



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 75 of 2010

JACOB SALERI PLAINTIFF

VERSUS

VINCENT MONDA..... DEFENDANT

J U D G M E N T

1. On 6th July, 2010 the applicant filed an originating summons seeking orders to the effect that the respondent's interest in plot No. LR No. 12889/29 Kilifi has been extinguished and that the applicant has become entitled by virtue of adverse possession to be registered as the proprietor of the suit property. Filed simultaneously with the Originating Summons was a Chamber Summons seeking an order of injunction in the following material terms:

“That this honourable court do grant a temporary injunction against the defendant, his agents or servants or hirelings or any persons claiming through him from wasting, damaging or demolishing the applicant's developments on and the suit property and from trespassing and evicting the applicant from the suit property pending the hearing and determination of this suit.”

2. The main grounds on the face of the application are:

“a. That the defendant has been sending unknown people to the suit property to carry out survey the latest time being 3rd July, 2010.

b. That the applicant constructed and is running a secondary school on the suit property herein and he stands to suffer irreparable loss and damage, mental and psychological anguish should the orders herein not be granted.

c. That the suit herein will be rendered nugatory if the injunction orders are not granted to preserve the interest of the applicant which interest is the house land as well as the said school.

d. That the students who are about 100 in number, the teachers as well as the subordinate staff and more particularly the student who are in form 4 and are now preparing for national examination next term are likely to suffer should the trespass and disturbance by the respondent and his agents, servants, hirelings and other persons claiming through the respondent.”

3. The application is supported by the initial affidavit and further affidavit of the applicant. The gist thereof is that the applicant has been in continuous, uninterrupted and open possession of the suit property since 1995, that he has developed and is running a school with 100 students who stand to suffer prejudice if the orders sought are not granted. It would appear that the Originating summons and application were prompted by the visit to the suit property of some persons on 3rd July, 2010 who declared an intention to survey the land on behalf of the respondent.

4. The respondent responded by filing grounds of opposition and a replying affidavit. In summary the respondent asserts his title to the suit property and denies the claims by the applicant that he has been in occupation of the land since 1995, and asserts that on the contrary, he has been paying rates to the relevant authorities, that the applicant is a “sneaky” trespasser who has been unlawfully constructing permanent buildings on the land after the year 2006.

5. The application, by consent of the parties was disposed off by way of written submissions which took cue from the positions adopted in the pleadings. I have now carefully perused the pleadings herein, the affidavits filed as well as the respective submissions.

6. First on the technical objection relating to compliance with XXXVI rule 7 of the old Civil Procedure Rules, the applicant does not have an answer. He was duty bound to file a “certified extract” of the title alongside the Originating Summons. His failure to do so however is curable. He is directed to comply within 7 days of this ruling.

7. The principles governing the grant of an interim injunction have been settled since **Giella vs Cassman Brown & Co. Ltd. [1973]EA 358.** The successful applicant must demonstrate to the court that he has a *prima facie* case with a likelihood of success, that he will suffer irreparable damage if the orders sought are denied. If the court is in doubt about the above, it will consider the balance of convenience.

8. The applicant's claim is based on adverse possession. While he asserts that he has been in possession since 1995, no tangible proof have been placed before the court in support of the intention. Indeed as the Respondent rightly points out the alleged school on property was on the face of it registered in 2009. Besides, the respondent has tendered communication from the responsible local authority denying that the actual construction of the alleged school was approved as required under the Physical Planning Act.

9. Further the applicant has not demonstrated to this court any records of students enrolled in the school presently or in the past. The photographs annexed to the affidavit of the applicant “JS1a” show no sign of student life on the premises, a part of which appears to be still under construction. For his part, the respondent asserts that when he visited the land in 2006 no buildings were on the property. He terms the applicant's activities on the land as stealthy and secretive and denies he was aware of them prior to being served with pleadings.

10. On the law, the respondent has raised the novel challenge that is becoming increasingly popular in cases of this nature: the constitutionality of Section 38 of the Limitations of Actions Act, indeed the entire doctrine of adverse possession in light of the 2010 Constitution. Obviously, that is not a matter to be canvassed at such a preliminary stage but it will have to be addressed substantively at some point.

11. Applying the test laid down in the case of **Mrao Ltd vs First American Bank of Kenya Ltd. and two others [2003] KLR 125.** I am not satisfied that the applicant herein has shown 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.”

Regarding the issue of damages likely to be incurred by the applicant these too could be quantifiable if found payable. Besides the challenge of the alleged irregularly surrounding of the construction will need to be surmounted at the trial.

12. The court has given some thought to the applicant's expressed fear that the 100 students at the school will be prejudiced by denial of the interim orders sought. But as I have indicated, the applicant did not exhibit any records of enrolment of the alleged students, or even photographs of the alleged school in session. It is difficult in absence of some sort of material to conclude that there are indeed 100 students in the school who will be adversely affected, if say, the applicant is evicted.

13. In view of the foregoing I have found that the applicant has failed to surmount the hurdles in **Giella vs**

Cassman Brown & Co. Ltd. This application must fail and is dismissed with costs.

Delivered and signed at Malindi this **26th** day of **October, 2012** in the absence of the parties.

Court clerks – Leah, Evans

C. W. Meoli
JUDGE