



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 56 OF 2017

JAMES WESONGA NAFWA.....PLAINTIFF

VERSUS

JENEPHER MAROTI BARASA.....DEFENDANT

R U L I N G

1. The application under consideration in this ruling is a Notice of Motion dated 16/3/2017 and filed in court on the same date. It was brought by the Plaintiff – **JAMES WESONGA NAFWA** – against the Defendant – **JENEPHER MAROTI BARASA** – who is said to harbour intentions of evicting him from Land Parcel No. MARACHI/ELUKHARI/948. The application is expressed to be brought under Order 40 Rules 1-3 of Civil Procedure Rules.

2. The Plaintiff is seeking interim orders of injunction to restrain the Defendant, her agents, employees, relatives, government officers, authorities or any other person acting on her behalf from evicting the Plaintiff from land parcel No. MARACHI/ELUKHARI/948 or selling, alienating, or transferring the land to third parties or interfering with the suit land in any manner whatsoever until the suit is heard and determined. Also sought are costs of the application.

3. The Defendant is said to be intending to evict the Plaintiff from land parcel No. MARACHI/ELUKAHRI/948 (“disputed land” hereafter). The Plaintiff says he is entitled to the disputed land and as the Defendant might also transfer it to a third party, the suit herein may be rendered nugatory if the Plaintiff ultimately succeeds. The Plaintiff said he has been staying on the disputed land since 1996 and has been cultivating it. Then without his knowledge, the initial owner transferred the land to the Defendant. The Defendant got to know this and complained.

4. The Defendant responded vide a replying affidavit dated 4/5/2017 filed here on 15/5/2017. She introduced herself as wife of the late Festus Were Omire who had several cases with the Plaintiff in his lifetime all touching on the ownership of the disputed land. The Plaintiff is even said to have been evicted from the disputed land and had even paid costs of the cases he lost. The ownership of the disputed land came ultimately to the Defendant who built a house on it and settled there.

5. The present case by the Plaintiff is said to be an attempt to re-adjudicate over the ownership of the disputed land. The Defendant said she is the registered owner of the disputed land and the Plaintiff was said to have no *prima facie* case.

6. The application was canvassed by way of written submissions. The Defendant submissions were the first to be filed on 5/12/2017. The Plaintiff followed with his submissions on 11/12/2017 and filed yet another set of submissions on 13/12/2017. In her submissions, the Defendant pointed out the fact that she is the registered owner of the land and therefore entitled to enjoy all rights and privileges that go with such ownership. She also referred to previous decided cases all revolving around the ownership of the same land. In most of these cases, the Plaintiff was said to have been the loser.

7. The Defendant’s submissions focused mainly on pointing out faults or shortcomings associated with the orders made against him in the previous cases. He said further that he built his home on the disputed land in 1996. He has lived there since and that is why he claims the land as an adverse possessor. In the second set of submissions by the Plaintiff, he pointed out that the registration of the Defendant as owner is subject to his rights as an adverse possessor. The rest of the submissions comprise of continued attacks on the decisions in previous cases made by courts or tribunals.

8. I have considered the application, the response made, rival submissions, and the pleadings as filed. The starting point is the appreciation that the Defendant is the registered owner of the disputed land. It is not easy to ignore or wish away this fact when a person seeking a temporary injunction is not the registered owner of the land. In **JAMIN KIOMBE LIDODO Vs EMILY JERONO KIOMBE & Another: HCC 81 of 2015**, Gacheche J. (as she then was) made a pertinent point when she observed, *inter alia*, that where an applicant has not shown title to the suit land, it is unsafe to hold that a *prima facie* case is made.

9. It has to be borne in mind here that the Plaintiff is not the registered owner of the land. He is seeking a temporary injunction against a registered owner. And besides this case itself, there have been several other cases regarding ownership of the same land and the Plaintiff did not come out the victor. The Plaintiff's application is less appealing when viewed against this background.

10. I have read carefully the Plaintiff's submissions. The submissions contain fairly detailed information about the previous cases. All these cases are faulted for one reason or other. If I were to delve into the details, I would run the real risk of making findings that should only appropriately be made after trial. I would wish therefore to take a different approach. And in this approach, I am guided by the wisdom of the court in **SHITAKHA Vs MWAMODO & 4 Others [1986] KLR 445** where it was held, *inter alia*, that substantive issues should not be decided on at the interlocutory stage. This, it was pointed out, ought to be left for the trial. This same position emerged in the case of **MBUTHIA Vs JIMBA CREDIT FINANCE CORPORATION & Anther [1988] KLRI** where the court held that the correct approach in dealing with an application for interlocutory injunction is not to decide issues of fact, but rather to weigh up the relevant strengths of each side proposition.

11. It appears to me that the submissions of the Plaintiff approach the issue as if this court is sitting on appeal or review of the previous cases. That is not the position. The court's task here is to decide whether to grant the discretionary remedy of interlocutory injunction. The Plaintiff has filed the suit herein but it's clear that he has had other cases concerning the disputed land. In matters of adverse possession, cases are known to have the effect of interrupting the running of time. I really do not know whether that is the position here and I think I should not even know. I think I should only know it during or after trial. But this is nevertheless a consideration I should have in mind in exercising my discretion at this stage.

12. As can clearly be seen therefore, the Plaintiff has several odds stacked against him. The Defendant is the registered owner of the land. Then there have been other cases concerning ownership over the same piece of land and in a number of them it is the Plaintiff himself who has been claiming ownership. Add to this the fact that the Plaintiff has not demonstrated that he has met the threshold required to grant injunctive relief as spelt out in the case of **GIELA Vs CASSMAN BROWN & CO. LTD [1973] E.A. 358**.

13. And given the circumstances of this case, particularly that the Plaintiff is not the registered owner, I am of the view that the Plaintiff should have given an undertaking to pay damages. He has not given such an undertaking. In **GATI Vs. BARCLAYS BANK (K) LTD (2001) KLR 525** the court held, *inter alia*, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

14. When all this is considered, I am of the considered view that I should not issue an injunction. I find the application herein unmeritorious and dismiss it with costs.

Dated, signed and delivered at Busia this 23rd day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: