REPUBLIC OF KENYA

High Court of Kisii

Civil Case 69 of 2012

LABASON ARAP BALACH……..……..…....……..PLAINTIFF

VERSUS

JEREMIAH SAOLI OLE MEGESH……...……..…….1ST DEFENDANT

KUNINI OLE KIPAAS…...……2ND DEFENDANT

RULING

1. The application before me is the Notice of Motion dated 23rd February, 2012 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap. 21 Laws of Kenya. The Plaintiff in this application is seeking a temporary injunction to restrain the defendants from alienating, transferring, interfering with and/or evicting the Plaintiff from all that parcel of land known as LR.No. Transmara/Kimintet D/447(hereinafter referred to as "**the suit property**"), more particularly, a portion thereof measuring "**1 Acre"** which has been in use and occupation by the Plaintiff (hereinafter where relevant referred to as "**disputed portion of the suit property**") pending the hearing and determination of this suit. The application is supported by the affidavit and supplementary affidavit of the Plaintiff sworn on 23rd February, 2012 and 21st March, 2012 respectively. The Plaintiff's claim against the defendants which forms the basis of the current application for injunction has been brought by way of Originating Summons dated 23rd February, 2012. In the Originating Summons, the Plaintiff is seeking, a declaration that the defendants' right to recover a portion measuring **37 Acres ("the disputed portion of the suit property")** comprised in all that parcel of land known as LR No. Transmara/ Kimintet D/447 ("**the suit property"**) is barred under the Limitation of Actions Act, Cap.22 Laws of Kenya, and that the defendants title over the said portion of the suit property which is in occupation and/or use of the Plaintiff is extinguished, an order that the Land Registrar, Transmara District, do register the Plaintiff as the proprietor of the disputed portion of the suit property in place of the defendants and/or the register of the suit property be rectified to reflect the Plaintiff's ownership of the said portion of the suit property which is under his use and occupation and, an order that, the defendants do execute all the requisite documents necessary for the registration of the Plaintiff as the proprietor of the said portion of suit property and in default, the Deputy Registrar of the High Court and/or the Executive Officer be at liberty to execute the same. The Plaintiff's suit and application for interlocutory injunction are premised on the ground that the Plaintiff has occupied and cultivated the said portion of the suit property which is registered in the name of the defendants for uninterrupted period exceeding 20 years(since 1990) and as such the Plaintiff has acquired ownership thereof by adverse possession. In his affidavits in support of the Originating Summons and application for injunction, the Plaintiff has deposed that he took possession of the disputed portion of the suit property in 1990 pursuant to an agreement for sale that was entered into between the Plaintiff and the 2nd defendant during that year under which the 2nd defendant sold to him a portion of the parcel of land then known as **Plot No. 447, Kimintet D, Adjudication Section**(hereinafter where relevant referred to as **"the original plot"**). The

