



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 1156 OF 2014

JACKTONE NZIOKA MUYANGA.....PLAINTIFF/APPLICANT

-VERSUS-

SITOLA KINYILI.....DEFENDANT/RESPONDENT

RULING

1. This is an application for an interlocutory injunction to issue and restrain the Defendant either by self or through agents, proxies or other persons from trespassing, transferring, constructing or interfering with the Plaintiff's peaceful possession of all that property known as Nzai/Kalamba/512. ("the suit property").
2. The Plaintiff claims to be the beneficial owner of the property by way of adverse possession having allegedly been in possession of the suit property since 1974. For that the Plaintiff took out an originating summons for the determination of questions generally as to whether the Plaintiff is entitled to be registered as the proprietor of the suit property by reason of adverse possession.
3. In support of the application for injunctions the Plaintiff swore an affidavit on 27th August, 2014. The affidavit is to the effect that the Plaintiff's father purchased the suit property in 1974 from the Defendant. That was two years after the Plaintiff was born. The Plaintiff states that the Plaintiff's father took possession and the Defendant migrated to Shimba Hills. The Plaintiff like his father before him has built for himself a house on the suit property. The Plaintiff then states that sometime in September, 2014 the Defendant who had not been heard of since 1974 resurfaced and sought to subdivide the suit property with the aim of selling the same. The Plaintiff further states that even the Plaintiff's parents, both deceased, were buried on the suit property as well as the Plaintiff's elder sister. The Plaintiff however does not state when this happened. Finally, the Plaintiff states that attempts to secure the suit property by registering a restriction have failed. The restriction which the Plaintiff registered in July, 2014 was reversed by the Land Registrar without notification to the Plaintiff and the Defendant has now moved a notch higher and seeks to subdivide the suit property. In the latter respect, the Plaintiff has exhibited a letter dated 27th June, 2014 from the District Land Surveyor of Makueni County notifying the Plaintiff of the intended subdivision. The Plaintiff states that unless an injunction is granted he will be dispossessed and will suffer irreparably.
4. The Defendant opposes the application and states that the Plaintiff lacks the capacity to file the

suit and further that the claim discloses no cause of action. The Defendant further contends that he is the registered owner of the suit property. He states that the Plaintiff's father was 'given' one quarter of an acre of the suit land after the Defendant was falsely accused of having stolen from the Plaintiff's father. The Defendant further contends that the annexures being relied upon are not on the suit property and further that the Plaintiff has not constructed on the suit property at all. The Defendant insists that the Plaintiff is not in occupation of the suit land. The Defendant finally admits that he has sold a portion measuring two acres of the suit property to one Jackson Ndolo Matata.

5. Stripped to detail, the Plaintiff's rather lengthy rejoinder reveals the Plaintiff insisting that the title deed was issued in 1976 to the Defendant but the Defendant had never laid claim to any part of the property knowing so well that the Plaintiff and the Plaintiff's father before him had always been in possession since 1974. The Plaintiff invites the court to conduct a site visit to ascertain the actual physical status of the property.
6. Both parties filed written submission which I have carefully read and considered.
7. At this interlocutory stage of the suit, I need only address myself to the simple principles laid out in the case of **Giella vs. Cassman Brown Co. Ltd [1973] EA 358** and elaborately dealt with by Odunga J. in **Bonde –v- Steyn [2013] 2 E.A 8**. Has the Plaintiff established a prima facie case with a probability of success? If an injunction is not granted, will the Plaintiff suffer irreparably? In the event of any doubts, in whose favour does the balance of convenience tilt? I must also keep in mind that the purpose of an interlocutory injunction is not simply to help maintain a status quo but also to ensure that the course of justice as well as its end is not subverted.
8. It is common ground that the Plaintiff and the Plaintiff's father before him have been occupying the suit property since 1974. The Defendant does not deny this. The controversy only arises when the Defendant says that the Plaintiff as well as the Plaintiff's father should have been occupying only one quarter of an acre. There is a dispute as to whether the property, the entire property was sold or 'given' to the Plaintiff's father. The Plaintiff says it was, the Defendant says nay. Both parties for a moment however forgot that the Plaintiff's suit is pegged on the fact of adverse possession and it then matters little how the possession was obtained in the first place. No doubt the doctrine of adverse possession raises various issues including human rights issues when one reads Article 40 of the Constitution. The policy behind however is that stale claims even over real property rights will not be encouraged by the courts hence its foundation being pegged to the Limitation of Actions Act (Cap 22). Secondly, the law has always also insisted on giving a long standing state of facts legitimacy as has been evident in such legal doctrines of estoppel and prescription, to name but just two.
9. A review of the many decision on adverse possession, both local and foreign would reveal that to establish a possessory title, the trespasser, as that is what the claimant must be called, must show (a) that without the consent of the registered owner he had sole and exclusive possession and had carried out such acts as would demonstrate that in the circumstances and having regard in particular to the nature of the land and the way it was commonly used he had dealt with it as an occupying owner might normally be expected to do and that no other person had done so, and (b) that he had the requisite intention to possess the land on his own behalf and in his own name and to exclude everybody else, including the registered owner so far as reasonably possible: see **JA Pye (Oxford) Ltd –v- Graham [2003] AC 419**, **Parshalls –v- Bryan [2013] 3 WLR**, **Mbira –v- Gachuhi [2002] 1 EA 137**, **Wambugu –v- Njuguna [1983] KLR 177** and **Wanje –v- Saikwa [1984] KLR 284**.
10. I am persuaded at this point of the proceedings and for the following reasons, that the Plaintiff has established that like his deceased father before him, he has an arguable and prima facie case in adverse possession. The Defendant admits that the Plaintiff, like his deceased father before him, have been in possession since 1974. The possession was open and adverse. The Defendant begrudged such possession as it was against his wish. Having been falsely accused of a crime he

never committed he was apparently forced to surrender his property to the Plaintiff's father. The Plaintiff's father used the property openly like any proprietor would. Later, the Plaintiff also did. Bodies of the Plaintiff's deceased relatives as well as of the Plaintiff's parents were interred within the suit property. The Defendant however contends that the Plaintiff was to be limited to only one quarter of an acre. I hold the view that the trial court will have to determine that issue of fact as the Plaintiff claims conversely that it was never one quarter of an acre but rather the entire suit property. Likewise, the trial court will also have to determine whether the Plaintiff's occupation or possession of the suit property since 1974 was ever interrupted. For now, I am confident that the Plaintiff has established a prima facie case in terms of the decision of **Mrao Ltd -v- First American Bank of Kenya Ltd and 2 others [2003] KLR 1215.**

11. I now move to the question whether in the absence of an injunction the Plaintiff will suffer irreparably. I would also answer the question in the positive. Even though land can actually be valued, I have stated previously that it has some intrinsic value which runs beyond monetary value. The Plaintiff in the instant case has developed the suit property. The Plaintiff has settled on the same property as has the Plaintiff's family. If the property is to be disposed of now the loss would likely be beyond monetary compensation. In my view the use of the property ought not be disturbed.

12. For the avoidance of any doubts, I also believe that the balance of convenience tilts in favour of the Plaintiff. The Defendant has not been in occupation or user of that suit property even if he holds a Certificate of title. It matters little that there is now a third party in whose favour the Defendant wants to effect a transfer of a portion of the suit land. It should be noted that the said third party ought to have ascertained the exact interest of the Plaintiff or other persons in occupation prior to committing himself to the purchase: see *Githu -v- Ndeete* [1984] KLR 776.

13. In conclusion, I would allow, which I hereby do, the application dated 27th August, 2014 in terms of prayer (c). I also grant costs of the application to the Plaintiff.

14. I further also direct that this suit be transferred for disposal by the Environmental & Land Court at Machakos. Pursuant to Direction 14 of the Practice Directions of the Environmental & Land Court Gazette Notice No. 5178 of 2014, the suit property is situate nearer to the Machakos Environmental & Land Court which is now duly constituted.

15. Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of January, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

.... for the Plaintiff/Applicant

....for the Defendant/Respondent