



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 814 of 2012**

**JONATHAN CHERUIYOT..... 1ST PLAINTIFF**

**SAMUEL SANG CHERUIYOT.....2ND PLAINTIFF**

**VS**

**ESTHER MISHACK.....DEFENDANT**

***(Application for injunction; principles upon which the court will determine an application for injunction; plaintiffs claiming to have acquired suit land by adverse possession; defendant resisting the claim; plaintiffs seeking to have defendant restrained from suit land pending hearing and determination of the suit; opposing averments on who is in possession; balance of convenience; status quo to be maintained pending hearing of suit)***

**RULING**

The application before me is an application dated 22 February 2012 filed by the plaintiffs. It is an application brought under the provisions of Order 40 Rule 1& 3 of the Civil Procedure Rules, 2010. It is an application for injunction in which the plaintiffs seek to have the defendants restrained by way of temporary injunction from ploughing, interfering and/or trespassing and/or dealing with 0.7 acres of the land parcel Nandi/Kamobo/510 pending the hearing and determination of this suit.

The application is supported by the affidavit of the 1st plaintiff and is founded inter alia upon the following grounds :-

- That the plaintiff has been in occupation of the subject land since 1981.
- That the period occupied by the plaintiff is over 12 years.
- That the plaintiff's occupation has been open and without interruption of the defendant.
- That the defendant has recently unlawfully threatened to disturb the plaintiffs.

The application is opposed by the defendant who has filed a replying affidavit.

This being an application for injunction, I will turn to the principles set out in the case of ***Giella v Cassman Brown (1973) EA 358***. First the plaintiff has to set out a prima facie case; secondly, I need to be satisfied that if the injunction is not granted the plaintiffs will suffer irreparable loss and finally if in doubt decide the matter on a balance of convenience.

This suit was commenced by way of Originating Summons stated to be brought under the provisions of

Order XXXVII Rule 1 of the Civil Procedure Rules. It is an application in which the plaintiffs seek orders that Jonathan Cheruiyot be registered as the proprietor of 0.7 acres of thereabouts out of land parcel No. Nandi/Kamobo/510 in place of Esther Mishack having acquired ownership thereof through adverse possession.

The affidavit to the Originating Summons is sworn by Jonathan Cheruiyot. He has averred that he bought 0.7 acres of the suit land at a consideration of Kshs.1,000/= from the 2nd plaintiff in 1981 when the suit land was still in the name of the original owner, one Mishack Torombon who is the deceased husband to the defendant. It has further been deponed that the 1st plaintiff has planted several trees (blue gum) and grazed his livestock since 1981 to date . He has deponed that his occupation has been continuous and uninterrupted for over 12 years but that recently, the defendant threatened to destroy his developments including the trees planted on the land. To the affidavit, the plaintiffs have annexed a copy of the register of the parcel No. Nandi/Kamobo/510 which shows that the suit land is approximately 0.32 Hectares (about 0.8 acres in my rough estimation). The title shows that the land was first registered in the name of Kimatar arap Torombon on 16/6/1976 and latter transmitted to the defendant who became registered as proprietor on 31/10/2002. There is a restriction on the title owing to Land Disputes Tribunal Case No. 56 of 2005.

The supporting affidavit to the application for injunction has more or less reiterated what has been deponed in the supporting affidavit to the O.S.

On her part, the defendant in her replying affidavit has stated that she is in possession, occupation and user of the whole of the suit land. She has stated that no claim was ever made by the plaintiffs during the lifetime of her deceased husband and that there was no objection filed by the plaintiffs in the succession proceedings to her husband's estate. She has denied that the applicants are on the land or indeed ever been on the land. She has also in her affidavit averred that the plaintiffs claim to have bought the land from one Mishack Torombon whereas the original title holder was one Kimatar arap Torombon. She has further averred that no agreements of sale have been annexed. She has also deponed that the limitation period has not lapsed as time started running against her in 2005 when she first became registered and this is only 7 years and not 12 years as required for one to claim land by adverse possession. She has therefore prayed that this application be dismissed.

The application was canvassed before me on 11/4/2013. Mr. Kiboi, learned counsel for the plaintiffs urged me to allow the application and he based his arguments on the affidavits in both the O.S and the Motion. The defendant who appears in person urged me to dismiss the application and she more or less reiterated what she had deponed in her replying affidavit.

It is with the above pleadings and depositions that I need to make a decision on this application for injunction.

It will be noted at the outset that there is a serious dispute as to who is in possession. The plaintiffs claim that the 1st plaintiff is in possession whereas the defendant has deponed that the plaintiffs have never been in possession and that she is the one who has all along been in possession of the land. Now, I cannot tell who is telling the truth and who is not, at least at this preliminary stage. Occupation of land is of course a key element in any claim for adverse possession and I hesitate to make any preliminary finding on who is in possession and who is not at this stage of the proceedings.

There is the averment by the defendant that possession aside, time did not begin to run against her before 2005 when she became the registered proprietor and since it is only 7 years since she became the registered proprietor, the plaintiff has not established a prima facie case of possession for a duration of 12 years to assert a claim for adverse possession. I can confidently say that this is not the position in law. Time continues to run even when there is a change of proprietorship a position that was affirmed in the case of *Githu v Ndeete (1984) KLR 776*.

Given the opposing positions on occupation taken by the plaintiffs and the defendant, I am in serious doubt as to the correct position with regard to occupation and therefore in doubt as to the strength of the

case of the plaintiff. None of the parties buttressed their positions with regard to occupation by tendering a valuation report or a surveyor's report, or by the depositions of an independent witness who would have had the authority to state who exactly is in possession of the suit land.

Where there is doubt as to the applicant's case, the principles direct me to decide such an application on a balance of convenience. The balance of convenience in this regard is to have the suit land remain in the status that it is currently. I also have in mind that the objective of an injunction is to preserve the subject matter of the suit pending the hearing on merits of the case. In our case, I think it is best if the suit land is retained in the status that it presently is until the determination of this suit. It is regretful that I am unable to accurately define that status but whatever the status may be, let the same remain until this suit is finally disposed of.

The costs of this application shall be costs in the cause.

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2013.

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT & LAND COURT AT ELDORET**

*Delivered in the presence of :*

*Mr. T.K. Kiplimo holding brief for Mr. Kiboi fof M/s Chemitei & Company Advocates for the plaintiffs.*

*Defendant in person present.*