



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 455 OF 2013 (O.S.)

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

AND

IN THE MATTER OF LAND REFERENCE NO. NYANDARUA/MUKUNGI/2853-2883, 2693-2894, 2923, 2924 AND 3249

BETWEEN

DANIEL KAMAU MWANGI.....1ST PLAINTIFF/APPLICANT

ELIUD KAMAU MWANGI.....2ND PLAINTIFF/APPLICANT

GRACE WANJIRU MWANGI....3RD PLAINTIFF/APPLICANT

VERSUS

JOHN PETER KINUTHIA GATERI.....DEFENDANT/

RESPONDENT

RULING

1. Daniel Kamau Mwangi, Eliud Kamau Mwangi and Grace Wanjiru Mwangi the applicants/plaintiffs herein, filed a Notice of Motion dated 4th July, 2013 seeking the following substantive orders; **that the Defendant by himself, his agents, servants, employees, or otherwise be restrained from entering, evicting or in any other way interfering with the Plaintiff's peaceful and quiet possession or otherwise howsoever of all those parcels of land known as Nyandarua/Mukungi/2853-2883, 2693-2894, 2923, 2924 and 3249 ("the suit properties") pending the hearing and determination of this suit.**

2. The application is premised on the grounds on its face and is supported by the affidavit of the 1st Plaintiff sworn on 4th July, 2013. He depones that he has the authority of the other Plaintiffs to swear the affidavit and that he and the other plaintiffs has lived on the suit properties since 1969. He further deponed that they had acquired the suit properties by way of adverse possession but the defendant had now subdivided the original title to give rise to 397 parcels and wished to evict them.

3. The application is opposed. The defendant/respondent filed a replying affidavit dated **16th December, 2013** in which he deponed that he was the registered owner of the suit properties, save for plot number 3249 whose owner was unknown to him ; that being resident in Nairobi, he had employed a caretaker one **Andrew Mwangi Kamau** (hereinafter referred to as the caretaker) in 1969 to take care of his land, parcel No. **Nyandarua/ Mkungi/6 measuring 24 hectares at Ndinda**. He maintained a good relationship with the caretaker and entrusted him with his property including livestock. He even promised to give him two portions of land totalling to one quarter of an acre to enable him build and settle his family therein and use the same as a burial site when death struck.

4. The defendant, the care taker and his family maintained a healthy relationship with no problems until when the caretaker fell ill and his son, the 1st plaintiff herein, became unruly and started interfering with the defendant's property. He sold off the defendant's livestock and its produce, cut down his trees and leased out the defendant's land for personal gain. From these proceeds, the 1st plaintiff managed to buy himself a parcel of land. The defendant unhappy with the 1st plaintiff's conduct, asked him to move out of the suit properties and settle on the land he had purchased. The 1st plaintiff moved out but this did not stop him from interfering with the defendant's land. However due to the ill health of his caretaker the defendant restrained himself from taking any action against the 1st plaintiff.

5. After the caretaker died in 2004, the 1st plaintiff continued with his unruly behaviour and even filed a claim before the Land Disputes Tribunal which he lost. The defendant allowed the late care take's family to continue living on the suit properties but made it clear that this should not be construed to be a right over the defendant's land by the plaintiffs.

6. On **19th December, 2003** parties agreed that the application would be disposed of by way of written submissions. The plaintiffs filed their written submissions on **18th February, 2014**, while the defendant filed his on **11th March, 2014**.

7. In his submissions, Counsel for the plaintiff gave a background of the facts as outlined hereinabove. He submitted that the plaintiffs had fulfilled all the conditions required for granting of an injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** having been in possession of the suit properties since 1969. He relied on the cases of **Margaret Molly Endesia v Clement Odhiambo & Another (Eldoret ELC No 66 of 2013)** and **Joseph Muiru & 2 Others v Jane Njeri Kimani (Nairobi HCCC No 607 of 2003)**.

8. He further submitted that the plaintiffs would suffer irreparable damage that could not be compensated by an award in damages as they had lived on the property since 1969 and knew no other home. In conclusion he submitted that the court should be guided by the oxygen rule to do justice if at all the plaintiffs had failed to qualify under the strict dictates of the rules in the **Giella case**.

