



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT CASE NO. 1183 OF 2014 (OS)
IN THE MATTER OF AN ORIGINATING SUMMONS

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CHAPTER 22 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

AND

KHAIRUNNISA MOHAMEDALI HARUNANI & 1ST PLAINTIFF

SULEIMAN ABDULSHAKUR HARUNANI 2ND PLAINTIFF

VERSUS

NIRANJAN ZAVERCHAND SHAH 1ST DEFENDANT

SHUSHILA NIRANJAN SHAH 2ND DEFENDANT

PRADEEP BHANGWANJI SHAH 3RD DEFENDANT

SUNANDA PRADEED 4TH DEFENDANT

RULING

1. The plaintiffs as executors of the will of Mohamedali Abudlshakur Harunani (deceased) were registered as proprietors of **LR No. 1870/11/129** situate in Nairobi and measuring **0.4893** of a hectare or thereabouts on 19th June 1986. The plaintiffs caused the said parcel of land to be subdivided into two portions being **LR No. 1870/11/304** measuring **0.3065** of a hectare or thereabouts and **LR No. 1870/11/305** measuring **0.1828** of a hectare or thereabouts. The plaintiffs retained **LR No. 1870/11/304** where they reside and have resided since 1986 when the original parcel of land was subdivided. The plaintiffs sold and transferred **LR No. 1870/11/305** to the defendants on terms and conditions that the plaintiffs contend the defendants have breached and/or have threatened to breach.

2. The defendants are presently the registered proprietors of the leasehold interest in the property known

as **LR No. 1870/II/305** (hereinafter known as the suit premises) along Kabete lane, Nairobi comprising approximately 0.1828 hectares or thereabouts situated along Kabete lane within Nairobi and more particularly being a leasehold interest for 45 years from the 1st June 1986 at an annual rent of kshs. 2,715 per annum payable to the Government of Kenya. The plaintiffs land parcel **LR No. 1870/11/304** is adjacent to the defendants land parcel **LR No. 1870/11/305** the two parcels of land having been subdivided from land parcel **LR No. 1870/11/129** originally owned and registered in the plaintiffs' names. Following the subdivision the plaintiffs sold land parcel **LR No. 1870/11/305** to the defendants who were issued with a certificate of title on 10th December 1986.

3. The plaintiffs contend that the subdivision of their original parcel of land **LR No. 1870/11/129** and the sale of subtitle **LR No. 1870/11/305** (suit premises) to the defendant was subject to the defendants allowing the plaintiffs to use a servants quarters within the defendants suit premises without any charges and further on the understanding that if the defendants were to sell the suit premises to any other party such sale would be subject to the plaintiffs right to at all times continue to use the servants quarter situated on the suit premises without any charges as long as they (plaintiffs or their successors) owned the adjoining premises namely **LR No. 1870/11/304**.

4. The plaintiffs have contend that the defendants are contrary to the aforestated agreement with them seeking purchasers for the entire suit premises without reference to the plaintiffs and this has prompted the plaintiffs to institute the present suit and to file the instant Notice of Motion under Order 40 Rules 1, 2, 4 and 101 (a) of the Civil Procedure Rules dated 3rd September 2014 seeking the following orders:

1. Spent
2. Spent
3. **That an order of injunction do issue against the defendants, jointly and severally restraining them whether by themselves or through their agents/servants/employees or any other person claiming through or under them from wasting, damaging, charging, encumbering, alienating, selling, removing, transferring, conveying or disposing of the property known as title number LR No. 1870/II/305 along Kabete lane within Nairobi and all the buildings erected thereon and particularly those standing on a portion of the said property and described as covering the area measuring 5.2m by 13.4m by 11.45m and by 5.53m pending the hearing and determination of this suit.**

5. The above application is supported by the affidavit of the 2nd plaintiff who depones that the plaintiffs were the registered proprietor of the original suit premises namely **LR No. 1870/II/129** as delineated on the land survey plan number 125578 and that they caused the land to be subdivided into **LR No. 1870/11/304** and **LR No. 1870/11/305** and the latter parcel of land was sold and transferred to the defendants and the defendants were subsequently issued with the title thereto on 10th December 1986.

