



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 129 OF 2014 (OS)

SUSAN WANGARI MATHENYU.....1ST PLAINTIFF

JOHN NJENGA MATHENYU.....2ND PLAINTIFF

SAMUEL NGANGA MATHENYU.....3RD PLAINTIFF

MARGARET WANJA MATHENYU.....4TH PLAINTIFF

VERSUS

JAMES PETER MATHENYU.....1ST DEFENDANT

TERESIA WANJIKU NGUGI.....2ND DEFENDANT

RULING

When the Plaintiff's application dated 10/2/2014 came up for ex-parte hearing, the Court certified the application as urgent and granted a temporary order of injunction restraining the 1st and 2nd Defendants, their agents and servants from evicting and/or interfering with the applicant's possession, sub-dividing and or parting possession with or otherwise disposing half share (1.02 ha) of the parcel of land known as Riabai/Ndumberi/207 pending the hearing and determination of the application. It is this order that the Plaintiffs ask this court to confirm pending the determination of the suit. The application is premised on grounds that the Defendants have threatened to evict the Plaintiffs from the suit property. It is the Plaintiff's averments that they have enjoyed quiet possession of the property and that they continue to substantially develop the same. Further that there is a danger that the property will be alienated if the Defendants make good their threat.

The application is supported by an affidavit sworn by the 1st Plaintiff wherein she deposes that they have been in exclusive possession of the property for a period of over 12 years. It is her deposition that she settled on the suit property in 1983 cohabiting with the 1st Defendant and begot children - the 2nd, 3rd, and 4th Plaintiffs while still living there in 1986, 1991 and 1985 respectively. It is deposed that the 1st Defendant is the grandson of the registered owner who died in 1978 but that a grant of letters of administration was issued in 2013 after the one issued in 2007 was revoked. The deponent states that the occupation has been done continuously as of right and without permission neither from the Defendants nor the deceased registered owner's legal representative. Further that they have not been evicted despite

the Defendants' being aware of their possession.

The application was opposed by the 2nd Defendant who swore a Replying Affidavit on 20/2/2014. The 2nd Defendant deposed that both parties to these proceedings are related and gave a family tree stating that the 1st Plaintiff came to the suit property by virtue of marriage to the 1st Defendant, and the 2nd, 3rd and 4th Plaintiffs are children of that marriage. It is deposed that the Plaintiffs' entry to the property was not adverse and therefore their claim is based on wrongful and erroneous interpretation of the doctrine of Adverse Possession.

The 2nd Defendant deposed that she and the 1st Defendant are the grandchildren of the deceased registered proprietor of the property and that their parents also being deceased, they were next in line to inherit the estate. Thereby and pursuant to **P & A Cause No. 3490 of 2004**, the Court distributed the estate, including the suit property, in the manner that was proposed and agreed by all the beneficiaries of the estate. The deponent states that 1st Defendant participated in the succession proceedings and consented to the distribution of the estate in full view and knowledge of the Plaintiffs and that there has been no appeal lodged against the mode of distribution as ordered by court on 27/7/2007. However, that the Plaintiffs in 2010 moved the Court to review the mode of distribution, which application was dismissed on 9/7/2010 on the basis that they lacked the requisite locus standi to challenge the mode of distribution since they (Plaintiffs) derive their entitlement to the property through the 1st Defendant who did not challenge the process.

The deponent stated that the Plaintiffs' prayer to be registered as owners of 1.02 ha of the property, if granted will deprive the other beneficiaries of their share. The 2nd Defendant urged the court to dismiss the application deposing that the same is vexatious with an intention to circumvent the orders of distribution of the estate and therefore an abuse of the court process.

The 1st Plaintiff filed a Supplementary Affidavit on 7/3/2014, wherein she reiterated that none of the Plaintiffs were given permission to enter, develop or cultivate the portion of the property. It was her deposition that she legally got married to the 1st Defendant in 1998 but before then, they were merely cohabiting. She also deposed that the succession cause had no effect on her claim for adverse possession. The 1st Plaintiff deposed that the temporary orders of injunction granted by the court did not halt the entire distribution exercise save for two persons who, the deponent stated, have never developed nor cultivated or interfered with her quiet possession. The 1st Plaintiff referred the court to a survey plan annexed to her affidavit and deposed that the distribution would entail causing an access road through her buildings and vesting her developed sections to other beneficiaries leaving her homeless and destitute.

The application was canvassed by way of written submissions, which I have carefully considered. The Plaintiffs' counsel filed submissions dated 5/5/2014 wherein counsel urged the court to grant the orders, submitting that the Plaintiffs had demonstrated how the suit property would be wasted, damaged or alienated thus resulting to irreparable loss. Counsel for the Defendants filed submissions dated 20/5/2014 wherein he submitted that he entire suit was an abuse of the court process since a claim for adverse possession as far as family members are concerned could not hold.

The 1st and 2nd Defendants and the 2nd, 3rd, and 4th Plaintiffs are third and fourth generation of the estate of Njoroge Kamuru, the registered owner of the property. The 1st Plaintiff is the wife of the 1st Defendant and the 2nd, 3rd and 4th Plaintiffs are their children. The Plaintiffs seek an order of injunction pending the determination of originating summons wherein the Plaintiffs claim ownership of the suit property by adverse possession. At this juncture the court is set to determine whether the Plaintiffs have met the threshold enunciated in the case of **Giella v Cassman Brown & Co. (1973) E.A. 358**

“that first, an applicant must show a prima facie case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience”.

The Plaintiffs aver to have been in possession of the property without interruption for a period of over 12 years. Further that her entry into the property in 1983 was without permission from the registered owner or any of his legal representatives. In the reply sworn by the 2nd Defendant she pointed to the court towards the Succession Cause and revealed that the 1st Defendant had in fact sold off a portion of the property thereby benefiting to the tune of **Kshs.400,000/-** which he failed to refund to the estate and thus upon distribution, the 1st Defendant obtained less the portion he had sold. On the claim for adverse possession, the 2nd Defendant deposed that by virtue of the Plaintiffs being the wife and children of the 1st Defendant, their entry and possession of the property is not adverse.

Courts have established the elements of adverse possession that a claimant must prove. In **Mbira v Gachuhi (2002) 1 EALR 137**, the court held:

...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption”

From the decisions above, it comes out very clearly that possession for the requisite number of years is not the sole requirement in proving a claim for adverse possession. Such claimant must also prove non-permissive or non-consensual possession.

On the issue of non-permissive possession, the Plaintiff contends that her entry to the suit property and that of the 2nd, 3rd and 4th Plaintiffs were without permission. She bases her argument on the fact that, first, she only cohabited with her husband from 1983 to 1998 when she officially got married. Secondly, that the registered owner of the property passed on in 1978 and until the Defendants obtain letter of administration in 2013, there was no one with legal capacity to grant the Plaintiff's permission to enter the suit property. It is not uncommon for African folk to die intestate. The situation herein is that the registered owner died in 1978 and from the depositions of the 2nd Defendants, his wives and children passed away too such that they are the third in line to occupy the property after their parents and grandparents.

The Law of Succession outlines the various scenarios upon the demise of the deceased intestate on how the estate devolves (**See Sections 38, 39 & 40 of the Law of Succession Act**). There is no contention that the Defendants are entitled to the estate by virtue of being the surviving grand-children. It is my view, therefore, that a claim for adverse possession cannot be sustained as against the Defendants by virtue of being the surviving heirs of the estate. Turning onto whether the entry to the property was non-permissive, the Plaintiff states that she settled on the suit property and cohabited with the 1st Defendant from 1983. It is also apparent that the 2nd, 3rd and 4th Plaintiffs were born out of their union in the years 1985, 1986 and 1991. Adverse possession, by its very nature, is the hostile take-over of a parcel of land by a person who is in possession of the said parcel of land. There is no evidence that the 1st Plaintiff and the 1st Defendant are divorced or separated. It therefore, cannot be said that a wife and children born out of a union are adverse possessors of the husband's inheritance. It matters not that the 1st Plaintiff and 1st Defendant were merely cohabiting from 1983 – 1998 since long cohabitation gives rise to a presumption of marriage.

From the above analysis, it is my finding that the Plaintiffs have failed to establish a prima facie case with probability of success against the Defendants. I therefore decline to confirm the orders of injunction granted by this court on 10/2/2014. The application is hereby dismissed with costs. Matter to proceed for hearing and be decided on merit.

It is so ordered.

Dated, Signed and Delivered this **24th** day of **February, 2015**

L.N. GACHERU

JUDGE

In the Presence of:-

Mr Ndirangu for the Plaintiffs/Applicants

M/s Sang holding brief Mr Kariuki for the 2nd Defendant/Respondent

None attendance for 1st Defendant/Respondents

Kamau: Court Clerk

L.N. GACHERU

JUDGE

24.2.2015