



Rothea & 2 others (Suing on their Behalf and on Behalf of the 275 Members of Arumrum Kambi ya Simba Self Help Group) v Lauti Hill General Stores & 42 others (Environmental and Land Originating Summons E015 of 2022) [2024] KEELC 5873 (KLR) (20 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2022
AK BOR, J
AUGUST 20, 2024**

BETWEEN

**JEREMIAH ROTHEA 1ST PLAINTIFF
PATRICK ITAPARA ELIMO 2ND PLAINTIFF
WILSON TANUI BARNO 3RD PLAINTIFF
SUING ON THEIR BEHALF AND ON BEHALF OF THE 275 MEMBERS OF
ARUMRUM KAMBI YA SIMBA SELF HELP GROUP**

AND

LAUTI HILL GENERAL STORES & 42 OTHERS & 42 OTHERS .. DEFENDANT

RULING

1. The Plaintiffs brought the application dated 20/11/2023 seeking a temporary injunction to restrain the Defendants, their agents or employees from entering, subdividing, erecting beacons, leaving eviction, demolishing structures, transferring, changing, releasing or in any other way interfering with the land known as Marmanet Melwa Block 2/3 to 150 (“the suit property”) pending hearing and determination of this suit.
2. The application was made on the grounds that this suit was instituted on behalf of 275 members of Arum Arum Kambi ya Simba S.H.G who have been in occupation of the suit property since 1965 and that on 18/11/2023, some of the Defendants visited the suit property in the company of surveyors with survey equipment and appeared to be undertaking a survey exercise. Further, that the Defendants had issued verbal threats to the Plaintiff’s members that they were on a survey mission to subdivide the suit property into plots and will soon start erecting beacons and evicting the members of the Plaintiff. It was alleged that they were armed with crude weapons and were ready to use violence to the Plaintiff’s members necessitating the filing of the application.



3. The application was supported by the affidavit of Jeremiah Rothea who deponed to the same set of facts set out in support of the application. Catherine Kabugo Wangai swore the replying affidavit in opposition to the application. She confirmed that the conduct of the survey and erection of beacons on the suit property took place on 19/11/2023 but denied that that was done amid verbal threats to members of the Plaintiff. She added that the suit property had already been subdivided and devolved to the beneficiaries of the estate of the late Titus Wangai Mwaniki and to the purchasers of portions of the land for good consideration all of whom are Defendants in this case. She averred that the erection of the beacons was an exercise necessary to demarcate the boundaries of the different portions belonging to the Defendants and that that exercise would not occasion any irreparable harm to the Plaintiff. That in any event, the pendency of this suit over the proprietorship of the suit property afforded the Plaintiffs who are in occupation of the land an unfair advantage over the Defendants.
4. The court directed parties to file written submissions. In the written submissions filed on 15/1/2024, the Plaintiffs submitted that they had resided on the suit property since 1965 and were claiming adverse possession in the suit. That while it was true that the 1st Defendant was the registered proprietor of Marmanet/Malewa /Block 2/2 and the 2nd to 43rd Defendants were beneficiaries of the land, their rights were not absolute pursuant to Section 28 of the [Land Registration Act](#) until the suit was heard and concluded. They urged that the court's duty at this juncture was not to determine the issues raised in the suit but to determine whether the orders sought in the application ought to be granted based on what was before the court.
5. The Plaintiff urged that unless an injunction was granted, the Defendants might evict them from the land since they had already commenced the survey of the land and plans were underway to subdivide the suit property into plots. Being in possession of the suit property, they stood to suffer loss and damage which could not adequately be atoned for by an award of pecuniary damages. Further, that having established that they were in occupation of the suit property before it was demarcated, the balance of convenience tilted in their favour. They urged the court to maintain the status quo pending the outcome of the litigation.
6. In the written submissions filed on 12/2/2024, the Defendants submitted that the Plaintiffs' application fell short of expectation because their claim for adverse possession of the suit property was false and misguided, on the basis that their encroachment as a self-help group only begun in 2016. Additionally, that the self-help group became operational in 2014 and begun encroaching on the suit property in 2016 upon the demise of Titus Wangai Mwaniki. They urged that it was not proper for the court to determine the case on affidavit evidence since the issues of fact were seriously contested.
7. On irreparable loss, they contended that the Plaintiffs had an unfair advantage since they were in occupation of the suit property to the detriment of the Defendants. The Defendants also submitted that the balance of convenience tilted in their favour since they acquired proprietary rights in the suit property vide the letter of allotment dated 11/10/1996 from the Commissioner of Lands. Further, that as at 1/1/2016, Titus Wangai Mwaniki who was the registered owner passed away and his estate was subjected to succession proceedings with the result being that the suit property devolved to the beneficiaries of his estate through his widow Catherine Kabugo Wangai who was appointed administrator. The suit property was eventually subdivided and devolved to the beneficiaries of his estate and individuals who had purchased portions of it.
8. The issue for determination is whether the court should grant an order of injunction to restrain the Defendants from dealing with the suit property pending determination of this suit. What the court has to consider is whether the Plaintiffs have established a prima facie case and the harm they will suffer



unless the orders sought are not granted. If in doubt, the court will determine the matter based on balance of convenience.

9. The court has considered the application, the Replying Affidavit together with the supporting documents. The Plaintiffs claim to have been on the suit property since 1965 while the Defendants contend that the land was allocated to Titus Wangai Mwaniki on 11/10/1996 and that the Plaintiffs moved to the land in 2016. These are all facts which will have to be tested during the trial. The Plaintiffs are apprehensive that if the survey of the suit property proceeds, then they may be evicted from the land before a determination of their claim to the land through adverse possession is made. If evicted from the suit land, the Plaintiffs would suffer irreparable loss. It is in the interest of the parties that the suit is heard and determined expeditiously.
10. The court grants prayer 3 of the application dated 20/11/2023 on condition that the Plaintiffs give an appropriate undertaking to pay damages within 15 days of the date of this ruling.

The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Waichungo Martin for the Plaintiffs

Mr. K. Muchiri holding brief for Mr. G. Mwangi for the Defendants