6. The plaintiffs state that they have become aware that there are persons making inquiries about the defendant's parcel of land for purchase purposes and the plaintiffs are apprehensive that the defendants may proceed to sell and/or dispose the suit property without any regard to the agreement with the plaintiffs which would be prejudicial to the plaintiffs rights and interest over the suit premises and this has necessitated the suit and the instant application.

7. The plaintiffs aver that the agreement between themselves and the defendants was to be reduced into a deed by the defendants, but the parties erstwhile advocate did not see the matter to conclusion. The plaintiffs state that they have nonetheless occupied and used the said servants quarters in the defendants' portion of land both before the said sub-division and after the transfer of their interest in suit premises to the defendants. The plaintiffs aver that they have continually, uninterruptedly, openly, without secrecy, with the defendants consent and without charge continued to occupy and use the said servants quarters and the land in which it is situate with the full knowledge and agreement of the defendants for over 28 years now i.e since 1st June 1986 and have since acquired prescriptive rights and/or adverse possession proprietary rights therein.

8. The plaintiffs' application is opposed by the defendants vide a replying affidavit sworn by the 3rd defendant herein **Pradeep Bhangwanji Shah**. The defendants depone that they are the registered proprietors of the suit premises **LR No. 1870/II/305 (original number 1870/II/129/2)** and have an absolute and indefeasible title and there are no encumbrances registered against the said title. The defendants aver that the plaintiffs are the registered proprietors of property known as **LR No. 1870/11/304 (original number 1870/II/129/1)** and that though the plaintiffs property and the defendant's property neighbor each other they are each clearly delineated and have marked boundaries. The defendants' state that the use of the servants quarter within the defendants property by the plaintiff does not amount to the plaintiffs' having ownership to the said premises.

9. The defendants aver that the arrangement/agreement that the plaintiffs refer to was never finalized and was not registered against the title. The defendants state that they never executed any deed to grant the servants quarters to the plaintiffs and the arrangement/agreement never went beyond the negotiation stage and could therefore not bind the defendants. The defendants further contend that the plaintiffs cannot claim adverse possession over the suit land or any portion thereof since their occupation of the servant's quarters was derived from the proprietors of the land in which it is located in the form of permission and such occupation cannot be said to be adverse. The defendants thus contend that being the registered absolute proprietors of the suit property they are entitled to deal with their property without reference to the plaintiffs and consequently have a right to sell the same.

10. The plaintiffs in a supplementary affidavit sworn on 21st January 2015 by the 2nd plaintiff, aver that notwithstanding the existence of interim orders of the court restraining any interference with the servants quarters located in a portion of the defendants parcel of land **LR No. 1870/11/305** Kabete lane, Nairobi, the defendants through their agents on 10th December 2014 descended on the said servants quarters and demolished parts of the building rendering the same inhabitable and in the process damaged the plaintiffs personal belongings and effects. The plaintiffs state the acts by the defendants have exposed them to substantial loss and are apprehensive that the defendants may unless restrained continue destroying the plaintiffs property to their prejudice.

11. The parties filed written submissions to canvass the application by the plaintiff. The plaintiffs' submissions are dated 30th March 2015 and the defendants' submissions are dated 10th April 2015. The plaintiffs filed further submissions dated 20th May 2015 in reply to the defendants' submissions.

12. I have considered the plaintiffs application together with the affidavit in support thereof and the defendants replying affidavit, the plaintiffs' supplementary affidavit and both parties written submissions. Quiet clearly the issue to resolve in this application is whether the plaintiffs have satisfied the conditions upon which an interlocutory injunction may be granted. The principles for granting a temporary injunction are now fairly well settled and the case of **Geilla –vs- Cassman Brown & Co. Ltd [1973] E. A 358** remains the leading authority on the subject. In the said case the court held that an applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the injunction is granted he is likely to suffer irreparable injury which cannot be compensated in damages. If the court was in doubt in regard to either of the two antecedent conditions then the court could determine the application by considering in whose favour the balance of convenience tilts.

13. In the instant case, the plaintiffs have contended that their right of occupation of part of the suit premises is based on adverse possession. Prima facie therefore, the plaintiffs would be required to demonstrate and show that their occupation of the servants quarters in the suit premises was adverse to the rights and interests of the defendants to warrant the court to grant an injunction in their favour on that basis. The Black Law Dictionary, Ninth Edition at page 62 defines adverse possession as **“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person claim and is continous, hostile, open and notorious.”** Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya sets the statutory threshold to be 12 years for such enjoyment and/or occupation by a claimant to give rise to adverse possession.

