



No. 427

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 486 OF 2014 (OS)

ITEMBE SENDI 1ST APPLICANT
PAUL MARWA ITEMBE 2ND APPLICANT
NKIRU MARWA ITEMBE 3RD APPLICANT

VERSUS

ROBI MWITA MACHERA.....RESPONDENT

RULING

1. The applicants brought this suit on 18th December 2014 seeking a declaration that they have acquired title to a portion measuring 3.3 ha. of all that parcel of land known as **LR No. Bukira/Buhingera/191** (hereinafter referred to as “**the suit property**”) by adverse possession having had uninterrupted possession thereof for over 12 years. The applicants also sought further orders that the suit property be subdivided and a portion thereof measuring 3.3ha registered in their joint names and an order of injunction to restrain the respondent from interfering with their enjoyment of the said portion of the suit property.
2. Together with the Originating Summons, the applicants filed an application by way of Notice of Motion dated 18th November 2014 seeking a temporary injunction to restrain the respondent from evicting them or interfering in any manner with their occupation of the said portion of the suit property measuring 3.3ha. pending the hearing and determination of this suit. The application was brought on the grounds that the applicants reside on and derive their livelihood from the said portion of the suit property and as such they would suffer irreparable loss if the respondent evicts them therefrom while this suit is pending hearing and determination. In his affidavit sworn in support of the application, the 2nd applicant stated that the respondent had served them with a notice of eviction and that it would serve the interest of justice if the orders sought are granted to restrain the threatened eviction pending the hearing and determination of the suit.
3. The application was opposed by the respondent through a replying affidavit sworn on 22nd December 2014. The respondent contended that the application is frivolous, vexatious and amounts to an abuse of the court process. The respondent contended that the dispute between the parties herein over the disputed portion of the suit property has been arbitrated in various forums and the verdict has always been in favour of the respondent. The respondent contended that the application is intended to deny her the enjoyment of the fruits of the decisions which have been made in her favour by courts of competent jurisdiction. The respondent contended that the 1st applicant is a citizen of the Republic of Tanzania and as such has no right to claim the disputed portion of the suit property. The respondent annexed to her affidavit, a certificate of official

search on the title of the suit property and copies of the various orders that have been made in her favour in the cases that the parties have had over the suit property.

4. When the application came up for hearing on 10th February 2015, the parties relied entirely on their affidavits in support of and in opposition to the application. I have considered the applicants' application and the affidavit filed in support thereof. I have also considered the respondent's replying affidavit that was filed in opposition to the application. The principles that guide the court while considering applications for interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages if the injunction is not granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. See also the case of **Aikman –vs- Muchoki [1984] KLR 353**.
5. The applicants are claiming a portion of the suit property by adverse possession. In the case of **Wanje –vs- Saikwa (No. 2) [1984] KLR 284**, it was held that;
 - i. **In order to acquire by the statute of limitations a 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.**
 - ii. **What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.**

In the case of **Salim –vs- Boyd & Another [1971] E. A. 550**, it was held that for a claimant of land by adverse possession to succeed he must prove that he has been in open, continuous and uninterrupted occupation of the subject land for a period of 12 years or more.

6. The onus was upon the applicants to demonstrate on a prima facie basis that they have been in open, continuous and uninterrupted possession or occupation of the disputed portion of the suit property for a period of 12 years or more. The applicants have contended that they have been in possession of the disputed portion of the suit property since the year 1982. A part from the 2nd applicant whose occupation of the suit property is not in dispute save for the duration of such occupation, the other applicants have not placed any evidence before the court in proof of their occupation of the suit property. The said applicants have not stated whether they have been using the disputed portion of the suit property as their residence or for cultivation. No evidence was placed before the court of any activity being undertaken by the applicants on the disputed portion of the suit property. The 1st applicant is said to be a citizen of the Republic of Tanzania. This contention by the respondent has not been denied. The applicants had a duty to place material before the court on the basis of which the court could say on a prima facie basis that they are in occupation of the disputed portion of the suit property and that their occupation of the same has been continuous and uninterrupted.
7. I have noted from the certificate of official search dated 19th December 2014 that was annexed to the respondent's replying affidavit that the respondent was registered as proprietor of the suit property on 25th July 2014. This means that for the purposes of Limitation of Actions Act, Cap. 22 Laws of Kenya, time could not run against the respondent prior to 25th July, 2014. Before the respondent became registered as the proprietor of the suit property, time could only run against her predecessor in title who in this case was one, **Festo Mwita Machera**. As was held in the case of **Kairu vs. Gacheru (1988) 2 KAR 111**, “**the law relating to prescription affects not only present holders of the title but also their predecessors (S.7 Limitation of Actions Act)**”. The applicant's suit herein having been filed after a lapse of only five (5) months from the date when the respondent became registered as the proprietor of the suit property, the applicants claim can only succeed if the applicants were to establish that they had acquired prescriptive rights over the disputed portion of the suit property before the plaintiff was registered as proprietor thereof. That would mean that their right to acquire the disputed portion of the suit property by adverse possession had accrued as against the plaintiff's predecessor in title, Festo Mwita Machera and that the plaintiff's title to the suit property was acquired subject to the applicant's said right.

8. Festo Mwita Machera, deceased (hereinafter referred to only as “**the deceased**”) was the respondent’s husband. The respondent is the administrator of his estate. The respondent acquired the suit property through Grant of Letters of Administration that was issued to her in respect of the estate of the deceased in **Kehancha Succession Cause No. 29 of 2013**. If the applicants right to acquire the disputed portion of the suit property by adverse possession had accrued as against the deceased who was the registered owner of the suit property from the time the applicants claim to have entered the suit property in 1982 up to 25th July, 2014 when the suit property was registered in the name of the respondent, the applicant’s claim should have been lodged as against the estate of the deceased. In the circumstances, the respondent should have been sued in her capacity as the administrator of the estate of the deceased and not in her own right. I don’t think that the applicants could have acquired prescriptive rights over the disputed portion of the suit property between the time the respondent was registered as the proprietor of the suit property on 25th July 2014 and 18th December 2014 when this suit was filed on the basis of which the reliefs sought in the Originating Summons herein can issue. Even if the applicants had sued the respondent in her capacity as the legal representative of the estate of the deceased, I don’t think that their claim on that account would stand a better chance of success.
9. I have noted from the ruling dated 11th November 2014 by Majanja J. in **Migori Succession Cause No. 400 of 2014, In the matter of the Estate of Festo Mwita Machera (deceased)**, that the 2nd applicant herein who seems to be the main force behind this suit had sought unsuccessfully to revoke the Grant of Letters of Administration that had been issued to the respondent in respect of the estate of the deceased. In that succession cause, the 2nd applicant had contended that the deceased had held the suit property in trust for the applicants. The 2nd applicant had accused the respondent of concealing this fact when she applied for a Grant of Letters of Administration. If the deceased held the suit property in trust for the applicants then the issue of adverse possession does not arise. The applicants could not therefore have acquired any prescriptive rights over the suit property while it was registered in the name of the deceased.
10. The dispute between the parties seems also to have been heard and determined in the respondent’s favour by Provincial Land Appeals Committee for Nyanza Province. The said committee had ordered the 2nd applicant and one Salim W. Itembe to stop interfering with the respondent’s enjoyment of the suit property. The decision of the said committee was adopted as a judgment of the court on 18th September 2009 in Migori CMCC No. 42 of 2009. There is no evidence that any appeal was preferred against the said decision. I have noted further that the respondent had filed another case at Migori against the 2nd respondent, namely, Migori SPMCC No. 457 of 2014 in which an order was made on 4th December, 2014 for the eviction of the 2nd respondent from the suit property. There is no evidence that any appeal has been preferred against that decision or that the same has been stayed. This court is not sitting as an appellate court over the said decision in Migori SPMCC No. 457 of 2014. It will therefore not be able to set aside or review the said order of eviction against the 2nd applicant at the hearing of this suit.
11. Due to the foregoing, I am not satisfied that the applicants have established a prima facie case with a probability of success against the respondent. In view of that finding, it is not necessary for me to consider whether the applicants stand to suffer irreparable injury if the orders sought herein are not granted. The applicants have therefore failed to satisfy the conditions for granting interlocutory injunction and as such their application herein cannot succeed. I would like to add that injunction is an equitable remedy. Those seeking injunction owe the court a duty to make full disclosure of all material facts. An applicant for injunction who conceals material facts to the court cannot partake of the remedy. I am of the view that the applicants concealed from this court the existence of the decision that was made by the Provincial Land Appeals Committee and its adoption as a judgment of the court. The applicants also concealed the decision of Majanja J. in Migori Succession Cause No. 400 of 2014. This court cannot exercise its discretion in favour of a party who is guilty of such non-disclosure.
12. In conclusion, I find no merit in the applicant’s application dated 18th November 2014. The same is dismissed with costs to the respondent.

Delivered, signed and dated at KISII this 13th of March 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the applicants

N/A for the respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE