



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 442 OF 2014

HANNAH W. NDUNGI.....1ST PLAINTIFF

JOHN GITHI NDUNGI.....2ND PLAINTIFF

SIMON NGIGI NGUNGI.....3RD PLAINTIFF

VERSUS

GIDEON MBURU THIANI.....DEFENDANT

RULING

The Plaintiffs' Application

The application before the court for determination is a Notice of Motion dated 9th April 2014 filed by the Plaintiffs, seeking orders of a temporary injunction against the Defendant to restrain him from evicting and/or interfering with the Plaintiffs' quiet possession of the parcel of land known as Dagorreti/Ruthimitu/148 (hereinafter "the suit property"), pending the hearing and determination of this suit. The grounds for the application are that the Defendant has threatened to evict the Plaintiffs from the suit property. Further, that the Plaintiffs have invested on the said property and have enjoyed quiet possession of the same for over 50 years.

The Plaintiffs in their supporting affidavit sworn on 9th April 2014 by the 2nd Plaintiff state that the Plaintiffs who are members of the family of the deceased Ndungi Kamau Karindi who was their father, have been in possession of the suit property for over 50 years. The deponent explained that the said property together with another parcel of land known as Dagorreti/Ruthimitu/124 were initially owned by their deceased grandfather known as Karindi Ndungi.

Further, that upon their grandfather's death the suit property was mistakenly bequeathed to one of his dependants known as Ndoongi Karindi, who was supposed to get Dagorreti/Ruthimitu/124. The said Ndoongi Karindi sold the suit property under the mistaken belief that the same was Dagorreti/Ruthimitu/124, and that since then all subsequent purchasers including the Defendant have been in occupation and/or possession of Dagorreti/Ruthimitu/124 but while having title to the suit property.

The Plaintiffs claim that they and other family members have always been in actual possession and/or occupation of the suit property, while the Defendant has always been in actual possession and/or occupation of parcel of land No. Dagoretti/Ruthimitu/124. Further, that they were therefore shocked to be summoned and informed by the local Chief that the Defendant was claiming that he was in actual possession and/or occupation of the suit property and wanted them to be evicted from the same.

It is the Plaintiffs' contention that due to their said occupation, the Defendant's title has become extinguished, and that they have acquired title to the suit property by adverse possession as provided by law. The deponent attached copies of the letters from the Chief, Mutuini Location to this effect, and copies of the title deeds to the suit property and of Dagoretti/Ruthimitu/124.

The Defendant's Response

The Defendant opposed the Plaintiff's application in a replying affidavit sworn on 5th May 2014, wherein he stated that he is the registered owner of the suit property, and that the Plaintiffs are trespassers thereon and have no right to occupy the said land. He annexed a copy of his title to the suit property. The Defendant denied that the Plaintiffs had been in continuous occupation of the suit property for over 50 years, and stated that there were no structures thereon. Further, that the occasional farming and hiring out of the land for cultivation by the Plaintiffs did not constitute substantial occupation or actual possession.

The Defendant claimed that the mistaken occupation of the suit property had been admitted by the Plaintiffs, and could not therefore give rise to a claim for adverse possession. Further, that he has never occupied nor possessed the suit property, and could therefore not be dispossessed of the same. The Defendant averred that he acquired the title to the suit property as a purchaser for value and the alleged mistake in allocation if any, occurred before he purchased the said land.

The Submissions

The parties were directed to file written submissions on the Plaintiffs' application. The Plaintiffs' counsel filed submissions dated 30th June 2014, wherein he relied on the decision in **Archbishop Stephen Musa Thuo & Another vs Bishop Johana Kamande & Another (2012) e KLR** to argue that the Plaintiffs have met the conditions for the grant of a temporary injunction, as they had have been in continuous occupation of the suit property and invested in the same, cultivated thereon and made it their family abode. The counsel also submitted that that the Defendant had acquiesced to the Plaintiffs' occupation and was not in physical possession of the suit property. Further, that the Plaintiffs will suffer irreparable damage if the injunction is not granted, and for the same reasons the balance of convenience tilts in their favour.

The Defendant's counsel filed written submissions dated 2nd July 2014. The counsel submitted that the Plaintiff had not established a *prima facie* case as their claim of adverse possession cannot lie. It was the counsel's argument that the Plaintiff's occupation of the suit property was not with the clear intention of dispossessing the Defendant, as they had assumed that the said property was their family land until informed otherwise by the Defendant. Therefore, that time only began to run when the Plaintiffs realized they were on the wrong parcel of lands. The counsel referred to the decision in **Sadaka Dzeno Mbauro vs Kenya Commercial Bank Ltd, Malindi ELC Case No 106 of 2007** and **Wambugu vs Njuguna (1983) KLR 173** in this respect.

The Defendant's counsel further submitted that there is no irreparable injury that can be suffered by the Plaintiffs as the suit property is not developed and there are no structures built thereon. The counsel contended that there was only a small patch of cultivated land on the suit property and that the rest was a bush.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The question to be determined is whether the Plaintiffs have met the threshold for the grant of the order of temporary injunction sought. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR 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.”

The Plaintiffs in the Originating Summons dated and filed herein on 9th April 2014 are seeking to be registered owners of the suit property by way of adverse possession. They claim that they have been in occupation and possession of the suit property for 50 years, and have invested heavily in, and developed the same. While this Court cannot at this stage definitively decide on whether the elements of adverse possession have been met by the Plaintiffs, evidence of possession is crucial and necessary for the Plaintiffs to establish a *prima facie* case. The Plaintiffs however did not provide any evidence of their occupation and /or possession of the suit property, or of the developments they allege to have made thereon. In the circumstances I find that they have not established a *prima facie* case, and accordingly decline to grant the prayers sought in their Notice of Motion dated 9th April 2014.

The Plaintiffs shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____22nd____ day of ____September____, 2014.

P. NYAMWEYA

JUDGE