



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Etc. Case No. 437 Of 2013

GABRIEL OSINDO..... 1ST PLAINTIFF
SAMSON ODHIAMBO..... 2ND PLAINTIFF
DANIEL OWINO.....3RD PLAINTIFF
MICHAEL ODHIAMBO..... 4TH PLAINTIFF
JOEL NJINGO.....5TH PLAINTIFF
THEOKRITUS ODEMBO.....6TH PLAINTIFF
EDDIE ONYANGO.....7TH PLAINTIFF
DANIEL OWAGA.....8TH PLAINTIFF
ZAKAYO AYUGI.....9TH PLAINTIFF
WILLIAM OFUETE.....0TH PLAINTIFF
LUCAS OWINO.....11TH PLAINTIFF
AGGREY OCHIENG.....12TH PLAINTIFF
MICHAEL OGINGA.....13TH PLAINTIFF
JOHN MAGERO.....14TH PLAINTIFF
TRANSLAUS ODUNGA.....15TH PLAINTIFF

-VERSUS-

MORRIS OWUOR OMOLLO.....1ST DEFENDANT
JOHN PETER MAINA.....2ND DEFENDANT

KANGETHE.....3RD DEFENDANT

AORON KIMOSO.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion application dated 8/4/13 brought under Order 40 Rule 1, 2, 3 and Section 3A of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-

- a. Spent.
- b. That a temporary injunction do issue restraining the Defendants by themselves or by their agents and or servants or otherwise howsoever from evicting, disposing off and/or interfering with the Plaintiff's possession of Plot Nos. 269/1-4 (the "Suit Property") situated along Rabai Road, Harambee Estate pending the hearing of this application.
- c. That an injunction do issue restraining the Defendants by themselves or by their agents and/or servants or otherwise however from evicting, disposing off and/or interfering with the Plaintiff's possession of the Suit Property pending the hearing of this Suit.
- d. The costs of this application be provided for.

The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of Gabriel Osindo sworn on the 8/4/13 in which he stated that the applicants herein are a group of people who are conducting various enterprises such as carpentry, welding and motor vehicle garages on the Suit Property since 1990 to date.

He further stated that the applicants have applied for and obtained licenses from the City Council of Nairobi to conduct their various businesses on the Suit Property. He also stated that they have gone ahead to build semi-permanent business structures on the Suit Property which has cost them substantial amounts of money. He further swore that sometime in 2001, an intruder made efforts to evict them from the Suit Property which they robustly resisted. He further swore that they were shocked to learn that the 1st, 2nd and 4th Defendants have purportedly acquired title documents over the Suit Property and have now sold the same to the 3rd Defendant and his assigns. He also stated that they have been served with a notice from the District Officer to vacate the Suit Property within two days to allow the aforementioned purported title holders and/or their assigns to occupy the Suit Property. He further stated that he holds the view that the aforesaid allocation is unlawful and illegal as they have occupied the Suit Property since 1990 without interruption in Adverse Possession. He further swore that the applicants are poor people who have done their best to live honestly and peaceably and the unlawful actions of the Defendants will greatly prejudice them as they have nowhere else to go.

The application is uncontested. Despite being duly served with the application and a hearing notice, the Defendants did not appear in court or file a Replying Affidavit. There is an Affidavit of Service in the file.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of *Giella v. Cassman Brown [1973] EA 258* in which the conditions for the grant of an interlocutory injunction were settled as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Have the Applicants made out a *prima facie* case with a probability of success? In the case of ***Mrao v First American Bank of Kenya and Two Others [2003] KLR 125***, a *prima facie* case was described as:-

“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Have the applicants established a *prima facie* case with a probability of success? To my mind, I am not convinced that the applicants have established a *prima facie* case with a probability of success. Their only claim to the Suit Property is that since 1990, they have occupied the same and have conducted their various businesses there. They claim ownership under the doctrine of Adverse Possession. However, their claim has not been determined by any court of law. Hence, as matters stand at this juncture, they have absolutely no proof that they are the proprietors of the Suit Property. The fact that the City Council of Nairobi has routinely issued them with annual licenses to conduct their businesses on the Suit Property does not in any way confer upon them ownership rights over the Suit Property.

Further, investing in the Suit Property by developing semi-permanent structures therein also does not confer upon them ownership rights whatsoever. Overall, I stand unconvinced that the applicants have established a *prima facie* case with a probability of success. This being my finding, I rule that it is unnecessary to consider whether the other two conditions in the ***Geilla*** case cited above have been met.

In light of the foregoing, I hereby dismiss this application. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI ON THE 14TH

DAY OF JUNE 2013

MARY M. GITUMBI

JUDGE