



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 98 OF 2017

IN THE MATTER OF L.R NOS. KABARE/NYANGATI/8215/8216 & 8217

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ACQUISITION OF TITLES BY ADVERSE POSSESSION

BETWEEN

JOHN NG'ANG'A MWANGI

ANDREW MURIMI MWANGI

BERNARD GITARI MWANGI

PATRICK MURIUKI MWANGI

CATHERINE WANJIRU MWANGI

MARGARET WANJA NG'ANG'A APPLICANTS

VERSUS

JANE WANGECI NJIRU (Sued on her own behalf and on behalf of

the Estate of JAMES NJAGI NJIRU (Deceased)....1ST RESPONDENT

JEREMIAH NGARI GITHINJI.....2ND RESPONDENT

MUGO MURAGE.....3RD RESPONDENT

RULING

By an Originating Summons filed herein on 22nd June 2017, the Applicants seeks orders that they have been in adverse possession of land parcels No. KABARE/NYANGATI/8215, 8216 and 8217 (the suit properties) for a period exceeding twelve (12) years and have therefore acquired the same and the Respondents titles thereto have been extinguished.

On 13th July 2017, the Applicants filed a Notice of Motion seeking the following orders:

(a) Spent.

(b) Spent.

(c) That pending the hearing and determination of this suit, the Respondents, their agents, and/or servants be restrained by a temporary injunction from interfering with the Applicants possession or in any way dealing with the suit properties No. KABARE/NYANGATI/8215, 8216 and 8217.

(d) That costs be provided for.

The application which is the subject of this ruling is based on the grounds set out therein and also supported by the affidavit of **MARGARET WANJA NG'ANG'A** the 6th Applicant herein.

The gravamen of the application is that though the suit properties are registered in the names of the Respondents, the Applicants have jointly been in open, exclusive and un-interrupted possession and use thereof since 1999 when they were registered in the names of the previous owner **JAMES NJAGI NJIRU** as L.R No. KABARE/NYANGATI/1778. That they have substantially developed the suit properties where they have their residence as well as crops and livestock. That the Respondents have never possessed or used the suit properties until recently when they threatened to evict the Applicants. It is therefore feared that the Respondents may alienate the suit properties to strangers in which case the Applicants will suffer inextricably hence this application.

In opposing the application, the 2nd Respondent **JEREMIAH NGARI GITHINJI** has on behalf of the other Respondents averred that indeed they are the registered proprietors of the suit properties which were as a sub-division of land parcel No. KABARE/NYANGATI/1778 belonging to **JAMES NJAGI NJIRU** now deceased who was allocated the same by the then **KIRINYAGA COUNTY COUNCIL**. That the 1st Respondent is the administratrix of the Estate of **JAMES NJAGI NJIRU** while the 2nd and 3rd Respondents purchased parcels No. KABARE/NYANGATI/8216 and 8217 from the 1st Respondent and the Applicants are mere trespassers who should vacate and cannot claim the same by adverse possession.

When the application came up for hearing on 25th September 2017, there was no appearance by the Respondents or their advocate though duly served and **MS MUTHIKE** for the Applicants requested me, which I accepted, to deliver a ruling on the basis of the pleadings filed.

I have considered the application and the rival affidavits.

This is an application for temporary injunction pending trial and the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. The Applicant must establish a prima facie case with a probability of success.**
- 2. A temporary injunction will not be granted unless the Applicant shows that he will suffer irreparable injury that cannot otherwise be compensated by an award of damage.**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** 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 NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012, the Court of Appeal had the following to say on what constitutes a prima facie case:

“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 of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed”.

The Court went on to add that:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation”

Finally, as was held in FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.R 772, the Court while considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**.

It is not in dispute that the suit properties are registered in the names of the Respondents whose rights thereto are therefore protected by **Section 24 of the Land Registration Act**. The Applicants claim to the suit properties however is that they have been in open and exclusive possession of the suit properties since 1999 and have therefore acquired ownership of the same by virtue of adverse possession thereof. Of course whether the Applicants will prove their entitlement to the suit properties by adverse possession cannot be a matter for consideration at this stage. That will have to await the full trial and at this point, I cannot hold a mini trial. What the Applicants seek now are orders restraining the Respondents from interfering with their possession of the suit properties pending trial. The Applicants’ possession of the suit properties since 1999 has not been rebutted. Indeed it is conceded in paragraph 15 of the replying affidavit of **JEREMIAH NGARI GITHINJI** when he deposes as follows:

“That the Applicants are mere trespassers who should vacate from the parcels belonging to the Respondents”

By virtue of that long possession which is not controverted, I am satisfied that pending trial, there is a prima facie case made out by the Applicants to entitle them to the orders sought.

On irreparable injury, the Applicants have pleaded, again un-controverted, that they have their residence, crops and other economic activities on the suit properties. Given the long period that they allege to have been on the suit properties, I am prepared to hold that the injury they may suffer would not be adequately compensated in an award of damages. The Applicants as per paragraph 7 of the supporting affidavit of **MARGARET WANJA NG’ANG’A** have also been threatened with eviction. The Court of Appeal in GEORGE ORAGO VS GEORGE JAGALO & OTHERS C.A CIVIL APPEAL No. 62 of 2009 (2010 e K.L.R) stated that where the Applicant is in possession, the denial of any injunction would have the effect of dispossessing him of the land. It is therefore proper in this case that I grant the orders sought and that the suit properties are preserved and the Applicants are not evicted. The Applicants have proved the first two principles set out in the **GIELLA** case (supra). Even if this Court was in doubt, which is not the case, the balance of convenience would tilt in favour of allowing the application as that, in my view, is the route that appears to carry the lower risk of injustice.

The up-shot of the above is that the Applicants’ Notice of Motion dated 13th July 2017 is hereby allowed in the following terms:

1. That pending the hearing and determination of this suit, the Respondents, their agents and/or servants are restrained from interfering with the Applicants possession of land parcels No. KABARE/NYANGATI/8215, 8216 and 8217 or in any other way dealing with the same.

2. Costs shall be in the cause.

3. The parties to comply with pre-trial directions so that this case is heard and determined in the next twelve (12) months.

B.N. OLAO

JUDGE

19TH OCTOBER, 2017

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

Mr. Kagio for Mr. Kingori for the Applicants present

Mr. Kinyanjui for the Respondents absent.

B.N. OLAO

JUDGE

19TH OCTOBER, 2017