Plaintiff has deposed that the said agreement for sale was entered into after the area had been declared an adjudication section and when the compilation of the adjudication register was completed, the Plaintiff laid a claim to the said portion of the suit property as against the 2nd defendant and the same was awarded to him by the Adjudication Court in Objection No.297. The 2nd defendant appealed to the Minister against the said decision but the Minister upheld the same in Appeal Case No.124 of 2001. The Plaintiff has annexed copies of both decisions to his affidavits sworn in support of the Originating Summons and the application for injunction. In the objection proceedings, the Adjudication Court ordered that a portion of the suit property that had been sold by the 2nd defendant to the Plaintiff be curved out from the suit property along **"the established boundary in the ground"** and the same be registered in the name of the Plaintiff under a new land reference number. As I have stated above, this decision was upheld on appeal. However, while the said appeal was pending hearing and determination, the Land Registrar, Transmara District and the District Surveyor, acting on the said orders of the Adjudication Court, curved out from the suit property a portion measuring approximately 11.23 Hectares (27.758 Acres) and had the same registered in the name of the Plaintiff on 7th January, 2004 under L.R. No.Transmara/Kimintet D/1144(hereinafter referred to as **"Plot No.1144"**). On the same date, what remained of the suit property which was now measuring approximately 37.73 Hectares (93.260 Acres) was registered in the name of the two defendants under L.R. No. Transmara/Kimintet D/447(suit property). It is the Plaintiff's contention that during the execution of the Land Adjudication Court's order aforesaid which was confirmed on appeal, the Land Registrar, Transmara District and the District Land Surveyor failed, refused and/or neglected during the demarcation of the portion of the suit property that was to be registered in the name of the Plaintiff to follow **"the established boundary"** with the result that approximately 37 Acres(disputed portion of the suit property) of the original plot that was supposed to form part of Plot No.1144 remained part of the suit property. It is not clear to me from the Plaintiff's affidavits whether this 37 Acres claimed by the Plaintiff is in addition to the 27.758 Acres comprised in Plot No.1144 which is already in the name of the Plaintiff or not. The Plaintiff claims that due to this anomaly, the disputed portion of the suit property which he has occupied and used for over 20 years and which ought to have been part of his land and to have formed part of Plot No.1144 remained as part of the suit property and became registered in the name of the defendants. The Plaintiff claims that he discovered this anomaly when he carried out a survey over Plot No. 1144 in April, 2011. The said survey is said to have been carried out as a result of a claim that had been lodged by the 1st defendant over a portion of land that was under the Plaintiff's occupation and use and from which the 1st defendant had threatened to evict the Plaintiff. After this discovery, the Plaintiff claims to have made several attempts to have the matter resolved through the Land Registrar and the Survey department but he was not successful. The Plaintiff was then left with no alternative but to file this suit to claim the disputed portion of the suit property from the defendants by adverse possession. It is the Plaintiff's contention that he is still threatened with eviction from the disputed portion of the suit property by the defendants and unless the orders sought are issued to restrain the defendants from carrying out the said threat, the Plaintiff stands to suffer irreparable loss. The Plaintiff claims that the intended forceful eviction is aimed at defeating rights and interests that have accrued to the Plaintiff over the said portion of the suit property. The Plaintiff has claimed further that he depends on the said portion of the suit property for his subsistence and his eviction therefrom would be equivalent to depriving him of his livelihood. The Plaintiff claims that he has established a prima facie case against the defendants. The Plaintiff claims further that, since the defendants have never occupied or used the said portion of the suit property for over 20 years, they would not be prejudiced in any way with the orders sought.

2. In the written submissions filed in court on 16th May, 2012 by the Plaintiff's advocates in support of the application for injunction, the Plaintiff reiterated the contents of his various affidavits and the grounds set out in the body of the Notice of Motion application. The Plaintiff maintained in his submission that he has had peaceful, continuous, open and uninterrupted occupation of the disputed portion of the suit property since 1990 a fact that was confirmed by the decisions that were made in the Objection Case No. 297 and Appeal Case No. 124 of 2001. The Plaintiff submitted that it was the failure on the part of the Land Registrar, Transmara and the District Surveyor to reconcile their records that led to the disputed portion of the suit property remaining as part of the suit property instead of being part of Plot No.1144. It has also been submitted that the disputed portion of the suit property came to be part of the suit property through manipulation of the area index map which manipulation was intended to enlarge the suit property

by 37 Acres for the benefit of the defendants. It was submitted further by the Plaintiff that the Land Registrar and the District Surveyor have been unable to rectify this obvious anomaly because the title issued to the defendants of which the disputed portion of the suit property belonging to the Plaintiff now form part was by way of first registration and as such cannot be rectified. This left the Plaintiff with no alternative but to claim back the said portion of the suit property through adverse possession. The Plaintiff lamented that it is a pity that he has to claim this portion of the suit property afresh although the same had already been awarded to him. The Plaintiff submitted further that he has established a prima facie case against the defendants based on adverse possession. The Plaintiff submitted that he has satisfied the ingredients of adverse possession that were highlighted in the case of **Kenya Tea Development Authority-vs-Jackson Gichuhi Karanja & Another[2006]eKLR** and also demonstrated that he stands to suffer irreparable loss unless the orders sought are granted. It was submitted further on behalf of the Plaintiff that, even if the application is considered on a balance of convenience, the same would tilt in favour of the Plaintiff. The Plaintiff also relied on the Court of Appeal case of **Githu-vs-Ndeete [1984]KLR 776** in support of his submission that he has all along asserted his right to the disputed portion of the suit property. In conclusion, the Plaintiff urged the court to allow the application by granting the injunction sought.

3. The Plaintiff's application is opposed by the defendants. The defendants filed a replying affidavit and a further replying affidavit sworn on 12th March, 2012 and 26th March, 2012 respectively by the 2nd defendant in opposition to the application. The defendants have not contested most of the material statements of fact contained in the Plaintiff's affidavits in support of the injunction application such as, the Plaintiff's entry into the portion of what was formerly **Plot No.447,Kimintet D, Adjudication Section**("**the original plot"**), the Plaintiff's demarcation of the boundary of the portion of the said plot that was under his occupation, the objection that was lodged by the Plaintiff claiming the said portion of land, the outcome of the said objection proceedings, the appeal that was lodged with the Minister against the said decision, the decision of the Minister and the subdivision of the then **Plot No.447, Kimintet D, Adjudication Section(original plot)**, into **LR.No. Transmara/Kimintet D/447**(**suit property**) that was registered in the name of the defendants and **L.R.No. Transmara/Kimintet D/1144 (Plot No.1144)** that was registered in the name of the Plaintiff. The only points of divergence between the parties are whether the Land Registrar and the District Surveyor who carried out the subdivision of the original plot did so in accordance with the order made by the Adjudication Court which was subsequently confirmed on appeal or not and whether a portion of the original plot measuring 37 Acres that was supposed to go to the Plaintiff as part of Plot No.1144 remained or was caused to remain as part of the suit property. According to the defendants, the decision of the Adjudication Court was implemented to the letter. The original plot was subdivided in accordance with the said decision and the Plaintiff was given the portion thereof which has all along been in his possession and occupation which portion was registered in the Plaintiff's name as Plot No.1144. The remaining portion of the original plot was registered in the names of the defendants and assigned LR.No.Transmara/Kimintet D/447(suit property). The defendants have denied that any error occurred during the subdivision of the original plot and that the Plaintiff has been in occupation of a portion of the suit property measuring 37 Acres (disputed portion of the suit property) as claimed. The defendants claim that this suit is a calculated and deliberate move by the Plaintiff to gain additional portion of land from the suit property and amounts to lodging an appeal against the decision of the Minister through the back-door as such appeal is not allowed by law. It is the defendants' contention that the Plaintiff's application is misconceived, mischievious and legally untenable. According to the defendants, the orders sought in the application are contrary to law and the court has no jurisdiction to entertain the same.

4. In the written submissions filed in court on 21st May, 2012 by the advocates for the defendants in opposition to the injunction application, the defendants have reiterated the contents of the 2nd defendant's affidavits in reply to the application and submitted that the Plaintiff has failed to show that he has a prima facie case against the defendants and that he will suffer irreparable loss unless the orders sought are granted. It is the defendants' submission that the parcel of land that the Plaintiff is claiming to have been in his possession and occupation since 1990 was adjudicated and demarcated in his favour pursuant to the aforesaid adjudication proceedings which parcel was assigned Plot No.1144. It is the defendants' submission therefore that the Plaintiff's claim that the same parcel of land that he occupied in 1990 is now part of the suit property is misconceived. The defendants' have submitted further that if the

Plaintiff's contention is that he has all along been in possession and occupation of the disputed portion of the suit property on the belief and understanding that it was part of Plot No.1144 which is owned by him, then his claim to the same is not maintainable as he cannot claim through adverse possession what he believed to belong to him as of right. The defendants' have contended further that the defendants' and the Plaintiff's rights over the portions of the original plot that was subsequently subdivided to give rise to the suit property and Plot No.1144 only crystalized after the decision of the Minister on appeal by the 2nd defendant on 10th June, 2004. It follows therefore according the defendants that the Plaintiff's alleged occupation of a portion of the suit property can only be reckoned from 10th June, 2004 and not from the year, 1990 as claimed by the Plaintiff. It is the defendant's contention that even if it is assumed that the 37 Acres claimed by the Plaintiff forms part of the suit property, the Plaintiff's claim to the same through adverse possession would be premature as the mandatory 12 years period had not lapsed as at the date when this suit was lodged. The other point raised by the defendants is that the Plaintiff has not sought an order of injunction in its originating summons and as such, the Plaintiff is not entitled to an interlocutory injunction. The defendants have submitted further that the Plaintiff has not demonstrated at all that unless the orders sought are granted, he will suffer irreparable loss. According to the defendants, the Plaintiff is in possession and occupation of Plot No.1144 which is registered in the name of the Plaintiff. The Plaintiff therefore stands to suffer no irreparable loss if the orders of injunction sought are denied. The final argument put forward by the defendants in their submission is that the defendants are the registered proprietors of the suit property on a first registration and as such the defendants are entitled to protection afforded to them by law which includes a right to develop and enjoy the suit property. It is the defendants' submission that they cannot therefore be stopped from carrying out development on their own land. In support of their above submissions, the defendants relied on the cases of **Aikman-vs-Muchoki(1984)KLR353, MraoLimited-vs-First American Bank of Kenya Limited&2others(2003)KLR125, Githu-vs-Ndeete(1984) KLR776, Southern Credit Banking Corporation Ltd.-vs-Charles Wachira Ngundo,Nairobi HCC No.1780 of 2000(unreported), K.I.G Bar Grocery & Restaurant Ltd. -vs- Gatabaki & Another(1972) E.A 503** and **George Orango Orago-vs-George Liewa Jagalo & 3 Others, Court of Appeal, Civil Appeal No.62 of 2009(Unreported)**.

5. I have considered the Plaintiff's case for interlocutory injunction and the response thereto by the defendants. This is the view I take of the matter. The Plaintiff's suit on the basis of which the present injunction application has been brought is seeking title to land registered in the names of the defendants by adverse possession. The history behind the claim is rather checkered and is not agreed upon by the parties. The true facts may not be known until the hearing of the main suit. This history will however come to bear when the substance of the Plaintiff's case is being considered at this stage for the purposes of determining whether or not the case put forward by the Plaintiff warrants the granting of an interlocutory injunction. The Court cannot therefore avoid delving into it. The Plaintiff claims that he had entered into an agreement for sale with the 2nd defendant with respect to a portion of the parcel of land then known as Plot No.447, KimintetD, Adjudication Section(**original plot**). The said agreement is said to have been entered into in the year 1990 soon after Kimentet D area was declared an adjudication section. When the adjudication register for the area was compiled, the whole of the original plot was demarcated in favour of the 2nd defendant including the portion that the Plaintiff claimed to have been sold to him by the 2nd defendant. The Plaintiff raised an objection to this register claiming that he was entitled to a portion of the original plot. The objection was opposed by the 2nd defendant who maintained that the whole of the original plot was his and that he had only allowed the Plaintiff to cultivate a portion of it for subsistence. The Plaintiff's objection was allowed and the Adjudication court ordered that a portion of the original plot be demarcated in favour of the Plaintiff along "**the established boundary**" and that the Plaintiff be given a land reference number for it. From the record, the Plaintiff's objection was heard on 5th September, 2000 and the decision of the Adjudication court seems to have been made on 7th November, 2000(not 7th January, 2000). The 2nd defendant was aggrieved by the decision of the Adjudication court and preferred an appeal to the Minister pursuant to the provisions of the Land Adjudication Act, Cap.284, Laws of Kenya. The 2nd defendant's appeal was opposed by the Plaintiff and by his decision made on 10th June, 2004, the Minister represented by the then District Commissioner, Transmara District upheld the decision of the Adjudication Court. While this appeal to the Minister was pending, the original plot was subdivided into two (2) in accordance with the order of the Adjudication

Court. A portion measuring 11.23 Hectares was curved out and registered in the name of the Plaintiff as Plot No.1144 while the remaining portion which measures approximately 37.73 Hectares was registered in the name of the defendants as the suit property. The subdivision of the original plot and the registration of the two portions thereof in the names of the Plaintiff and the defendants were done on 7th January, 2004 while the appeal was determined on 10th June, 2004. Since the appeal was dismissed, the said subdivision of the original plot was not affected in any way. The Plaintiff now claims after eight (8) years since the subdivision of the original plot was done that approximately 37Acres of land that should have formed part of Plot No.1144 during the subdivision of the original plot remained as part of the suit property. This allegation is very difficult to determine at this stage for various reasons. It is not clear from the record as to what portion of the original plot was sold by the 2nd defendant to the Plaintiff. This information did not come out during the objection proceedings and at the hearing of the appeal. I believe that it is for this reason that the Adjudication court did order that **"the Plaintiff be awarded a portion which he claims which is along the established boundary in the ground…".** Without any information as to the measurement of the portion of the original plot that was sold by the 2nd defendant to the Plaintiff and which was in the possession and occupation of the Plaintiff as at the time of the objection proceedings, the only guide left is the so called "**established boundary**". The Plaintiff claims that this boundary was not followed during the subdivision of the original plot while the defendants claim the opposite. It follows therefore that this is an issue which can only be determined at the trial. The issue may never be determined at the trial at all after all.

6. In this suit, the Plaintiff is not claiming the disputed portion of the suit property on the basis of the erroneous demarcation or subdivision which he has dwelt on at length in his various affidavits but on the ground that he has acquired title to the same by adverse possession through open, quiet and uninterrupted possession and occupation of the same for a period of over 20 years reckoned from 1990. It is not clear from the record when exactly the Plaintiff discovered this erroneous sub-division. I don't want to say much at this stage so as not to prejudice the hearing of the main suit, but I must say that I am not in agreement with the contention by the Plaintiff that since the suit property was registered in the name of the defendants on a first registration basis, any error noted in its register upon resurvey could not be corrected. I believe that the Land Registrar has power under section 142(1) (c) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) to rectify such errors if they indeed exist even on a first registration after giving notice to the parties and hearing them. If the Registrar declines to act or rules that he has no power or jurisdiction to do so, the aggrieved party can follow the appeal process provided for under the said Act or take other appropriate measures as provided by law to safe guard his interest. Anyway, the Plaintiff having decided to pursue his claim to the disputed portion of the suit property through adverse possession, his claim against the defendants falls for consideration under the principles underpinning adverse possession claims.

7. 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 is 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 disputed portion of the suit property that he is claiming for a period of 12 years or more. The Plaintiff claims that he purchased the disputed portion of the suit property from the 2nd defendant in 1990 and immediately took possession which possession has continued to date. It is the Plaintiff's contention therefore that his date of occupation should be reckoned from 1990 which would bring the period he has been in possession of the disputed property to about 22 years as at the date when this suit was instituted. This claim is refuted by the defendants. It is the defendants' contention that the Plaintiff's occupation of the portion of the suit property in dispute which is not admitted was interrupted by the objection proceedings when the 2nd defendant asserted his right to the suit property and the subsequent appeal by the 2nd defendant. For the circumstances that amount to assertion of right by a proprietor, refer to the case of **Githu-vs-Ndeete (1984) KLR 776** which has been cited by both parties. As observed above, the defendants' contention is that the Plaintiff's period of occupation can only be reckoned from 10th June, 2004 when the 2nd defendant's appeal to the Minister was determined and not earlier. Without determining the issue conclusively, I am in agreement with the Defendants' advocates that the Plaintiff's occupation of the disputed portion of the suit property can only be reckoned from 10th June, 2004 and not

