



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 156 OF 2017 (ORIGINATING SUMMONS)**

**SIMON NTHIGA GICUBI.....PLAINTIFF**

**VERSUS**

**MUGO NTHIGA.....DEFENDANT**

**RULING**

1. By an originating summons dated 9<sup>th</sup> October 2017 brought under **section 38 of the Limitation of Actions Act (Cap 22)**, the Plaintiff sought a declaration that she had become entitled to 1 ½ acres (hereinafter described as the suit property). There was also an alternative prayer for a declaration of trust in his favour with respect to 1 ½ acres out of the suit property.
2. The said originating summons was supported by an affidavit sworn by the Plaintiff on 9<sup>th</sup> October 2017 together with the annexures thereto. It was claimed in the said affidavit that the Plaintiff had bought the said portion of the suit property sometime in 1994 and taken possession thereof. He then proceeded to develop it extensively by planting various trees, cash crops and food crops thereon. It was also stated that the Defendant had never interfered with his occupation of the suit property. He further stated that he and his family members had lived thereon openly for more than 12 years.
3. Simultaneously with the filing of the cited originating summons, the Plaintiff also filed a notice of motion under the provisions of **Order 40 Rules 1 and 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap 21)**, and **all other enabling provisions of the law** for an order of temporary injunction to restrain the Defendant from evicting him or interfering with his occupation of the suit property pending the hearing and determination of the suit. He also sought an order of prohibition to prevent further dealings with the suit property pending the hearing and conclusion of the suit.
4. The said application was based upon the various grounds on the face of the motion and supported by the Plaintiff's own supporting affidavit sworn on 9<sup>th</sup> October 2017. The Plaintiff was basically concerned with preservation of the suit property and the maintenance of the *status quo* so that he is not evicted from the suit property before conclusion of the suit.
5. In the Plaintiff's said supporting affidavit, it was asserted that the Defendant "may" evict the Plaintiff upon being served with summons and that the Defendant may dispose of the suit property thereby rendering the instant suit nugatory.
6. The Defendant filed a replying affidavit sworn on 5<sup>th</sup> December 2017 in opposition to the Plaintiff's said application. He stated that the Plaintiff had not been in occupation of the entire suit property; that the Plaintiff had entered the suit property with his consent; and that his occupation had not been without interruption. He, therefore, asked the court to dismiss the Plaintiff's said application.
7. When the said application was listed for hearing on 30<sup>th</sup> October 2017 the parties agreed to dispose of it through written submissions. The Plaintiff filed his submissions on 22<sup>nd</sup> January 2018 whereas the Defendant filed his on 29<sup>th</sup> March 2018.
8. The court has considered the Plaintiff's said application, the replying affidavit in opposition thereto and the respective submissions of the parties. The first issue for determination is whether or not the Plaintiff has satisfied the requirements for the grant of an order of injunction as enunciated in the case of **Giella Vs Cassman Brown & Co [1973] EA 358**. The second issue is whether or not the Plaintiff has made out a case for a prohibitory order or inhibition order to prevent any dealings with the suit property.
9. The court has noted that it has not been alleged in the application for injunction that the Defendant intends or has taken steps to evict the Plaintiff. It has not been alleged that he has threatened to evict the Plaintiff or interfere with his possession of the suit property. The court is of the opinion that the Plaintiff's application is based on mere suspicion and conjecture. It was simply alleged that the Defendant may decide to evict him upon being served with the suit papers. That is purely speculative. It cannot support an application for interlocutory injunction.
10. The court has also noted that in his originating summons dated 9<sup>th</sup> October 2017, the Plaintiff swore that the Defendant had never interfered with his occupation of the suit property. In those circumstances, the court is not satisfied that the Plaintiff has made out a *prima*

*facie* case with a probability of success. The application for interlocutory injunction must fail.

11. The second issue is whether or not an order of inhibition should be granted to prevent further dealings with the suit property. The court is aware that under **Order 40 Rule 10 (1) (a)** a court may make an order for the preservation of any property which may be the subject matter of a suit. The court is also empowered under **section 68 of the Land Registration Act, 2012** to make an order of inhibition to prevent dealings with any property.

12. The court is aware that the Plaintiff's claim is based upon adverse possession. The Defendant has filed a replying affidavit refuting the claim. The determination of this question of adverse possession can only be undertaken by the trial court upon consideration of the evidence tendered at the trial. The court shall not make interim findings or express any opinion thereon as that may prejudice the fair trial of the suit.

13. The court is, nonetheless, satisfied that the suit property should be preserved pending the trial and disposal of the suit. As was held in the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907**, the court has a duty to preserve any property which is the subject of a dispute in judicial proceedings. Accordingly, an order of inhibition shall be granted to preserve the subject matter of litigation.

14. Although the Plaintiff has failed in his application for interlocutory injunction, the court is of the view that the current *status quo* should be maintained. It would not be prudent for the Plaintiff who is in possession to be evicted from the suit property before his case is heard and determined.

15. The upshot of the foregoing is that the Plaintiff's notice of motion dated 9<sup>th</sup> October 2018 succeeds only in part. Consequently, the court makes the following orders;

- a) The Plaintiff's application for an interlocutory injunction is hereby declined.
- b) An order of inhibition is hereby granted to prevent any dealings with the suit property pending the hearing and determination of the suit.
- c) The *status quo* obtaining at the time of filing the suit shall be maintained pending the hearing and determination of the suit.
- d) Costs of the application shall be in the cause.

16. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>TH</sup>** day of **JULY, 2018**.

In the presence of Ms Beth Ndorongo for the Plaintiff and Ms Muthama holding brief for Ms Rugaita for the Defendant.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**12.07.18**