



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 39 OF 2016

LUCY WAIRIMU NJAU..... PLAINTIFF

VERSUS

NICHOLAS NGUTHI KIVINDA.....1ST DEFENDANT

MARY NTHURAKU NJERU

(Sued in her capacity as the

Legal Representative of the estate of

FRANCIS NJERU NYAGA..... 2ND DEFENDANT

MARGARET NJOKA

(Sued in her capacity as the

Legal Representative of the estate of

NJOKA KONJI..... 3RD DEFENDANT

RULING

1. By a plaint dated and filed on 9th June 2016, the Plaintiff sought the following reliefs against the Defendants;

i. A declaration that the Plaintiff acquired title to the whole of land parcel No. Nthawa/Gitiburi/1533 by way of adverse possession and that she ought to be registered as the absolute proprietor of the said land.

ii. That the title held by the Defendants on the aforesaid land parcel Number Nthawa/Gitiburi/1533 stands extinguished.

iii. Costs of this suit and interest thereof.

2. The basis of the said reliefs was that the Plaintiff and her family had been in occupation of Title No. Nthawa/Gitibiri/1533 (hereinafter known as the 'suit property') measuring 3.6 ha since the year 1975 without any interruption.

3. Contemporaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 9th June 2016 seeking the following interlocutory orders;

i. Spent

ii. Spent

iii. Spent

iv. That this honourable court be pleased to issue an order of temporary injunction restraining the respondent, his agents and/or servants from forcefully evicting the applicant and her family members from land parcel No. Nthawa/Gitiburi/1533 pending the hearing and determination of the main suit herein.

v. That an order of inhibition be issued (sic) this honourable court against Land parcel No. Nthawa/Gitiburi/1533 pending the hearing and determination of the main suit herein.

vi. That the costs of this application be provided for.

4. The said application was based upon the grounds set out in the said motion which stated that although the Plaintiff had been in occupation of the suit property since 1975, the Defendants had recently threatened her with eviction. It was further stated that the Defendants had recently visited the suit property in the company of strangers with a view to disposing of the suit property.

5. The said application was supported by the supporting affidavit of the Plaintiff sworn on 9th June 2016 in which she reiterated the contents of the plaint and the grounds set out in the said notice of motion. She asserted her right to adverse possession and stated that unless the Defendants are restrained from evicting her, she would otherwise suffer irreparable damage if evicted before the suit is heard and determined.

6. The said application was opposed by the Defendants who filed 3 replying affidavits sworn on diverse dates. Each of the Defendants swore and filed one replying affidavit. The affidavits gave a fairly detailed history on the dispute between Nditi clan and Mbuya clan over the suit property. It would appear that the said dispute went through various dispute resolution mechanisms culminating in an appeal to the Minister in Civil Appeal No. 1022 of 1985. Nditi clan to which the Defendants belong finally won the case and subsequent attempts to challenge the Minister's decision in court were unsuccessful.

7. The Defendants disputed the Plaintiff's claim in both the suit and application. It was denied that she had been in occupation since 1975. It was denied that she was occupying the entire suit property. It was also stated that the Plaintiff's husband was allowed into the suit property with the permission of the Defendants and so the issue of adverse possession could not arise.

8. The main issue for determination herein is whether the Plaintiff has satisfied the requirements for the grant of an interlocutory injunction as set out in the case of ***Giella V. Cassman Brown & Co Ltd [1973] EA 358***. The first principle requires the Plaintiff to demonstrate a *prima facie* case with a probability of success. It is common ground that the Plaintiff is in possession of the suit property. What is in dispute is the acreage of land under occupation, the length of occupation and whether such occupation was adverse to the rights of the Defendants.

9. It was submitted by the Defendants that upon their registration as proprietors in 1996, a restriction was placed on the suit properties until 4th January 2016 hence time should start running with effect from the latter date for purposes of adverse possession. The court is of the view that time does not stop running simply because a restriction or prohibitory order was registered against the suit property. No authority was cited for the proposition advanced by the Defendants. So, if time is reckoned with effect from 1996, the Plaintiff may establish possession for at least a period of 12 years from 1996. The issue of the actual acreage in the Plaintiff's occupation and the issue of whether occupation was adverse or with the

permission of the 1st Defendant can only be conclusively determined at the trial. It is sufficient to state that on the basis of the material on record, the court is satisfied that the Plaintiff has established a *prima facie* case with a probability of success at the trial.

10. The second principle relates to adequacy of monetary damages. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which cannot be adequately compensated by an award of damages. The Plaintiff stated that she is in occupation of the entire suit property whereas the Defendants asserted that she occupied only a small portion thereof. It would appear that she is actually residing thereon hence her eviction before the suit is concluded may cause her serious damage. The court is satisfied that the Plaintiff may suffer irreparable harm or damage which cannot be remedied by an award of monetary damages.

11. In case the court is wrong on the second principle, the court would still be inclined to find in favour of the Plaintiff on the balance of convenience. The Plaintiff is currently in occupation. A refusal of the injunction at this stage may result into greater hardship to the Plaintiff than a denial would cause to the Defendants. The court would, therefore, still find in favour of the Plaintiff on the third principle.

12. Although the Defendants had raised a preliminary objection to the suit for the reason that proceedings were commenced by plaint instead of originating summons, this objection was not argued by the Defendants in their submissions. The court shall, therefore, not make any determination on the matter since the objection was not prosecuted. The Defendant shall be at liberty to prosecute the preliminary objection at a later stage, if need be.

13. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 9th June 2016. The court is also of the persuasion that it has a duty to preserve the suit property which is in dispute herein pending the hearing and determination of the suit as guided by the decision of **Shivabhai Patel V. Manibhai Patel [1959] EA 907**. The said notice of motion is consequently allowed in terms of prayers 4 and 5 thereof. Costs of the application shall be in the cause.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **OCTOBER, 2017**

In the presence of Ms Makobu holding brief for Mr Andande for the Plaintiff and Mr Njoroge holding brief for Mr Okwaro for the Defendant.

Court clerk Njue

Y.M. ANGIMA

JUDGE

19.10.17