1990. This means that as of the date of filing this suit on 23rd February, 2012, the Plaintiff if he is in possession of the disputed portion of the suit property would have had such possession for a period of about 8 years only which falls short of the mandatory 12 years necessary for a claim for title to land based on adverse possession. I must say also that the Plaintiff did not make any attempt to place before the court any form of evidence to support his claim to possession of the disputed portion of the suit property. The Plaintiff claims to have taken possession of the suit property in 1990 pursuant to an agreement for sale between the Plaintiff and the 2nd defendant and that he has remained in possession to date. The proceedings of the appeal to the Minister however show that, when the Minister's panel visited the property, there was only evidence of **"earlier settlement (burnt structures/shelter)"**. Due to the foregoing, I am not satisfied that the Plaintiff has proved on a prima facie basis that he has had open, quiet and uninterrupted possession of the disputed portion of the suit property for a period of or exceeding 12 years. The other issue that casts doubt on the veracity of the Plaintiff's claim to the disputed portion of the suit property through adverse possession is the Plaintiff's claim that all along he had occupied the said property on the belief that the same was part of Plot No.1144 which is registered in his name until he carried out a survey sometimes in the year 2011 which revealed that the disputed property is actually part of the suit property which is registered in the name of the defendants. I am in agreement with the submission of the advocates for the defendants that such contention is inconsistent with an adverse possession claim. A person who occupies land that he claims to belong to him as of right cannot claim that such occupation was adverse to the interest of the registered proprietor of such land. An adverse possessor must have no right to be on the land claimed other than his entry and occupation thereof. See the persuasive case of **Mbira-vs-Gachuhi [2002] 1 EA 132**. Due to the foregoing, I am in 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 activities if any that he is carrying out on the suit property. The plaintiff has only claimed without any proof that he has put up a live fence around the disputed portion of the suit property a fact which is disputed by the defendants who claim that the Plaintiff's activities are within his Plot No. 1144. There is nothing to show that the Plaintiff's alleged occupation of the disputed portion of the suit property is threatened. Having expressed my doubt as to 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 now falls for consideration on a balance of convenience. The defendants have a legal title to the suit property including the portion claimed by the Plaintiff while the Plaintiff claims to be in possession of the same and that his proprietorship rights over the same have accrued. When considering an application for injunction on a balance of convenience, this court normally applies 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 reached in an application of this nature. In this case, the Plaintiff claims to be in possession of the disputed portion of the suit property and have had such possession for the last 20 years and that the Defendants intend to evict him from the property. The Plaintiff's claim although seriously in doubt 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 disputed portion of the suit property have a title to the same 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 20 years as alleged and that prescriptive rights have accrued to him in the process. 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.

9. 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 preservatory orders. In the circumstances, I disallow the application dated 23rd February, 2012. In place thereof, I order that the status quo as relates to title, use, occupation and/or possession of the disputed portion of the suit property, namely 37 Acres of all that parcel of land known as LR.No. Transmara/Kimintet D/447 situated at its border with LR. No. Transmara/Kimintet D/1144 as at the date of this order shall be maintained by the parties pending the hearing and determination of this suit. Since the Plaintiff has to a large extent failed in the application, the defendants shall have the costs of the application.

Signed, dated and delivered at KISII this 26th day of April, 2013.

S. OKONG'O,
JUDGE.

In the presence of:-

Mr. Nyambati holding brief for Otieno for the Plaintiff

Mr. Ochwangi for the Defendants
Ombasa Court Clerk.

S. OKONG'O,
JUDGE.