



REPUBLIC OF KENYA



KENYA LAW
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Dindila & another v KCB Bank Kenya Limited & another; East African Portland Cement Co Ltd (Interested Party) (Environment & Land Case E004 of 2023) [2023] KEELC 16596 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16596 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E004 OF 2023
A NYUKURI, J
MARCH 28, 2023
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
(CAP 22) LAWS OF KENYA
AND
IN THE MATTER OF THE LAND REGISTRATION ACT 2012
AND
IN THE MATTER OF LAND REFERENCE NUMBER 8784/654
(I.R. 246244) (ORIGINAL NUMBER 8784/146/2) AS WELL AS
LAND REFERENCE NUMBER 8786 (I.R. 11095/1)

BETWEEN

JOSEPHAT DINDILA 1ST PLAINTIFF

JOSEPH MUTUA 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

MILIKISPACE PROPERTIES LIMITED 2ND DEFENDANT

AND

EAST AFRICAN PORTLAND CEMENT CO LTD INTERESTED PARTY



RULING

Introduction

1. Vide a notice of motion dated February 24, 2023, the plaintiffs/applicants sought the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an injunction order against the defendants by themselves, their agents, servants and/or advocates by way of staying the continuance and completion of the intended sale, payment of purchase price, transfer and/or any other dealings of the suit property.
 5. That pending the hearing and determination of the petition herein, this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, their agents, servants and/or any other person acting under their instructions from evicting, trespassing, entering or otherwise interfering with the plaintiffs and other legally recognized squatters' quiet occupation and possession of the suit properties.
 6. That the costs of this application be provided for.
2. The application is premised on the grounds stated on its face together with the affidavit sworn by Joseph Mutua, the 2nd plaintiff. The applicants' case is that the 1st interested party was the initial registered proprietor of land reference numbers 8784/654 (IR 246244) (original number 8784/146/2) and land reference number 8786 (IR 11095/1) (hereinafter referred to as the suit properties), which were later transferred to the 1st defendant on account of mortgage.
3. The plaintiffs stated that they have been in occupation and possession of the suit property since 2008 without any interference. According to the plaintiffs, the interested party had recognized the plaintiffs' occupation and taken steps to have the plaintiffs and others to be formally allocated portions of the suit property. They insisted that they have used the suit property as of right continuously to the exclusion of the 1st defendant with the knowledge of the 1st defendant since 2008. Further, they stated that their entry on the suit properties was without force, without stealth and without permission. They further averred that they had acquired adverse possession rights over the suit properties by living on the suit properties for over twelve years as legally recognized squatters and have heavily invested on the land by putting up permanent structures for both residential and commercial purposes.
4. They alleged that the 1st defendant being aware of the petitioners' proprietary rights to the suit property, issued a notice to the general public seeking sale of the suit properties and that the plaintiffs have been made aware of the 1st defendant's intention to irregularly dispose of the suit properties. The plaintiffs contend that the intended sale and transfer of the suit properties is unconstitutional as it deprives the plaintiffs right to property which is enshrined in article 40 of the *Constitution* and that the same undermines the ongoing public participation exercise, sale and regularization process between the interested party and the plaintiffs. They are apprehensive that the intended sale will result in their properties being demolished. Their position is that the 1st defendant has no title or proprietorship of the suit property to pass to the 2nd defendant.



5. The application was opposed. The 1st defendant filed grounds of opposition dated March 10, 2023. Their position was that the plaintiffs had not demonstrated a basis for asserting ownership of the suit properties thereby failing to establish a prima facie case. According to the 1st defendant, the suit properties are lawfully and legitimately registered in the name of the 1st defendant pursuant to a court order issued in Milimani HCCOMMMISC/E1322 of 2020 which granted the 1st defendant leave to purchase the suit properties from the interested party herein.
6. It was the 1st defendant's position that the 12 year mark for adverse possession has never been attained against the 1st defendant as the suit properties were Government land owned by East Africa Portland Cement Ltd (a State Corporation) until 2022 and that therefore, the period before 2022 does not count to be computed in arriving at the statutory 12 years for a claim under adverse possession. They stated that there cannot be a claim for adverse possession against public land.
7. The 1st defendant further averred that the plaintiffs had not demonstrated possession of the suit property and that the balance of convenience tilts in favour of the 1st defendant as the plaintiffs had not demonstrated conditions for grant of injunction. They also stated that there were no allegations of irregularity or illegality made or construed from the pleadings and evidence against the 1st defendant and that there were two other similar suits being Machakos ELC constitutional petition No E003 of 2023 and Machakos ELC Misc No E057 of 2023. They held the view that the application was frivolous, vexatious, misconceived and an abuse of the court process.
8. The interested party filed a replying affidavit sworn by Florence Mitey, their Company Secretary, on March 24, 2023; in opposition of the application. It was the interested party's case that although the plaintiffs' claim is based on the doctrine of adverse possession, no document has been produced by the plaintiffs to demonstrate that they have any identifiable right or claim over the suit properties or that they have constructed on the suit properties. Further, that even if there were constructions, the same would be illegal and amount to forcible detainer.
9. They stated further that on January 19, 1955, the interested party was granted all that land known as LR No 8786 measuring 745 acres situated in Athi River Trading Centre to hold for a term of 945 years with effect from January 1, 1955. That subsequently, on April 1, 1962, the interested party was further granted LR No 8784/4 measuring 1,363 acres situated in East of Mavoko Municipality to hold for a term of 949 years 9 months with effect from April 1, 1962.
10. The interested party further stated that over the years, the interested party has obtained several banking facilities from the 1st defendant to be able to finance its working capital. Further that the interested party obtained a loan from the 1st defendant which fell into arrears leading to the latter to commence the process of exercising its statutory power of sale. That negotiations ensued and an agreement was reached to transfer the suit properties to the 1st defendant to ensure payment of all outstanding debts. Further that *vide* Misc cause No E1322 of 2020, the 1st defendant was granted leave to purchase as chargee the property known as LR No 8786, *vide* the court's order made on January 5, 2021 which led to transfer of the said property to the 1st defendant on February 8, 2021 at a consideration of Kshs 4,850,000,000/-.
11. They further stated that the transfer of LR No 8786 to the 1st defendant did not cover the entire debt, and therefore the parties agreed to have the interested party's parcel number LR No 8784/146/2 transferred to the 1st defendant. They also stated that the plaintiffs' claim purports to defeat the rights created under the charge and debenture instruments in favour of the 1st defendant and that if that were to be granted, that would lead to disastrous consequences on a publicly quoted company. They stated that the issue of the 1st defendant's securities being in place has been in the public domain as the



interested party publishes its annual accounts. They maintained that the suit properties having been transferred to the 1st respondent, the latter became the legitimate owner of the said properties with a right to deal with the same in any manner they deemed fit.

12. They also stated that some unknown people have over the years tried to illegally encroach on the suit properties and have been evicted on several occasions but that due to the sheer size of the land, the illegal encroachment has persisted. Further that the plaintiffs in cohorts with other illegal invaders have tried to frustrate the interested party's ownership of the suit properties and have by abuse of the court process filed Machakos ELC No 185 of 2016 and ELC No 116 of 2014 among other matters; which suits were dismissed. They also stated that a similar petition and application was filed *vide* Machakos ELC petition No 15 of 2021, *David Musau Mutiso & 2 others v Kenya Commercial Bank & 3 others*, but that the application was dismissed on February 21, 2023. They therefore maintained that the interested party had the right to transfer the property and that no claim has been demonstrated by the plaintiffs.

Analysis and Determination

13. I have carefully considered the application, the supporting affidavit, grounds of opposition and the replying affidavit. The issue that arise for determination is whether the plaintiffs deserve orders of temporary injunction. Order 40 rule 1 of the *Civil Procedure Rules* provides for the jurisdiction of the court to grant a temporary injunction where the applicant demonstrates that the disputed property is in danger of being wasted, damaged, alienated, wrongly sold in execution of a decree or that there is a threat of the property being disposed of in circumstances that may result in obstruction or delay of any decree that may be issued in favour of the applicant.
14. Principles of grant of temporary injunction are well settled. To obtain a temporary injunction, the applicant must demonstrate the following;
 - a. That they have a *prima facie* case with probability of success;
 - b. That they stand to suffer irreparable injury if a temporary injunction is not granted; and
 - c. Where the court is in doubt in regard to the nature of the loss to be suffered, the court shall determine the application on a balance of convenience.
15. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held as follows;

in an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a) establishes his case only at a *prima facie* level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b), by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.
16. In the instant application, the plaintiffs' claim on the suit property is premised on the position that they have acquired the suit properties by the doctrine of adverse possession by being on the suit properties for over 12 years, since 2008 uninterrupted, and exclusively to the exclusion of the 1st defendant. Further that the interested party has recognized them as squatters on the suit properties, and that the 1st defendant has sold the suit properties to the 2nd defendants. In support of these allegations, the plaintiffs attached sale agreements dated February 10, 2023 in respect of LR No 8784/654 (original



8784/146/2) and LR No 8786 between the 1st defendant and the 2nd defendant. They also attached five photographs of permanent houses some of which are under construction to show developments on the suit properties.

17. The plaintiffs' claim therefore is based on the doctrine of adverse possession. A claim under adverse possession is a claim made under the *Limitation of Actions Act* where a person exclusively occupies another's land openly, continuously, as of right notoriously and without force for a period of over 12 years, leading to the rights of the registered proprietor thereof being extinguished.

18. Section 7 of the *Limitation of Actions Act* provides as follows;

An action may not be brought by any person to recover land after the end of the twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

Section 13 (1) of the *Limitation of Actions Act* provides as follows;

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

And Section 17 thereof provides that;

Subject to section 18 of this Act, at the expiration of the period prescribed by this act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

19. To establish adverse possession, the claimant ought to demonstrate dispossession of the land from the registered proprietor. In the case of *Wambugu v Njuguna* [1983] KLR, the court held as follows;

In order to acquire by the statute of limitations, title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

20. Therefore, an adverse possession claim accrues as against a registered proprietor of the land in dispute where the acts of the illegal possessor are contrary to the enjoyment of the registered proprietor. In the instant matter, although the plaintiffs alleged that the 1st defendant was the registered proprietor of the suit properties, they did not attach any document showing such registration which could have been, either a search or a copy of the register. It is upon the plaintiffs to show that they have acquired adverse possession rights which have extinguished the rights of the registered proprietor; as the land in issue is registered land.

21. The 1st defendant and the interested party on their part stated that until 2022, the suit properties were registered in the name of East African Portland Cement Ltd, a State Corporation, hence the land was public land. According to them, adverse possession rights cannot accrue as against public land. Indeed, it is trite law that adverse possession cannot accrue against land owned by the Government. See *Ravji Karsan Shanghani v Peter Gakumu* [2019] eKLR. Section 41 of the *Limitation of Actions Act* excludes public land from the application of the said Act and provides as follows;

41. Exclusion of public land

This Act does not –



- a. Enable a person to acquire any title to, or any easement over –
 - i. Government land or land otherwise enjoyed by the government;
 - ii. Mines or minerals as defined in the *Mining Act* (cap 306);
 - iii. Mineral oil as defined in the Mineral Oil Act (cap 307)
 - iv. Water vested in the Government by the *Water Act* (cap 372);
 - v. Land vested in the county council (other than land vested in it by section 120 (8) of the Registered Land Act (cap 300); or
 - vi. Land vested in the trustees of the National Parks of Kenya.
22. It is not disputed that the suit properties were registered in the interested party's name before the independence of this country, and remained registered as such until 2022, when the same were transferred to the 1st defendant. It is also not disputed that the interested party is a state corporation and therefore all assets owned by them are public assets and the land herein is land being enjoyed by the government meaning that the suit properties herein are public land, which falls within the purview of section 41 (a) (i) of the *Limitation of Actions Act*.
23. In the premises therefore, by virtue of section 41 of the *Limitation of Actions Act*, no right under adverse possession could accrue in favour of any person including the plaintiffs as against the suit properties as long as they were registered in the name of the 1st interested party. As it is trite law that a claim under adverse possession can only accrue where it is demonstrated that the claimant has continuously occupied the suit property for over 12 years, it therefore follows that, the 1st defendant having been registered as proprietor thereof in 2022, the period of limitation can only run from 2022 hence the period of 12 years has not lapsed and therefore it is the finding of this court that at a prima facie level, the plaintiffs have failed to show that they have a claim with a probability of success as against the defendants and the interested party.
24. Therefore, I find and hold that the plaintiffs have failed to demonstrate a prima facie case as against the respondents and I hereby dismiss their notice of motion dated February 24, 2022 for being unmeritorious. Costs of this application shall be borne by the applicants.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 28TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Thuita for Plaintiffs

Mr. Ochola holding brief for Mr. Kipkogei for 1st Defendant

Mr. Muturi with Ms Nkatha for Interested Party

Mr. Gikonyo holding brief for Mr. Theuri for 2nd Respondent

Ms Josephine – Court assistant

