



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 5 OF 2017

(FORMERLY SIAKAGO CIVIL CASE NO. 48 OF 2013)

JULIANA MBUYA NJIRU.....PLAINTIFF

VERSUS

PITHON NJIRU NGARI.....1ST DEFENDANT

NGUYU KARANJA.....2ND DEFENDANT

ADRIANO MATHURI NGONDI.....3RD DEFENDANT

RULING

1. By a plaint dated and filed on 15th April 2011, the Plaintiff sought to be registered as proprietor of *Title No. Embu/Kithunthiri/1484* (hereinafter known as the suit property) on the basis that it was part of clan land which was allocated to her late husband Njiru Mwathi and that she had exclusively occupied the suit property for a period of more than twelve (12) years. The said plaint was amended on 3rd November 2017 to specifically plead a *declaration* that the Plaintiff had acquired the suit property through adverse possession.

2. The Defendants filed a defence and counterclaim dated 31st May 2011 which was amended on 5th December 2017. The Defendants denied the Plaintiff's claim and pleaded that they lawfully bought the suit property from Njiru Mwathi for valuable consideration. They denied that the Plaintiff had been in continuous and peaceful occupation of the suit property or that the doctrine of adverse possession was applicable in the circumstances.

3. The Defendants, therefore, prayed for dismissal of the Plaintiff's suit and counter-claimed for a declaration that the Plaintiff was a trespasser and an order for eviction of the Plaintiff from the suit property.

4. By a notice of motion dated 10th November 2017 brought under the provisions of Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Defendants sought the following orders against the Plaintiff;

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

b. That pending interparties hearing and determination of this application temporary injunction be issued against the Plaintiff/Respondent, her agents, servants or anybody claiming through her from trespassing on, working on, remaining on or in any other manner interfering with the land parcel No. L.R Embu/Kithunthiri/1484.

c. That pending the hearing and determination of this suit a temporary injunction be issued against the Plaintiff/Respondent, her agents, servants or anybody claiming through her from trespassing on, working on, remaining on or in any other manner interfering with the land parcel No. L.R Embu/Kithunthiri/1484.

d. That OCS Kiritiri be ordered to ensure compliance with this order.

e. That costs of this application be borne by the Plaintiff/Respondent.

5. The said application was based upon the various grounds shown on the face of the motion and supported by an affidavit sworn on 10th November 2017 by the 3rd Defendant's personal representative. It was stated in said affidavit that the Plaintiff had recently invaded the suit property, cleared the land and ploughed it in preparation for planting.

6. The Defendants contended that the Plaintiff intended to waste the suit property hence an injunction should be issued to stop her from trespassing, working, remaining upon or in any manner interfering with the suit property.

7. By a further supporting affidavit sworn on 13th December 2017 and filed on 14th December 2017, the Defendants reiterated that the Plaintiff had not been in occupation of the suit property and that she was occupying an adjacent parcel of land measuring about 2.2 ha. It was further stated that the Plaintiff had not been in occupation without interference since the matter had been adjudicated before a council of elders, the Locational Chief, the Land Disputes Tribunal and various Law Courts at Siakago, Embu and Kerugoya.

8. The Plaintiff filed a replying affidavit on 5th December 2017 in opposition to the said application. The date of swearing was not indicated or endorsed thereon. She stated that she had been in occupation of the suit property for over thirty (30) years and that if the orders sought were granted it would result into her eviction before her suit was heard and determined. She contended that the Defendants had never lived or worked on the suit property.

9. It was the Plaintiff's contention that the suit had been pending for about 10 years but the Defendants had never made an application for injunctive orders. She, therefore, considered that there was undue delay on the part of the Defendants in filing the instant application and urged the court to dismiss it.

10. When the said application was listed for hearing on 14th December 2017, the parties agreed to dispose of it through written submissions. The Defendants filed their submissions on 10th January 2018 whereas the Plaintiff filed hers on 14th May 2018.

11. The court has considered the Defendant's said application, the Defendant's further affidavit, the Plaintiff's replying affidavit and the respective submissions of the parties. The main issue for consideration is whether or not the Defendants have satisfied 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**.

12. As indicated in the proceeding paragraphs, the Defendants in both the original and amended defence and amended counterclaim conceded that the Plaintiff was in possession. The main relief sought in amended counterclaim was as follows;

“b) A declaration to the effect that the Defendant in the counterclaim is a trespasser and has no lawful authority to dwell, occupy and or use the suit property being parcel No. Embu/Kithunkiri/1484 and therefore ought to vacate and or give vacant possession to the Plaintiffs in the counterclaim” (sic)

13. So, if the Plaintiff was not in occupation or possession, why would the Defendants seek an order for her to vacate and give vacant possession of the suit property? The court has also noted that in both the amended defence and further supporting affidavit the Defendants contend that the Plaintiff's possession was not without interference since the land dispute was taken to various fora for adjudication. In my opinion, the Plaintiff's occupation of the suit property cannot be doubted. The court does not accept the Defendants' contention that the Plaintiff recently invaded the suit property and started cultivating it. The court is, therefore, not satisfied that the Defendants have demonstrated a *prima facie* case with a probability of success.

14. The question of whether or not the Plaintiff will ultimately demonstrate her claim for adverse possession is matter squarely for the trial court and I need not venture into that issue at the interlocutory stage.

15. The court is of the view that the Defendants' said application should fail for the other reasons. First, an order of injunction cannot be issued when what is sought to be prevented has already taken place. An order of injunction is usually prospective and forward looking. As was held in the case of **Mavoloni Company Ltd Vs Standard Chartered Estate Management Ltd Nairobi Civil Application No. 266 of 1977**, an injunction cannot be granted if the event intended to be prevented has already taken place.

16. The second reason is that the prayer for interlocutory injunction is framed in such a manner as would result into an eviction order in its effect. If a party who is in possession is restrained from “trespassing”, “remaining”, or working upon the suit property, that would effectively constitute an eviction whilst the suit is pending.

17. The third reason is that the Defendants are guilty of laches. This suit was filed way back in 2011. The Defendants did not apply for an injunction until 13th November 2017. I think the maxim that equity aids the vigilant and not the indolent applies here. Equally applicable is the maxim which states that delay defeats equity.

18. For all the foregoing reasons, the court finds no merit in the Defendants' notice of motion dated 10th November 2017 and the same is hereby dismissed. Costs of the application shall be in the cause.

19. In view of the age of this suit, the parties are advised to take steps to comply with all pretrial procedures under **Order 11 of the Civil Procedure Rules** with a view to fixing the suit and counter-claim for hearing.

20. It is so ordered.

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

In the presence of Ms Muthama holding brief for Mr Mugambi for the Plaintiff and Mr Lee Maina holding brief for Mr Andande for the Defendant.

Court clerk Mr Muinde.

Y. M. ANGIMA

JUDGE

14.06.18