14. Claims predicated on adverse possession have been considered and adjudicated upon by courts and there are numerous judicial decisions. In the case of **Mbira –vs- Gachuhi [220] 1 EALR 137**, the court held:

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove nor permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”.

In the case of **Jandu –vs- Kirpial and Another [1975] E. A 225** it was held as follows:-

....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

15. The Court of Appeal judges in the case of **Wambugu –vs- Njuguna [1983] KLR 172** considered the factors and principles that a court ought to take into account in determining whether adverse possession has been proved when they held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

16. There are thus certain elements and characteristics that necessarily have to be established for the possession by a claimant to amount to adverse possession as described in **“Elements of Land Law 5th Edition” by Kerin Gary and Susan Francis Giray** at paragraphs **9.1.44** to **9.1.52**. These are that:-

1. There must be a complete and exclusive physical control over the land in dispute.
2. The possession should be open meaning not secret.
3. It must be peaceful and not by force.
4. It must be adverse and not by consent of the true owner.

17. Having regard to the above factors and principles that require to be satisfied in a claim for adverse possession the issue that the court requires to determine in the instant matter is whether the plaintiffs have demonstrated and/or established a prima facie case with a probability of success to warrant the court to grant a temporary injunction as prayed for at this interlocutory stage. In other words can it be said the plaintiffs have satisfied the test of what constitutes a prima facie case as laid out in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**? In the case the court of appeal held thus:

“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.”

18. In the instant matter it is not disputed that the defendants are the registered proprietors of **LR No. 1870/11/305**, the suit property herein and that there are no encumbrances registered against the property. Thus in terms of sections 24, 25 and 26 of the **Land Registration Act 2012** the ownership rights of the defendant are absolute and indefeasible. The plaintiffs sold the suit property to the defendants and claim that the sale and transfer was subject to the defendants allowing and/or permitting the plaintiffs to have unrestricted use of the servants quarters that were then on the portion sold to the defendants. The plaintiffs further aver that the defendants were for as long as the plaintiffs were the owners of the adjacent property **LR No. 1870/11/304** not to sell the suit property to any third party unless such sale was subjected to the same condition that the plaintiffs were to continue with the exclusive use, possession and

occupation of the servants quarters on the portion of the defendants parcel of land and at no charge.

19. The agreement alluded to by the plaintiffs with defendants was not formalized in writing and was therefore not executed by the parties. In consequence the plaintiffs cannot in terms of section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya, which requires that all contracts/agreement relating to disposition of an interest in land to be in writing and to be signed by all the parties to the contract, found an action on such an agreement. Section 3 (3) of the Law of Contract Act provides as follows:-

3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless;

a. The contract upon which the suit is founded-

i. Is in writing

ii. Is signed by all the parties thereto, and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

20. The defendants on their part assert that the plaintiffs have used the servants quarters in the defendants parcel of land with the consent and permission of the defendants and hence the circumstances pursuant to which the plaintiffs have occupied the servants quarters cannot constitute and/or be construed as adverse possession. The defendants aver that as the registered owners of the suit property, they are entitled to deal with the property without any hindrance from the plaintiffs.

21. I have carefully considered the evidence and material placed before the court by the plaintiffs and the defendants and I am not satisfied the plaintiffs have demonstrated and/or established a prima facie case with a probability of success. I am not persuaded the plaintiffs occupation of the servants quarters on the defendants property constituted adverse possession as even the plaintiffs agree the occupation of the premises was with the agreement and/or permission of the defendants but which agreement was not formalized so as to becoming binding on the parties. My view is that no prima facie case has been established and as the conditions for grant of injunction are sequential such that if the first condition fails then the application fails as well, I need not consider the other conditions for grant of a temporary injunction.

22. The net result is that I find the plaintiffs application dated 3rd September 2014 to be lacking in merit and I order the same dismissed with costs to the defendants.

Ruling dated and signed at Kisii this 11th day of November 2015.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 11th day of December, 2015.

S. OKONG'O

JUDGE

In the presence of:

Mr. Lubellah for the plaintiffs

Ms. Makanga for the defendants

S. OKONG'O

JUDGE