



No. 293

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 316 OF 2012 (OS)

MILTON ROBERT KODHULPLAINTIFF

VERSUS

GEORGE OKINYI ABICH

(Sued as the legal administrator of Raphael Kisenge-deceased)..... DEFENDANT

RULING

1. The defendant is the registered proprietor of all that parcel of land known as **LR No. Suna West/Wiga/84** (hereinafter referred to as "**Plot No.84**"). The defendant was registered as the proprietor of Plot No. 84 on 13th January 2012 through transmission upon obtaining a grant of letters of administration in respect to the estate of one, Raphael Kisenge (deceased) who was the original registered owner thereof. The plaintiff has brought this suit against the defendant seeking to be registered as the proprietor of a portion of Plot No. 84 measuring 4 acres (hereinafter referred to as "**the suit property**") on account of adverse possession. Together with the Originating Summons, the plaintiff filed an application by way of Notice of Motion dated 21st August 2012 seeking a temporary injunction to restrain the defendant from entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner whatsoever dealing with the suit property pending the hearing and determination of this suit. The plaintiff's application was supported by the affidavit of the plaintiff sworn on 21st August, 2012.
2. In his affidavit in support of the application, the plaintiff contended that; the plaintiff purchased the suit property from Raphael Kisenge, deceased, on 15th May 1995 at a consideration of Kshs. 52,000.00. The plaintiff took possession of the suit property immediately after purchase and commenced cultivation of maize thereon. The vendor, Raphael Kisenge died thereafter before obtaining the consent of the Land Control Board to transfer the suit property to the plaintiff. The plaintiff continued in occupation of the suit property even after the death of Raphael Kisenge. On 12th July 2012 the defendant who had applied for and obtained a grant of letters of administration in respect of the estate of the said Raphael Kisenge, deceased and caused Plot No. 84 to be registered in his name entered the suit property and started destroying the plaintiff's maize plantation thereon. At the same time, the defendant lodged a complaint against the plaintiff at Migori Police Station for trespass which led to the arrest and arraignment of the plaintiff before Migori Senior Principal Magistrate's Court to answer a charge of forcible detainer. The plaintiff has contended that it is necessary in the circumstances for the court to issue a temporary injunction to preserve and/or conserve the suit property. The plaintiff annexed to his affidavit as exhibits, a

