



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 66 of 2013**

**MARGARET MOLLY ENDESIA.....PLAINTIFF**

**VS**

**CLEMENT ODHIAMBO.....1ST DEFENDANT**

**CHERRYLYNE KHAKAI ACHOKA.....2ND DEFENDANT**

**RULING**

**Part A : Background**

1. The application before me is the application dated 19 February 2013. It is an application brought under the provisions of Order 40 Rules 1,2 and 4 of the Civil Procedure Rules. The application seeks an injunction to have the defendants restrained from interfering with the plaintiff's possession or in any other way dealing with the parcel of land registered as Soy/Soy Block 10 (Navillus) /2411 pending the hearing and determination of this suit. The application is supported by the affidavit of the plaintiff and is opposed by the defendants.

2. This being an application for injunction, I stand guided by the principles laid down in the case of ***Giella v Cassman Brown (1973) EA 358***. In the said case, the guidelines when dealing with an application for injunction were elaborated. First, the applicant has to demonstrate a prima facie case with a probability of success; secondly, the court ought to be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and finally, if in doubt the court will decide the application on a balance of convenience.

3. The starting point is inevitably the applicant's case as set out in the pleadings and the affidavit in support thereof. Where the respondent has replied to the application or has filed defence, then the assessment of the applicant's case must be made in light of the defences raised by the respondent.

4. What then is the plaintiff's case ?

**Part B : The Plaintiff's Case.**

5. This suit was commenced by way of Originating Summons brought under the provisions of the Limitation of Actions Act, CAP 22 ; Order 37 Rule 7 of the Civil Procedure Rules; and Section 28 (h) of the Land Registration Act, Act No.3 of 2012. In the Originating Summons, the applicant (whom I refer to herein as the plaintiff) has sought orders that she has obtained title to the land parcel No. Soy/ Soy Navillus Block 10/2411 (the suit land) by way of adverse possession. She has further sought orders that the defendants' title has been extinguished by lapse of time and has asked that she be registered as proprietor of the suit land in place of the defendants.

6. In the affidavit in support of the Originating Summons, the plaintiff has elaborated her claim over the suit land. She has deponed that she is a member of Ishieywe Self Help Group and that she balloted and was allocated a plot designated as Plot No. 27 measuring 0.12 acres within the land parcel registered as Soy/Soy (Navillus)/ 65. She was later given title to the land parcel Soy/Soy Block 10 (Navillus)/ 2276. However on the ground she had been occupying the land parcel Soy /Soy Block 10 (Navillus) 2411 which is the suit land. She has deponed that she has been occupying the suit land since 1999 and has extensively developed it, built a house and planted crops. The suit land was initially registered in the name of the 1st defendant who later transferred it to the 2nd defendant. She has deponed that no one ever came to attempt to remove her and that she has been on the land openly and without force. It is for these reasons that she now claims the land by way of the doctrine of adverse possession.

7. Alongside the Originating Summons, the plaintiff filed this application for injunction. In the affidavit in support of the application for injunction, the plaintiff has deponed that the 2nd defendant has threatened her with eviction and that on 15/2/2013 the 2nd defendant came to the suit land and uprooted some vegetables before she was stopped by neighbours. She has therefore asked that she be protected pending the hearing and determination of the suit. To her supporting affidavit, the plaintiff has annexed copies of her membership card to Ishieywe SHG, her share certificate, minutes of the land control board of 15 March 2007, payment receipts to Ishieywe SHG, a copy of the certificate of official search for the suit land and some photographs said to be photographs of the suit land.

### **Part C : The defendants' Case**

8. Upon being served, the defendants entered appearance and filed a replying affidavit to the Originating Summons. They have also responded to the present application by filing a replying affidavit. The defendants have denied that the plaintiff has obtained title to the suit land by way of adverse possession. It has been contended in the replying affidavit that the case of the applicant is not clear i.e whether she is claiming the suit land by way of adverse possession or as a purchaser for value. They have stated that the applicant is on the suit land irregularly and/or illegally and ought to be compelled to give vacant possession forthwith to the legal owner. They have denied that the plaintiff has been on the suit land since 1999 to date.

9. It is deponed that Ishieywe Self Help Group did not have an interest in the suit land in 1999. The land was previously owned by Lonrho Agribusiness (East Africa) Limited which sold the land to Ishieywe SHG on 20 July 1999.

10. The 2nd defendant has deponed that he bought the suit land from one John Njuguna Maina who had balloted for plot No.27 and who later transferred his interest directly to the 2nd defendant. The 2nd defendant therefore came to be registered as proprietor of the suit land on 7/12/2012. The 2nd defendant has deponed that when she went to take possession of the land, she found that the plaintiff had started fencing the land and she reported the matter to the police station vide OB No. 07/28/12/2012. She has deponed that the matter was referred to the District Commissioner Uasin Gishu and the Land Registrar who acknowledged that the land belonged to the 2nd defendant but that the plaintiff refused to move out. She then wrote a letter of demand dated 18 February 2013 asking the plaintiff to vacate the suit land.

11. She has deponed that the occupation of the suit land by the plaintiff cannot be said to have been peaceful or uninterrupted. With reference to the minutes of the land control board, the defendants have deponed that the same show that the plaintiff was allocated land parcel Soy/Soy (Navillus) Block 10/2276 and not Soy/Soy (Navillus) Block 10/2411 (the suit land). They have in any event contested the consent as being fraudulent and it is denied that the plaintiff's name was ever in the allotment list. They have stated that the plaintiff never paid money that would have entitled her to any allocation of land. They have contested the payment receipts annexed to the plaintiff's supporting affidavit and have averred that the plaintiff could not have made payments in 1998 for land that was not yet purchased since the Self Help Group purchased the land in 1999.

12. It is deponed in any event that if the wrong land parcel was allocated to the plaintiff, then she

ought to have taken steps to have that anomaly corrected which she did not. They have deponed that the plaintiff will be unjustly enriched if this suit is allowed.

#### **Part D : Arguments of Counsel**

13. The application was canvassed before me on the 30 April 2013. Miss. S.W. Karuga, learned counsel for the plaintiff urged me to allow the application for injunction. She took me through the application and the supporting affidavit and averred that the plaintiff has been in occupation of the suit land since 1999 and needs to be protected pending the hearing and determination of this suit. On the other hand Miss. L.M. Isiaho, learned counsel for the respondents, urged me to dismiss the application. Counsel relied upon the replying affidavit filed by the respondents. No authorities were relied upon by either party.

#### **Part E: Determination by Court**

14. I have considered the application and the submissions of counsel. At the outset, it must be appreciated that the purpose of an injunction is to preserve the subject matter of the suit. The subject matter of this suit is land occupied by the plaintiff and the plaintiff claims to have obtained title to the same by way of adverse possession. There is no contention that the plaintiff is currently in possession and occupation of the suit land.

15. Counsel for the respondents has argued that the occupation of the suit land by the plaintiff is illegal and she ought not to be allowed to continue occupation of the same. She argued that her occupation has not been peaceful nor quiet. She pointed out that the 2nd defendant is the registered owner of the suit land after purchasing it for value. She raised issue with the documents that the plaintiff has relied upon in her affidavit to support her case that she was a bona fide member of Ishieywe Self Help Group.

16. I have taken note of these submissions. The case of the plaintiff is however one of adverse possession and not one of having acquired land by way of purchase. She has explained that she came into possession of the suit land by virtue of her being a member of Ishieywe Self Help Group.

17. Quiet possession is of course contested by the respondent. I am at this stage of the proceedings careful not to make any firm pronouncement with regard to whether the plaintiff entered into possession in 1999, whether she was a bona fide member, or whether her possession has been quiet for a duration in excess of 12 years to entitle her to the suit land by virtue of adverse possession. Without deciding the issue, I can nevertheless see that there is probability that the plaintiff has been in possession since the year 1999. The defendants found her on the suit land and they have not offered when precisely the plaintiff moved into possession.

18. I have seen that the suit land is registered in the name of the 2nd defendant who became registered as proprietor in the year 2012. If it is to be believed that the plaintiff has been in the suit land since 1999 then a period in excess of 12 years would have lapsed. As I stated earlier, there is a probability that the plaintiff has been settled on the suit land in excess of 12 years but the precise determination of the exact period in which the plaintiff has been in possession and whether such possession has been open and quiet will have to be left for trial.

19. My view at this juncture is that the subject matter of the suit is best left, in the circumstances of this case, in the hands of the person in possession, who is the plaintiff. In my opinion, the plaintiff has demonstrated a prima facie case with a probability of success.

20. I therefore allow this application for injunction and direct the defendants by themselves and/or their servants/agents not to interfere with the possession of the plaintiff pending the hearing and determination of this suit.

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

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF MAY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence*

*Miss S.W. Karuga of M/s Magare, Musundi & Co. Advocates for the plaintiff/applicant.*

*Miss. L.M. Isiaho of M/s Roseline Odede & Co. Advocates for the defendants/respondents.*