



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 17 OF 2015

BETH KANJIRU SIMBA.....PLAINTIFF

VERSUS

WILLIAM NJERU SIMBA.....1ST DEFENDANT

DIOCESE OF EMBU REGISTERED TRUSTEES.....2ND DEFENDANT

RULING

1. By an originating summons dated and filed on 5th August 2008, the Plaintiff sued the Defendants claiming for a declaration that she had become entitled to one acre out of *Title No. Nthawa/Siakago/258* by virtue of adverse possession and for her registration as a proprietor thereof.
2. The said originating summons was supported by an affidavit sworn by the Plaintiff on 5th August 2008 in which she stated that she had lived on the suit property for over 20 years without interruption and that she had extensively developed one acre of the suit property. That was the brevity of her affidavit. She did not indicate when or how she came into occupation of that one acre of the suit property and what developments she had undertaken thereon.
3. On or about 20th June 2016, the 1st Defendant filed a notice of motion dated 7th June 2016 under certificate of urgency under **Order 40 of the Civil Procedure Rules** seeking a prohibitory order to be issued against the suit property on the basis that he had learnt from “reliable sources” that the 2nd Defendant, who is the registered owner of the suit property intended to dispose of the same. The source of the information was, however, not disclosed as required under **Order 19 of the Civil Procedure Rules**.
4. When the said application came up for hearing on 9th October 2012 Mr Guantai for the 1st Defendant prosecuted the said application while Mr. Morris Njage for the 2nd Defendant opposed the same. The court was informed that the Plaintiff was not opposed to the application.
5. The 2nd Defendant did not file any replying affidavit in opposition to the notice of motion dated 7th June 2016 but chose to rely upon the earlier affidavits filed by the 1st and 2nd Defendants in response to the originating summons. Mr Guantai was opposed to such reliance and urged the court to consider his application as unopposed.
6. The court is of the view that all material evidence on record, regardless of who may have adduced it, may be considered by the court whilst considering an application for interlocutory relief. It may be particularly important to look at evidence placed on record by the 1st Defendant before the filing of the instant application. The provisions of **Order 19 Rule 1 of the Civil Procedure Rules** provide for the

admission of affidavits filed even before the filing of the suit. There is no logical reason why an affidavit sworn before the filing of an application cannot similarly be received in evidence. The court, therefore, overrules the objection by Mr Guantai on this point and holds that it is proper for the 2nd Defendant to rely on the two affidavits sworn in 2008.

7. The main question for consideration is whether or not the 1st Defendant has made out a case for the grant of the prohibitory order sought. The court considers that the prohibitory order sought is in the nature a prohibitory injunction since it is grounded upon **Order 40 Civil Procedure Rules**. The court has considered all the material evidence on record and is far from satisfied that the 1st Defendant has made out any *prima facie* case with a probability of success at the trial within the meaning of the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The court is aware that the 1st Defendant has no counterclaim of any sort in this matter. That is not to say that a Defendant cannot apply for interim orders in a suit.

8. The court has perused the 1st Defendant's replying affidavit sworn on 29th August 2008 in response to the Plaintiff's originating summons dated 5th August 2008. The 1st Defendant conceded that he had consciously disposed of the suit property to the 2nd Defendant and that the Plaintiff, who is his mother, had no claim for adverse possession. In fact, he was totally dismissive of his mother's claim. That begs the question of what interest the 1st Defendant is seeking to protect if he admittedly sold and transferred the suit property to the 2nd Defendant way back in 1993. So what case or defence does he have which may succeed at the trial of the suit? The court can hardly discern any. However, since the suit is still pending trial, I shall say no more since there might be a risk of prejudicing a fair trial hereof.

9. The second principle relates to adequacy or otherwise of monetary damages should the 1st Defendant ultimately succeed at the trial. The court was not addressed on this aspect. There is no averment in the 1st Defendant's application that he might otherwise suffer irreparable loss or damage if the orders sought are denied. There was also no demonstration of the same. The court therefore holds that there is no evidence or demonstration that the 1st Defendant shall otherwise suffer irreparable loss or damage unless the orders sought are granted. The court consequently finds that the 1st Defendant has failed to meet the first two principles for the grant of an interlocutory injunction.

10. The upshot of the foregoing is that the court finds no merit in the 1st Defendant's notice of motion dated 7th June 2016 and the same is hereby dismissed with costs to the 2nd Defendant.

11. The court shall give directions on the hearing of the suit at the time of delivery of the ruling given the age of the suit.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **10th day** of **NOVEMBER, 2017**.

In the presence of Mr Okwaro for the Plaintiff, Ms Muriuki holding brief for Ms Wairimu for the 1st Defendant

and Mr Morris Njage for the 2nd Defendant.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

29.11.17