



No. 210

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO.497 OF 2012(O.S)

PAULINA CHELANGAT ROTUK..... PLAINTIFF

VERSUS

JOEL KIPRUTO KIRUI..... DEFENDANT

RULING

1. The Plaintiff brought this suit by way of Originating Summons dated 29th October, 2012 seeking; a declaration that the defendant's right to recover all that parcel of land known as **LR. No. Transmara/Ntulele "B"/212** measuring 1.48 hectares (hereinafter referred to as "**the suit property**") is barred under the Limitation of Actions Act, Cap. 22 Laws of Kenya and his title over the same is extinguished, an order that the Land Registrar, Trans-Mara District do register the Plaintiff as the proprietor of the suit property in place of the defendant, an order that the defendant do execute all requisite documents as may be necessary for the registration of the Plaintiff as the proprietor of the suit property in default of which the deputy registrar and/or the executive officer of the court be put at liberty to do so and a permanent injunction restraining the defendant from interfering with the Plaintiff's occupation and/or use of the suit property. The Originating Summons was brought on the grounds that the Plaintiff has peacefully and openly occupied and cultivated the suit property for a period exceeding 12 years without any interruption from the defendant who is the registered proprietor thereof and as such the Plaintiff has acquired title to the same by adverse possession. The Plaintiff contended further that the defendant had threatened to evict the Plaintiff from the suit property claiming albeit wrongfully that the suit property belonged to him.
2. Together with the Originating Summons, the Plaintiff filed an application by way of Notice of Motion of the same date seeking interlocutory injunction to restrain the defendant from alienating, transferring, interfering with and/or evicting the Plaintiff from the suit property pending the hearing and determination of the Originating Summons. This is the application before me for determination. The application was supported by the Plaintiff's affidavit sworn on 29th October, 2012 in which the Plaintiff contended that she entered and occupied the suit property in the year 1980 together with her family. The Plaintiff claimed that the adjudication process was carried out in the area while she was in occupation of the suit property and that she has failed to understand how the defendant came to be registered as the proprietor of the suit property while she was the one who was and still is in actual possession of the same. The Plaintiff claimed that she only came to know recently that the defendant is registered as the proprietor of the suit property when the defendant came to the property in the company of police officers to lay a claim to the same. The Plaintiff reiterated that she has been in actual, open, and peaceful uninterrupted occupation of the suit property for a period exceeding 12 years and as such she has acquired title to the same. The Plaintiff contended that the defendant is now desirous of evicting her from the suit property and as

such it will serve the interest of justice if the injunction sought is granted. The Plaintiff annexed to her affidavit in support of the application, a certificate of official search dated 7th August, 2012 in respect of the title of the suit property.

3. The Plaintiff's application was opposed by the defendant through a replying affidavit sworn on 6th February, 2013. The defendant termed the Plaintiff's application, ill intentioned, frivolous, and vexatious and an abuse of the process the court. The defendant denied all the allegations contained in the Plaintiff's affidavit in support of the application. The defendant contended that the Plaintiff has never entered and occupied any portion of the suit property. The defendant claimed that the defendant is in occupation of and has been carrying out activities on her own parcel of land known as **LR. No. Trans-Mara/Ntulele "B"/210** measuring 2.21 hectares (hereinafter referred to as "**Plot No. 210**"). The defendant contended that the Plaintiff is ill bent on grabbing the suit property which the defendant acquired lawfully through the adjudication process. The defendant claimed that he sought the assistance of the provincial administration and the police over the suit property when the Plaintiff's son, one, Boniface Koech illegally entered the suit property and destroyed the seedlings he had planted and started putting up a temporary structure thereon. The defendant contended that the Plaintiff's affidavit is full of lies and that if the injunction sought is granted, it is the defendant who would suffer irreparable harm. The defendant annexed to his affidavit; a copy of a certificate of official search dated 10th January, 2013 in respect of the title for Plot No. 210, a copy of an extract of Sheet Map No. 9 for Trans-Mara/Ntulele "B" registration section, a copy of the title deed for the suit property and copies of correspondence regarding the report he made to the provincial administration regarding trespass to the suit property by the Plaintiff's son aforesaid. The Plaintiff filed a further affidavit in which she reiterated the contents of her affidavit in support of the application herein.
4. On 29th May, 2013, the parties agreed by consent to argue the Plaintiff's application by way of written submissions. The Plaintiff filed her written submissions on 19th August, 2013 while the defendant filed his submissions on 10th September, 2013. I have considered the Plaintiff's application and the replying affidavit filed in opposition thereto by the defendant. I have also considered the parties' advocates' respective submissions. This is the view I take of the matter. The law on interlocutory injunctions is now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. –vs- First American Bank of Kenya Ltd (2003) KLR. 125**, it was held as follows;

“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 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”.

5. The question that I need to answer is whether the Plaintiff has satisfied this court on a prima facie basis that she has a right over the suit property which has been infringed by the defendant. 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. In the case of, **Ahmed Abdulkarim & Another vs. Minister for Lands and Mines & Another [1958] E.A 436**, that was cited by Ojwang' J. (as he then was) in the case of, **Kenya Tea Development Authority vs. Jackson GichuiKaranja & Another [2006] e KLR**, that was relied on by the Plaintiff in her submissions, it was held that to establish a claim for adverse possession the following conditions must be met; **the identity of the suit land must be clear, the identity of the claimant must be clear and it must be demonstrated that the Plaintiff has been in open, exclusive, continuous and uninterrupted possession/occupation.** The Plaintiff has a duty therefore to demonstrate that she has been in open, continuous and uninterrupted occupation of the suit property or the

portion thereof that she is claiming for a period of 12 years or more. To start with, it is not very clear to me from the Plaintiff's pleadings as to the land which is the subject of her claim by adverse possession in this suit. In the Originating Summons, the Plaintiff's claim is over "a portion measuring 1.48 ha." of the suit property. See prayers 1, 2, 3 and 4 in the Originating Summons. On the other hand, in the Notice of Motion application, the injunction is sought in paragraph 2 over; a portion of the suit property measuring 1 Acre and in prayer 3 over; a portion of the suit property measuring 1.48 ha. In ground (a) in support of the Originating Summons, the Plaintiff claims to have occupied and cultivated a portion measuring 5 ½ Acres of the suit property. The Plaintiff's case and application is framed as if the suit property is more than 1.48 ha. which is not the case as the entire land comprised in the title of the suit property is 1.48 ha. as shown in the certificate of official search and a copy of the title deed for the said property that was exhibited in the affidavits of the Plaintiff and the defendant respectively. It is apparent from what I have stated hereinabove that the Plaintiff seems not be sure of the portion of the suit property that is the subject of her claim. That said, the Plaintiff has also failed to demonstrate that she has been in occupation of the suit property for a continuous period of 12 years or more. First, the Plaintiff placed no material before the court to establish her occupation or possession of the suit property or any portion thereof. The Plaintiff who claims to have settled on the suit property with her family in 1980 and has since then been occupying and carrying out cultivation on the suit property has placed no evidence before the court in proof of these activities. I am therefore not persuaded that the Plaintiff has been in continuous occupation of the suit property for over 12 years as she claims as there is no iota of proof of such occupation. I am more inclined to believe the defendant in his contention that the Plaintiff has been occupying her own parcel of land namely, Plot No. 210 which according to the material placed before the court by the defendant, shares a boundary with the suit property. It is instructive to note that the Plaintiff failed to disclose the existence of this Plot No. 210 when she filed the present application which gives the impression that she had something to hide in relation to the existence of that parcel of land having claimed that when she came to the area, she straight away settled on the suit property and that she was in occupation of the suit property even when the adjudication process was going on. One is left to wonder how she came to be registered as the proprietor of Plot No. 210 during the adjudication process if the parcel she was occupying was actually the suit property and not Plot No. 210. The other issue that arises is the limitation period. The Plaintiff's right or title over the suit property would only be extinguished after the expiry of 12 years of continuous open and uninterrupted occupation of the suit property by the defendant. The evidence placed before the court by the Plaintiff and the defendant shows that the defendant was registered as the proprietor of the suit property through a first registration on 5th April, 2011. I am in agreement with the submission by the defendant's advocates that even if the Plaintiff's claim that she has occupied a portion of the suit property since 1980 is true, time for the purposes of Limitations of Actions Act, Cap. 22 Laws of Kenya could only start running as against the defendant from 5th April, 2011 when he became registered as the proprietor of the suit property. The Plaintiff cannot claim adverse possession over the suit property before the suit property came into being and as against the defendant before the defendant was registered as the proprietor thereof.

6. Due to the foregoing, I am not satisfied that the Plaintiff has established a prima facie case against the defendant. Having reached this conclusion, I am under no obligation to consider whether the Plaintiff would suffer irreparable harm unless the orders sought are granted. I would say though that if I was to decide this issue, I would have held against the Plaintiff. It has been shown and the Plaintiff has admitted that she has a parcel of land which shares a boundary with the suit property and which is larger in size than the suit property. She would be able still to carry out the farming activities that she was carrying out if at all on the suit property on her own parcel of land. I don't think therefore that the Plaintiff would suffer irreparable harm or loss.
7. In conclusion, I find no merit in the Plaintiff's Notice of Motion application dated 29th October, 2012. The same is hereby dismissed with costs to the defendant.

Delivered, dated and signed at KISII this 31st day of January 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ochwang'i h/b for O. M Otieno for the Plaintiff

Mrs. Asati for Bigogo for the Defendant

Mobisa Court clerk

S. OKONG'O

JUDGE