



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 75 OF 2014

DIANA KAPEEN1ST PLAINTIFF

MICHAEL K KAPEEN2ND PLAINTIFF

SEAN SARUNI KAPEEN.....3RD PLAINTIFF

VERSUS

CAROLINE LEINA LEMOMO.....1ST DEFENDANT

CALVIN OLONANA.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; both parties with claims and counterclaims that are worthy of consideration; balance of convenience; status quo to be maintained)

This suit was commenced by way of plaint filed on 1 March 2014. The four plaintiffs are siblings , and the surviving children, of Livingstone Koitamet Kapeen (Livingstone) (deceased) and Salome Nasieku Kapeen (deceased), who died in the year 1996 and 2003 respectively. It is pleaded that the plaintiffs were raised by their parents in the land parcel Narok/Cis-Mara/Ololunga/158 which land measures 2.8 Hectares. They have pleaded that the said land is ancestral family land inherited by their father from his forefathers; that they have occupied it for the last 44 years; and that to the best of their knowledge, the land had not yet been adjudicated at the time their parents died. They have asserted that this is their home; that they know no other home; that their parents and sister were buried on the said land; and that even after the death of their parents, they continued living on the land.

This went on until 5 March 2013 when they were summoned by the District Commissioner on the complaint of the defendants. The defendants are the plaintiff's cousins as they are children of Livingstone's elder brother. It was claimed that the defendants have inherited the land from their late father and were processing title documents. The plaintiffs state that they were shocked by this turn of events. They aver that the 1st defendant is married and lives in Tanzania. She informed them to exhume the bodies of their parents and sisters as she wanted to sell the land. On 7 March 2014, they were given a 7 day notice to vacate and that is what prompted them to file this case. It is their case that the defendants acquired title fraudulently as this is an attempt to disinherit them. There is also a pleading that in the alternative, they have acquired title by way of adverse possession. In the suit, they have asked for the following orders :-

- (a) A permanent injunction to restrain the defendants from the suit land.
- (b) A declaration that the plaintiffs are the legitimate and beneficial owners.
- (c) An order directing that they be registered as proprietors of the suit land.
- (d) Damages for trespass.
- (e) Costs and Interest.
- (f) Any other relief that the court may deem fit.

Together with the plaint, the plaintiffs filed an application for injunction to stop the defendants from evicting the plaintiffs or interfering with their possession pending hearing and determination of this suit. The application is supported by the affidavit of the 1st plaintiff who has more or less repeated the averments in the plaint. She has annexed several photographs of the suit land showing a house, graves and evidence of cultivation. She has also annexed the notice to vacate issued by the 1st defendant on 5 March 2014.

The defendants entered appearance and filed a statement of defence and counterclaim. They also filed a Notice of Preliminary Objection and an application of their own, asking that the suit be struck out. In their defence they pleaded that they are the biological children, administrators and beneficiaries of the estate of David Lemomo Kapeen (deceased), and the legal proprietors of the suit land, whose value they have estimated at about Kshs. 100 Million. They aver that the suit property was subject of Nairobi High Court Succession Cause No. 1214 of 2009 relating to the estate of David Lemomo Kapeen which has been finalized and the grant confirmed. They have stated that they have no notice of the plaintiffs' interest in the suit land; that the fact that the plaintiffs buried their parents on the suit land does not confer them with proprietary rights; that the defendants are only occupying 1/2 acre and not 2.8 hectares; that even this occupation is without the permission of the defendants; that the land is about 40 acres; and that no objection was raised by the plaintiffs in the succession proceedings. In the counterclaim, they have asked for a declaration that they (the defendants) are entitled to exclusive possession of the land; vacant possession and mesne profits.

In their application to strike out the plaint, it is their contention that the suit is frivolous and vexatious and discloses no cause of action. It is averred that the plaintiffs are guilty of material non-disclosure for failing to disclose the existence of succession cause No. 1214 of 2009. It is also averred that the claim for adverse possession ought to come under Order 37 of the Civil Procedure Rules. The supporting affidavit to this application of the defendants, and their Replying affidavit to the plaintiffs' application for injunction, more or less assert the same issues that I have laid out above. They have annexed the grant and confirmed grant of letters of administration of the estate of David Lemomo Kapeen and a copy of the register of the suit land. The same shows that the land is 2.8 hectares with the first proprietor being David Lemomo Kapeen, having become registered as proprietor on 10 July 1980.

The Preliminary objection is to the effect that the suit does not comply with the mandatory provisions of Order 37 Rule 7, which requires an originating summons in a claim for adverse possession supported by an affidavit and extract of title, and that the verifying affidavit profanes the provisions of Order 19 Rule 4, which requires an affidavit to state the description, abode and postal address of deponent.

The plaintiffs filed a Reply to Defence and Defence to counterclaim. They inter alia pleaded that the land was originally about 100 hectares but their inheritance is comprised in the suit land which is 2.8 hectares. They have averred that they have come to the correct forum to agitate their rights to the suit land. It is further stated that the defendants' father left for them land in an area called Lamek, and that is where the defendants' inheritance lies.

The two applications, the one for injunction and the other for striking out, together with the preliminary objection were canvassed together. I have taken note of the submissions of counsels who agitated their

respective positions and I take the following view of the matter.

The claim of the plaintiff to me, appears to be a claim under a customary trust. I am not too sure whether their intention is to canvass a claim for adverse possession, which is merely pleaded in the plaint as an alternative, and is not among the prayers that they have explicitly asked for. Mr. Ochieng for the plaintiffs in his submissions, in fact stated that the suit is principally not one of adverse possession, and that the mention of adverse possession in paragraph 27 of the plaint is merely in the alternative. Mr. Masika for the defendants, inter alia argued that the matter has already been decided in the succession cause, but I beg to differ.

A claim under customary trust can be made by way of plaint, and it is not a must, that the claim be tabled in the succession cause. There have been various cases of customary trust and these were not necessarily decided in succession proceedings. This is not to say that the plaintiffs' case herein must succeed. What I am trying to say, is that there seems to me to be substance in the claims of the plaintiffs, and I do not think the plaintiffs' claims herein can be termed as frivolous or vexatious, or that the plaint does not disclose a cause of action. I actually think that there are serious issues of customary trust to be tried in this matter. I therefore decline the application to strike out the plaint and also decline to allow the preliminary objection. These two are dismissed with costs.

That only leaves the application for injunction filed by the plaintiffs. For the court to allow an application for injunction, it needs to be convinced that a prima facie case has been laid, and if in doubt, the court will determine the matter on a balance of convenience. Both plaintiffs and defendants have strong points in their favour, and I think it will not be wise for me to go into length in assessing the relative strengths and weaknesses of each in this application. That, in the light of the claims and counterclaims, is best left for the trial. I will therefore decide this application on a balance of convenience.

In my view, the balance of convenience is to allow the status quo which prevailed at the time that this suit was instituted. From the material tabled, it seems as if it is the plaintiffs who have been in possession, and that is why the defendants issued them with a notice to vacate. I therefore order that the said status be maintained pending hearing of this suit. I also issue an order of inhibition, inhibiting the registration of any disposition in the register of the suit land and none of the parties should attempt to sell, charge, lease or otherwise encumber the suit land. The costs of the plaintiffs' application shall be costs in the cause.

It is so ordered.

Dated, signed and delivered in open Court at Nakuru this 11th day of February 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of:-

Mr Yoni holding brief for Mr Agwara of M/s Prof. Albert Mumma & Co Advocates.

Mr Ikua holding brief for Mr. Masika of M/S Masika & Korose Advocates

MUNYAO SILA

JUDGE

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