

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CASE NO. 213 OF 2009

ALICE ADA ANYANGO MALACKY.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH OKAKA OGOLA.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff has brought this suit by way of originating summons dated 23rd October, 2009 seeking a declaration that she has acquired by adverse possession a portion measuring 8 acres of all that parcel of land known as **LR. No. Kabuoch/Kachieng/470** (hereinafter referred to as “**the suit property**”), an order that, that portion of the suit property be registered in her name and a permanent injunction restraining the defendant from interfering with her enjoyment of the said portion of the suit property. The Plaintiff claimed that she entered the suit property in 1985 and has had uninterrupted occupation and/or possession of the same since then which is in excess of 12 years. The Plaintiff claimed that she has put up a homestead on the suit property, planted trees, sugar cane and has over the years been cultivating seasonal crops thereon for livelihood. The defendant was served with the originating summons but has to date not filed any affidavit in response to the same.
2. On 20th September, 2011, the Plaintiff filed an application seeking an order of prohibition to issue prohibiting the defendant from disposing of the suit property pending the hearing and determination of this suit. The application was brought on the ground that the defendant was planning to sell the suit property while this suit is pending. The said application was served upon the defendant but he never opposed the same. The order was issued by the court on 25th October, 2011. There is therefore an order in existence restraining the defendant from alienating the suit property.
3. What I have before me is yet another application by the Plaintiff. I must say that I am concerned with the Plaintiff’s habit of filing applications in this matter one after the other instead of listing this old case for hearing and final disposal. I will revisit this issue when making final orders in this application. The present application was filed on 27th February, 2012. The same is seeking an interlocutory injunction to restrain the defendant from in any way interfering with the suit property pending the hearing and determination of this suit. The application was supported by the affidavit of the Plaintiff sworn on 27th February, 2012. The same was brought on the grounds that the defendant had leased the suit property to someone unknown to the Plaintiff who had cleared a portion of the same measuring about 8 acres in readiness for planting sugar cane. The Plaintiff claimed that she stood to suffer irreparable harm if sugarcane is planted on the suit property and that the defendant would not suffer any prejudice if the status quo is maintained. The application was served upon the defendant and he attended court for the hearing thereof. However even after he was given time to respond to the application, he never did so. The averments contained in the Plaintiff’s affidavit in support of the application have therefore not been controverted. When the application came up for hearing on 27th June, 2013, Mr. Bosire, advocate who appeared for the Plaintiff submitted that the fact that the Plaintiff has occupied the suit property for uninterrupted period of over 12 years is not disputed by the defendant. Counsel submitted that in the circumstances, the Plaintiff has established a prima facie case that she has acquired a portion of the suit property through adverse possession. Counsel submitted that the defendant was now in the process of disposing the suit property to a third party an act that would deprive the Plaintiff of the suit property and cause her irreparable harm. Counsel urged the court to allow the Plaintiff’s application.

4. Although the defendant filed neither a replying affidavit nor grounds of opposition, I allowed him nevertheless to address the court. He submitted that if the orders sought are granted, he will starve. This is because, the suit property is a farm which he cultivates for his livelihood and if the injunction sought is granted, he will have nowhere to cultivate for his sustenance. The defendant submitted that he was cultivating the suit property prior to the institution of this suit and that since the Plaintiff obtained an order of injunction he is now unable to do so. In the circumstances, the confirmation of the injunction would cause him a lot of suffering. The defendant urged the court to disallow the application.
5. The principles to be applied while considering applications for interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for interlocutory injunction must show that it has a prima facie case with a probability of success against the defendant and that unless the orders sought are granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. The Plaintiff has deposed both in her affidavit in support of the originating summons and the affidavit in support of the present application that she has occupied the suit property continuously for a period exceeding 12 years. This averment has not been contested by the defendant. The defendant has not filed any affidavit in response to the originating summons. He did not also file any affidavit or grounds of opposition in response to the present application. Even when I gave him opportunity to address the court, the defendant did not deny the fact that the Plaintiff has been in occupation of the suit property as claimed. I am satisfied that the Plaintiff has established a prima facie case with a probability of success against the defendant. The defendant has not denied that he has attempted to lease out the suit property to a third party for sugarcane cultivation. I am in agreement with the Plaintiff's advocate that if the defendant succeeds in this endeavor, the Plaintiff stands to suffer irreparable harm as she stands to be deprived of her interest in the suit property that has already accrued.
6. The upshot of the foregoing is that the Plaintiff has established a case for granting of the order sought. The Plaintiff's Notice of Motion application dated 27th February, 2012 is granted in terms of prayer 3 thereof. The injunction shall however be restricted only to a portion of the suit property measuring 8 acres which the Plaintiff claims to have acquired by adverse possession. The defendant shall be at liberty to deal with the remaining portion of the suit property which measures over 7 acres in whatever manner deemed fit save for selling of the same. The injunction shall also be limited to a period of 6 months only from the date hereof within which period the Plaintiff must take steps to list this four year old case for hearing and final disposal. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 22nd day of November 2013

S. OKONG'O

JUDGE

In the presence of:-

Mr. Nyamuraongi h/b for Masese for the Plaintiff

Present in person for the Defendant

Mobisa Court Clerk.

S. OKONG'O

JUDGE