- copy of the register for the suit property, a copy of the agreement for sale of land dated 15th May, 1995 between the plaintiff and Raphael Kisenge, deceased, copies of photographs said to have been taken on the suit property, a copy of the charge sheet dated 3rd August, 2012 and a copy of a letter dated 10th August, 2012 by the Chief of Lower Suna Location.
3. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 17th October 2012. In his affidavit; the defendant contested the authenticity of the agreement for sale which the plaintiff has claimed to have entered into with Raphael Kisenge over the suit property. The defendant also denied that the plaintiff has ever taken possession of the suit property or undertaken any activity thereon. The defendant contended that the suit property is lying bare with only scattered shrubs growing thereon. The defendant termed the photographs annexed to the plaintiff's affidavit as evidence of destroyed maize plantation as suspect. The defendant annexed to his affidavit as exhibits, photographs which the defendant claimed to be giving a true picture of the state of the suit property. The defendant denied any knowledge of the sale of the suit property to the plaintiff. The defendant denied that he had entered the suit property on 12th July 2012 and destroyed the plaintiff's maize plantation as claimed by the plaintiff. The defendant contended that on the day when he is said to have entered the suit property and caused the said damage, he was away in Isiolo on training. The defendant contended that the plaintiff was arrested when he entered the suit property and started carrying out mining activities thereon. The defendant contended further that no prescriptive rights have accrued to the plaintiff over the suit property and as such the plaintiff has no rights over the suit property which can be protected by the orders sought.
 4. On 20th March 2013, I directed that the plaintiff's application be argued by way of written submissions. The plaintiff filed his written submissions on 9th September 2013 while the defendant filed his submissions in reply on 11th November 2013. I have considered the plaintiff's application together with the affidavit filed by the defendant in opposition thereto. I have also considered the written submissions filed by the advocates for both parties together with the authorities cited therein. The principles for granting interlocutory injunction are well settled. The applicant must establish a prima facie case with a probability of success and demonstrate that unless the order is granted, the applicant will suffer irreparable harm which cannot be adequately compensated for by an award of damages. If the court is in doubt as to the above, the court will decide the application on a balance of convenience. See, **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** and **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**.
 5. The plaintiff's case is that he has acquired proprietary right over the suit property by adverse possession. The plaintiff has claimed that he has had uninterrupted occupation of the suit property for a period exceeding 12 years. In proof of his claim over the suit property by adverse possession, the plaintiff exhibited in his affidavit in support of the application herein, a copy of the agreement for sale that the plaintiff had entered into with Raphael Kisenge over the suit property on 15th May, 1995, copies of photographs said to have been taken on the suit property after the defendant entered therein and destroyed the plaintiff's maize plantation and a letter dated 10th August, 2012 from the area chief on the dispute between the plaintiff and the family of the defendant over the suit property. The defendant has denied the plaintiff's claim over the suit property. The defendant has denied that the plaintiff has been in possession of the suit property for over 12 years.
 6. The defendant has claimed that the defendant has never been in possession of the suit property at any time and that the defendant has not undertaken any activity thereon. The defendant has annexed to his affidavit in opposition to the application herein, the defendant's own set of photographs which he claims to depict the true picture of how the suit property is on the ground. Proof of open, uninterrupted and exclusive possession of land is paramount in claims over land based on adverse possession. 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. The Plaintiff was therefore duty bound to demonstrate to the court on a prima facie basis that he has been in open, continuous and uninterrupted occupation of the suit property for a period of 12 years or more.
 7. On the material before me, I don't think that the plaintiff has discharged this burden of proof. The

plaintiff has contended that he has been cultivating maize on the suit property from 1995 until July 2012 when the defendant entered into the suit property and started destroying the plaintiff's maize plantation. The only evidence of maize cultivation on the suit property that was placed before this court by the plaintiff was composed of copies of photographs said to have been taken on the suit property. The defendant has disputed these photographs. I am unable to determine at this stage whether these photographs were taken on the disputed property or not. The images in the said photographs are also blurred. I have found it very difficult to discern the kind of crops which are on the said photographs and whether the said crops were damaged or not. I find the plaintiff's evidence of occupation of the suit property shaky. I am of the view that the plaintiff should have placed more evidence before the court in proof of his occupation of the suit property. The plaintiff having claimed that the defendant entered the suit property and destroyed his crops, I expected the plaintiff to put before the court some form of a report that he had made to the Ministry of Agriculture or to the area Police Station. I don't think that the letter dated 10th August, 2012 by the area chief is of much assistance to the plaintiff. The letter is not clear as to what kind of activity if any the plaintiff has been undertaking on the suit property. In the circumstances, I am doubtful whether the plaintiff has established a prima facie case against the defendant. The plaintiff having failed to come out clearly on his occupation of the portion of the suit property and the nature of activity if any the plaintiff has been undertaking on the property, I am equally doubtful whether the plaintiff will suffer irreparable harm unless the orders sought are granted.

8. In view of the above findings, the plaintiff's application falls for consideration on a balance of convenience. I am of the view that in the circumstances of this case justice would be well served if the suit property is preserved pending the hearing and determination of this suit. That will ensure that the property is available to whoever succeeds at the trial of the suit. I therefore decline to grant the orders sought in the plaintiff's application dated 21st August 2012 and in place thereof, I hereby order that pending the hearing and determination of this suit, the defendant by himself or through his agents, servants or employees is restrained from selling, transferring, leasing, charging or in any other manner alienating all that parcel of land known as LR No. Suna West/Wiga/84 or any portion thereof. The cost of the application dated 21st August 2012 shall be in the cause.

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 defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE