



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 607 OF 2013

SUSAN MBEKE KASOME & 872 OTHERSPLAINTIFFS

VERSUS

NJIRU AGERIA DEVELOPMENT LIMITED.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 20th June 2014 in which the Defendant/Applicant seeks for orders of temporary injunction restraining the Plaintiffs from cutting stones, selling, alienating, entering, wasting or in any way interfering with the parcel of land known as L.R. No. 13468 (hereinafter referred to as the “suit property”) pending the hearing and determination of the Plaintiffs’ Amended Originating Summons dated 26th August 2013 and further that the costs of this Application be borne by the Respondents.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Waweru Kiratu, the Chairman of the Defendant, sworn on 20th June 2014 in which he averred that the Defendant is the registered owner of the suit property. He produced a copy of the certificate of title. He further averred that the Plaintiffs have attempted to carry out quarrying activities in the suit property through use of force, violence and intimidation. He further averred that some of the members of the Defendant reside on the suit property but that none of the Plaintiffs have ever resided there. He added that some of the Plaintiffs have been masquerading as the true owners of the suit property and have been hoodwinking unsuspecting members of the public to engage in agreements with them for the purchase of stones and murram that they excavate from the suit property. He stated further that these illegal activities have led to unwarranted confrontation between the Plaintiffs and members and shareholders of the Defendant and if not addressed may escalate to violence, loss of lives and destruction of property. He stated further that the Plaintiffs’ illegal activities on the suit property have further led to wastage of the property and loss of value thereof as they have been cutting out stones from the land. He further added that the Plaintiffs being fully aware of their illegality have moved to court in this suit by way of Originating Summons seeking to be registered as the owners of the suit property by way of adverse possession.

The Application is contested. The Plaintiffs/Respondents filed their Grounds of Opposition dated 27th June 2014 in which they stated as follows:

1. That the Defendant/Applicant’s right of ownership to the suit property had lapsed by operation of

- law.
2. That the Plaintiffs/Respondents have since acquired overriding interests on the suit property having resided and occupied the same for a period now exceeding 20 years peacefully, openly and uninterrupted.
 3. That the Application is fatally defective and consequently an abuse of the court process in so far as the same is not premised on any substantive prayers.
 4. That in any event the Defendant/Applicant has not established any irreparable loss likely to be suffered by them and which cannot be compensated by way of damages.
 5. That the Defendant/Applicant has not established any prima facie case with probability of success.
 6. That the Defendant/Applicant has not established any cause of action by way of a suit to warrant the grant of the prayers sought for.

Both the Defendant/Applicant and the Plaintiffs/Respondents have filed their written submissions which have been read and taken into account in this ruling.

The issue which I must determine is whether the Defendant/Applicant is entitled to the temporary injunction that they pray for. In deciding whether to grant the temporary injunction sought after by the Defendant/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Defendant/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Defendant/Applicant have a genuine and arguable case? The Defendant/Applicant’s case is that it is the registered proprietor of the suit property upon which some of its shareholders reside. Their further case is that the Plaintiffs/Respondents have never lived on the suit property but are mere trespassers thereon where they excavate murrum and stones for sale to unsuspecting members of the public. It is the Defendant/Applicant’s further case that the Plaintiffs/Respondents have gained access to the suit property through use of force, violence and intimidation. In response to this, the Plaintiffs/Respondents did not dispute these facts. In fact, the Plaintiffs/Respondents did not dispute the assertion by the Defendant/Applicant that it is the duly registered proprietor of the suit property. However, the Plaintiffs/Respondents argue that the ownership rights of the Defendant/Applicant have been extinguished by operation of law and that the Plaintiffs/Respondents have acquired the same by way of adverse possession having resided and occupied the same for a period now exceeding 20 years peacefully, openly and uninterrupted. These being the only substantive grounds that the Plaintiffs/Respondents rely on, I have to state that this court has not reached a definitive decision on them. While the Plaintiffs have filed this suit by way of Amended Originating Summons dated 26th August 2013, it is too early for them to claim that they have acquired ownership rights over the suit property by way of adverse possession. Further, the Plaintiffs/Applicants cannot claim that the title over the suit property held by the Defendant/Applicant has been extinguished by operation of law. That is not the true position at this interlocutory stage of these proceedings. That position can only be determined after this court has heard and fully determined this case. As of now, therefore, I will rely on the decision of Justice Munyao Sila who, when faced with similar circumstances in the case of **Francis Kibii Cherutich vs John Mbuthia &**

2 Others (2013) eKLR, stated as follows:

“Mr. Obutu argued that I cannot grant the injunction sought because the defendants are in possession. I do not buy this contention which is not an uncommon argument. I do not think that all that a trespasser needs to do is enter land and by virtue of that entry an injunction cannot issue against him to prevent him from further acts of trespass. An injunction can and will issue against a person in occupation of land if such person cannot demonstrate that his occupation is lawful or that he has a legitimate arguable claim over the said land. I could only allow the defendants to continue in possession if they had demonstrated a sustainable competing claim in which instance I would have had to decide the case on a balance of convenience which no doubt tilts in their favour. However, the plaintiff in my view has demonstrated a prima facie case with a probability of success and therefore I will not decide this application on the basis of balance of convenience. Having demonstrated a prima facie case with a probability of success, I do not hesitate to issue the injunction sought. I therefore issue an order restraining the defendants from entering upon, planting, ploughing, using or in any other way interfering with the plaintiff’s possession of the suit land until the hearing and determination of this suit.”

As matters stand right now, only the Defendant/Applicant has been able to authoritatively convince this court that it is the registered proprietor of the suit property. They have produced a copy of their certificate of title and this position has not been contested by the Plaintiffs. On their part, the Plaintiffs have not been able to convince this court that they have any sustainable competing claim over the suit property even by way of adverse possession. They have not demonstrated that they have been in occupation of the suit property for any period of time. I take it that they are mere trespassers. That said, allowing the Plaintiffs/Respondents to continue their activities of extracting stones and murrum from the suit property pending the hearing and determination of this suit will no doubt prejudice the interests of the Defendant and cannot be permitted to continue. To that extent therefore, I find in favour of the Defendant/Applicant and do allow this Application. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 5TH

DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE