REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. NO 292 OF 2015

MBAYANI MWINUKIE……...PLAINTIFF

VERSUS

NJIRU KAGANE……..DEFENDANT

RULING

1. By an originating summons dated 18th March 2015 and filed in court on 15th April 2015, the applicant sought an order or declaration to the effect that he had become entitled to be registered as proprietor of 1 ½ acres out of Title No. Nthawa/Siakago/846 registered in the name of the Respondent on account of adverse possession. There was an alternative prayer for entitlement to the said portion of 1 ½ acres on account of alleged trust.

2. It was stated in the affidavit in support of the said originating summons that the Applicant settled on the suit property at around 1970 before land adjudication was undertaken. It was stated that he occupied about 1 ½ acres out of the 5 acres comprised in the suit property. The Applicant further swore that he had developed his portion of about 1 ½ acres and cultivated mangoes, banana stems, miraa stems and some food crops thereon.

3. The Applicant also averred that he had lived on the said land openly and for so long without interference from any quarters.

4. Simultaneously with the filing of the originating summons the Applicant also filed a Notice of Motion dated 18th March 2015 seeking an interim injunction to restrain the Respondent, who is the registered owner of the suit property, from evicting him or interfering with his peaceful occupation of the portion of 1 ½ acres which he claimed on account of adverse possession, pending the hearing of the suit. He also sought an injunction to restrain the Respondent from selling, transferring, alienating, leasing or in any other way dealing with the suit property pending the hearing and determination of the suit.

5. The said application was supported by an affidavit sworn by the Applicant which reiterated his claim for adverse possession but added that the Respondent had threatened to evict him from the suit property. He, therefore, urged the court to grant the orders sought in the said application.

6. There was a considerable lapse of time before the Respondent filed a response to the case brought by the Applicant. He filed a statement of defence on 24th February 2016 and a replying affidavit on 6th May 2016. The defence was presumable filed in response to the originating summons while the replying affidavit was filed in opposition to the application for interlocutory injunction.

7. The Respondent stated in his replying affidavit that he was the absolute proprietor of the suit property

and that he had a title deed for the entire land. He also denied that the Applicant had resided on a portion of the said land for a period exceeding 12 years without any disturbance.

8. The Respondent pointed out that there were at least four court cases involving the parties which have been in court for the past 20 years namely:

i. Siakago RMCC No. 58 of 1996.

ii. Embu High Court Civil Case No. 77 of 1997.

iii. Embu SPM No. 58 of 1996.

iv. Embu High Court Civil Case No. 117 of 2007

9. The court has considered the said application for interlocutory orders pending the hearing and determination of the suit. I have also considered the previous cases cited by the Respondent. All those citations really revolve around one case which was filed by the Applicant seeking a portion of the suit property on account of a sale agreement which was initially filed in the Resident Magistrate's Court at Siakago.

10. It would appear from a perusal of the copies of the pleadings, proceedings, and orders annexed to the Respondent's affidavit that the said suit was transferred to the SPM's Court at Embu by the High Court in Civil Case No. 77 of 1997 since the RM's Court at Siakago had no pecuniary jurisdiction to handle the suit. When the suit was pending before the Senior Principle's Magistrate's court, it was dismissed for want of prosecution. The Applicant applied for its reinstatement but that application was dismissed too in consequence of which he filed Embu High Court Civil Appeal No. 117 of 2007 which could still be pending.

11. In all those cases, the current Respondent was either a Defendant or Respondent. He did not file or originate any of those cases. He could not, therefore, be said to have legally interrupted the Applicant's possession of the suit property or any portion of which he is in occupation.

12. On the basis of the material on record, this court is reasonably satisfied that the Applicant has been in possession of a portion of the suit property. What is in contention is the size or acreage which is occupied by the Applicant. Whereas the Applicant states that he occupies 1 ½ acres, the Respondent's statement of defence states that he occupies only ½ an acre. The witness statement of Jemima Kimunyu Njiru for the Respondent also states that the Applicant's wife cultivates about ½ acre.

13. The question of the length of occupation is an issue to be decided at the trial and need not be resolved at the interlocutory stage. That is the function of the trial court and I need not make any findings which may prejudice the trial suffice it to state that the Applicant has made out *prima face* case with a probability of success as contemplated in the case of ***Giella v. Cassman Brown & Co. Ltd [1973] EA 358.***

14. The next issue is whether the Applicant has satisfied the second principle for the grant of an order of injunction, that is, the requirement of irreparable loss if the injunction is not granted. The Applicant claims to have resided in the suit property for a long time and to be cultivating it. It may be difficult to quantify the kind of loss the Applicant may suffer in the event that the orders are denied and he is consequently evicted or the suit property alienated.

15. The third requirement states that if the court is in doubt, it may decide the matter on a balance of convenience. On the material before me, I am reasonably satisfied that the Applicant has satisfied both the first and second principles. However, in case I am wrong on the second principle, I would still be inclined to find that the balance of convenience tilts in favour of the Applicant. I am of the view that the hardship which the Applicant might suffer as a result of eviction and or alienation of the suit property would far outweigh any hardship which the Respondent might suffer by the granting of the interim

injunctions.

16. The upshot of the foregoing is that the Applicant's Notice of Motion dated 18th March 2015 is meritorious and the same is hereby allowed in terms of prayers 2 and 3. Costs of the application shall be in the cause.

17. Orders accordingly.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **12th** day of **July 2017.**

In the presence of Ms Muthoni Ndeke Advocate for the Plaintiff/Applicant and the Defendant in person.

Court clerk Njue

Y.M. ANGIMA

JUDGE

12.07.17