9. In a rejoinder, Counsel for the defendant submitted that the plaintiffs had not established a prima case as they based their whole case on the doctrine of adverse possession. According to the defendant, the plaintiffs had not fulfilled the conditions for adverse possession as elucidated in **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR**. Counsel for the defendant further submitted that the plaintiffs having no rights, could not suffer any loss that could not be compensated by way of damages and that the balance of convenience actually tilted towards the defendant.

10. I have considered the application, affidavits and submissions by counsels and I find the issue that stands out for determination to be whether on the facts and circumstances of this case, the applicants are entitled to the orders of injunction sought at this interlocutory stage.

11. The principles upon which the court will grant an injunction are well settled and articulated in the case of **Giella vs Cassman Brown & Co. Ltd (supra)**. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider

the second and third principles if it finds that the appellant has a *prima facie* case.

12. In one of the cases relied on by the defendant, *prima facie* is defined in the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** cited in **ELC 682 of 2011**, **Salamat Bibi Sheikh v Rehmat Ali [2013] eKLR** as " 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"

13. So have the applicants herein established a *prima facie* case with probability of success?

At the outset, it must be appreciated that the purpose of an injunction is to preserve the subject matter of the suit. It is common ground that part of the subject matter is occupied by the plaintiffs as family members of the late caretaker. The caretaker's son, the 1st plaintiff herein, claims that his family has obtained title to the land they occupy by way of adverse possession having been in occupation since 1969. It is clear from the pleadings that the defendant is in possession of the larger portion of the suit properties. He has been cultivating therein with the assistance of the caretaker's family, had planted trees, had been keeping livestock and had concluded subdivision of the suit properties.

14. For the plaintiffs to succeed in their claim of having obtained title by way of adverse possession, they must fulfill certain conditions. These conditions were clearly outlined in the case of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau (supra)** relied on by the defendant and which I cite with approval. **Ombwayo J** identified the five basic conditions to be met to perfect the title of the adverse party as follows; ".....**Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely;**

(a) **open and notorious use of the property.** For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

(b) **Continuous use of the property** –The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

(c) **Exclusive use of the property**– The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(d) **Actual possession of the property**– The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit

of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner.

(e) Nonpermissive, hostile or adverse use of the property—The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: **Objective view—used without true owner's permission and inconsistent with true owner's rights. Bad faith or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. Good faith view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.**

The Specific requirements for adverse possession by the court is a Claim of title or claim of right.

The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title."

15. In the instant case as observed earlier, the plaintiffs and their late father entered the suit properties with the permission of the defendant. It is only after their father died in 2004 that their occupation can be said to have become hostile or adverse. It was also observed earlier that the plaintiffs had not been using the suit properties to the exclusion of the owner. The alleged subdivision of the suit parcels by the defendant clearly shows that he must have been in possession to engage surveyors who were able to enter the suit properties and carry out subdivision resulting in 387 parcels without any objection, resistance or disruption by the plaintiffs.

16. I am at this stage of the proceedings careful not to make any firm pronouncement with regard to the plaintiffs claim on adverse possession. My view at this juncture, is that this is a matter that would require further interrogation of the parties' evidence by way of oral submissions by the parties at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered. However, at this stage all the applicants are required to demonstrate is not a case which must succeed but one which may succeed. With the facts and evidence placed before me, and taking into consideration the five basic principles outlined in the **Virginia Wanjiku case**, I find that the plaintiffs have not established a prima facie case with a probability of success.

17. On whether the defendants will suffer irreparable damage that cannot be compensated by an award in damages, I am of the view that this being land, it is possible to quantify any damage suffered by the plaintiffs in the event that the court rules in their favour during trial.

18. The balance of convenience in this case tilts towards the defendant being the registered owner of the suit properties and also being in possession of the larger portion of the subject matter.

19. For the above reasons, I find no merit in the Notice of Motion dated **4th July, 2013** and hereby

dismiss it with costs to the defendant.

Dated signed and delivered in Nakuru this day of 25th July, 2014

L N WAITHAKA

JUDGE

PRESENT

Mr P K Njuguna for the Defendant

Mr S K Njuguna holding brief for Mr Mureithi for plaintiff

Cc: Emmanuel Maelo.

L N WAITHAKA

JUDGE