



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 232 OF 2014

LYDIA MUTHONI KARIUKI & 25 OTHERS..... PLAINTIFFS/APPLICANTS

-VERSUS-

KENYA NATIONAL AFRICAN UNION.....DEFENDANT/RESPONDENT

RULING

1. By an Originating Summons dated 28th February, 2014 the twenty six Plaintiffs claim ownership of all that parcel of land known as Land Reference Number 29082 Nairobi. The Plaintiffs claim to have occupied the said property a *nec vi, nec clam, nec precario* which Latin phrase means in Lord Hoffmann's words in **R –v- Oxfordshire CC ex parte Sunningwell Parish Council [1999] 3 All ER 391**, at 391 "Not by force, nor stealth, nor the license of the owner". They claim their occupation has been running since 1995. They consequently not only claim ownership by adverse possession but also the protection of their current occupation.
2. The Plaintiffs also filed an application for injunctive orders on 28th February, 2014 seeking orders that pending the hearing and determination of the suit herein the Defendant, its servants agents or employees be restrained from demolishing the Plaintiffs structures or evicting the Plaintiffs from the suit property or interfering with the Plaintiffs occupation, possession and/or access to the suit property.
3. Naturally, the Plaintiffs application is opposed. The Defendant filed a Replying Affidavit through its Secretary General and dubbed the Plaintiffs trespassers on the Defendant's property being the suit property. The Defendant also denied that The Plaintiffs entered into and have been occupying the suit property since 1995. The Defendant further stated that the Plaintiffs originally entered the suit property as tenants and thereafter attempted to defraud members of the public by trying to sell the suit property whereupon the Defendants evicted the Plaintiffs and also made a report to the relevant authorities. The Defendant further stated that the Defendant had filed a suit against another group of persons through whom the Plaintiffs were claiming the suit property and the court had issued an order restraining the group from invading the suit property. The suit was ELC No. 151 of 2014 at Nairobi.
4. It is foremost to be noted that the court is now only dealing with the interlocutory application for injunction as sought by the Plaintiffs. The court therefore need only address two issues and when in doubt determine the application on a balance of convenience. The two issues of principle to be

addressed by the court are whether the Plaintiffs have established a prima facie case with chances of success and secondly, whether the Plaintiffs are bound to suffer irreparable and beyond compensation by damages if no injunction is granted: see the cases of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**, **Bonde vs. Steyn [2013] 2 EA 8**, **Mrao Ltd –v- First American Bank of Kenya Ltd [2003] KLR 1215** and **American Cyanamid Ltd & 2 others –v- Ethicon [1975] AC**.

5. The parties filed their respective written submissions with the Defendant contending that the Plaintiffs have not shown any prima facie case. The Plaintiffs on the other hand through their written submissions contended that they had shown a prima facie case with a probability of success and further that they stood to suffer irreparably as their businesses which they have established over a period of time will be destroyed and so too will their families.
6. I have read carefully and considered both sets of submissions. I have also read carefully and considered the affidavits filed in this suit.
7. The purpose of an interlocutory prohibitory injunction ordinarily is to ensure that the subject matter of the suit is preserved and that the course of justice is not subverted by the time the suit is up for trial: **see Bonde –v- Steyn [2013] 2 EA 8**. When ensuring such preservation the court must also ensure that neither party is unduly prejudiced. The difficulty therefore lies in the balancing of the parties cases. The court must not make specific and final findings of fact but simply ascertain whether a prima facie case is shown whilst also keenly and meritoriously considering the defendant's response and case.
8. It is certainly common ground that the owner of the suit property is the Defendant. The Defendant is not yet registered as the proprietor but holds an allotment letter which was accepted and the required premiums paid for (see annexures to the Replying Affidavit). The Defendant is also the land rates payer.
9. From a preliminary view, the Defendant is currently the recognized proprietor of the suit property. Even as it awaits issuance of the Grant or title documents under section 26 of the Land Registration Act, the court is entitled to treat the Defendant as the proprietor. It is the beneficial owner. The Defendant has documents of title. As a beneficial proprietor the Defendant would certainly be entitled to the protection of the law. The law as well as the court should not encourage any party to interfere with such proprietorship unless with the Defendant's permission, consent or acquiescence.
10. The Plaintiffs contend that the law allows them to occupy the suit property. That the law by virtue of Section 7 of the Limitation of Actions Act (Cap 22) entitles them to permanently dispossess the Defendant. It is the Plaintiffs' further contention that they have inhabited the suit property since 1995.
11. However quite a part from the deposition in the supporting affidavits there is nothing else to corroborate such statement. True, there are photographs of developments. The developments appear permanent. There is however no way of telling that the developments were erected more than twelve years ago. There is also no way of telling that the developments are on the suit property or were actually the subject of demolition by the Defendant's agents. One would have expected the Plaintiffs to perhaps avail approved building plans under the Physical Planning Act 1995 to show where the developments actually are but the Plaintiffs did not do so. One would also have expected the Plaintiffs to even avail utility bills to help identify and show their long term occupation but this too did not happen.
12. In the end, even though prove of adverse possession is strictly a matter of fact and evidence of a long standing state of affairs, on a prima facie basis the Plaintiffs in my view have not made a case. Too much has been left for the courts inference even by the Defendant who states that the Plaintiffs originally occupied the suit property as tenants but does not state when and what were

the terms of the tenancy. I find that the Plaintiffs have not shown a prima facie case with chances of success.

13.The Defendant has also submitted that they are in possession. A statement to like effect was also made under oath in the Replying affidavit. This was not denied by the Plaintiffs. Rather the Plaintiffs confirmed the position when the Plaintiffs expressly complained at paragraph 5 and 6 of the Affidavit in support of the Notice of Motion that the Defendant has demolished structures on the suit property and also denied the Plaintiffs access to their businesses on the suit property. It is consequently evident that the Defendant has taken possession of the suit property which it has even fenced off. What then would be the purpose of a negative injunction as sought by the Plaintiffs in the circumstances? It would serve no purpose. I would hold that even in the absence of an injunction the Plaintiffs, who have been out of possession since February, 2014 will not suffer irreparably.

14.In the result, I hold that the plaintiffs have not made out a case for an interlocutory injunction, the application dated 28th February, 2014 ought to be dismissed and is hereby dismissed with costs.

15.Orders accordingly.

Dated, signed and delivered at Nairobi this 17th day of February, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent