



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 817 of 2012

ABMA INVESTMENTS ::::::::::::::::::::::::::::::: PLAINTIFF
=VS=

SARAH TUMNO ::::::::::::::::::::::::::::::: DEFENDANT

RULING

(Application for injunction; principles to be considered in an application for injunction; plaintiff registered owner of suit land; plaintiff having bought suit land while respondent was in possession of a portion of the same; claim of agreement for respondent to remain in possession for a little while as children seek alternative school; respondent continuing in possession in excess of 12 years after purchase of land; prima facie case; probability that plaintiff barred by limitation of time; probability that defendant has acquired prescriptive rights over portion of suit land; doubt as to probability of success of plaintiff's suit; balance of convenience in favour of respondent; application for injunction dismissed.)

The application before me is the application dated 23rd February 2012 filed by the plaintiff. It is an application brought under the provisions of Order 40 Rules 1,2 and 4(1) and (2) of the Civil Procedure Rules, and Sections 3A and 63E of the Civil Procedure Act, CAP 21, Laws of Kenya. Principally, this is an application for injunction. The application as drafted seeks the following prayers :-

- (a) That this application be certified as urgent.
- (b) That service of this application be dispensed with in the first instance.
- (c) That a temporary injunction do issue to restrain the defendant/respondent by herself, agents, servants and/or assigns from selling, leasing out, ploughing, grazing cattle, cutting down trees, excavating stones, alienating, wasting, damaging or trespassing upon or in any other manner dealing with the plaintiff/applicant's parcel of land known as UASIN GISHU/BURNT FOREST/47, to avert any further loss and destruction pending inter-partes hearing and determination of this application.
- (d) That an interlocutory injunction do issue in favour of the plaintiff/applicant against the defendant/respondent by herself, agent, servants and/or assigns pending the determination of this suit.
- (e) That this Honourable Court be pleased to grant orders authorizing the plaintiff/applicant to enter upon or into the suit property and utilize the same unconditionally and without interference by the defendants/respondents (sic) pending the determination of this suit inter-partes.
- (f) That this application be fixed for inter-partes hearing.

(g) That costs of this application be in the cause.

The application is based on the following grounds:

- That the Plaintiff/applicant is the registered owner of all that land parcel namely UASIN GISHU/BURNT FOREST/47 (hereinafter referred as to the suit property”);
- That the Defendant/Applicant without any color of right trespassed into the suit property;
- That unless the orders sought are granted, the Plaintiff/Applicant stands to suffer irreparable loss and injury, which cannot be adequately compensated by way of damages;
- That the Defendant/Respondent illegally occupies and continues to waste and damage a portion the suit property by cutting down trees and excavating natural stones;
- That the Defendant/Respondent is in the process of leasing out part of the suit property to unsuspecting third parties;
- That this application is made in utmost good faith.

The application is supported by the affidavit of one Abraham Kiptanui, a director of the plaintiff company.

The defendant was duly served with summons to the suit and with the subject application. Despite being served she has not formally entered any appearance to the suit. However, on the date that this application was listed inter-partes, she appeared in person and stated that she would wish to oppose the application . To do justice, and in order to hear her side of the story, I had her sworn and took her evidence therein as being her evidence in opposition to the subject application. In doing so, I was alive to the fact that there are no rules on this, but I felt that it would have been unjust to the respondent, who is unrepresented, to feel that she has not been given an opportunity to be heard. I took comfort in the provisions of Article 159 (d) of the Constitution of Kenya, 2010. I will at a later point in this ruling set out her reply to the application.

This being an application for injunction, I stand guided by the principles set out in the case of **Giella vs Cassman Brown (1973) EA 358 where at page 360** , it was stated as follows :-

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

The first thing I need to establish is whether the plaintiff has demonstrated a *prima facie* case with a probability of success. This I will do by assessing the plaint and the evidence laid out in the supporting affidavit. Since the respondent had something to say on the said application, I will also consider her response in determining whether the plaintiff has set out a *prima facie* case with a probability of success.

The plaintiff, a limited liability company, has pleaded that on the 28th January 1998, it purchased the suit land UASIN GISHU/BURNT FOREST/47 measuring 39.0 Hectares from one **AARON KIMOSOP KANDIE (KANDIE)**. It proceeded to procure the title deed to the suit land on the 19th April 1999. It is pleaded that at the time of sale, one **JOSEPH KIPKURUI TUMNO (TUMNO)** resided as caretaker on part of the suit land together with his children. It is further pleaded that upon the purchase, **KANDIE** sought alternative land for the said **TUMNO**. It is pleaded that whereas the agreement between **KANDIE** and the plaintiff company has in it a clause 7 which provides that the property is sold with vacant possession, there was a mutual agreement that since the defendant had school going children it was only fair that the children be allowed to complete the academic year and seek alternative schools in Londiani.

It is further the plaintiff's case that the defendant has since neglected to vacate the suit land. It is further pleaded that owing to this, the plaintiff has been denied quiet enjoyment of the suit land, that the defendant has been tilling and planting on the suit land, has felled trees and has demarcated and fenced off a portion of the suit land. The plaintiff in its prayers has sought for the following orders :-

- (a) **A permanent injunction against the defendant in respect of the suit land.**
- (b) **Eviction orders against the defendant.**
- (c) **An award of mesne profits.**
- (d) **A government assessor to assess the damage caused by the plaintiff owing to her continued occupation and acts of waste on the suit land.**
- (e) **Costs of the suit.**
- (f) **Interest at court rates.**
- (g) **Any other or further relief deemed fit and just to grant.**

The supporting affidavit has more or less repeated the pleadings in the plaint. It is further deponed that at the time of sale in 1998, the defendant, a relative of the previous owner, sought a little time to source for alternative schools for her children. It is further deponed that the defendant has attempted to lease out part of the suit land and has started cutting trees and excavating natural stones hence wasting the property. It is for these reasons that the plaintiff has sought interim orders of injunction.

As I stated earlier, I allowed the respondent to make depositions from the witness stand in court. She was duly sworn and she stated as follows.

*The applicant found me on the property. I have been on the suit land for the last 35 years. My father was brought into the land by **Aaron Kimosop Kandie** when he was the owner. I have been on the suit land. **Aaron Kandie** died in the year 2003. When he died he did not tell us that he had sold the land. He had promised my parents that he will give them a portion of 10 acres. The plaintiff should give me alternative land. I do not have another place to live. **Aaron Kandie** was my uncle. He was not a brother to my father but a relative. It is only myself and my children (5) on the shamba. I am not married. I have a right to be on the land because **Aaron Kandie** promised to give us a portion of the land. I have not refused to negotiate with them for a portion. I have not leased the land. I have also not felled any trees. That is all.*

Mrs. Kiage for the applicant urged me to allow the application. She emphasized that the suit land is owned by the plaintiff and that the respondent is wasting the same. In response to the respondent's statement, she stated that no agreement has been exhibited by the respondent indicating that she was allowed to stay on the suit land by the previous owner. It was her position that the respondent was only allowed to stay for a little for the sake of her children while she sought alternative land.

I have considered the application for injunction. It is not in dispute that the plaintiff company is the owner of the suit land. It is also not disputed that the defendant is in occupation of part of the suit land. The plaintiff's case is that they accommodated the respondent to live on the suit land for a little while so that her children can go to school. In its pleading the plaintiff has averred in paragraph 5 of the plaint that "*it was our mutual agreement that since the defendant had school going children it was only fair that the children be allowed to complete the academic year and seek alternative schools in Londiani.*" The supporting affidavit has laid out that "*the defendant/ respondent sought a little time to source for alternative schools for her children after which she undertook to vacate (probably vacate)...*"

Unfortunately, the period described as "a little time" has not been defined. What exactly was the agreement of the parties? Was it for the respondent to stay for a year, two years or the now fourteen years? Was there in fact any agreement between the two parties at all? These issues have not come out

clearly. What is apparent, and it is not disputed, is that the respondent has been on the land for a long while. The respondent has placed her occupation at 35 years. I am not sure if it is 35 years but it is not disputed that she was on the suit land when the plaintiff purchased the same from **Kandie**. The purchase was done in the year 1998 so at the very least the respondent has been on the suit land for about 14 years to the time of filing suit. There is no explanation from the plaintiff why it took it so long to file this suit. Were there any negotiations going on between the two parties in the interim ? On what basis did the plaintiff allow the defendant to continue being resident on the suit land ? Again, there are no answers to these questions.

What I can discern is that the plaintiff has taken a period of more than 12 years to assert its claim over the suit land. Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya provides that :-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Without deciding the point with finality , it may very well be that the plaintiff's suit is barred by limitation. There is therefore a doubt as to the strength of the plaintiff's case. Where there is doubt, the matter is decided on a balance of convenience. I am of the view that the balance of convenience in this case tilts in favour of the respondent. She has been in occupation of the suit land. Indeed she may very well have a legitimate claim to the portion of the suit land occupied by herself through the doctrine of adverse possession. I think it is best to preserve the status quo currently prevailing pending the hearing and determination of this suit.

In the premises, I think justice will best be served if I issue the following orders which I hereby issue:-

1. That the status quo ante, i.e the status quo prevailing before the filing of this suit, with regard to possession do continue pending the hearing and final determination of this suit.
2. That the defendant do continue to occupy the portion of land that she was in occupation of, but no more, pending the hearing and determination of this suit and continue to utilize the same as her residence and for subsistence.
3. That the defendant be restrained from cutting down trees on any portion of the suit land including the portion occupied by herself , excavating rocks, and/or leasing out the suit land or any portion of it to third parties, pending the hearing and determination of this suit.
4. That costs of this application be costs in the cause.

It is so ordered.

DATED AND DELIVERED THIS 29TH DAY OF JANUARY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mrs. F.J.B Boinett of M/s Boinett & Bett for the plaintiff/applicant.