



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 333 OF 2015 (O.S)**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCELS NOS.**

**GATURI/WERU/10398, 10399 AND 10404**

**BETWEEN**

**MARGARET RWAMBA NJAGI.....PLAINTIFF**

**VERSUS**

**JOSEPH MUGO NGAI.....1<sup>ST</sup> DEFENDANT**

**DAVID KIONGO WACHIRA.....2<sup>ND</sup> DEFENDANT**

**LAWRENCE P.K. NYAGA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 24<sup>th</sup> September 2018 brought under the provisions of **section 63 (e) of the Civil Procedure Act (Cap 21)** and **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** filed under certificate of urgency, the 2<sup>nd</sup> Defendant sought an order for the Plaintiff to be restrained from entering and erecting new structures on *Title No. Gaturi/Weru/10399* (hereinafter called the *suit property*) and from interfering with his use of the same pending the hearing and determination of the suit.

2. The said application was supported by an affidavit sworn by the 2<sup>nd</sup> Defendant on 24<sup>th</sup> September 2018. It was stated in the said affidavit that the Plaintiff had leased out a portion of the suit property and had excavated a pit latrine thereon. The 2<sup>nd</sup> Defendant also exhibited photographs showing that some building materials including sand and ballast had been deposited on the suit property.

3. The Plaintiff filed a replying affidavit sworn on 28<sup>th</sup> September 2018 in opposition to the said application. It was contended that the Plaintiff was occupying and utilizing the suit property pursuant to an earlier court order of injunction dated 1<sup>st</sup> February 2016. It was further contended that since the 2<sup>nd</sup> Defendant had no counterclaim in the suit, there was no legal basis for granting the injunctive orders sought. It was further contended that the Plaintiff was merely constructing a pit latrine and that it was the 2<sup>nd</sup> Defendant who was harassing her into vacating the suit property.

4. When the said application came up for the hearing on 1<sup>st</sup> October 2018 the parties consented to canvass the said application through written submissions. The matter was thereupon fixed for ruling on 13<sup>th</sup> December 2018. By the time of preparation of the ruling, however, none of the parties had filed written submissions.

5. The court has considered the 2<sup>nd</sup> Defendant's said application and the replying affidavit in opposition thereto. The court has also considered the previous proceedings in this matter. The record shows that the Plaintiff had vide an application dated 12<sup>th</sup> October 2015 sought various orders against the Defendants whereby the said application was resolved through a consent order made on 1<sup>st</sup> February 2016. The terms of the consent were as follows;

*a. That an order of inhibition be and is hereby issued inhibiting the registration of any transfer, charge or any other dealings*

whatsoever with land parcel numbers Gaturi/Weru/10398, Gaturi/Weru/10399 and Gaturi/Weru/10404 pending the hearing and determination of this case.

b. That the Plaintiff and her family do continue occupying and utilizing the area they occupy on land parcel numbers Gaturi/Weru/10398, 10399 and 10404.

c. That the Defendants jointly and severally be and are hereby restrained from interfering with the Plaintiff and her family's use and occupation of the area and land that the Plaintiff and her family are in occupation of pending the hearing and determination of this matter.

d. That the 1<sup>st</sup> Defendant to continue using the building on land parcel number Gaturi/Weru/10398.

e. That the 1<sup>st</sup> Defendant be and is hereby restrained from blocking the Plaintiff and her family from using the building on land parcel number Gaturi/Weru/10398.

f. That this case be heard on 30<sup>th</sup> March 2016.

6. It is also evident that there are about 3 properties which are in dispute in this suit including the suit property. The court is satisfied from the material on record that the Plaintiff or her agents commenced construction of some new structures on the suit properties whilst the suit was pending. The record further shows that part of the construction was undertaken in violation of the interim orders which were first issued on 24<sup>th</sup> September 2018. There is also a record of contempt of court proceedings against the Plaintiff in which the Plaintiff was convicted of contempt of court and fined Kshs 30,000/- in default of which she was to serve 2 months imprisonment.

7. The court has noted from the record that whereas the Plaintiff had initially claimed that she was merely putting up a pit latrine on the suit property, the photographic evidence on record showed the contrary. The Plaintiff was simply out to mislead the court.

8. The court is satisfied from the material on record that the suit property should be preserved in its current state pending the resolution of the originating summons by which the Plaintiff is seeking adverse possession of the suit property. The Plaintiff should not be allowed to steal a march on the 2<sup>nd</sup> Defendant by erecting additional houses or structures in a bid to cement her claim for adverse possession which is yet to be heard and determined.

9. The court does not agree with the Plaintiff's contention that a Defendant who has not filed a counterclaim cannot seek an interim injunction against the Plaintiff. In the case of **Njoroge Kironyo & Others Vs Koronyo Njoroge [1976 – 80] 1 KLR 132 Harris J** considered a similar objection and held as follows;

**“That such an order may be made at the instance of a Defendant would appear to follow from the decision in Sargant Vs Read (1876) 1 Ch D 600, where the power to appoint a receiver under the section was so exercised.**

**If then the jurisdiction conferred upon this court by section 3 (1) of the Judicature Act includes that conferred upon the High Court of Justice in England by the Act of 1873, the omission of any provision in order XXXIX for the granting of an interlocutory injunction to a Defendant cannot, having regard to section 3A of the Civil Procedure Act, properly be construed as withholding by implication from this court in the exercise of its inherent jurisdiction the power to grant such an injunction at the instance of a defendant.**

**Furthermore, approaching the matter as one of principle, I cannot see why a Defendant, who, as here, has submitted to the jurisdiction of the court by an unconditional entry of appearance and has filed a defence claiming an interest in the property in dispute, should not be entitled in a proper case to the same measure of interim protection by way of an interlocutory injunction in regard to that interest as would the Plaintiff in regard to the interest claimed by him.”**

10. The upshot of the foregoing is that the court is satisfied that the 2<sup>nd</sup> Defendant has satisfied the requirements for the grant of an order of injunction. The 2<sup>nd</sup> Defendant's notice of motion dated 24<sup>th</sup> September 2018 is accordingly allowed in terms of order Nos. 3 and 4 thereof. 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 20<sup>th</sup> day of DECEMBER, 2018.**

In the presence of Ms Nzekele holding brief for Mr Okwaro for the Plaintiff and Mr Muraguri holding brief for Ms Ndorongo for the Defendants.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

20.12.18