



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 137 of 2013

THE PRESBYTERIAN FOUNDATION.....PLAINTIFF/APPLICANT

-VERSUS-

STANLEY CHEGE.....1ST DEFENDANT/RESPONDENT

JOHN NYAGA.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff by a plaint dated 29th January, 2013 filed the instant suit on the same date. Simultaneously also the Plaintiff filed a Notice of Motion application under Order 40 Rules 1, 3 and 4 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all other enabling Provisions of the law. Inter alia the application seeks the following orders: -

3. *“That the Defendants, their Agents, Servants, employees and anyone claiming under them be hereby restrained from developing, constructing, wasting, alienating, transferring, disposing and/or in any other way dealing with parcel of land number 13858/97 situated in Githurai Nairobi pending the hearing and determination of this suit”.*

4. *“That the Honourable court be pleased to order that the Defendant vacates the property number Land reference 13858/972”.*

The application is supported by the annexed affidavit of Samuel Njoroge Waweru, Secretary of the plaintiff and grounds set out on the face of the application as follows:

(a)The Plaintiff is the registered owner of parcel of land number 13858/97 situated in Githurai South of Ruiru town.

(b)The Plaintiff has acquired all the proprietors rights and interest in the said parcel of Land and has a good title.

(c)The Defendants have without any colour of right unlawfully trespassed on the said parcel of land and have commenced developments thereof without the plaintiff's knowledge or consent.

(d)The Defendants have no rights or interest in the suit property and should be ordered to vacate.

(e)The plaintiff has suffered and continues to suffer irreparable loss and damage due to the said trespass.

(f) It is in the interest of justice to preserve the suit property to prevent any more wastage and to safeguard the rightful owner's interest.

The defendants in response have filed a statement of defence and counterclaim to the plaintiff's claim in which they claim being entitled to the suit property by virtue of having acquired title to the property through the doctrine of adverse possession. In response to the plaintiff's notice of motion application both defendants have sworn replying affidavits in opposition to the plaintiff's application for a temporary injunction.

Briefly the case for the plaintiff is that he purchased the suit property from one Eliud Ngala Mwendwa and the property was transferred to the plaintiff on 19th October 2000 for the consideration of Kshs. 900,000/= and the plaintiff has ever since been the registered owner as per the copy of the certificate of title annexed as "SNW1" in the supporting affidavit. The plaintiff avers that sometime in 2011 some persons unknown to them trespassed onto the suit property and commenced developments thereon without the Plaintiff's knowledge and/or consent. The plaintiff further avers that they attempted to have the trespassers identified and summoned to the Chief's office to no avail. That it was not until January

2013 that the Plaintiff managed to get the identities of the trespassers which enabled the Plaintiff to institute the present suit. The Plaintiff states that unless the defendants are restrained by an order of the court they are likely to unlawfully continue constructing, wasting and/or will alienate or deal with the property to the detriment of the Plaintiff.

For their part the defendants have as stated above filed a counterclaim where they claim to be lawfully and legally entitled to the suit property by virtue of having been in adverse possession of the property from 1999/2000. The Defendants have filed replying affidavits whereby they each claim to have been in

actual possession of the suit property since the year 2000 when they constructed structures where they live with their families.

They claim their possession has been uninterrupted for a period of over 121 years and would in any event be entitled to be declared as owners by virtue of their having been in adverse possession. The Defendants contend that it is not true that the plaintiff did not know that the defendants have been in possession since 2000 as the occupation and possession by the defendants has been open and not secret as evidenced by the structures they have constructed and wherein the defendants live and reside with their families. The defendants finally contend that the plaintiff has not satisfied the conditions necessary for the grant of a temporary injunction.

The court is in the instant suit faced with the two distinct and divergent positions. Firstly, the plaintiffs assertion that the defendants moved into and started developments in the suit property in 2011. Secondly, the defendants assertion that they actually settled in the suit property in 2000. Depending on which position the court will hold to be true the final result of the contest could be markedly different. If the assertion by the plaintiff is held to be true then it will follow that the defendants would be in trespass. However if the assertion by the defendants is found to be true then it will be necessary for the court to consider whether the doctrine of adverse possession would be applicable given all the attendant circumstances. Whereas the plaintiff became registered owner of the suit property in 2000 the court notes that the plaintiff has not on the materials and evidence tendered before the court shown what the status of the suit property was between 2000 and 2011 when they claim the defendants encroached onto the same.

Pursuant to directions given by the court the parties filed written submissions. I have considered the submissions and the totality of the evidence adduced on the part of the plaintiff and the defendants on the basis of the filed affidavits and all the annexures and I hold that the respective parties contentions cannot be ruled upon at this interlocutory stage. Indeed the court will need to take and hear evidence to determine ownership of the suit property in view of the counterclaim filed by the defendants. The annexures relating to utility bills annexed to the Defendants affidavits point to the fact that the defendants are actually in physical occupation of the suit property. Of course it is not apparent when they started paying these utility bills but then that remains a matter of evidence at the trial.

Turning to the prayers in the plaintiff's Notice of Motion prayer No. 3 seeks to restrain developing, constructing, wasting, alienating, transferring, and/or disposing of the suit property pending the hearing and determination of the suit. Prayer No. 4 seeks an order that the defendants vacate the suit property. Both the plaintiff and the defendants have each claimed ownership to the suit property. The plaintiff by virtue of being the registered owner and the defendant by virtue of having been in adverse possession for a period of over 12 years. Until the issue of who is entitled to ownership is determined it is my view that there is need for the status quo of the suit property to be maintained so that whoever is decreed to be the rightful owner should be able to have the property restored and/or vested to them. As relates to prayer No. 4 it is my view that the order sought would only be available on finalisation of the case if the plaintiff is decreed as the owner of the suit property.

I have in determining this application not considered the often referred to grounds for the grant of a temporary injunction to wit:-

- That an applicant must show a prima facie case with a probability of success;

- That an applicant must show that he stands to suffer irreparable loss if the order of injunction is not given.

- That any doubt in regard to the above two conditions should be resolved on the balance of convenience by the court.

I have considered what would be justifiable in the circumstances of the case particularly since both the plaintiff and the defendants claim ownership of the suit property on varying grounds. The duty of the court is to do substantive justice having regard to all the attendant circumstances. In the circumstances of this case the order that commends itself is that the parties maintain the status quo which would be interpreted to mean there should be no fresh developments, constructions and/or acts of wastage or transfer or any disposal of the suit property by any party. Of course status quo would mean that the defendants who are already in possession remain in occupation and possession until the suit is finally heard and determined on merits.

The costs of this application will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant

