



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C. NO. 303 OF 2015

GRACE WAHU.....1ST PLAINTIFF/APPLICANT

CHARLES MURUNGI NDUNGU.....2ND PLAINTIFF/APPLICANT

VERSUS

MUMBI W/O MURUNGI.....DEFENDANT/ RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated **17th December, 2015**. It is taken out by the plaintiffs seeking the following orders *inter alia*:

a) Spent.

b) That pending the hearing and the final determination of this application and/or suit, the respondent, her servants, agents and/or any person claiming for or on her own behalf be restrained by an order of injunction from in any way interfering with the quiet possession and enjoyment of the applicants on the suit property known as Aguthi/Gatitu/1209. (herein after referred to as the suit property)

c) That the costs of this application be provided for.

2. The application is premised on the grounds stated on the face thereof, which include that the applicants have been in quiet possession of their portion of the suit property since 1960s.

3. It is deponed that the respondent who is the registered owner of the land was so registered to hold it as a trustee for the family of Murungi, who is the applicant's grandfather, in the year 1977.

4. This was after Murungis father, Muya son of Kamara, subdivided his own land **Aguthi/Gatitu/194** into 2 portions for his two sons Githinji and Murungi and gave each his share. It is deponed that it is at this point, that the applicant's grandfather's share was registered in the names of the respondent who is the applicant's step grand mother. The applicants are children of an unmarried daughter of Murungi from his first wife who has also passed on. They state that their own mother who lived in the suit property passed on in the year 1971.

5. They further state that they have been living on their deceased grandmother's share of Murungis property peacefully, where their own mother had lived and that they fear that once their step grandmother who was a co-wife of their grandmother, and who is of advanced age passes on, they may be chased

away by her successors and deny them access and that in the interests of justice, the orders sought ought to be granted.

6. The application is opposed vide the respondent's replying affidavit dated **22nd February, 2016**. She admits that the original registration details of the suit property were in their father's name and subsequent subdivision and transmission to their father's two sons Githinji and Murungi but denies every other allegation in the application, putting the applicants to strict proof.

7. On 23rd February, 2016 when the parties appeared for hearing and disposal of the application the respondent applied for an adjournment to enable her engage the services of an advocate. Her application was allowed

8. On 11th May, 2016 when the application again came up for hearing, the respondent did not attend court, but her son Cyrus Mwangi was present in court. On record was a replying affidavit that had been filed by the respondent which the court admitted.

9. I have considered the application and affidavits, as well as the submissions of the applicants counsel. The principles for granting an injunction have been laid down in the case of **Giella V Cassman Brown & Co. (1973) EA 358**, Firstly, the granting of an injunction is discretionary and judicial, and has to be done on the basis of law and evidence. To this, counsel submitted that the evidence shows that the plaintiff is the registered owner of the suit property, and has enjoyed quiet possession of the same.

10. Secondly, the applicant must show a *prima facie* case with a probability of success. The applicants contend that the respondent never objected to the applicants occupation of the suit property from the time when their mother was alive; that the land is family land for the beneficiaries of Murungi s/o Kamara who is their grandfather and that the respondent though registered as owner, holds the suit property in trust for the entire family of the deceased Murungi.

11. Thirdly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm. It is the submission of counsel that the applicants may be chased away from the suit property upon the demise of their step grandmother by her successors thus the filing of the instant suit. It is their contention that if the injunction is not granted, they will suffer harm which cannot be compensated adequately by an award of damages.

12. Fourthly, if the court is in doubt, it will decide on a balance of convenience, which tilts in the applicant's favour. I am guided by case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 123** as quoted in **Samuel Ongori Ongori v Yuvinalis Nyankeboka Ongori & 4 Others [2010] eKLR**.

13. The relying affidavit filed by the respondent does not appear to be in opposition of the application. It only puts the applicants to strict proof of the averments in the application. The respondent has denied being the registered owner of the suit property, while the applicants have attached a search certificate which confirms that she is the registered owner of the suit property.

14. From the above pleadings and submissions, the only issue before this court is whether the applicants are entitled to the interlocutory injunction sought considering the circumstances of the case on the basis of the applicable principles.

15. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510 where he stated as follows:

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”, I associate myself with the

views expressed by the learned Judge in the aforementioned case. I say so in consideration of the submissions and averments set out by the respective parties. The principles for granting an interim injunction as enunciated in the **Giella v Cassman Brown** case (supra) were correctly submitted by both parties. From the submissions and averments, I am satisfied that the applicants have established a prima facie case. The applicants have been in occupation of the suit property which fact has not been controverted by the respondent. The issues the applicants have raised relating to trust and adverse possession can only be determined at the hearing of the main suit.

16. The balance in deciding whether to grant the injunction or not lies on the balance of probabilities. It is not in dispute that the applicants herein are in occupation of the suit property. It is my humble view therefore, that if the injunction is not granted then the applicants may be evicted from the suit property.

17. For the above reasons, I find the order that best commends itself to the circumstances of this case to be an order of status quo and I proceed to order that status quo be maintained pending the hearing and determination of the suit.

18. costs of the application will be in the cause.

Orders accordingly.

Dated, Signed and delivered at Nyeri this 28th day of July, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Nderi h/b for Mr. Nganga for the applicant

N/A for the respondent

Court assistant - Lydia