



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 582 of 2011

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF THE REGISTERED LAND ACT

BETWEEN

EVANS MUURU DAVID.....PLAINTIFF/APPLICANT

-VERSUS-

JAMES NJENGA NDUNGI.....1ST DEFENDANT

LOISE WAMBUI MWAURA *Alias* WAMBUI MWAURA....2ND DEFENDANT

RULING

The Plaintiff in this matter has filed two interlocutory applications as follows:-

Firstly, the Notice of Motion application dated 26th October 2011 and secondly, the Notice of Motion application dated 20th February 2012.

The application dated 26th October 2011 inter alia sought orders:-

1. “THAT the 1st Defendant be restrained by a temporary injunction from blocking the entrance to, damaging the common fence, committing other wanton acts of waste or interfering with the Plaintiffs/Applicant’s quiet possession of the premises known as Kiambaa/kihara/4694 (herein after referred to as “*the suit premises*”
2. “THAT the 1st Defendant be restrained by a temporary injunction from selling, transferring, charging or in any manner whatsoever dealing with the suit premises until this suit is fully determined”.
3. “THAT the 1st Defendant be ordered to remove the temporary structures blocking the Plaintiff/Applicants driveway to the suit premises.

The application is based on the grounds that:-

i) The Plaintiff lives on the suit premises together with his family and has occupied the same since 1989 and has developed the same extensively.

ii) On or about 28th September, 2011 the 1st Defendant entered the suit premises, cut and uprooted the common fence. The 1st Defendant also blocked the driveway by erecting temporary structures thereat and thereby denies the Plaintiff/Applicant access to his home.

The application is further supported by the Affidavit of EVANS MUURU DAVID sworn on 26th October, 2011.

The Notice of Motion application dated 20th February 2012 inter alia seeks the following orders:-

“That the 1st Defendant be restrained by a temporary injunction from destroying, damaging, pulling down or in other manner interfering with the Plaintiff/Applicant’s buildings erected and being on the suit premises known as KIAMBAA/KIHARA/4694 until the full determination of this suit”.

The plaintiff in support of the application avers that on or about the 3rd January 2012 the 1st Defendant entered the suit premises and destroyed or damaged the wall of the Plaintiff’s building while this suit together with other applications were pending before the court. The Plaintiff swore an affidavit in support of the application on 20th January 2012. Both the 1st and 2nd Defendants filed their replying affidavits on 9th November 2011 in opposition to the Plaintiff’s application dated 26th October, 2011. The 1st Defendant further filed a replying affidavit on 6th March 2012 in opposition to the Plaintiff’s dated 20th February 2012.

Mr. Munya Gachomba represented the Plaintiff while Mr. Mwicigi Kinuthia represented the Defendants.

Briefly the Plaintiff alleges that in or about 1973 he and his brothers Evans Gitau Kamuiru and Caxton Karuri Kamuiru (both now deceased) purchased from Mwaura Ndungi (also deceased) a portion of about one (1) acre out of Title Number Kiambaa/Kihara/739.

That the said portion was transferred to the deceased plaintiff’s brother Evans Gitau Kamuiru who according to the Plaintiff was to hold the portion in trust for himself, the Plaintiff and the Plaintiff’s other brother Caxton Kiruri Kamuiru. The portion was apparently transferred to the 3 brothers in 1991 as per the abstract of title marked “EMD-2” annexed to the Plaintiff’s supporting affidavit. The plaintiff avers that in 1989 he entered into an agreement for the purchase of a portion of approximately 50ft by 25ft at the price of Kshs. 60,000/= from Mwaura Ndungi (deceased) which portion was adjacent to his own parcel of land.

The plaintiff paid the full purchase price but the deceased did not effect the transfer of the portion to the Plaintiff although the plaintiff took possession and has remained in the possession since 1989.

The Plaintiff states that in 1999 he obtained approval and started construction of a residential cum-business premises on the portion of the plot. The plaintiff further claims that on 28th September 2011 or thereabout while he was still in occupation of the suit premises the 1st Defendant entered onto the property and cut and uprooted the common fence between the suit premises and the adjacent land. The 1st Defendant also blocked the plaintiff’s drive way which the plaintiff claims to have used since 1989.

By reason of the 1st Defendants acts the plaintiff claims he now has no access to his property and has to access the same through a neighbour’s land which he has been allowed by the neighbour to do pending the resolution of the dispute. The plaintiff in the premises moved to court seeking injunctive orders against the 1st Defendant in terms of the Plaintiff’s notice of motion.

In regard to the Notice of Motion application dated 20th February 2012, the plaintiff further seeks an

injunction against the first defendant who he claims on or about 3rd January 2012 entered onto the suit premises and damaged the walls to the building that the plaintiff had constructed thereon. The plaintiff reported the matter regarding damage to property to Gigiri police station. The plaintiff seeks a restraining order against the 1st Defendant in terms of the application.

On his part the first defendant vide a replying affidavit sworn on 9th January 2012 refuted the averments by the plaintiff claiming that Land Reference Kiambaa/Kihara/4694 did not exist as the said land was subdivided and that he was now registered owner of L.R. No. Kiambaa/Kihara/5139.

The 1st defendant denies that the plaintiff is entitled to the portion that he claims to be his and claims that the portion forms part of his land and that the portion has been used as a path by the 1st defendant, the children and parents of Ann Mande nursery school. The 1st defendant further states that the disputed portion was used as a path by church goers around 2003 before the closure of the church in 2007. The 1st defendant further states that the plaintiff contrary to what he alleges has had his own gate since 1972 in the former title number Kiambaa/Kihara/1907 which fronts the main road.

