the suit property and that the Plaintiff had failed to exhibit a copy of any sale agreement to back up his claim. She further contended that the suit was time barred and should be dismissed.

11. The Plaintiff filed a further affidavit sworn on 23<sup>rd</sup> October 2017 in response to the two replying affidavits by the Defendants. He maintained that since 1989, neither the Defendants nor the late Njue Karanga had collected rent from or claimed ownership of the suit property. He also pointed out that the 2<sup>nd</sup> Defendant had never claimed the suit property since 2011 when she was issued with a grant.

12. The main question for determination is whether the Plaintiff has satisfied the requirements for the grant of an order of interlocutory injunction as set out in the case of Giella Vs Cassman Brown & Co Ltd [1973] EA 358.

13. The court has considered the pleadings, affidavits and other documents on record therein. There is no doubt that the Plaintiff has established a *prima facie* case with a probability of success. There is material on record to indicate that the Plaintiff purchased the suit property; that M/S Waweru Gatonye & Co Advocates acted for both parties; that the Plaintiff developed rental houses thereon; and that he has been collecting rent from the property for many years. That is the *prima facie* evidence before me which may, of course, be rebutted at the hearing.

14. The court is further satisfied that unless the interim orders are granted, the Plaintiff and his tenants may otherwise suffer irreparable damage which cannot be adequately compensated by an award of monetary damages. If the Plaintiff's tenants are evicted or harassed whilst this suit is pending, an award of damages may not be adequate recompense. It may not always be possible to quantify the inconvenience and disruption of family lives in monetary terms. If, on the other hand, the suit property were to be alienated before the suit is concluded, the subject matter of the dispute may disappear, never to be recovered.

15. The court is also of the view that the balance of convenience tilts in favour of the Plaintiff. He is currently in possession and has been collecting rent for many years. There is no reason to disturb the existing status pending the hearing and determination of the suit.

16. Although the 2<sup>nd</sup> Defendant contended that the Plaintiff's suit was time barred, there is no need to determine the issue of limitation at this stage since the Plaintiff has an alternative prayer for adverse possession. The 2<sup>nd</sup> Defendant shall, however, be at liberty to canvass that issue at the hearing of the suit or at any appropriate stage of the proceedings.

17. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 12<sup>th</sup> June 2017 and the same is hereby allowed in terms of prayer No. 3 thereof. The court declines to grant order No. 4 since no basis for it was established. Costs of the application shall be in the cause.

18. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 8<sup>th</sup> day of MARCH 2018.**

In the presence of Ms Muriuki holding brief for Ms Fatuma for the Plaintiff and Ms Mutegi holding brief for Mr Andande for the

Defendants.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**08.03.18**