



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 810 OF 2013 (O.S)

NDUNGU KIMANI

MARY NJERI KIOKO

MARY NJOKI MUITHE.....PLAINTIFFS/APPLICANTS

VERSUS

JOHN GITAU MBURU.....DEFENDANT/RESPONDENT

RULING

The dispute herein relates to the following parcels of land:

LOC 5/GITURA/286

LOC 5 GITHUNGURI/227

LOC 5/KAGUMOINI/1330 and

LOC 5/KAGUMOINI/21 hereinafter referred to as the suit properties.

The plaintiffs filed an Originating Summons on 26th November 2013 seeking a declaration that the suit properties belong to them or in the alternative, that they have acquired ownership of the same by adverse possession having been in uninterrupted possession thereof for a period of over 12 years and therefore the defendant is in illegal and unlawful possession of the titles to the said properties which should be cancelled.

Simultaneously with that Originating Summons, the plaintiffs filed a Notice of Motion under **Order 40 Rules 2 (1) of the Civil Procedure Rules** seeking the following orders:

1. Spent.

2. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order restraining the defendant whether by himself, his servants, agents, employees or any one deriving authority under him from entering onto, processing titles with regard to the properties described as LOC 5/GITURA/286, LOC 5/GITHUNGURI/227, LOC 5/KAGUMOINI/212 or interfering in any manner whatsoever with the aforesaid properties.

3. That pending the hearing and determination of this suit, the Honourable Court be pleased to order a stay of the proceedings in Thika Succession Cause No. 258 of 2011 in the matter of the

Estate of JOSEPH MWANGI KURIA (deceased).

4. That the costs of this application be borne by the defendant in any event.

The application which is the subject of this ruling is based on the grounds set out therein and supported by the affidavit of **MARY NJERI KIOKO** the 2nd plaintiff herein.

The gist of the application is that the plaintiffs are now the respective owners of the suit properties having lived thereon continuously and un-interrupted for a period of over 12 years although the said properties belonged to one **KURIA MUTIRI** who passed them on to **JOSEPH MWANGI KURIA** to hold in trust for his siblings **MUITHE KURIA** and **KIMANI KURIA** both now deceased who were away in Nairobi and Nandi Hills respectively. However, **MUITHE KURIA** came back in 1967 and settled on parcel No. LOC 5/GITURA/286 but **KIMANI KURIA** passed away in Nandi Hills in 1978. However, his son **NGUNDU KIMANI** the 1st plaintiff came back in 1990 and was allocated land parcel No. LOC 5/KAGUMOINI/1330. The 1st and 2nd plaintiff then applied for letters of administration in respect to the Estate of **JOSEPH MWANGI KURIA** but the defendant objected on the ground that he was the registered proprietor of the suit properties. The plaintiffs have extensively developed the suit properties where they have lived continuously with their children and they fear that they may suffer irreparable loss and damage unless the orders sought are granted.

The defendant **JOHN GITAU MBURU** filed a replying affidavit in opposing the Notice of Motion describing it as mischievous and an abuse of the process of the Court. He deponed that **JOSEPH MWANGI KURIA** his late grandfather had two other brothers namely **KIMANI KURIA** and **MUITHE KURIA** both also deceased. That **KIMANI KURIA** sold his land and relocated to Nandi Hills while **MUITHE KURIA** was the registered owner of land parcel No. LOC 5/GITHUNGURI/436. That upon the demise of his grandfather, all his land was transferred to him (defendant) as the next of Kin and the plaintiffs are only jealous of the fact that he has more land than them.

Submissions have been filed by counsel for both parties as agreed on 27th September 2016 when it was directed that the application be canvassed by way of written submissions.

I have considered the application, the rival affidavits and the submissions by counsel.

The main orders sought by the plaintiffs herein are:

1. An order of temporary injunction to restrain the defendant from entering onto or processing the titles with regard to the properties No. LOC 5/GITHUNGURI/227, LOC 5/KAGUMOINI/1130 and LOC 5/KAGUMOINI/212 pending the hearing and determination of this suit.

2. An order to stay the proceedings in Thika Succession Cause No. 258 of 2011 in the matter of the Estate of JOSEPH MWANGI KURIA deceased.

Order 40 Rule 1 of the Civil Procedure Rules provides as follows:

“Where in any suit it is proved by affidavit or otherwise –

a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit

the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging,

alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”.

It is clear from the above that an order of temporary injunction is not granted as a matter of course. The applicant must prove by affidavit or otherwise that the property in dispute “is ***in danger of being wasted, damaged or alienated***” or that the defendant “***intends to remove or dispose of his property***” in order to delay the execution of any decree. The applicant must of course then meet the threshold set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358*** where at page 360, SPRY J. held that:

“The condition for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience”

I have perused the supporting affidavit of the 2nd plaintiff and the grounds upon which this application is founded and while the said supporting affidavit is silent as to whether in fact there is any danger that the suit properties may be wasted or damaged, the grounds upon which the application is premised include ground (b) which alleges that:

“That the defendant/respondent has begun processing titles to the properties with a view to transferring the same to his name. Further, the defendant/respondent has begun interfering with the 1st applicant’s quiet enjoyment and use of the property that the 1st applicant occupies by entering thereon and counting the trees planted thereon with a view to selling them to a 3rd party”

I think that ground satisfies the requirement of ***Order 40 Rule 1 of the Civil Procedure Rules.***

Have the applicants satisfied the test set out in the ***GIELLA*** case (supra)? I am persuaded that they have. It is not in doubt that land parcels No. LOC 5/KAGUMOINI/212 and LOC 5/KAGUMOINI/1330 are registered in the names of the defendant as per the copies of the title documents annexed to the applicant’s Notice of Motion. It would appear that the title documents with respect to the other two properties i.e. LOC 5/GITHUNGURI/227 and LOC 5/GITURA/286 are still in the process of being registered. The defendant has however pleaded in paragraph 9 of his replying affidavit that his grandfather transferred all the suit properties to him. This will be a matter for trial. The plaintiffs’ case is however hinged on a claim of adverse possession which will also have to be proved by evidence at the trial. The plaintiff’s assertion that they live on the suit land has not been rebutted by the defendant. Therefore, I have before me a party who claims ownership of the suit properties and others who believe they have a claim in adverse possession. One of the two claims will no doubt prevail at the trial. As to whether the plaintiffs have established a prima facie case, such a case was defined in ***MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 1 K.L.R 125*** at page 137 as:

“a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

In the case of ***NGURUMAN LTD VS JAN BONDE NIELSON & OTHERS 2014 e K.L.R.***, the Court of Appeal went further and said:

“All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been threatened with violation..... The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of

probabilities. This means no more than that the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed".

As I have already indicated above, the plaintiffs' case is premised on adverse possession. That they have lived on the suit properties for a period of over 12 years. Their occupation of the suit properties has not been expressly denied. Whether adverse possession will be proved is another matter. In my view, the plaintiffs have surmounted the first hurdle in the GIELLA case (supra).

With regard to whether the plaintiffs will suffer irreparable damage that cannot be adequately compensated by any damages, in the case of NGURUMAN (supra), the Court of Appeal said that irreparable injury is "***injury that is actual, substantial and demonstrable***". The plaintiffs claim that they all along lived on the suit properties and have heavily invested and extensively developed the same. If the suit properties are therefore alienated to third parties, the plaintiff will be rendered destitute. That, in my view, would amount to irreparable damage and in the circumstances, an order of temporary injunction is merited. As I am not in doubt about the first two principles in the GIELLA case (supra), I need not consider the balance of convenience.

The other remedy sought by the plaintiffs is an order to stay the proceedings in Thika Succession Cause No. 258 of 2011. There is no doubt in my mind that this Court has the inherent powers under Section 3A of the Civil Procedure Act and under the rubric of its inherent jurisdiction to make any order or grant any relief as it deem fit and just as per Section 13 (7) of the Environment and Land Court Act. In HARMAN SINGH & OTHERS VS MISTRI 1971 E.A 122, it was held that:

"The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the Court"

I believe this Court like the High Court, similarly enjoys the inherent jurisdiction to preserve the integrity of the judicial process by issuing orders of stay of proceedings in a subordinate Court in appropriate cases. In doing so, however, this Court must not lose sight of its jurisdiction as provided for in law. The Court will also take into account several factors including the need to have Court proceedings expedited, the status of the proceedings sought to be stayed and also the likely prejudice to be suffered by the parties if a stay is not granted. This Court has not been told about the status of the proceedings in the Thika Succession Cause No. 258 of 2011. From what I can glean in 2nd plaintiff's supporting affidavit, she has applied for letters administration of the Estate of **JOSEPH MWANGI KURIA** to which the defendant objected stating that he is the owner of the suit properties. In my view, the plaintiffs claim to the suit properties by way of adverse possession will not be prejudiced even if there is a change of ownership of the suit properties because, as was held in GITHU VS NDEETE 1984 K.L.R 776, "***the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession***". Besides, it is the plaintiffs who have moved to the Succession Court and also to this Court. I do not therefore see the need to order a stay of the succession proceedings.

Ultimately therefore and upon considering the plaintiffs Notice of Motion filed herein on 26th November 2013, this Court makes the following orders:

- 1. A temporary injunction is issued restraining the defendant from interfering with the plaintiffs' quiet enjoyment and use of land parcels No. LOC 5/GITHUNGURI/227, LOC 5/GITURA/286 and LOC 5/KAGUMOINI/212 pending the hearing and determination of this suit.***
- 2. The prayer to restrain the defendant from processing the titles to the above properties and the prayer to order a stay of proceedings of Thika Succession Cause No. 258 of 2011 in the Estate of JOSEPH MWANGI KURIA (deceased) are both dismissed.***
- 3. The parties are directed to comply with the pre-trial directions and have this suit heard and determined in the next 12 months.***
- 4. As the suit properties are situated in Muranga where we now have an Environment and Land***

Court, this case is hereby transferred to the Environment and Land Court at Muranga to be mentioned before Hon. Lady Justice Kemei on 30th May 2017 for further directions as to hearing.

It is so ordered.

B.N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Muchira for Mr. Njoroge for Defendant present

Mr. Mwangi for Mr. Chomba for Plaintiffs present

Defendant also present in person.

B.N. OLAO

JUDGE

19TH MAY, 2017