



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 786 OF 2013
IN THE MATTER OF L.R. NO. MWERUA/BARICHO/1634 AND 1635

AND

IN THE MATTER OF THE LIMITATION OF ACTION CAP 22 OF THE LAWS OF KENYA

MOSES WARUI GATIMU PLAINTIFF

VERSUS

DOUGLAS MWAI MACHURU 1ST DEFENDANT

DANIEL KARIMI WANJOHI 2ND DEFENDANT

RULING

By an Originating Summons filed herein on 1st November 2013, the plaintiff/applicant sought orders that he has acquired by adverse possession a portion of 1.40 Ha (3½ acres) on L.R MWERUA/BARICHO/1635 and 1634 which was a resultant sub-division of L.R MWERUA/BARICHO/224 which should therefore be registered in his names.

Simultaneously with the filing of the said Originating Summons, the plaintiff/applicant filed a Notice of Motion under **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules** seeking injunctive orders to restrain the defendants/respondents by themselves, their agents or servants from evicting the plaintiff/applicant from the parcel MWERUA/BARICHO/1634 and 1635 or damaging, cultivating or interfering with the said land (hereinafter the suit land) pending the hearing and determination of this suit. That is the application that is now before me.

I have considered the application, the rival affidavits by both sides together with the relevant annexures and the submissions by counsels.

Being an application for injunctive relief, it must be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must make out a prima facie case with a probability of success at the trial***
2. ***The applicant must show that he will otherwise suffer irreparable damage which cannot be compensated in damages***
3. ***If in doubt, the Court will determine the application on a balance of convenience***

A further principle in considering whether or not to grant an injunction was identified by Justice

Hoffman in FILMS ROVER INTERNATIONAL 1986 3 ALL E.R. 772 when he said that the Court should take whichever course appears to carry the lower risk of injustice.

Bearing the above in mind, the first issue that this Court notes is that the suit land is registered in the names of the two defendants/respondents and in the circumstances, they are entitled to enjoy the rights that go with such registration. It is a rare case indeed to injunct a registered owner of a property. Against that registration, however, is the plaintiff's claim that he has been in occupation of a portion of the suit land for more than 31 years having developed it and it is where he derives his livelihood. Apart from annexing a photograph of a crop of bananas and maize (annexture M.W.G 4), there is no evidence to suggest that he infact resides on the land as there are no photographs of any homestead. Clearly therefore, he must be residing elsewhere and only tenders a crop on the land. As to whether or not the plaintiff/applicant will be entitled to orders on adverse possession is a matter for trial after viva voce evidence has been tendered. As at this stage, I am not persuaded that a prima facie case is established as set out in the GIELLA case (supra).

On the issue of irreparable loss, as I have stated above, there is no evidence that the plaintiff/applicant has "***lived on this land for more than 31 years***" as deponed in paragraph 7 of his supporting affidavit because if indeed he has lived on the land, one would have expected to see photographs of the homestead that he lives in. I am however satisfied that he has a crop of banana and maize on the land as this has not been denied. There is nothing to suggest therefore that the value of such crop cannot be quantified in damages if the trial Court were to eventually find in his favour. The applicant has therefore also not met the second test in the GIELLA case (supra). That being my view of the matter, the plaintiff/applicant would not be entitled to the orders sought in his Notice of Motion.

Having said so, however, the order that commends itself to me in the circumstances of this case is that the plaintiff/applicant should be allowed to tender and harvest his crop. Thereafter none of the parties should interfere with the dispute land in any manner whatsoever until this suit is heard and determined.

Costs shall be in the cause.

It is so ordered.

B.N. OLAO

JUDGE

27TH JUNE, 2014

27/6/2014

Before

B.N. Olao – Judge

CC – Mwangi

Mr. Wangai for Ndana for Applicant - present

Mr. Kahuthu for Respondent – absent

COURT: Ruling delivered this 27th June 2014 in open Court.

Mr. Wangai for Mr. Ndana for Plaintiff/Applicant – present

Mr. Kahuthu for Respondent - absent

B.N. OLAO

JUDGE

27TH JUNE, 2014