



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 259 OF 2015 (ORIGINATING SUMMONS)

MZEE WEVI KIATHI.....PLAINTIFF

VERSUS

THOMAS NJIRU NTHUNI.....DEFENDANT

RULING

1. By a notice of motion dated 5th September 2018 brought under the provisions of **section 68 of the Land Registration Act, sections 1A & 3A of the Civil Procedure Act, Order 50 Rule 10 of the Civil Procedure Rules** and all other **enabling provisions of the law** the Plaintiff sought the following orders;

- 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 Nos. Evurore/Nguthi/3446 and Evurore/Nguthi/3445 pending the hearing of the main suit.*
- c. That the Respondent herein be restrained by way of temporary injunction from evicting the Plaintiff/Applicant from Land Parcel Evurore/Nguthi/3445 and Evurore/Nguthi/3446 pending the hearing and determination of this application.*
- d. That the Respondent herein be restrained by way of temporary injunction from evicting the Plaintiff/Applicant from land parcel No. Evurore/Nguthi/3445 and Evurore/Nguthi/3445 pending the hearing and determination of the main suit herein.*
- e. Costs of this application be provided for.*

2. The said application was based on the grounds that the Plaintiff has been living on the suit properties for over 12 years; that the Defendant was on the verge of disposing of the suit properties; that there was likelihood of the Plaintiff being evicted; and that it was in the interest of justice to grant the orders sought.

3. The said application was supported by an affidavit sworn by the Plaintiff on 5th September 2018 which reiterated and expounded upon the grounds set out in the motion. It was stated that although the Plaintiff had a pending claim for adverse possession, the Defendant was in the process of selling the suit properties to third parties and that the Plaintiff had forestalled the sale by objecting to the sale before the relevant Land Control Board on 14th August 2018. The Plaintiff was also apprehensive that he might be evicted if the suit properties are alienated before the hearing and determination of the suit.

4. The Defendant filed a replying affidavit sworn on 20th September 2018 in opposition to the said application. The Defendant's response was mainly directed at the Plaintiff's claim for adverse possession. The Defendant sought to show that the suit properties were the subject of an appeal to the minister under the **Land Adjudication Act** and various court cases which involved members of Nditi and Mukera clans which were determined against members of the Plaintiff's Mukera clan. He, therefore, contended that the instant application was an abuse of the court process and urged the court to dismiss it.

5. When the said application was scheduled for hearing on 24th September 2018, the advocates for the parties consented to canvass the said application through written submissions. The parties were accorded 42 days to file and exchange their written submissions. By the time of preparation of the ruling, however, none of the parties had filed submissions.

6. The court has considered the Plaintiff's said application, the replying affidavit in opposition thereto as well as the pleadings on record. The court is aware that the Plaintiff has a pending suit claiming adverse possession of the suit properties. There is also evidence on record that the Plaintiff is currently in possession of the suit properties.

7. The court has noted from the Defendant's replying affidavit that it has not been disputed that the Defendant is in the process of disposing

of the suit properties. It has not been disputed that the Plaintiff is in danger of being evicted before his suit is heard and determined. All that the Defendant has disputed is the Plaintiff's claim for adverse possession.

8. On the basis of the material on record, the court is satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. The question of whether or not the Plaintiff has demonstrated the elements of adverse possession is a matter for the trial court. It would be prejudicial for the court to express a definite opinion on the matter at this interlocutory stage. The issue of whether or not the proceedings are an abuse of the court process is also for the decision of the trial court.

9. The court is further satisfied that the Plaintiff shall suffer undue hardship were he to be evicted before the hearing and conclusion of the suit. The Plaintiff may also suffer great hardship should the suit properties be alienated whilst the main suit is pending. 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 may be in dispute pending resolution of the dispute. The court has jurisdiction to do so under the provisions of **Order 40 rule 10 of the Civil Procedure Rules**.

10. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated and filed on 5th September 2018. The same is consequently allowed in the following terms;

a. An order of inhibition be and is hereby issued against *Title Nos Evurore/Nguthi/3446 and 3445* pending the hearing and determination of the suit.

b. An order of temporary injunction be and is hereby issued against the Defendant restraining him from evicting the Plaintiff from the suit properties pending the hearing and determination of the suit.

c. Costs of the application shall be in the cause.

11. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22nd day of NOVEMBER, 2018.

In the presence of Ms Mutegi holding brief for Mr Andande for the Plaintiff and Mr Gachuba holding brief for Ms Beth Ndorongo for the Defendant.

Court clerk Muinde

Y.M. ANGIMA

JUDGE

22.11.18