



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 149 OF 2017

DANSON NJIRU JACOB.....PLAINTIFF

VERSUS

JOSEPH NJERU JACOB.....1ST DEFENDANT

MOSES MUIRURI WAINAINA.....2ND DEFENDANT

RULING

1. By a plaint dated and filed on 26th September 2017, the Plaintiff sought the following reliefs against the Defendant;

a. A declaration that the 2nd Defendant holds the title to land parcel No. Gaturi/Weru/3445 in trust for the Plaintiff having acquired the same from the 1st Defendant.

Or in the alternative

A declaration that the Plaintiff has acquired title to the whole of land parcel No. Gaturi/Weru/3445 by way of adverse possession and that he ought to be registered as the absolute proprietor of the said land.

b. Costs of this suit and interest thereof.

2. It was pleaded in the plaint that at all material times the Plaintiff was in actual possession and occupation of the *Title No. Gaturi/Weru/3445* (hereinafter described as the suit property). It was further pleaded that prior to the suit property being sold to third parties and ultimately the 2nd Defendant, the 1st Defendant held it in trust for the Plaintiff.

3. The Plaintiff also pleaded that there were previous proceedings viz Embu ELC No. 309 of 2015 between himself and the 1st Defendant in which no determination was made over the suit property.

4. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 26th September 2017 under certificate of urgency brought under the provisions of **section 68 of the Land Registration Act, sections 1A and 3A of the Civil Procedure (Cap 21), Order 50 Rule 10 of the Civil Procedure Rules and all enabling provisions of the law** seeking the following reliefs;

a. That this application be certified as extremely urgent and its service be dispensed with in the first instance.

b. That this honourable court be pleased to place an inhibition on land parcel No. Gaturi/Weru/3445 pending the hearing and determination of this application interpartes and later pending the hearing of the main suit herein.

c. That the respondents herein be restrained by way of temporary injunction from evicting the Plaintiff/Applicant from land parcel No. Gaturi/Weru/3445 pending the hearing and determination of this application interpartes.

d. That the Respondents herein be restrained from evicting the Plaintiff/Applicant from land parcel No. Gaturi/Weru/3445 pending the hearing and determination of the main suit herein.

e. Costs of this application be provided for.

5. The said application was based upon the grounds stated on the face of the motion and supported by an affidavit sworn by the Plaintiff on the date of filing. It was contended by the Plaintiff that he had been living on the suit property since 1978 but was being threatened with

imminent eviction which action may render his suit nugatory.

6. The 1st Defendant filed a replying affidavit sworn on 17th January 2018 in opposition to the Plaintiff's said application. The 1st Defendant contended that he sold the suit property to one Njue Ireri for valuable consideration on 8th April 2013 and granted him vacant possession. He asserted that he had no other interest in the suit property since he was not the owner at the time of its transfer to the 2nd Defendant.

7. In his written statement of defence dated and filed on 17th January 2018, the 1st Defendant pleaded that the instant suit was *res judicata* since the issues raised in the suit were fully ventilated and determined in Embu ELC Case No. 309 of 2015.

8. The 2nd Defendant filed a replying affidavit sworn on 9th October 2017 in opposition to the Plaintiff's said application. The 1st Defendant asserted that he was the registered owner of the suit property having acquired it for valuable consideration from one Peter Mwangi Munene on 20th April 2016. He contended that the Plaintiff was a stranger to him since he was not the registered proprietor at the time of its acquisition.

9. The 2nd Defendant further contended that the Plaintiff was guilty of non-disclosure of material facts by failing to disclose that the issues raised herein were also the same issues raised and determined in Embu ELC Case No. 309 of 2015. He maintained that the suit property was specifically excluded by the court from the reliefs granted in the judgement rendered in the said suit.

10. When the said application was slated for hearing on 13th December 2017, the parties herein agreed to dispose of it on the basis of written submissions and affidavits on record. The Plaintiff and the 1st Defendant filed their respective submissions whereas the 2nd Defendant relied on his replying affidavit on record.

11. The court has considered the Plaintiff's said application, the replying affidavits in opposition thereto as well as the written submissions on record. In my opinion, the following three issues arise for determination;

- a. Whether or not the Plaintiff's suit is *res judicata*.
- b. Whether or not the Plaintiff has satisfied the requirements for the grant of a temporary injunction.
- c. Whether the Plaintiff has made out a case for grant of an order of inhibition under the Land Registration Act, 2012.

12. The statutory provisions on the doctrine of *res judicata* are contained in **section 7 of the Civil Procedure Act (Cap 21)**. The material provisions of the section state that;

(1) No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

13. The court has considered a copy of the judgement in *Embu ELC No. 309 of 2015* which was delivered by the *Hon. Justice Boaz Olao* on 9th June 2016. That was a suit between the Plaintiff and the 1st Defendant herein in which the Plaintiff was claiming an interest in 5 parcels of land one of which was the suit property. In the said judgement, the court found as a matter of fact that the suit property had by then been transferred to a third party who had not been joined in the suit. Consequently, the court made a determination only in respect of the parcels whose proprietor had been sued in the proceedings.

14. So, could it be said that the Plaintiff's claim in respect of the suit property was adjudicated upon in the previous suit when the registered owner was not party to that suit. In my opinion, the requirements of **section 7 of the Civil Procedure Act (Cap 21)** have not been satisfied with respect to the suit property for two reasons. First, the 2nd Defendant was not party to the previous suit. Second, there was no adjudication on the merits of the case in respect of the suit property since the 2nd Defendant had not been joined. In those circumstances, the instant suit could not be said to be *res judicata*.

15. The Plaintiff's suit also reveals that he is seeking a declaration for adverse possession under the provisions of the **Limitation of Actions Act (Cap 22)** which was not the subject of the previous proceedings. On that account again, the instant suit could not be said to be *res judicata*.

16. The second issue is whether the Plaintiff has met the requirements for the grant of an interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. There is no doubt that the Plaintiff appears to have been in possession of the suit property for a long time. The Plaintiff now has a pending suit for a declaration of trust and in the alternative a declaration that he has acquired the suit property through adverse possession. The question of whether or not the Plaintiff will be able to establish the elements of adverse possession or declaration of trust are matters reserved for the trial court. The court is, therefore, satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial.

17. The court is aware that an interlocutory injunction will not normally be issued unless the Applicant might otherwise suffer irreparable loss or damage. The court has considered the evidence on record and the circumstances of this case. The court is satisfied that if the Plaintiff is evicted during the pendency of the suit, he might otherwise suffer loss or damage which cannot be adequately compensated by an award of damages. The court is consequently satisfied that the Plaintiff has satisfied the second principle for the grant of an injunction.

18. The 3rd issue is whether or not the Plaintiff is entitled to an order of inhibition under **section 68 of the Land Registration Act, 2012**. The material provisions of **section 68 of the Act** provide that:

“68 (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.

19. The court has carefully considered the circumstances of this suit. The Plaintiff has a pending suit in which he is seeking to obtain an interest in the suit property through a declaration of trust or adverse possession. In my opinion, it is necessary and, indeed, prudent to preserve the subject matter of the dispute pending the hearing and determination of the suit.

20. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907** it was held, inter alia, that it is not only right but also the duty of the court to preserve any property which is the subject of a dispute pending the hearing and determination of the suit.

21. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 26th September 2017 and the same is hereby allowed in terms of prayers (2) and (4) thereof. Costs of the application shall be in the cause.

22. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14th day of JUNE, 2018.

In the presence of Mr Lee Maina holding brief for Mr Andande for the Plaintiff and the 1st and 2nd Defendants in person.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

14.06.18