



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 68 of 2012

TITUS ONG'ANG'A NYACHIEO.....PLAINTIFF

VERSUS

MARTIN OKIOMA NYAUMA1ST DEFENDANT

JULIUS MAGERO MARTIN.....2ND DEFENDANT

THOMAS BOSIRE MARTIN.....3RD DEFENDANT

JOHN MAGERO MARTIN.....4TH DEFENDANT

RULING

1. The Plaintiff has brought this suit by way of Originating Summons seeking, a declaration that the defendant's right to recover a portion measuring 198 feet by 69 feet of all that parcel of land known as LR No. Central Kitutu/Daraja Mbili/819 (hereinafter referred to as "**the suit property**") is barred under the Limitation of Actions Act, Cap.22 Laws of Kenya, an order that the Plaintiff be registered as the proprietor of in place of the defendants and an order that, the defendants do execute all the requisite documents necessary to actualize the registration of the Plaintiff as the proprietor of the suit property. The Plaintiff's suit is brought on the ground that the Plaintiff has occupied and cultivated the suit property which is registered in the name of the defendants for uninterrupted period exceeding 38 years and as such the Plaintiff has acquired ownership thereof by adverse possession. In the grounds put forward by the Plaintiff in support of the said Originating Summons in the body of the application and in the affidavit of the Plaintiff sworn in support thereof, the Plaintiff claims that he took possession of the suit property pursuant to an agreement for sale that was entered into in the year 1975 between the Plaintiff, on the one hand, and the 1st defendant on the other hand. The Plaintiff claims that after the execution of the said agreement for sale, the 1st defendant gave him possession of the suit property and was to take steps to apply to the area land control board for the necessary consent and thereafter process a title deed in favour of the Plaintiff. The 1st defendant failed to apply for the land control board consent but the Plaintiff remained in possession of the suit property carrying out cultivation thereon to date. The Plaintiff claims that in the year 1996, the 1st defendant executed a document of surrender under which the 1st defendant agreed to surrender the suit property to the Plaintiff and to relinquish any claim over the same. The Plaintiff claims that, upon carrying out an official search on the title of the suit property in the year 2012, he discovered that despite the said agreement of surrender, the 1st defendant had secretly proceeded to sub-divide the suit property which he thereafter transferred to the 2nd to 4th defendants who are his sons. It is the Plaintiff's contention that the 1st defendant's right to the suit property had been extinguished by operation of law and as such, there was nothing that he could sub-divide and transfer to the 2nd to 4th defendants. It is the Plaintiff's contention that in view of the secretive manner in which the 1st defendant

went about sub-dividing and transferring portions of the suit property to the 2nd to 4th defendants, there is real danger that the defendants unless restrained by this court may proceed to alienate the suit property to third parties. The defendants have not yet filed a replying affidavit to the originating summons.

2. Together with the Originating Summons, the Plaintiff filed an application by way of Notice of Motion dated 23rd February, 2011(sic) seeking an interlocutory injunction to restrain the defendants from, alienating, transferring, interfering with and/ or evicting the plaintiff from the suit property pending the hearing and determination of this suit. This is the application which is the subject of this ruling. The plaintiff's application is brought on the same grounds as those put forward in support of the originating summons which I have already referred to herein above. The only new ground put forward by the Plaintiff in the body of this application and in the affidavit filed in support thereof is the fact that, the defendants have threatened the Plaintiff with forceful eviction from the suit property and they would proceed to do so unless they are restrained by the court. The Plaintiff has claimed further that he depends on the suit property for his subsistence and his eviction from the suit property would be equivalent to depriving him of his livelihood. The Plaintiff claims that he has established a prima facie case against the defendants and unless the orders sought are granted, he stands to suffer irreparable harm. The Plaintiff has annexed to his affidavit in support of the injunction application, a handwritten agreement dated 18th January, 1996 under which the 1st defendant agreed to surrender to the Plaintiff “ **the disputed piece of land approximately quarter of an acre**”. The measurement of the land is given in the said agreement as “**198 ft long and 69 ft wide**”. The agreement is signed by the Plaintiff as **new land owner** and the 1st defendant as **land owner** in the presence of witnesses. A part from its measurements and the fact that the land the subject of this agreement is disputed, no other particulars of the land is provided such as its registration details or its location. The Plaintiff has also annexed to the said affidavit a copy of a certificate of official search dated 15th June, 2006 which shows that as at 15th June, 2006, the suit property was registered in the joint names of **Nyauma Mbiru** and **Martin Okioma Nyauma**, the 1st defendant herein. The said search certificate shows further that the two were registered as proprietors of the suit property on 6th March, 1975. The last document annexed to the Plaintiff's affidavit is another certificate of official search dated 17th January, 2012 which shows that as at that date the suit property was registered in the joint names of the 2nd to 4th defendants as proprietors. According to this search certificate, the 2nd to 4th defendants were registered as proprietors of the suit property on 30th June, 2011. It is clear from this search certificate that as at 17th January, 2012, the suit property had not been subdivided.

3. In his submissions in support of the Plaintiff's application for injunction, **Mr. Otieno**, advocate who appeared for the Plaintiff reiterated the contents of the Plaintiff's affidavit and the grounds set out in the body of the application. **Mr. Otieno** submitted that the Plaintiff purchased the suit property in the year 1975 from the 1st defendant and has been in uninterrupted occupation of the same since then. Counsel submitted that in the year 2011, the 1st defendant sub-divided the suit property and gave portions thereof to the 2nd to 4th defendants who are his sons. Counsel submitted that the Plaintiff's interest in the suit property had accrued after the lapse of 12 years from the time the Plaintiff took possession of the suit property which interest could not be defeated by the change of ownership of the suit property. Counsel submitted further that if the orders sought are not issued, the Plaintiff would suffer irreparable loss as land has sentimental value.

4. Counsel submitted that even if the application was considered on a balance of convenience, the same would tilt in favour of the Plaintiff. **Mr. Otieno** relied on the Court of Appeal case of **Githu-vs-Ndeete [1984] KLR 776** in support of his submission that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. Counsel urged the court to allow the application.

5. The Plaintiff's application is opposed by the defendants. For reasons which are not clear to the court, the defendants did not file a replying affidavit in response to the application. Instead, they chose to oppose the application through grounds of opposition dated 29th March, 2012 which their advocates filed

in court on 4th April, 2012. The defendants' grounds of opposition raised mainly points of law. The defendants contended that the Plaintiff was not entitled to the orders sought and that he had approached the court with unclean hands. It is also contended in the said grounds of opposition that, the Plaintiff's application is self-defeating and that, the 2nd to 4th defendants were strangers to the application and the affidavit filed in support thereof.

6. In his submission in opposition to the application, **Mr. Omwange**, advocate who appeared for the defendants submitted that the Plaintiff had failed to lay a basis for the orders sought. Counsel submitted that the Plaintiff failed to demonstrate that the suit property was sold to him in 1975 by the 1st defendant. **Mr. Omwange** pointed out the fact that the document that the Plaintiff exhibited as evidence of surrender of the suit property by the 1st defendant to the Plaintiff did not mention the suit property. Counsel wondered why the Plaintiff had to enter into another agreement with the 1st defendant in 1996 which is 20 years after the Plaintiff is alleged to have bought and took possession of the suit property. Counsel submitted further that, in 1975 when the Plaintiff claims to have bought the suit property and took possession thereof, the suit property was in the names of two persons namely, **Nyauma Mbiru** and the 1st defendant. Counsel wondered therefore how the Plaintiff could have bought the suit property from the 1st defendant only. Counsel submitted further that, the Plaintiff's application was not proper as he had failed to annex to the affidavit in support of the application an extract of title of the suit property as required under order 37 rule 7(2) of the Civil Procedure Rules. **Mr. Omwange** submitted further that the Plaintiff had not demonstrated at all that the suit property had been sub-divided by the 1st Plaintiff as he had alleged. Counsel submitted further that the defendants had at no time given possession of the suit property to the Plaintiff. Counsel submitted that the injunction sought if granted would result in dispossession of the defendants of their land. Counsel submitted that if any order was to be given, it should be one which is aimed at maintaining the status quo and not otherwise. In conclusion, counsel prayed that the application for interlocutory injunction be dismissed with costs. In his reply to **Mr. Omwange's** submission, **Mr. Otieno** submitted that all that **Mr. Omwange** submitted amounted to nothing but evidence given from the bar. He contended that in the absence of an affidavit to controvert the facts deposed in the affidavit of the Plaintiff in support of the application, the defendants must be taken to have admitted the contents thereof.

7. I have considered the Plaintiff's case for interlocutory injunction and the response to it by the Defendants. 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's claim on the basis of which the present application for injunction has been brought is one for adverse possession. For the Plaintiff to succeed in the present application, he is 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. I am in agreement with the Defendants' advocate that the Plaintiff has not made any attempt to place before the court any form of evidence to support his claim to possession of the suit property. The Plaintiff claims to have taken possession of the suit property in 1975 pursuant to an agreement for sale between the Plaintiff and the 1st defendant. A part from the handwritten agreement for the surrender of the suit property dated 18th September, 1996, no evidence was placed before the court to prove that an agreement for sale existed between the Plaintiff and the 1st defendant. The court was neither told of the date of the said agreement nor the terms thereof more particularly the purchase price and the completion period. Due to the foregoing, this court is in doubt as to the circumstances under which the Plaintiff came into possession of the suit property if at all. This brings me to the next issue namely, whether the Plaintiff has proved open, continuous and uninterrupted possession of the suit property. Once again, the Plaintiff performed miserably in terms of proof. No evidence of whatsoever nature was placed before the court to prove possession actual or constructive. Nothing was placed before the court to show the alleged cultivation that the Plaintiff is alleged to have been carrying out on the suit property since 1975. Proof of possession was central to the Plaintiff's case and was the basis on which the injunction application depended. The Plaintiff ought to have put some effort therefore to demonstrate to the court that he has been in possession and he is still in possession of the suit property. I am in agreement with the submission of the advocate for the Plaintiff that the defendants filed no affidavit in response to the averments of fact contained in the Plaintiff's affidavit in support of the application and as such the same

should be deemed as having been admitted. This submission is correct only to some extent. The Plaintiff must appreciate the fact that the onus remained with the Plaintiff throughout to demonstrate to the court that it has a prima facie case against the defendants based on adverse possession. This onus would remain even if the defendants filed nothing in opposition to the application. The Plaintiff was therefore not discharged of the burden of proving on a prima facie basis the ingredients on which a claim for adverse possession is based. Due to the foregoing, I doubt whether the Plaintiff has a prima facie case against the defendants based on adverse possession.

8. A part from establishing a prima facie case with a probability of success, the Applicant was also supposed to prove that unless the orders sought are granted, the applicant would suffer irreparable harm in accordance with the principles that were enunciated in the case of **Giella –vs- Cassman Brown [1973] KLR 358**. I am not persuaded that the Plaintiff stands to suffer irreparable harm if the orders sought are not granted. The Plaintiff has not shown the nature of the activity if any that he is carrying out on the suit property. The plaintiff who claimed that the 1st defendant has sub-divided the suit property has also failed to demonstrate the said sub-division as his own documents show otherwise. A part from showing the suit property was transferred from the 1st defendant to the 2nd to 4th defendant in 2011, there is nothing to show that the Plaintiff's alleged occupation of the suit property is threatened. Now that I am in doubt whether the plaintiff has established a prima facie case with a probability of success and whether he stands to suffer irreparable loss if the orders sought are not granted, the Plaintiff's application falls for consideration on a balance of convenience. The 2nd to 4th defendants have a legal title to the suit property while the Plaintiff claims to be in possession of the same and that his proprietorship rights over the same have accrued.

9. When considering an application for injunction on a balance of convenience, this court would apply what Justice Ojwang' referred to in the case of **Suleiman –vs- Amboseli Resort Ltd. [2004] 2 KLR 589** as “**a more intrinsic test**” namely, whether more injustice would be done to the Plaintiff or to the Defendants if it turns out at the trial that the court was wrong in its conclusion in an application of this nature. In this case, the Plaintiff claims to be in possession of the suit property and have had such possession for the last 35 years and that the Defendants are ill bent on evicting him from the property. The Plaintiff's claim is in doubt but the same is yet to be tested at the trial. On the other hand, the Defendants who have not indicated whether or not they are in possession of the suit property a part from the claim on the part of their advocate from the bar that the injunction sought if granted would dispossess them of the suit property have a title to the property and would be free to deal with the property if the Plaintiff's claim fails. In the circumstances, I am of the view that more injustice would be visited upon the Plaintiff if I dismiss the present application and it turns out at the trial that the Plaintiff is actually in possession and has been in continuous possession for the last 35 years as alleged. If I allow the application and it turns out at the hearing that my doubts as to the Plaintiff's case were well founded, the defendants would have their land and the injustice done to them would be minimal. In the circumstances, balancing the interest of the Plaintiff as against those of the defendants, the order that commends itself to me is to preserve the suit property pending the hearing and determination of this suit.

10. This court has power under **Section 13(7)(a) of the Environment and Land Court Act, No. 19 of 2011** as read with **Section 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya** to make preservative orders. In the circumstances, the prayers sought in the Plaintiff's Notice of Motion application dated 23rd February, 2011(2) are disallowed. In place thereof, I order that neither the Plaintiff nor the defendants shall dispose of, sell, transfer, lease, charge or alienate in any manner whatsoever all that parcel of land measuring 189 feet by 69 feet (approximately ¼ acre) comprised in LR.No. Central Kitutu/Daraja Mbili/819 pending the hearing and determination of this suit. For the avoidance of doubt, the status quo in relation to possession and use of the said parcel of land as at the date of this order shall be maintained until the hearing and determination of this suit. Since neither party has wholly succeeded in the application, the costs shall be in the cause.

Signed, dated and delivered at KISII this 20th day of March, 2013

**S. OKONG'O,
JUDGE.**

In the presence of:-

..... for the Plaintiff
..... for the Defendants
..... Court Clerk.

**S. OKONG'O,
JUDGE.**