The 1st defendant in paragraph 12 of the replying affidavit denies that the plaintiff purchased any land from Mwaura Ndungi and contends that it is him and his family who have been using the portion claimed by the plaintiff. The 1st defendant claims it is the plaintiff who was encroaching into Mwaura Ndungid's land by constructing a building that extended into the land of the said Mwaura Ndungi in 2002 which the 1st defendant resisted and the house to date remains incomplete.

The 1st defendant further in response to the plaintiff injunction application filed on 20th February 2012, filed a replying affidavit sworn on 5th March 2012 where he denied damaging the walls of any building as alleged by the plaintiffs. The 1st defendant reiterated that he all along had been in exclusive possession of L.R Kiambaa/Kihara/4694 and contends he is the person who purchased additional portions of land from the 2nd defendant. The 1st defendant contends title L.R. No. Kiambaa/Kihara/4694 ceased to exist following subdivision and further that the plaintiff's averments are false and the plaintiff cannot be entitled to a grant of an injunction.

From the foregoing it is apparent that the various facts are in issue and are contested. The first defendant contends that the portion of land claimed by the plaintiff has always been part of his property and has been used as a public passage by the church goers, children attending Ann Maude nursery school and the defendant's tenants to access their rental premises. The 1st Defendant contends that the portion was not being used by the plaintiff as his drive way as alleged by the plaintiff.

The plaintiff is said to have a gate and drive-in off the main road. The defendants contend that all that exists is a boundary dispute between them and the plaintiff. The defendants state that a stone building the plaintiff was constructing in 2002 encroached onto the plot of the 1st defendant resulting in the construction being stopped and the building has since remained uncompleted. The construction is said to have been stopped at the instance of the 2nd defendant after her children sought the services of a surveyor who established that the building was encroaching onto the defendant's land.

The only admitted fact in this matter is that the plaintiff together with 2 other persons purchased a portion of one (1) acre from Mwaura Ndungi (now deceased) and that this portion was transferred out. What is not clear is if it is true that the plaintiff purchased the portion he now claims from the deceased what prevented him from obtaining a transfer from the deceased from 1989 to 2001 when the deceased died.

The plaintiff claims that he has acquired title to the disputed portion of land by virtue of being in adverse possession since 1989 which fact the defendant contest. To succeed on a claim of adverse possession the applicant has to prove that he has been in continuous and uninterrupted possession of the suit premises for a period of not less than 12 years before the filing of the instant suit. The case of WAMBUGU vs. NJUGUNA (1983) KLR 172 considered and laid the principles on which adverse possession may be

applicable. In the said case the court held that where possession is by the permission of the owner the occupant cannot be in adverse possession and also where possession is pursuant to contract of sale no adverse possession can accrue until the final instalment is paid and/or the contract is repudiated.

The principles consideration however is whether the possession is exclusive, uninterrupted and continuous and that the possession demonstrates a denial of another's right by an open assertion of a hostile title as against the other person through overt acts of usage and/or other acts that are inconsistent with the rights of the other person. The burden of proof that the possession has been exclusive, uninterrupted and continuous and hostile to the rights of the other person rests upon the person claiming title by adverse possession.

In the instant suit the plaintiff claims that he occupied and possessed the suit premises in 1989 and in 1999 had plans for a building approved and commenced construction.

The defendants contest this and state they stopped the construction by the plaintiff when they discovered the building was encroaching onto their plot. The defendants also contend that the suit premises were being used as a path by the public and that they always had the use of the plants and trees on the premises. In the court's view these facts can only be verified at the trial.

On the basis of the material placed before the court by the plaintiff and the defendants the issue arises whether or not the plaintiff has been in exclusive and uninterrupted possession continuously to entitle him to claim title through adverse possession. Prima facie however the plaintiff has been in occupation of part of the suit premises.

On whether or not the plaintiff entitled is to the injunctive relief that he seeks the court has to bear in mind and consider the principles on which an injunction can be granted. The principles on which an injunction will be granted continue to be the same old principles enunciated in the case of *GIELLA vs. CASSMAN BROWN & COMPANY LTD (1973) E.A 358;*

- i. The applicant must show that there is a prima facie case with a probability of success,
- ii. An interlocutory injunctive relief will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages,
- iii. The court if in doubt may determine an application on the balance of convenience.

Applying the principles to the facts and circumstances of this case it is firstly important to note that the parties are neighbours and relatives who have lived together over a long period of time. The contrasting statements and averments need to be tested and validated during the full trial of the case.

On the basis of the plaintiffs assertions the plaintiff has a prima facie case with a probable chance of succeeding but also the defendants have a plausible defence to the Plaintiff's claim.

Given the circumstances of the matter in the event the applicant is successful at the trial damages would not be an adequate remedy considering the plaintiff has a building stranding the suit premises and unless a conservatory order is given the building could be demolished before the suit is determined.

The balance of convenience in this matter would tilt in favour of the court granting an order requiring that the parties maintain the status quo pending the hearing and determination of the originating summons (OS).

The court in the premises makes an order that the parties maintain the status quo such that there will be no further developments, demolitions and/or cutting of trees on the suit premises till the final hearing and determination of the originating summons. It is so ordered.

The costs of the application will be in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st Defendant

..... for the 2nd Defendant