



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT EMBU

ELC CASE NO. 25 OF 2017

EMBU COUNTY GOVERNMENT..... PLAINTIFF/APPLICANT

VERSUS

JIM REEVES GITONGA NJIRU.....DEFENDANT/RESPONDENT

RULING

1. By an Originating Summons dated 10th February 2017 and filed in court on 13th February 2017, the Applicant sought a declaration that it had acquired **L.R. NO. KYENI/MUFU/3195** registered in the name of Njiru Tama (deceased) through adverse possession by virtue of section 7 of the Limitation of Actions Act(Cap 22). In the alternative, the Applicant sought an order for specific performance of an agreement for sale of the said property by the deceased to the Applicant. The Respondent is the personal representative of the estate of the deceased.

2. The said Motion was supported by 5 (five) affidavits one of which one was sworn by Timothy Kariuki, the County Attorney of Embu County Government. Mr Timothy Kariuki swore that the registered owner of the property one Njiru Tama had sold the same to the then Embu County Council in or about 1971 for use by the local community. He further stated that a permanent cattle dip was established there in 1971 and the community has been utilizing the land since then. He also stated that although consent to transfer was obtained from the Land Control Board in 2009, the transfer forms and other accompanying documents were lost or misplaced at the Land Registry hence the transfer has never been effected.

3. Simultaneously with the filing of the Originating Summons, the Applicant filed, under certificate of urgency, a Notice of Motion under 0.40 CPR seeking various orders of interlocutory injunction pending the hearing and determination of the application and suit. The relevant order for purposes of this ruling seeks an injunction to restrain the Defendant from entering, trespassing, occupying, possessing, selling, leasing, transferring, alienating or in any other way dealing with the suit property pending the hearing and determination of the suit.

4. The grounds of the application are the same as the ones for the Originating Summons and the Applicant relies on the same supporting affidavit sworn by Mr Timothy Kariuki who is the County Attorney. Mr Kariuki also filed an affidavit styled “replying affidavit” on 15th March 2017 in support of the application.

5. The Respondent filed a replying affidavit on 24th February 2017 and a further affidavit on 14th March 2017 in opposition to the said application for injunction. The Respondent stated that the same issues raised by the Applicant are pending determination in Runyenjes Principal Magistrates Court Succession Cause No. 154 of 2012 thereby rendering the instant application *ves judicata*.

6. The Respondent denied that the local community has been using the suit property since 1970 and maintained that his family has been cultivating the land. He exhibited copies of some photographs showing some of the crops which were allegedly destroyed by some locals and photos of banana stems, nappier grass and other crops growing on the land.

7. The Respondent also disputed the alleged sale of the suit property by the deceased and challenged the Applicant to produce title or lease documents for the suit property to prove its interest in the land. He also alleged that there was no full disclosure by the Applicant of the proceedings or undertaking made in the succession cause.

8. When the parties appeared before me on 28th February 2017, they agreed to dispose of the said application for injunction by way of written submissions. The parties duly filed their respective submissions by 16th March 2017 when the court fixed the application for ruling on 10th May 2017.

9. I have considered the application for injunction, the affidavits in support and in opposition thereto as well as the respective submissions of the parties. In my view, there are 3 main issues for determination in this application namely:

- a) Whether the instant application is *res judicata* by virtue of the pending Succession Cause proceedings in Runyenjes Principal Magistrate's Court.
- b) Whether or not there was non-disclosure of material fact by Applicant relating to an undertaking not to dispose of the suit property.
- c) Whether the Applicant has made out a case for the granting of an interim injunction.

10. In my considered view, the issue of *res judicata* cannot arise in the context of the present proceedings or two reasons. First, the matter or application in the succession cause is still pending. It has not been concluded. Second, the issue of adverse possession can only be determined by a superior court under s. 38 of the Limitation of Actions Act (Cap 22).

11. The second issue relates to alleged non-disclosure of a material fact in relation to the succession cause at Runyenjes Principal Magistrate's court. It has been alleged by the Respondent that he had given an undertaking to maintain the *status quo*. There is very scanty information on record regarding the succession proceedings. I have not seen a copy of the undertaking or order for *status quo*. There is no indication from the court file if it was filed herein.

12. Even if there was such an order, it would not be fatal for the Applicant to file the Originating Summons and seek interim orders in the nature of an interim injunction. A perusal of the orders sought in the Notice of Motion dated 10th February 2017 indicate that they go beyond disposal of the suit property. The Applicant seeks to restrain the Respondent from also entering, trespassing, occupying or possessing the suit property which may not have been covered by the *status quo* order. The court is therefore, not satisfied that there has been non-disclosure of a material fact.

13. The third issue relates to the principles for the grant of an order of interim injunction as set out in the case of *Giella v Cassiman Brownt & Co. Ltd* [1975] EA 358. There is some serious dispute on who has been in possession and the period or periods such possession. The Applicant claims there is a cattle dip on the suit property which the community has been using since 1970s. The Respondent has not categorically denied the existence of the cattle dip but has maintained that the family of the deceased has been in possession at all material times. At some point the respondent suggested that the cattle dip has not been operational since 1996 or thereabouts. He also annexed photographs of the crops which are said to be on the suit property. However, it is not possible for the court to tell on which land the crops are growing by simply looking at the photographs.

14. The court has examined the record but there is scanty evidence on the alleged sale of the suit property by the deceased. There are no copies of the sale agreement, consent of the Land Control Board, and

transfer forms. That is probably why the Applicant decided to proceed by way of adverse possession proving the element of adverse possession would most probably require oral evidence on the issue of possession and the length of such possession. That is an issue for the trial court. However, for purposes of this application, the court is reasonably satisfied that the Applicant has made out a *prima facie* case with a probability of success at the trial on the basis of the affidavits in support of the Originating Summons.

15. The court also finds that given the nature of the dispute, an award of monetary damages would not be an adequate remedy should the Applicant succeed at the trial. The Applicant is seeking to recover what it considers to be community land to be used for community purposes.

16. In view of the foregoing, the court need not consider the principle on balance of convenience. The court finds merit in the notice of motion dated 10th February 2017 but shall grant orders for preservation of the suit property in the following terms only;

a) An interim injunction be and is hereby issued restraining the Respondent from leasing, selling, transferring, or alienating the suit property **L.R. No.KYENI/MUFU/3195** pending the hearing and determination of the suit.

b) The costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Embu this 10th May 2017

ANGIMA Y M

ELC JUDGE