

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 237 OF 2014

JOSIAH KAFUTA MTLA.....APPLICANT/PLAINTIFF

VERSUS

ABDULKHALIK MOHAMED ABDULKHALIK

MAZRUI & 3 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiff/applicant has filed an originating summons seeking adverse possession. Together with the originating summons, he filed this notice of motion dated 15.9.2014 brought under Order 40 of the Civil Procedure Rules and Section 3 and 3 A of the Civil Procedure Act. The motion seeks :-

“ An order of temporary injunction to restrain the defendants and County administration from interfering with the applicant's peaceful possession, occupation and business on plot No 3981/VI/MN pending the hearing and determination of this suit”.

2. The application is premised on the grounds on its face and the affidavit sworn in support thereof. One of the grounds is that the applicant has been occupying the premises since 1970 and carrying on business on it. Further that the the defendants have expressed their intent to demolish the applicant's house which action will cause the plaintiff irreparable loss and render nugatory the issues for determination between the parties. He urged the Court to grant the injunction orders.

3. The application is opposed by all the respondents. The 3rd and 4th respondents filed grounds of opposition that the application is misconceived vexatious. Secondly that the orders sought are untenable and a nullity. Lastly the applicant is guilty of laches. The 1st and 2nd respondents swore a joint replying affidavit that stating they are the registered owners of plot No.MN/VI/3981. The 1st and 2nd respondents depose that the applicant is a trespasser on their land. Further that th applicant has been consistently informed to vacate but he has deliberately failed and or refused to vacate. The 1st and 2nd respondents depose they have been paying rates and since its an action for trespass, the applicant cannot claim ownership by way of adverse possession. Lastly they deposed that the applicant has not satisfied the principles for granting injunction as set out in the case of **Giella vs Cassman Brown**. They urged the Court to disallow the motion.

4. The advocates put in written submissions which I have had occasion to study and refer to in writing this ruling. From the pleadings filed, it is admitted the plaintiff is in occupation of the suit premises. For instance, the 1st and 2nd respondents deposes in their replying affidavit at paragraph 4 and 5 thus :-

“ 4. The applicant's building is an encroachment on my land and the applicant is thus a trespasser.

5. The applicant has been consistently informed and or warned to vacate the suit property since time immemorial

as he was a trespasser on the land suit property since it it did not belong to him ”.

The Applicant is seeking to be declared the owner of the suit property by virtue of adverse possession. The fact that it is admitted that he is in occupation is a clear fact that he has laid out a prima facie case with a probability of success.

5. The submission by the 1st and 2nd respondents that this occupation has not been open and uninterrupted are issues to be determined at the hearing and not at the interlocutory stage. On the issue of irreparable loss, the applicant pleaded that he has been doing business in the premises and paying all the fees for the requisite licences. This was not denied by any of the respondents. The 1st and 2nd respondents hold the applicant as a trespasser who should leave their land forth with. If the orders sought are not granted, the applicant will be evicted which will render the entire suit nugatory and result in loss of business to the applicant. Besides, the balance of convenience in the circumstance of this case tilts in maintaining the status quo.

6. Lastly on whether an injunction can issue against the 3rd respondent, the Civil Procedure Act at Order 29 (2) only gives provision that no injunction can issue against the government. The government in my understanding of this rule refers to the national government as the Law which created the 3rd respondent made it independent of the national government giving it a legal personality capable of suing and being sued in its name. The case law of **Hiten Kumar Amintal vs City Council of Nairobi Civil Appeal No 47 of 1981 (1982) KLR 75** referred to by the 3rd respondent is distinguishable. There is only one King in the Republic of Kenya being the office of the President. There are 47 Counties which though linked to the national government are run independently. If the law intended to exclude the 3rd respondent from the provisions of Order 40 of the Civil Procedure Rules the drafters of the County Government Act would have said so. I find the preliminary issue raised to be without merit and dismiss it. In conclusion, I find the notice of motion dated 15.9.14 as merited and do grant prayer 3 and 4 as presented.

Ruling Dated and Delivered at Mombasa this **18th** day of **September**, 2015

A. OMOLLO

JUDGE