



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC. NO. 302 OF 2013

KESSIAH WANJIKU KURIAPLAINTIFF

VERSUS

JOSPEH NDIRANGU MWANGIDEFENDANT

RULING

(Application to stop the defendant from interring a body in the suit land; previous order that status quo be maintained; interring will be interference with status quo; application allowed)

1. The application before me is that dated 12 July 2016 filed by the defendant. The principal order sought in the application is to stop the plaintiff from interring her late brother, one Stephen Kariuki, on the suit property, which is the land parcel Nyandarua/Ol Kalou Salient/342, until this case is heard and determined. The grounds upon which the application is based are inter alia that the defendant is the owner of the suit property and that the actions of the plaintiff will grossly interfere with the case.
2. A little background will shed light on the nature of the case before me and the events leading to the filing of the application.
3. This suit was commenced by way of plaint filed on 15 April 2013. The plaintiff commenced this case as administrator ad litem of the estate of one Wangari Mwangi (deceased). She is a daughter of the said deceased. She pleaded that her late mother was a registered member of Lombard Farm and beneficiary of a Plot 1513 of Unit 355 at Ol Kalou Salient which she pleaded is the same as the land Nyandarua/Ol Kalou/342. She pleaded that her mother is buried on this land and that she (the plaintiff) has been tilling and farming it. Sometimes in the year 1998, she discovered that the defendant had obtained a title deed to the suit land and intended to evict her from it. She pleaded that the defendant fraudulently acquired title to the suit land, although note that no particulars of fraud are set out in the plaint. In the suit, she seeks orders of a declaration that she is the legal and lawful beneficiary of the suit land; cancellation of the title of the defendant issued on 1st April 1998; costs of the suit and interest.
4. The applicant filed a defence vide which he refuted the claims of the plaintiff. He denied that the plaintiff has been in occupation of the suit land or that she has been farming it. He pleaded that he is the rightful owner of the suit land; that the same was properly allocated to him; and that he has title to it. He asked that the suit be dismissed with costs.
5. On 16 October 2015, the plaintiff filed an application seeking orders to restrain the defendant and his several employees, five of whom were specifically named, from interfering with the suit land. It was deposed in the supporting affidavit that the defendant and his five servants had descended on the suit land, cut down crops and made a path. That application came up for inter partes hearing on 22 October 2015. On the said date, Mr. Morara was present for the plaintiff and Mr. Muthanwa was present for the

defendant. Both plaintiff and defendant were also present in court. Mr. Muthanwa addressed the court and stated that it has been agreed that the application (that filed on 16 October 2015) be dropped. He stated that status quo may be maintained and that the position is that the defendant has title and is in possession. Mr. Morara agreed that the status quo may be maintained. I then recorded that status quo be maintained and that the status quo is that the defendant is in possession, but directed the defendant not to deal with the title pending hearing of the suit.

6. The matter lay quiet until this application was filed on 12 July 2016. In his supporting affidavit, the defendant has averred that it was directed that status quo be maintained until the suit is heard and determined. He has deposed that it will be unfair for the plaintiff to bury the deceased on the suit land since the matter has not been fully determined.

7. In her replying affidavit, the plaintiff has deposed that she has been in actual possession of the land since the year 1968 and is therefore entitled to be registered as owner of the land by virtue of adverse possession. She has averred that her late mother was buried on the suit land in the year 1968 and no claim has ever been raised by the defendant. She stated that she has developed the land and lived there undisturbed for more than 12 years.

8. I took in the submissions of Mr. Opar for the applicant and Mr. Ngamate for the respondent. Mr. Opar first asked that the replying affidavit be expunged for having been filed late. He further submitted that there is no proof that the mother to the respondent was buried on the suit land. He pointed out that the plaintiff's documents show a purchase of the land by the plaintiff's mother in the year 1974 and submitted that this could not be possible since she died in the year 1968. He further submitted that there is nothing that the respondent has annexed to show any development on the suit land or that she has been in possession for over 12 years.

9. On his part, Mr. Ngamate submitted that he was not on record when the order of status quo was made. He submitted that the applicant has not shown how he got title. He submitted that the applicant has not objected to the averment that the respondent's mother was buried on the suit land in the year 1968. He submitted that the applicant has not filed any case of eviction and that the respondent has been on the land undisturbed for over 12 years.

10. I have considered the application. The application has been prompted by the intention of the plaintiff to bury her late brother on the suit land. What is before me is principally an application for injunction and I note that indeed, the application has been brought pursuant to the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules. To succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success and also show that unless the injunction is granted, he will suffer irreparable loss. If in doubt, the court will decide the application on a balance of convenience. These principles were set out in the case of *Giella vs Cassman Brown (1973) EA 358*.

11. I can see that the defendant does have title to the suit land. He acquired the same on 1st April 1998. It is the case of the plaintiff that the title of the defendant was acquired fraudulently and that the same should be cancelled. I already mentioned that no particulars of fraud have been pleaded against the defendant and I therefore do not know on what basis the plaintiff alleges that the title of the defendant was acquired fraudulently. It has been argued in this application, that the plaintiff has been on the suit land for over 12 years and has acquired title by way of adverse possession. I am afraid that the case before me is not one of adverse possession. It is a case seeking to cancel the defendant's title on the basis that it was acquired fraudulently. It therefore does not help the plaintiff to attempt to argue in this application that she deserves the suit land through the doctrine of adverse possession.

12. I however do not wish to go too deeply into the respective strengths and/or weaknesses of the cases of the parties. I think the application is best decided on a balance of convenience and I am of the view that the same is in favour of the defendant. It is the defendant who holds title to the land and has been holding that title since the year 1998. Apart from that, in the record of 13 April 2016, it was conceded by counsel for the plaintiff, in the presence of the plaintiff, that it is the defendant in possession of the land. It was also agreed that status quo may be maintained. It is my view that interring the remains of the brother to

the plaintiff would go against the order of status quo as agreed by the parties. The burial of the deceased will no doubt cause some wastage of the suit land. The plaintiff contended that her mother was buried on the suit land but to me that is immaterial.

13. With the deepest of sympathies to the plaintiff, I am afraid that I have to allow this application. The plaintiff has the option of either interring her late brother in alternative land or wait until the conclusion of the case. If she succeeds, she can of course proceed to utilize the land as she may wish.

14. The costs of this application will be costs in the cause.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Mburu holding brief for Mr. Opar for the applicant

Mr . Ngamate for the respondent .

C/Asst: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU