



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1014 OF 2012

BISHOP ZACHARIA MAGONDU KIMANI.....1ST PLAINTIFF

ZACHARIAH. K. KURIA2ND PLAINTIFF

PETER NJIHIA3RD PLAINTIFF

VERSUS

ROSE MILLICENT ATIENO DEFENDANT

RULING

The Plaintiffs filed the present suit vide a plaint dated 17th Decent 2012 and in addition to seeking a permanent injunction against the Defendant the Plaintiffs sought a declaration that they were the legal owners of land title NO. **Kabete/Kabete/T.253 Kiambu** and an order that tile NO. **Kabete/Kabete/ 253 Kiambu** issued to the Defendant on 19th June 1992 be cancelled. Simultaneously with the plaint the Plaintiff filed a Notice of motion application seeking a temporary injunction against the Defendant restraining her from evicting or entering into the suit premises pending the hearing and determination of the suit and/or further orders of the court. The Plaintiffs application is predicated on the grounds set out on the face of the application and on the grounds contained in the supporting affidavit sworn by Bishop Zachariah Magondu Kimani on 17th December 2012 on behalf of the Plaintiffs and the supplementary affidavit sworn on 1st March 2013. The Defendant opposes the application and has filed a replying affidavit sworn on 14th January 2012 in opposition thereto and the further affidavit sworn on 8th May 2013.

On the directions of the court the parties filed written sub-missions each articulating their respective positions. The plaintiffs case is that they in 1975 applied to the county council of Kiambu for a plot to construct a place for worship and that vide a letter of 24/5/1975 annexed to the Plaintiffs affidavit marked “**BZMKI**” the County Council allocated them plot NO. **Kabete/Kabete/T.253** in terms of their application. The Plaintiffs state that they took possession of the plot and constructed thereon a prayer house, pastor’s house, a kitchen and multi purposes hall as per the photographs annexed to the plaintiffs affidavit and marked “**BZMK2**” and have used these facilities from 1975. The Plaintiffs state that in the year 2000 they received information that someone had fraudulently acquired a title deed to the suit

property and they raised complaint to the County Council of Kiambu who took up the matter with the Land Registrar as per the copy of the letter dated 10/7/2007 from the Town Council of Kikuyu addressed to Puritan Royal Services and copied to the Plaintiffs annexed and marked “BZMK3”.

The Defendant contends that she applied to the County Council of Kiambu for allocation of a plot in the usual manner and was allocated plot NO. **Kabete/Kabete/T.253** during 1991 following approval by the Council vide **minute NO. DPAC/1/92/129** attached to her replying affidavit and marked **RMA 1**. The Defendant claims that she thereafter applied to the commissioner of lands and was issued a title deed a copy whereof is annexed and marked **RMA 2**. The Defendant has further annexed a copy of Transfer of Land of Title NO. **Kabete/Kabete/T.253** signed by the commissioner of Lands on behalf of Kiambu county Council registered on 11th June 1992. The Defendant asserts that at the time she was allocated the suit plot the same was free and vacant and avers that the plaintiffs entered into the suit premises subsequently and put up structures thereon and states that after discovering the presence of trespassers on her said property she complained to Provincial administration and the area Chief asked them to vacate and when they failed to vacate she instructed her lawyers to deal with them and a demand letter was sent to them on 13th July 2012.

It is apparent that both the plaintiffs and the Defendant each claim to be entitled to the suit property. The Plaintiff claim to have been allocated the property by the county council of Kiambu in 1975 and that they entered into possession and constructed a prayer, house (church) and other buildings and have been in occupation since then. The Defendant for her part states she was allocated the plot in 1991 and had a title issued in her name in June 1992. It is not clear whether she took possession and occupation of the plot in 1992 but she states that in 2012 she discovered the plaintiffs and other people were in unlawful occupation of her plot and she initiated action for their removal. The plaintiff contends the allocation of the plot and issue of title to the Defendant could only have been procured fraudulently since the plot had already been allotted to them and in this regard they fault the execution of the transfer by the commissioner of lands instead of by the county council of Kiambu who were the owners of the plot. The Plaintiffs further contend the entity that is purported to have transferred the plot to the Defendant “**Kiambu County Council**” does not exist as a legal entity and hence the transfer was a nullity.

The Defendant for her part sets out her title as evidence of her ownership of the suit property and in her submissions asserts that the title is indefeasible since the plaintiffs have not established she acquired the plot fraudulently or through misrepresentation and thus avers that her title is not open to challenge.

However under the provisions of section 25(1) of the Land Registration Act NO. 3 of 2012 even though the rights of a proprietor are not liable to be defeated except as provided by the Act, the said rights and privileges of a proprietor are under section 25 (1) (b) of the said Act held subject to:-

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require nothing on the register, unless the contrary is expressed in the register.

The Plaintiffs under paragraph 9 of the plaint have pleaded thus:-

9. further and in the alternative the plaintiffs aver that they had acquired the right to title NO. Kabete/Kabete/T.253 by adverse possession at the time when the Defendant obtained the said title by fraud.

Should the Plaintiffs prove this assertion at the trial they would be entitled to be declared as the owners of the suit property. Besides the Plaintiff continued in occupation of the suit premises from June 1992 when the Defendant was registered as owner until 2012 when the Defendant sought to have the Plaintiffs removed and this state of things begs the question whether the Defendant would pursuant to the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya be entitled to recover the possession of the land from the Plaintiffs.

There are matters and issues that will need to be determined and settled at the trial and all I need to state at this stage is that section 28 (h) would appear to place a clog on the Defendant’s title as relates to the

claim by the Plaintiffs.

Section 28 of the Land Registration Act provides as follows:-

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register (a).....

(h) rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.

I have considered the contentions by both the Plaintiff and the Defendant and what is in issue is the ownership of the suit property and that neither party’s claim is frivolous. It is therefore essential that the subject matter of the suit be preserved until the suit is heard and determined so that the question of ownership is determined on merit. It is not possible at this interlocutory stage to resolve and determine the issue of ownership. It is in the interest of both parties that the subject matter of the suit be maintained and preserved in its present state. I therefore find that the order that commends itself in the interest of justice is that the parties do maintain the present and obtaining status quo in regard to the suit property until the suit is heard and determined.

Consequently I order and direct that the parties maintain the present status quo such that no party shall undertake any further constructions on the suit land and/or transfer or dispose the suit property until the suit is heard and determined.

The costs of the application are ordered to be in the cause.

Ruling dated and delivered at Nairobi this...31st.....day of...January.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....**PLAINTIFF**

.....**DEFENDANT**