REPUBLIC OF KENYA

High Court at Machakos

Civil Case 48 of 2012

SUNDIATA NATHAN MUTENDE…….....…….PLAINTIFF

VERSUS

WILLY MWOLOLO MUINDI ……....DEFENDANTS

RULING

This ruling relates to the application by **Sundata Nathan Mutende,** hereinafter "*the applicant*" dated 23rd February, 2012. The said application is brought against **Willy Mwololo Muindi,** *" the respondent*" In the application, the applicant in the main seeks that an order of injunction do issue restraining the respondent from dealing with land parcel number Machakos/Konza North Block 1/244 "*the suit premises*", in any manner whatsoever pending the hearing and determination of the suit. The application is expressed to be brought under Orders 37 rule 7, 40 rules 1, 2, 3 and 9 of the Civil Procedure rules, sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The applicant's suit upon which the application is based is for adverse possession. The applicant has by way of Originating summons under section 38 of the Limitations of Actions Act and Order 37 rule 7 of the Civil Procedure rules and all other enabling provisions of the law sought by virtue of adverse possession to have the following questions determined;-

"(a) Whether the plaintiff has been in exclusive and uninterrupted possession and occupation of the suit property known as title number Machakos Konza North Block 1/244 for a period of over 12 years.

(b) Whether the defendant's interest and title to the suit property occupied by the Plaintiff have been extinguished by virtue of the continuous adverse possession of the property by the plaintiff

(c) Whether the Land Registrar at Machakos should be ordered and directed to delete the name of the defendant and register the plaintiff absolutely as registered owner of the property known as Machakos/Konza North Block 1/244

(d) Whether the defendant should bear the cost of this sit".

The applicant in support of the application has advanced in the body of the application the grounds upon which the application is founded. He has also sworn a supporting affidavit to the application as well. The grounds and supporting affidavit aforesaid give the background facts leading to this suit. Essentially, the applicant is the registered proprietor of all that piece or parcel of land known as Machakos/Konza North Block 1/243 which is adjacent to the suit premises registered in the name of the respondent. Both parcels of land were sold allocated, delineated and boundaries identified by the original owner of the land from which the above parcels were subdivisions; Konza Ranching and Farming Society. However by fraud and or mistake, the applicant was shown the boundaries of his land aforesaid which included the

suit premises. Since then he had occupied the suit premises and has had quiet, uninterrupted use and possession of the suit premises. Indeed he has openly, peacefully and as of right been in possession and occupation of the suit premises for over 30 years and had invested heavily in the same by constructing a dam, terraces, gabions for soil conservation purposes and also constructed a permanent residential house. While undertaking the above developments and even thereafter, he did not receive any complaints or objections from the respondent. Since settling on the suit premises, the respondent had not taken any action to evict him or dispossess him of the suit premises, nor interfered or disrupted his possession thereof. There was however, a dispute over ownership of the suit premises but the same was settled amicably in 1990. The applicant had since been informed by one, **Jacob Mutula,** that sometimes in year 2011; the respondent had sold him the suit premises and wanted him out of the suit premises. To the applicant under the doctrine of adverse possession, the respondent's interest and title in the suit premises was extinguished after 12 years of his continuous occupation of the suit premises. Consequently, the respondent could not pass good title to the said **Jacob Mutula** and therefore he had no colour of right to evict the applicant from the suit premises. However, on or about 14th February, 2011 the respondent's agents accompanied by police officers from Machakos Town Police Station came to the suit premises and ordered the applicant to vacate the suit premises and demolish his developments therein, hence the suit. He stood to suffer irreparable loss if the respondent is allowed to make good his threats.

The response by the respondent is that though he is the registered proprietor of the suit premises, he had never occupied it or taken possession thereof. He knew the applicant as a neighbour. Each member of Konza Ranching and Farming Co-operative Society was allocated a portion of land measuring about 10acres and upon the said allocation he did not have the boundaries his suit premises delineated and identified to him by the management of the society as was required. However, the society appears to have delineated and identified the boundaries of the applicant's parcel of and thus his occupation of the suit premises was with the express authority of the society whether rightly or by mistake. The fact that the respondent was not in occupation of the suit premises coupled with the fact that the suit premises were not identified to him and that the applicant was developing the suit premises under the mistaken belief that he was developing his land gave the respondent no reason to interfere with his activities considering that he was entitled to 10 acres on a portion adjacent to the suit premises. In the premises, the suit does not meet the threshold of adverse possession as the applicant never dispossessed the respondent of the suit premises, nor did the respondent discontinue the possession. It follows naturally that the applicant has not in any way put the suit premises into use which is inconsistent with or adverse to the respondent's title. On that basis the claim for adverse possession cannot succeed. Though the applicant had referred to a dispute over ownership of the suit premises in his supporting affidavit which dispute was amicably settled in the year 1990 he had however, not furnished any particulars thereof. Finally, he deponed that the applicant's claim for adverse possession which is founded on mistake and or fraud cannot succeed as the occupation if any was not based on right and the fact that there had been disputes as admitted the applicant cannot be to have been in peaceful and uninterrupted occupation of the suit premises and there exists an acknowledgement that the applicant knows that he had no right over the land.

When the application came before me for *interpartes* hearing on 4th June, 2012, parties opted to canvass it by way or written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

In an application for injunction, all that the party seeking it has to demonstrate is that he has a *prima facie* case with a probability of success, that in the event that it is denied, he would suffer irreparable injury that cannot be compensated with an award of damages and should the court be in doubt, it will resolve the application on a balance of convenience. These principles were established in the case of **Giella vs Cassaman Brown [1973] E.A. 358**. Besides the foregoing the applicant also needs to know that in granting or refusing the injunction, the court is exercising discretion as well as jurisdiction in equity. These considerations are sequential. In the event that the applicant fails to satisfy the court on the first consideration, then there is no need for the court to ponder over the remaining tests.

Dealing with the first principle, all that the applicant is required to satisfy the court at this stage is that he has established a *prima facie* case with a probability of success. However, in determining whether the applicant has done so, I am not required at this stage to make definite findings on matters of facts and

law. Indeed a *prima facie* case is not a case that must necessarily succeed at the plenary hearing. All that the applicant needs to show is that on the material placed before 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 examination or rebuttal from the latter. *See***Mrao Ltd v First American Bank of Kenya Limited [2003) KLR 125.** In this case, there is no doubt at all that the applicant is in possession of the suit premises. The respondent admits that much. The applicant claims that he has been in continuous and uninterrupted occupation of the suit premises for over 30 years. The respondent does not dispute that fact either. The applicant has also invested heavily in the suit premises, a fact not denied by the respondent. However, the contention of the respondent is that to the extent that the applicant's entry into the suit premises was on account of his mistake, and or that of the society in pointing out the boundaries, his remaining on the suit premises is not therefore adverse or inimical to his title. This may well be true. However, at this stage I am not called upon to make a definite finding on that aspect of the matter. That is for the trial court. The applicant has pointed out that from 1989 when the respondent discovered that the applicant was in possession of the suit premises; he continued to acquiesce to his use and occupation of the suit premises thereof. No attempts at eviction or to assert title to the suit premises was undertaken by the respondent. Of course the applicant has made reference to his disposition in his supporting affidavit that sometimes in 1989, there was a dispute over ownership of the suit premises between them, which was settled amicably. The respondent's answer is that the applicant has not furnished the court with evidence of the amicable settlement and or the outcome. From the documents on record, there is no doubt at all that there was a dispute over the suit premises between parties herein. None of them has however furnished the court with the details as to how the dispute was resolved. Much as it was upto the applicant to do so, equally the respondent had a duty to do so in rebutting the applicant's assertion. If there was such a dispute and after its resolution, the respondent failed to take steps to assert his title to the suit premises but instead allowed the applicant to continue in occupation and possession of the suit premises, can it be said then that the time for purposes of adverse possession started to run then? Perhaps! It is also evident that the respondent took a loan with a bank on the strength of his title to the suit premises. By so doing did it amount to assertion to title? Perhaps! All these are matters of evidence and law which can only be resolved at the full trial of the case. At the trial, the main issue will ofcourse be whether, the applicant, was in continuous, uninterrupted and exclusive possession of the suit premises for over 12 years and if so, whether he was in possession as a licensee or adverse possessor? For now, I am satisfied that the plaintiff has established a *prima facie* case with probability of success.

I would also agree that the applicant stands to suffer irreparable loss that cannot be compensated by way of damages. It is not denied that the applicant resides on the suit premises and cultivates the same. There is also real danger that the suit premises could exchange hands between the respondent and one, **Jacob Mutula.** The said **Jacob Mutula** did approach the applicant and informed him that he had bought the suit premises and wanted him. This disposition has not been rebutted or denied by the respondent. Unless therefore this court grants the injunction, the suit premises may be alienated thereby defeating the applicant's claim which is anchored on adverse possession. In any event a claim for adverse possession as currently submitted by counsel for the applicant is determined on evidence showing that the applicant has been in open, uninterrupted and continuous occupation of the suit premises. If the applicant is dispossessed of the suit premises, there is real danger that the respondent may interfere with and or destroy such crucial evidence.

As regards balance of convenience, the scales obviously tilt in favour of the applicant. The respondent has never been in occupation of the suit premises. On the other hand, the applicant is in occupation of the suit premises. He has a residential house on the same in which he resides with his family. In those circumstances the applicant stands to suffer more harm if the court fails to grant the injunction. In other words, the applicant will be more inconvenienced than the respondent as he will be compelled to relocate from the suit premises with attendant expenses. The same cannot be said of the respondent.

For all the foregoing, I allow the application dated 23rd February, 2012 in terms of prayer 3. Costs shall however be in the cause. However, the injunction is granted on condition that within 21 days of this ruling the applicant shall execute an undertaking as to damages in the tune of Kshs. 700,000/=.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE