



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA

E.L.C. CASE NO. 68 OF 2017

**IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT, ORDER 37
RULES 7 AND 19 THE CIVIL PROCEDURE RULES SECTION 3 A OF THE CIVIL
PROCEDURE ACT AND ALL THE OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

NJERU NTHIURURO.....PLAINTIFF/APPLICANT

VERSUS

NGIMA NGURUIMWE.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 3rd April 2017, the Applicant sought various orders of temporary injunction against the Respondent seeking to restrain the latter from evicting him or interfering with his peaceful occupation of *Title No. EVURORE/KATHERA/1532* and from selling, transferring, charging, leasing or alienating the said property (hereinafter known as the 'suit property').
2. The Applicant's claim to the suit property is based upon adverse possession. In the supporting affidavit, the Applicant claims to have bought the suit property from the Respondent in 1979 for Kshs 1,150/-. He further stated that he took possession of the suit property which he had developed and settled upon with his family. He swore in paragraph 6 of the said affidavit that the Respondent had threatened to evict him from the suit property.
3. The Respondent filed an affidavit and other documents in opposition to the said application. He stated that both he and the Applicant were allocated their respective parcels of land by their clan during the land adjudication process. He was allocated parcel No. 1532 measuring 0.6 ha whereas the Applicant was allocated parcel No. 1487 measuring 2.2 ha. However, he stated that he was shown the location of his parcel number by clan elders in 2003. That is when he discovered that he was occupying land belonging to a different clan member whereas the Applicant was also occupying his parcel. He denied ever selling the suit property to the Applicant and challenged him to produce documentary evidence thereof.
4. He further stated that 6 adult sons of the Applicant who were living with him on parcel No. 1532 had relocated to parcel No. 1487 but the Applicant had refused to vacate in consequence of which he (the Respondent) filed Siakago PMCC No. 41 of 2007 seeking his eviction from the suit property. It was common ground that the said suit is still pending hearing. The Respondent therefore asked the court to dismiss the said application.
5. The court has perused copies of the pleadings in Siakago PMCC No. 41 of 2007 between the parties herein. The Plaintiff therein is Ngima Nguruimwe whereas Njeru Nthiururo is the Defendant. The main

prayer in that suit is an order of eviction and a permanent injunction restraining the Defendant from interfering with the suit property, that is, parcel No. 1532. The Defendant filed his defence pleading both adverse possession and having bought the suit property from the Plaintiff. It is strange that it took the Defendant another 10 years before filing the instant suit before the ELC claiming adverse possession.

6. In his further affidavit sworn on 14th July 2017, the Applicant admitted that he was allocated parcel No. 1487 by his clan and that some of his sons and family members were in occupation thereof. He further reiterated that he had a home on the suit property where he resided with some of his family members as well. He also reiterated having bought the suit property from the Respondent but did not annex any documents relating to the sale.

7. The main question for determination herein is whether or not the Applicant has satisfied the legal requirements for the grant of an order of injunction as set out in the case of ***Giella Vs Cassman Brown & Co Ltd [1973] EA 358***. The first is whether the Applicant has established a *prima facie* case with a probability of success. It is common ground that the Applicant has been in possession of the suit property for a considerable period of time. Whether such possession was hostile or adverse to the interests of the registered owner is a question which can only be conclusively determined at the trial of the action. The court is nonetheless satisfied on the basis of the material on record that a *prima facie* case has been established.

8. The court is also not satisfied that the Applicant might suffer irreparable loss which cannot be compensated by an award of damages. The Applicant concedes that he has his own parcel of land where some of his family members are residing. He would not be rendered homeless if the order of injunction were denied. An order of injunction is an equitable remedy and an Applicant who is otherwise entitled to an injunction may be denied the order due to laches or delay. The court has noted that the Respondent herein sued the Applicant for an eviction order before the PM's court at Siakago in 2007. The Applicant filed a defence raising the issues of adverse possession and a sale agreement but did absolutely nothing for another 10 years. It was only in 2017 that he filed the instant suit and application for interim injunction. There is also no indication that he sought interim orders in the suit pending before the PM's court at Siakago.

9. In view of the foregoing, prayer No. 2 of the notice of motion dated 3rd April 2017 is hereby declined on account of undue delay in seeking the orders. The court is, however, inclined to issue an order for preservation of the suit property to prevent its alienation in terms of prayer No. 3 before the suit is heard and concluded. Consequently, an order is hereby issued restraining the Respondent from selling, leasing, charging, transferring or alienating the suit property pending the hearing and determination of the suit. Costs of the application shall be in the cause.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of SEPTEMBER, 2017

In the presence of Ms Anne Thungu holding brief for Muthoni Ndeke for the Plaintiff and in the presence of the Defendant in person.

Court clerk Njue.

Y.M. ANGIMA

JUDGE

21.09.17