



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE No. E005 OF 2020 (OS)

ANDREW KIPROTICH LANGAT.....PLAINTIFF/ RESPONDENT

-VERSUS-

JOSEPH KIPRUTO MAINA.....DEFENDANT/ APPLICANT

RULING

1. Vide an undated Originating Summons of 2020, herein filed in court on 14th December 2020, the Plaintiff/Applicant claims to be entitled to be registered as the sole and absolute proprietor of 0.25 acres of land comprised in land parcel No. Kericho/Kipchimchim/3296 **by adverse possession. Simultaneously with the Originating Summons, the Applicant filed a Notice of Motion dated the 9th December 2020 seeking interim orders of injunction restraining the Defendant from interfering with his quiet possession of the said suit land.**
2. It was upon service of the said application that the Respondent filed a Notice of Preliminary Objection on the 15th February 2021 dated the 9th February 2021 seeking to have the Applicant's suit struck out for being incurably defective, frivolous and vexatious because it contravened the provisions of Sections 4 and 7 of the Limitation of Actions Act.
3. By consent directions were taken on the 14th October 2021 for both the Application **dated the 9th December 2020 and the** Preliminary Objection dated the 9th February 2021 to be disposed of through written submissions pursuant to which parties filed their written submissions to which I shall summarize as follows :
4. The Plaintiff's submissions in support of the application seeking interim orders of injunction against the Respondent/Defendant was to the effect that both parties had entered into a sale agreement on 10th March 1998 where the Plaintiff sought to purchase from the Defendant land measuring 0.25 of an acre to be excised from parcel No. Kericho/Kipchimchim/3296. That the Plaintiff subsequently took possession of the piece of land and embarked on planting tea as a source of income. The Defendant received payments for the land and initiated the process of transfer of land by a applying to the Land Control Board for consent, but was unable to finalize the same.
5. It was the Plaintiff's submission that he has enjoyed quiet possession of the suit land until July 2020 when the Defendant invaded the land, and evicted him from thereon before fencing it off with the intention of denying the Plaintiff access. That in the process the Defendant destroyed 60 bushes of tea which compelled the Plaintiff to lodge a caution against the suit land pending the filing of the suit. That the land now remains un-ploughed and the Plaintiff has continued to suffer a loss of 300 kilograms which translate into Ksh 9000/= per month.
6. The Plaintiff's further submission is that he has been in possession of the land for 22 years as an adverse possessor therefore not by force or stealth and therefore there is no doubt that he has established a prima facie case with a high chance of success.
7. That he continues to suffer daily loss as the tea goes to waste hence it is clear that unless the court intervenes, he will continue to suffer loss which is irreparable. That it is therefore sufficient for the court to grant an injunction as the Defendants who was in contravention of the law cannot be rewarded for his illegal acts.
8. In opposition to the application for injunction, the Defendant submitted that there was no doubt that he was the registered proprietor of the suit land parcel No. Kericho/Kipchimchim/3296. That there was also no dispute that the Plaintiff had been evicted from the said property in June 2020 and he had started utilizing it. Basing his argument on the notorious case of **Giella vs. Cassman Brown & Company Limited [1973] EA 358**, the Defendant submitted that the property was no longer in possession and utilization by the Plaintiff and therefore there was no prima facie case established of ownership.
9. That the Plaintiff had not shown he would suffer irreparable damages if the orders were not granted as the ship had already sailed and he was no longer on the suit land. Granting an injunction at this stage therefore would be useless.

10. The Defendant further relied on the case of **American Cyanamid vs. Ethicon [1975] 1ALL ER 504** to submit that since the Applicant could be compensated in terms of damages should the court find that indeed he was the legal owner of the suit land, no interlocutory injunction should be granted. That the balance of convenience lay with the maintenance of status quo as the Defendant had been in occupation of the suit land for a period of one year. His submission was that the court cannot issue an injunction on what has already happened. Secondly, that granting the prayers sought would amount to evicting him from the suit land. He sought for the application to be dismissed with costs.

11. On the second application where the Defendant/Respondent raised a Preliminary Objection to the Plaintiff's suit, his submissions in support of the same was that the suit did not conform to the provisions of Section 7 of the Limitation of Actions Act. That the continuous possession of the suit land was terminated the moment the Plaintiff vacated from thereon.

12. That in order for an application for adverse possession the person claiming it must be in actual use and quiet possession. That on several occasions the Plaintiff had tried to use force in trying to acquire the parcel and secrecy in fraudulently drafting a sale agreement to show that he had purchased the said parcel from the Defendant yet at that time, the Defendant had been bed ridden. That in the case of **Kimani Ruchire vs Swift Rutherfords & Co Limited [1980] KLR**, it had been held that the Plaintiff had to prove that they had used the land which they claimed as of right without force, secrecy or persuasion.

13. The Defendant submitted that the court had no jurisdiction to deal with the application for reasons that the Plaintiff's use of the property was not open and notorious, secondly that there was no continuous use of the property and neither was its use exclusive. Lastly that the Plaintiff was not in actual possession of the same as he had already been evicted from therein. The Defendant/Respondent sought for the suit to be dismissed with cost.

