



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E.L.C 304 OF 2013

CHARLES MACHUKI LWANGA AYOKA.....1ST PLAINTIFF

MARY PERPETUA AYORA.....2ND PLAINTIFF

VERSUS

MARGARET TAMINING NAISURU.....DEFENDANT

RULING

By a notice of motion dated 15th April, 2013 the Applicants/plaintiffs Charles Machuki Lwanga Ayora and Mary Perpetua Ayora seek the following orders among others: an injunction restraining the defendant whether by herself, her family, her agents, servants or persons acting on her behalf and or other persons that are registered owners of all the property known as **Nakuru/Ngongongeri/23** (the suit land) from entering, trespassing, occupying erecting any structures thereon, cultivating disposing of or interfering with the plaintiff's quiet possession and enjoyment of the suit land pending the hearing and determination of this suit.

The application is premised on the grounds on the face of the application and a supporting affidavit sworn by Charles Ayura, the 1st plaintiff on his own behalf and on behalf of the 2nd plaintiff sworn on 15th April 2013.

The applicants case is that they are the registered joint owners of the suit land having purchased the same from Michael Cherop and were issued with a title deed on 30th July 2007 in their joint names; That in February, 2013 when the 1st applicant wanted to cultivate the suit land he was informed that the Defendant was claiming ownership of the suit land, had erected a temporary shelter and was also cultivating the suit land: That he sought help from the police who asked both parties to produce proof of ownership but the Defendant did not have any documents: That upon conducting a search the applicants confirmed that the suit land was still registered in their names : That the Defendant does not have a genuine claim to the property and is only trying to use unorthodox means to forcefully take possession of the suit land.

The Defendant Margaret Tamining Naisuru swore a replying affidavit on 30th May, 2013. She strenuously opposed the application and gave a background account of the ownership of the suit land. She deponed that she belongs to the Ogiek community and had been living on the suit land prior to 1996 when survey was done and the suit land allocated to her: That her name was entered in a register which the provincial surveyor used to settle them: That she has been cultivating the suit land since 1996 until February, 2013 when the plaintiff attempted to violently evict her from the suit land: That even if she had not been allocated the suit land, she had acquired the same by adverse

possession.

I have read and considered the pleadings filed by the respective parties, the affidavit evidence adduced in support thereof and the submissions by counsels.

The application herein being for a temporary injunction, the burden is on the applicants to satisfy the conditions set down in **Giella V Cassman Brown & Co Ltd. (EA) 358**, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

The applicants case is that being the registered owners of the suit land, their interest is indefeasible. Their aforementioned contention is based on Section 27 and 28 of the Registered land Act, Chapter 300 laws of Kenya (repealed). The **sections provides:-**

“(27) Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b).....

28. The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require Noting on the register.....”

From the affidavit evidence presented before this court, there is no doubt that the defendant is in possession of the suit property. It is also noteworthy, that despite the defendant’s claim of adverse possession she has adduced no evidence to prove those assertions.

Failure to adduce evidence to prove such assertions is clearly in contravention of Section 107 of the Evidence Act (Cap 80) laws of Kenya which provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.”

Whereas the defendant has not adduced any evidence of ownership, it is common ground that she is in occupation. From the affidavit evidence, it is clear that she took possession when Section 30(g) of the Registered Land Act (now repealed) was in force. The rights of a person in possession or actual occupation of land to which the person is entitled in right only of such possession or occupation are protected.

Whereas the applicants are the registered owners of the suit property, have established a *prima facie* case with a probability of success and the balance of convenience tilts in their favour, granting the injunction as sought will amount to the respondent being evicted at an interlocutory stage. As this is never the intention of any court, See **Yego V Tuiya & another 91986) KLR 726** where the Court of Appeal

held:-

“the order of the judge requiring the appellant to deliver up vacant possession of the land exceeded the terms of the respondents’ application, and under the civil procedure Rules order XXXIX Rule 1, this was not a proper thing to do.”

Also see **Esso (K) Ltd V. Mark Makwata Okiya** civil appeal No. 69 of 1991 where the court of Appeal held:-

“the purpose of Injunction is to maintain status quo. Injunctions are not to be granted if the event meant to be restrained has taken place; and courts should not grant orders not prayed for.”

And the subject matter of this suit being land, I find that the respondent might otherwise suffer irreparable injury if the orders sought are granted as prayed. I will allow the plaintiff’s application dated 15/4/2013 with costs in the following terms; an injunction restraining the defendant whether by herself, her family, her agents, servants or persons acting on her behalf from further construction , cultivation, planting or disposal of the suit land is granted pending the hearing and determination of this suit.

Dated, Signed and delivered in open Court at Nakuru this 26th day of July 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Itabo for Applicants

Ms Ayuma holding brief for Mrs Ndeda for Respondent

Stephen Mwangi : Court Clerk