



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC NO. 60 OF 2016

STEPHEN KITHINJI NYAGA.....ST PLAINTIFF

BONIFACE KIMATHI NYAGA.....^{2ND} PLAINTIFF

VERSUS

JOSEPH MUCHANGI NTHIGA.....^{1ST} DEFENDANT

DAVID MURIUKI NTHIGA.....^{2ND} DEFENDANT

RULING

1.By a Notice of Motion dated and filed on 30 August 2016, the Plaintiffs sought an order of temporary injunction to restrain the Defendants from entering, leasing and interfering with ***Title Nos. GATURI/NEMBURE/10965 and 10966*** (hereinafter called the suit properties) pending the hearing and determination of the suit. The Plaintiffs also sought an order for the OCS Manyatta Police Station to enforce compliance with the order if granted.

2.The said application was based upon the several grounds shown on the face of the Notice of Motion. The main grounds were that they are the current registered owners of the suit properties having inherited them from their deceased father but that the Defendants' had wrongfully occupied and settled thereon. As a result of the Defendants said actions, the Plaintiffs stated that they were unable to occupy, cultivate or utilize the suit properties.

3.The said application was supported by a supporting affidavit sworn jointly by the two plaintiffs on 30 August 2016. They reiterated the grounds set out in the application and exhibited copies of their title deeds to the suit properties. The Plaintiffs also swore a joint supplementary affidavit on 10 July 2017 in response to the Defendants' replying affidavit of 14 September 2016.

4.The ^{2nd} Defendant swore a replying affidavit dated 14 September 2016 on his own behalf and on behalf of the ^{1st} Defendant in opposition to the said application. The ^{1st} Plaintiff also filed a supplementary affidavit on 16 May 2017 on his own behalf and on behalf of the ^{2nd} Defendant in opposition to the Plaintiffs' said application.

5.The court has considered the plaintiffs' said application, the affidavits in support and in opposition thereof and the supplementary affidavits filed herein. The court has also considered the oral submissions of the parties at the hearing hereof. It is clear to me that the Plaintiffs and the Defendants are cousins who are fighting over the property of their late grandfather. They appeared to have peacefully shared the 4 acres of clan land which was allocated to him but are feuding over the 7 acres comprised in ***Title No. GATURI/NEMBURE/1382*** hereinafter parcel No. 1382) which he had bought on his own.

6.The Defendants claim that they were shortchanged by the Plaintiffs' father who fraudulently acquired the suit property through Embu Succession Cause No. 163 of 2005 by swearing a false affidavit that he was the sole surviving son of his father and that the defendants' father was long dead. They further stated and demonstrated through documentary evidence that they had applied for revocation of the grant on the basis of which the Plaintiffs' father had obtained the suit property. It was further demonstrated that a stay order was granted in those proceedings and that the Plaintiffs' and their siblings were joined in the succession proceedings.

7.The Plaintiffs denied knowledge of any such pending application or their joinder in those proceedings. They claimed that they were not served at all and were unaware of the goings on in the succession cause. The Plaintiffs stated that they shared out the suit property which was part of the estate of their deceased father and stated that there was no appeal or challenge to the confirmation of grant.

8.The court having considered the entire material evidence on record, is not satisfied that the Plaintiffs' are entitled to the orders sought for two reasons. First, the court is not satisfied that the Plaintiffs' have demonstrated a *prima facie* case with a probability of success. The Defendants have *prima facie* shown that the Plaintiffs' father either fraudulently or irregularly obtained registration of parcel No. 1382. The Defendants have also *prima facie* established that there is a stay of execution granted in succession cause No. 163 of 2005 pending the hearing and determination of their application for revocation of grant.

9.The second reason is that the plaintiffs are seeking to restrain the Defendants from *inter alia*, entering and interfering with the suit properties whereas the Defendants are already in occupation of the properties. The Plaintiffs concede in their application that they are unable to occupy, cultivate or utilize the suit properties because the Defendants have already occupied the land. In my opinion, if the orders sought are granted, their effect would be to evict the Defendants before the suit is heard on the merits and before the pending application for revocation of grant is concluded by the Succession court.

10.The upshot of the foregoing is that the court finds no merit in the plaintiffs' Notice of Motion dated 30 August 2016 and the same is disallowed. There shall be no order as to costs since the parties are close relatives.

11. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF OCTOBER 2017.

In the presence of the plaintiff's in person and Mr. Mwathe holding brief for Mr. P.N. Mugo for the defendant's. The Notice Motion dated 30 August 2016 disallowed with no order as to costs.

Court Clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE. – 5.10.17.