14. In opposition to the Defendant's Preliminary Objection, the Plaintiff submitted that the suit did not contravene the provisions of Sections 4 of the Limitation of Actions Act as it was based on the land and not liable or slander.

15. That the suit was based on the doctrine of adverse possession as stipulated under the provisions of Sections 7 of the Limitation of Actions Act, the Plaintiff having been in possession of the same for over 20 years. The Plaintiff relied on the provisions of Section 13, 37 and 38 of the Limitation of Actions Act, to submit that his suit met the threshold as stipulated in the said provisions of the law, to be filed before court and was therefore not frivolous as suggested by the Defendant.

Determination.

16. I have considered the both the application and seeking interim injunctive orders against the Defendant and the Defendant's application on a point of Preliminary Objection to the effect that the suit should be struck out for reasons that the same was incurably defective, frivolous and vexatious and an abuse of the court process for it was time barred.

17. The background to the present application for the equitable remedy of an injunction pending the hearing and determination of the Plaintiff's suit, can be summarized as follows.

18. Sometime in the year 1998 or 2000 (according to the Defendant) the Plaintiff herein somehow got into occupation, through lease and/or purchase, (issue yet to be determined) of 0.25 acres of land comprised in parcel No. Kericho/Kipchichim/3296, land which is registered to the Defendant, where he commenced to plant tea bushes which he sold as a source of income.

19. That it was not until sometime in June or July 2020, that the Defendant had invaded the land, evicted the Plaintiff from therein before fencing it off thereby denying the Plaintiff access.

20. What is conceded is that the Defendant herein is the registered proprietor of land parcel No. Kericho/Kipchichim/3296 over which the Plaintiff is claiming a portion measuring 0.25 acres of land comprised therein **by adverse possession having been in possession of the said parcel of land for more than 20 years.**

21. It is also not in contention that sometime between June and July 2020, the Defendant invaded the land, evicted the Plaintiff from thereon, fenced it and was now in occupation of the same.

22. The issues that arise for determination therein are as follows;

- i. Whether the injunction could issue when a person has left the land.
- ii. Whether there can be a claim for adverse possession after continuous possession has ceased.
- iii. Whether the Preliminary Objection raised is sustainable

23. The often cited case of **Giella –vs- Cassman Brown (supra)** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

24. In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal explained what constitutes a prima facie case in the following terms:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

25. The Defendant/Respondent having demonstrated that he was the registered owner of the suit property namely No. Kericho/Kipchimchim/3296 wherein he had been issued with a title deed, the provisions of Section 26(1) of the Land Registration Act come into operation which provision stipulate that prima facie his title is indefeasible and the burden would now shift to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

26. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondent’s title but the mere proof that he holds a duly registered certificate which on the face of it was properly acquired, is sufficient to lead the court to hold that the Applicant/Plaintiff has not established that he has a prima facie case.

27. Further, the Applicant had sought, inter alia, an interlocutory injunction to stop the Respondent from **interfering with his quiet possession of the said suit land. The evidence on record which is not contradicted is that the Respondent has already evicted the Applicant from the suit land and has taken possession of the same. In essence therefore there is nothing** which can be the subject of the injunction which the Applicant seeks. (see **Mavoloni Company Limited vs Standard Chartered Estate Management Ltd [1997] eKLR**

28. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya vs David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

29. On the second issue as to whether there can be a claim for adverse possession after continuous possession has ceased, the provisions of Section 7 of the Limitation of Actions Act stipulate as follows;

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

30. It is trite law that the critical period for the determination as to whether possession is adverse is 12 years and that the onus is on the person or persons claiming adverse possession to prove that they are in actual occupation of another person’s land of which they claim as of right, without the true owner’s permission and that the possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration.

31. I find that although it is not in contention that the Plaintiff/ Applicant herein had been in occupation of the suit land from the year 1998 or 2000 (according to the Defendant), he was eventually evicted from the said property between the month of June and July 2020 wherein he had filed the present suit on the 14th December 2020, by which time he was no longer in actual possession of the portion of land on the suit land. It cannot therefore be said that the Applicant is in possession of the suit land as the Defendant/Respondent who is the registered proprietor **took and/or asserted his right by making an effective entry into land.**

32. The principles in **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (1969) EA 696** are clear that for a Preliminary objection to be sustained, it must consist of a point(s) of law which if argued is capable of disposing of the suit. I find that the Respondent herein has argued successfully that the Applicant cannot bring suit against him seeking entitlement to be registered as the sole absolute proprietor of 0.25 acres of land comprised in land parcel No. Kericho/Kipchimchim/3296 **by adverse possession** since he has not proved and/or discharged the elements of adverse possession to wit that he is in actual, open, exclusive and hostile possession of the land claimed.

33. In totality therefore I find that the Applicant has not established a prima facie case as he holds no title to the suit land and further, the Respondent had ousted him from the suit land herein thus discontinuing his claim for adverse possession. The preliminary objection is allowed with the result that I dismiss the Applicant’s application dated the **9th December 2020 and** proceed to strike out his undated Originating Summons of 2020 which was filed on 14th **December 2020**, with costs to the Respondent. The interim orders are vacated accordingly.

Dated and delivered via Teams Microsoft at Kericho this 17th day of February 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE