



NO.80

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 292 OF 2012(O.S)

MONYENYE AGAO suing as the administrator

of the estate of AGAO MONYENYE, deceased.....PLAINTIFF

VERSUS

ORINA MURWA (sued as the legal administrator

of the estate of MURWA AYIEMI,

deceased).....DEFENDANT

RULING

1. The Applicant brought this suit by way of Originating Summons dated 25th July, 2012 seeking, a declaration that the defendant's rights to recover a portion measuring 1.1 ha. of all that parcel of land known as LR. No. Wanjare/ Bogitaa/ 1060 (hereinafter referred to as "**the suit property**") where the context so admits) is barred under the Limitation of Actions Act, Cap. 22, Laws of Kenya and his title thereto is extinguished, an order that the Plaintiff be registered as the proprietor of the said portion of the suit property in place of the defendant and an injunction restraining the defendant from interfering with the Plaintiff's peaceful possession and occupation of the said portion of the suit property in any manner whatsoever. The Plaintiff's suit is brought on the ground that the Plaintiff has occupied and possessed a portion of the suit property measuring 1.1 hectares which is registered in the name of **Murwa Ayiemi** (deceased) for uninterrupted period exceeding 35 years and as such the Plaintiff has acquired ownership thereof by adverse possession. In his affidavit sworn on 25th July, 2012 in support of the said Originating Summons, the Plaintiff has claimed that the Plaintiff's father **Agao Monyenye** (deceased) on behalf of whose estate this suit has been brought entered into an agreement for sale with Murwa Ayiemi, deceased, on behalf of whose estate the defendant herein has been sued, of a portion measuring 1.1 hectares of the suit property pursuant to which agreement the said Murwa Ayiemi allowed Agao Monyenye to enter upon and take possession of the said portion of the suit property. The Plaintiff has stated further that the said agreement was subject to the Land Control Act, Cap. 302, Laws of Kenya and as such the late, Murwa Ayiemi was supposed to apply for the Land Control Board consent which he failed to do rendering the transaction null and void. The late Agao Monyenye nevertheless continued in occupation of the said portion of the suit property uninterrupted until his death on 8th October, 2007 after which his estate and/or heirs continued in occupation and possession of the same. The Plaintiff has deposed that neither the late Murwa Ayiemi nor the defendant has ever taken possession of the disputed portion of the suit property since the same was sold to the late

Agao Monyenye in 1977 over 35 years ago and as such the defendant's title over the said portion of the suit property stands extinguished by effluxion of time and the estate of the late Agao Monyenye has acquired adverse rights and/or interests over the same.

2. On 20th February, 2013, about seven (7) months after filing the Originating Summons, the Plaintiff filed an application under certificate of urgency by way of Notice of Motion dated 18st February, 2013 seeking a temporary injunction to restrain the defendant from, entering into, trespassing onto, cultivating, building structures on, interfering with and/or in any other manner whatsoever dealing with the disputed portion of the suit property herein pending the hearing and determination of this suit. This is the application which is the subject of this ruling. The Plaintiff's application for injunction was brought on several grounds most of which were put forward in the affidavit in support of the originating summons the contents of which I have highlighted herein above in detail. In addition to the facts that are deposed in the affidavit in support of the originating summons which have been reiterated, the Plaintiff in his affidavit filed in support of the injunction application has stated that, on 4th February, 2013 after the defendant had been served with the originating summons, the defendant entered the disputed portion of the suit property and commenced the destruction of maize and banana plants that the Plaintiff had grown thereon an act which the Plaintiff claims is aimed at evicting the Plaintiff from the disputed portion of the suit property so as to defeat his prescriptive rights that have already accrued. The Plaintiff contends that in the circumstances, it is necessary that the injunction sought do issue so as to preserve and/or conserve the disputed portion of the suit property pending the hearing and determination of this suit as the defendant is ill bent in continuing with his alleged acts of trespass unless restrained by the court. The Plaintiff contends that he has established a prima facie case against the defendant. The Plaintiff has annexed to his affidavit in support of the injunction application, copies of certificate of an official search and an extract of the register for the suit property which shows that the suit property was registered in the name of Murwa Ayiemi (deceased) on 4th August, 1976 and that it measures approximately, 2.2 hectares. The Plaintiff has also annexed to the said affidavit copies of photographs said to be of the disputed portion of the suit property showing the destruction alleged to have been carried out by the defendant on the Plaintiff's sugar cane and banana plantation. The Plaintiff has also annexed to the said affidavit a copy of a hand written letter said to be from the Assistant Chief, Bogitaa Sub-location on the dispute between the Plaintiff and the defendant over the suit property.
3. The Plaintiff's application for injunction is opposed by the defendant. Through a replying affidavit sworn on 15th March, 2013, the defendant has denied all the allegations contained in the Plaintiff's affidavit in support of the injunction application. The defendant has denied that the Plaintiff's father, Agao Monyenye, deceased entered into an agreement for sale with the late Murwa Ayiemi in 1977 for the purchase of a portion of the suit property measuring 1.1 hectares or at all or that the said Agao Monyenye, deceased took possession of the said portion of the suit property in 1977 and commenced cultivation thereon of maize and bananas as alleged by the Plaintiff or at all. The defendant has stated that the parcel of land that was sold by the late Murwa Ayiemi to Agao Monyenye, deceased was LR No. Wanjare/ Bogitaa/ 1153 which parcel of land is the one which the Plaintiff and other heirs of Agao Monyenye have been cultivating. The defendant has deposed further that there were negotiations between the late Murwa Ayiemi and Agao Monyenye, deceased for the purchase of the suit property but which sale was not concluded because Agao Monynye deceased failed to come up with the purchase price that was fixed at Ksh. 20,000.00 despite several promises. The defendant has annexed to his affidavit a copy of what is said to be the agreement that the late Murwa Ayiemi had entered into with Agao Monyenye, deceased, and copies of correspondence that the two deceased persons are said to have exchanged concerning the said agreement which the defendant claims to constitute promises for payment that were made by Agao Monyenye to the late Murwa Ayiemi and which were never fulfilled leading to the break-up of the sale negotiations. The defendant has deposed further that there was no way the late Agao Monyenye (hereinafter referred to only as "Agao") would have taken possession of the suit property and commenced cultivation thereon while no purchase price had been paid by him to the late Murwa Ayiemi (hereinafter referred to only as "Ayiemi") for the property. The defendant has denied ever damaging the Plaintiff's crops or boundary and has termed the Plaintiff's claim herein

as one of his many false claims, a similar one having been made at Suneka Land Disputes Tribunal. The defendant has accused the Plaintiff of producing the photographs attached to his affidavit in support of the injunction application merely to support an illegal claim. The defendant has further challenged the independence of the Assistant Chief of Bogitaa Sub-Location terming him a participant in the Plaintiff's grand scheme to disinherit the defendant and other beneficiaries of the estate of Ayiemi of the suit property. The defendant contends that the defendant and the other beneficiaries of the estate of Ayiemi were peacefully utilizing the suit property until the year 2011 when the Plaintiff herein lodged a claim against the defendant at Suneka Land Disputes Tribunal with a view to illegally acquire title to the suit property the a ward from which Tribunal was dismissed by the court. The defendant annexed to his affidavit in reply, copies of the proceedings and the award that was made by Suneka Land Disputes Tribunal over the dispute between the Plaintiff herein and the defendant over the suit property. In conclusion, the defendant urged the court to dismiss the Plaintiff's application.

4. The Plaintiff's application was argued before me on 19th March, 2013, when Mr. Oguttu Mboya, advocate appeared for the Plaintiff and Mr. Nyamurongi, advocate appeared for the defendant. In his submission, the Plaintiff's advocate reiterated the contents of the Plaintiff's affidavit in support of the application and the grounds set out in the body thereof. The Plaintiff's advocate maintained that there was an agreement for sale between Agao and Ayiemi with respect to the disputed portion of the suit property and that the defendant had admitted that negotiations took place between Agao and Ayiemi concerning the sale of the said portion of the suit property albeit according to the defendant the transaction never materialized. The Plaintiff's advocate submitted that whether the sale materialized or not can only be determined at the trial and that, what the court needs to confirm at this stage of the proceedings is whether the Plaintiff has established a prima facie case which he submitted that the Plaintiff has. The Plaintiff's advocate submitted further that the other issue in contention between the parties concerns possession of the disputed portion of the suit property. Whereas the Plaintiff contended that Agao was in possession of the suit property from 1977 until his death in the year 2007 and thereafter the beneficiaries of his estate have occupied the same to date, the defendant contended to the contrary. The defendant in fact claimed that Agao and after his death, his heirs have at all material times occupied and cultivated a totally different parcel of land namely, LR. No. Wanjare/Bogitaa/1153. The Plaintiff's advocate submitted that this issue of possession like that concerning the existence or otherwise of the agreement for sale between Agao and Ayiemi can only be determined conclusively by the court at the trial. Counsel submitted that if the Plaintiff is in possession as he contends and the injunction sought is not granted, the Plaintiff will suffer irreparable loss unlike the defendant who stands to suffer no prejudice whatsoever if it turns out at the trial that the injunction was wrongfully issued. The Plaintiff's advocate submitted that in the circumstances, the injunction sought will go a long way in maintaining a balance between the Plaintiff and the defendant by preserving the rights of both parties pending the determination by the court of this suit. Counsel submitted that the orders sought should issue to protect the Plaintiff's prescriptive rights which have already accrued.
5. In his submission, Mr. Nyamurongi, advocate for the defendant doubted the existence of the alleged agreement for sale between Agao and Ayiemi. Counsel submitted that the documents annexed to the Plaintiff's affidavit when considered together with the evidence that was adduced by the Plaintiff before Suneka Land Disputes Tribunal casts serious doubt over the existence of the alleged agreement for sale of the disputed portion of the suit property by Ayiemi to Agao. Counsel submitted that the Plaintiff has alleged in the supporting affidavit that Agao had carried out a search on the suit property in 1977 and ascertained that the same was registered in the name of Ayiemi. The defendant contends that this cannot be true as the search certificate annexed to the supporting affidavit was issued on 6th October, 2011 long after the death of Agao and that the same was obtained by the Plaintiff from the affidavit that had been filed by the defendant in the Miscellaneous Civil Application that the Plaintiff had filed in the lower court to have the award of the Suneka Land Disputes Tribunal adopted as a judgment of the court. The defendant's advocate submitted further that whereas in this suit the Plaintiff claims that Agao only purchased a portion of the suit property, before Suneka Land Disputes Tribunal, the Plaintiff had claimed the whole of

the suit property and was in fact purportedly a ward of the whole parcel by the said Tribunal. Counsel submitted that this state of affairs at the Plaintiff's court when considered against the totality of the material placed before the court by the defendant to show what according to the defendant actually transpired between Agao and Ayiemi concerning the suit property, leaves no doubt that the defendant is more trustworthy. Counsel submitted that whereas the defendant has produced evidence to prove the existence of the failed negotiations, the Plaintiff placed nothing before the court to prove the existence of the alleged agreement for sale between Agao and Ayiemi. Counsel maintained that what was sold by Ayiemi to Agao was Plot No. LR. No. Wanjare/ Bogitaa/ 1153 and not the suit property. Counsel submitted that this suit is nothing but an attempt by the Plaintiff to unjustly enrich himself an attempt whose genesis can be traced to Suneka Land Disputes Tribunal where an attempt was made by the brother of the Plaintiff to fraudulently acquire title to the suit property. Counsel conceded that most of the issues that have presented themselves in this application for determination by the court cannot be determined at this stage as they require evidence to be adduced. Counsel submitted that the defendant as the proprietor of the suit property will suffer prejudice if the orders sought are granted. In conclusion, the defendant prayed that the application for temporary injunction be dismissed with costs.

6. I have considered the Plaintiff's case for a temporary injunction and the response to it by the defendant. 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. A similar decision was reached by Kneller J. in the case of **Kimani Ruchine & Another –vs-Swift Rutherford Co. Ltd. & Another[1977]KLR10** where he stated as follows at page 16,

“The Plaintiffs’ have to prove that they have used this land which they claim as of right; Nec vi, nec clam, nec plecario(no force, no secrecy, no evasion). So the Plaintiff must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession and occupation. The Possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration; see Wanyoike Gathure-vs-Beverly[1965]E.A.514,518,519,per Miles J.”

The Plaintiff's claim on the basis of which the present application for injunction has been brought being one for adverse possession of land, the Plaintiff was duty bound to demonstrate to the court on a prima facie basis the existence of the ingredients of adverse possession highlighted in the above two cases. I am in agreement with the submission put forward by the defendant that the evidence that has been placed before the court by the Plaintiff in support of his contention that Agao and thereafter the beneficiaries of his estate have been in open, continuous and uninterrupted possession of the disputed portion of the suit property since the year 1977 is far from convincing. The Plaintiff has not placed any form of evidence before the court a part from his deposition to prove the existence of the agreement for sale that Agao is said to have entered into with Ayiemi which is the back-bone of the Plaintiff's claim herein. It is pursuant to the said agreement for sale that Agao is said to have taken possession of the suit property. Since possession is central to a claim over land by adverse possession, information on the circumstances under which such possession came to be is very important for the determination of the existence of such possession and whether the nature of the possession was such that can support the claim. The Plaintiff did not produce a copy of the said agreement or correspondence from which the existence of such agreement could be inferred as evidence before court. Save for the deposition in the Plaintiff's affidavit that Ayiemi failed to obtain the consent of the Land Control Board for the transaction, the court was not informed of the other terms of the said agreement if it existed and whether the same were fulfilled on the part of Agao or not. The Plaintiff did place evidence in the form of photographs to show the destruction that is said to have been carried out on the portion of the suit property that the Plaintiff claims to be in his possession. The said photographs confirm the alleged damage to the Plaintiff's banana and maize plants but that is all. They cannot without more be taken as evidence of possession. The Plaintiff has also relied on a letter from Bogitaa Assistant Chief to prove the said damage to his crops and his

possession of the suit property. The letter although written in English is incomprehensible and it is difficult to appreciate what it intended to communicate. In the face of a denial on the part of the defendant that; there was an agreement between Agao and Ayiemi, that Agao took possession of a portion of the suit property and had occupied the same until his death in the year 2007, that the Plaintiff and other heirs of Agao have been in possession of the said portion of the suit property since his death and that he had destroyed the Plaintiff's maize and banana plants, the Plaintiff ought to have done more to establish a prima facie case of adverse possession. The defendant has placed evidence of correspondence between Agao and Ayiemi going back to 1988 over a parcel of land that Ayiemi was to sell to Agao. Although the parcel number of the land concerned is not indicated, the defendant claims that the correspondence concerned the suit property. From the said correspondence, negotiations over the sale of the said parcel of land were still going as at 23rd November, 1988. The defendant has also placed before the court, proceedings before Suneka Land Disputes Tribunal where the Plaintiff and one of his brothers had first taken their claim herein against the defendant for determination. According to the evidence that was given by the Plaintiff before the said Tribunal, the Plaintiff had claimed that Agao had purchased the entire parcel of land comprised in the suit property in three phases. The Plaintiff and his said brother claimed the whole parcel and were in fact awarded the suit property in its entirety by the said Tribunal whose decision the lower court declined to adopt. As correctly submitted by the defendant's advocate, the position that was taken by the Plaintiff at Suneka Land Disputes Tribunal is inconsistent with the position taken by the Plaintiff before this Court in which the Plaintiff claims that Agao had only purchased a portion of the suit property measuring 1.1 hectares out of the 2.2 hectares which is the total acreage of the suit property. The Plaintiff has also claimed in paragraph 3 of his affidavit in support of the application herein that Agao had done a search prior to entering into an agreement for sale with Ayiemi in 1977 and proceeded to annex a certificate of official search dated 6th October, 2011 alleged to have been obtained by Agao. From the foregoing, I am in agreement with the submission by the defendant's advocate that the facts put forward by the Plaintiff in support of the present application do not establish a clear case of adverse possession. The case put forward by the Plaintiff looked at against the response thereto by the defendant leaves a lot of doubt in the mind of the court whether the Plaintiff has a prima facie case against the defendant with a probability of success. As I have observed herein above, the onus of proof of a claim based on adverse possession was upon the Plaintiff and not the defendant. I am not satisfied that the Plaintiff has discharged this burden on a prima facie basis. I am in agreement with the submission of both parties that most of the contentious issues raised in the present application cannot be determined at this stage and must await the hearing on the main suit. That notwithstanding, even in cases where the facts of the case cannot be determined conclusively at an interlocutory stage, for an applicant for interlocutory injunction to succeed, he must establish a case which even in the face of contested facts leaves no doubt that his case although not water tight has some probability of success. This is what was expected of the Plaintiff herein and which as I have already found above he fell short of doing. My conclusion from the totality of the foregoing is that, I am doubtful whether the Plaintiff has established a prima facie case with a probability of success against the defendant.

7. A part from establishing a prima facie case with a probability of success, the Plaintiff was also supposed to prove that unless the orders sought are granted, the Plaintiff would suffer irreparable harm in accordance with the principles that were pronounced in the case of **Giella –vs- Cassman Brown [1973] KLR 358**. I am equally in doubt whether the Plaintiff will suffer irreparable harm unless the orders sought herein are granted. The Plaintiff has deposed in the affidavit in support of the application herein that the only activity being carried out by the Plaintiff on the disputed portion of the suit property is the cultivation of maize and bananas. The Plaintiff has not indicated that this is the only land available to the Plaintiff or the beneficiaries of the estate of Agao for cultivation.

8. In view of the conclusion that I have reached herein above, the Plaintiff's application falls for consideration on a balance of convenience. This call for balancing of the Plaintiff's claimed prescriptive interest in the suit property with that of the defendant as the registered proprietor. In striking this balance, the order that commends itself to me is that which would preserve the suit property pending the determination of the parties' respective rights while at the same time not

unduly prejudicing the interests of either party. With the aim of achieving this purpose, I hereby make the following orders;

- I. **Pending the hearing and determination of this suit, the suit property namely, LR. No. Wanjare/ Bogitaa/ 1060 shall not be sold, leased, charged or disposed of in any manner whatsoever;**
- II. **The defendant by himself or through his servants, agents or employees is restrained by a temporary injunction from entering into, cultivating, building structures on or in any other manner interfering with that portion of the suit property, namely, LR. No. Wanjare/ Bogitaa/ 1060 which is under cultivation by the Plaintiff if any pending the hearing and determination of this suit;**
- III. **The costs of this application shall be in the cause.**

Signed, dated and delivered at KISII this 21st day of June 2013

S. OKONG'O,

JUDGE.

In the presence of:-

..... for the Plaintiff

..... for the Defendant

..... Court Clerk.

S. OKONG'O,

JUDGE