



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 10 OF 2013

DR. JOEL MAKENGE MARWA.....PLAINTIFF

VERSUS

DINA MAHEGERE.....1ST DEFENDANT

DAVID MAHEGERE.....2ND DEFENDANT

MATINDE JAMES MWITA.....3RD DEFENDANT

NCHAMA SIMEON MAHEGERE.....4TH DEFENDANT

ROBI JAMES.....5TH DEFENDANT

JAMES MWITA MAHEGERE.....6TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 11th January 2013 seeking; a declaration that the defendants acts of invading and trespassing into land parcel No. Nyabasi/Busonga/325 (hereinafter referred to as “the suit property”) is unlawful, an order of eviction against the defendants, mesne profits of Kshs. 5,000/= per month and a permanent injunction to restrain the defendants by themselves, their servants, agents, family members or anybody under their direction from entering and interfering with the suit property in any manner whatsoever.

2. In his plaint, the plaintiff averred that the plaintiff is the registered proprietor of the suit property which the plaintiff purchased from one Charles Monanka Marwa. The plaintiff averred that prior to the sale of the suit property by Charles Monanka Marwa to the plaintiff, the defendants had unlawfully and without any justifiable cause trespassed on the suit property and erected semi-permanent structures thereon which they have occupied even after the suit property was transferred to the plaintiff. The defendants filed a joint statement of defence on 12th March 2013 in which they denied the plaintiff’s claim in its entirety. The defendants contended that they have been in continuous and uninterrupted occupation of the suit property for a period of over 12 years and as such they have obtained and/or acquired title to the same by adverse possession. The defendants contended that before the plaintiff brought this suit against them, the defendants had lodged a suit against the plaintiff and one, Charles Monanka Marwa seeking to be

registered as proprietors of the suit property on account of adverse possession in Kisii HCCC No. 549 of 2012 (OS).

3. On 26th July 2013 the plaintiff filed an application by way of Notice of Motion dated 25th July 2013 seeking interlocutory injunction to restrain the defendants jointly and severally from cutting down trees, planting trees, building houses and/or interfering howsoever with the suit property pending the hearing and determination of this suit. The plaintiff's application that was supported by the affidavit sworn by the plaintiff on 26th July 2013 was brought on the grounds that the plaintiff is the registered proprietor of the suit property which measures 12.4ha and that the defendants are engaged in destruction of trees and other natural features on the suit property. The plaintiff claimed further that the defendants have drained a natural swamp on the suit property and are planting gum trees thereon. The plaintiff claimed further that the defendants are in the process of putting up new houses on the suit property and at the same time leasing portions thereof to third parties. The plaintiff annexed his affidavit a copy of the title deed for the suit property in his name.

4. The plaintiff's application was opposed by the defendants who filed joint grounds of opposition dated 9th October 2013 and four (4) separate replying affidavits sworn by the 1st, 2nd, 3rd, 4th and 5th defendants on 10th February 2014. The defendants also filed a notice of preliminary objection dated 16th January 2014 to the application. The contents of the four (4) replying affidavits that were filed by the defendants in opposition to the plaintiff's application are similar. The defendants contended that they are members of the same family. The defendants claimed that they have occupied the suit property for uninterrupted period ranging from 36 years to 54 years. The defendants claimed that they have their homes on the suit property and that they have planted various types of crops on the suit property for their subsistence. The defendants claimed that the plaintiff has not carried out any development on the suit property. The defendants exhibited in their affidavits aforesaid copies of photographs they claimed to have taken on the suit property of the houses that they have put up and are occupying on the said property. The defendants contended that prior to the filing of this suit they had filed another suit against among others the plaintiff herein over the suit property in which suit the court had ordered that the parties should maintain status quo. The defendants contended that the orders sought herein would be in conflict with the said order of status quo.

5. The principles for granting a temporary injunction are well settled. The applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the order sought is granted the applicant will suffer irreparable harm which cannot be compensated for in damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience. See **Giella -vs- Cassman Brown & Co. Ltd [1973] 358**. The plaintiff's claim against the defendants is based on trespass. Trespass is any form of intrusion by a person upon the land in possession of another without any justifiable cause. The onus was upon the plaintiff to establish on a prima facie basis that the plaintiff is the owner of or that he is in possession of the suit property and that the defendants have without any justifiable cause entered thereon. The plaintiff has demonstrated that he is the registered proprietor of the suit property. The plaintiff has exhibited a copy of the title deed for the suit property which shows that the plaintiff was registered as the proprietor of the suit property on 5th October, 2012. The defendants have contended that the plaintiff's title over the suit property was acquired irregularly in that as at the time the suit property was transferred to the plaintiff, the defendants were in possession and had acquired rights over the same.

6. Whether the plaintiff's title over the suit property was acquired irregularly as claimed by the defendant is an issue that can only be determined at the trial. On a prima facie basis, I am satisfied that the plaintiff is the registered proprietor of the suit property. As I have stated hereinabove, for the plaintiff to establish the tort of trespass, the plaintiff had to show in addition to proof of his title to the suit property that the defendants have entered and occupied the suit property without any justifiable cause. The defendants have contended that they have been in occupation of the suit property for uninterrupted period of between 36 years and 54 years. The defendants have contended that they have their homes on the suit property and have over the years cultivated the suit property on which they have planted various crops for subsistence. The defendants have contended that the plaintiff purchased the suit property while they were in

occupation and that they have a suit pending against the plaintiff in which they have claimed title to the suit property by adverse possession.

7. The foregoing claims by the defendants have not been controverted by the plaintiff. The plaintiff neither filed a reply to the defendants' statement of defence nor a supplementary affidavit to respond to these claims that were raised both in the defendants' statement of defence and the defendants' affidavits in opposition to the application herein. The defendants have placed before this court photographs which show that the defendants have residences on the suit property which residences seem to have been in place for several years. I have also perused the court file for Kisii HCCC No. 549 of 2012 (OS), **David Mdanyi Mahegere & 6 Others –vs- Charles Monanga Marwa and Marwa Makenge Joel**. In this case, the defendants herein have sued the plaintiff herein and the person who had sold to the plaintiff the suit property seeking to be registered as proprietors of the suit property on account of adverse possession.

8. In that suit, the defendants herein had filed an application for a temporary injunction to restrain the plaintiff herein from among others, entering, trespassing onto, cultivating, building, interfering with and/or in any manner whatsoever dealing with the suit property pending the hearing and determination of that suit. On 3rd April 2013 this court made an order in that suit that the parties should maintain the status quo. That order for status quo has not been varied or set aside.

9. Due to the foregoing, I am not satisfied that the plaintiff has established on a prima facie basis that the defendants are trespassers on the suit property. I am also not convinced on the material before me that the plaintiff stands to suffer irreparable loss or damage if the orders sought are not granted. The plaintiff has not placed any form of evidence before me of the acts complained of in the present application and the nature of damage if any occasioned thereby. The upshot of the foregoing is that the plaintiff has failed to meet the conditions for granting a temporary injunction. The plaintiff's application dated 25th July 2013 is therefore not for granting. The same is dismissed accordingly with costs to the defendants.

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

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE