



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 26 of 2011**

**KUSI MUKAMI KIMANI ..... PLAINTIFF**

**VERSUS**

**MERCY SYONG'OME KITHEKA ..... DEFENDANT**

**RULING**

(1) This is a suit for trespass to land. The Plaintiff who is the registered proprietor of the suit parcel of land has by Notice of Motion dated 17<sup>th</sup> February 2011 sought an order for:

***“a temporary injunction restraining the Defendant by herself, relatives, assigns, employees, and/or otherwise from encroaching upon continuing to waste trespassing and/or in any other manner interfering with all that parcel of land known as Kwale/Ukunda/2860 pending the hearing and determination of this suit.”***

The application is based on three principal grounds set out on the face of the application as follows:

(a) ***That the Applicant is the sole registered proprietor of all that parcel known as Kwale/Ukunda/2860.***

(b) ***That the [Defendant] has since sometimes in 2000, encroached upon the said parcel and has refused, neglected and/or ignored to vacate the suit premises.***

(c) ***That as a result of the said Respondent's behaviour, the suit property continues being wasted at the Respondent's instance and had by 13<sup>th</sup> December 2010, incurred an unpaid electricity bill of Kshs.297,991.59***

and the Plaintiff contended that the court had the discretion to grant the orders sought in the interest of justice. A copy of the Plaintiff's title deed of 6<sup>th</sup> December 2010 was exhibited.

(2) The application is opposed by the Defendant who has filed grounds of objection and a replying affidavit. The essence of her defence is that she is entitled to the suit property on which she has lived since 1998 by virtue of purchase thereof by the Defendant and her partner, one Bent Koch (deceased) at the price of Kshs.2.5 million paid by installments to one Rama Matano Mwaurinda who together with one Anne Kimani were the initial registered proprietors of the suit property. The said Mwaurinda died in August 2010 before the property could be transferred to the Defendant and the transfer into the Plaintiff's name was aimed at denying her proprietorship. She attached copies of a statement of account of the said Mr. Mwaurinda's account with Barclays Bank, Diani and the said Mr. Koch's transaction at Unibank

dated respectively 26<sup>th</sup> September 1998 and 7<sup>th</sup> January 1998 indicating some of the payments.

(3) The parties' counsel then filed written submissions citing statutory and case law authority in support of their respective contentions. For the Plaintiff, the right of a registered proprietor to the suit property (**Obiero v. Opiyo & others (1972) EA 277**) was set up against the defendant who did not have any written memorandum on the sale transaction as required under section 3 (3) of the Law of Contract Act. The Respondent contended that the requirement for written agreement for sale of land did not, in terms of section 3 (4) of the Law of Contract Act, affect the creation or operation of a resulting, implied or a constructive trust; that the application before the court was really one for mandatory injunction which ought not be granted at the interlocutory stage except in a clear case (citing **Stephen Kipkebut T/A Riverside Lodge & Rooms v. Naftali Ogola (2009) eKLR**); and that the balance of convenience lay with **“the Defendant who, together with her partner, purchased the property and who has been in occupation since 1998.”**

(4) I have considered the matter and I find that the fact of the Respondent's possession of the suit property is not in dispute; only the extent of her possession. The Plaintiff alleges that the Respondent had been in possession only since 2000 while the respondent asserts possession since 1998. If the Respondent were able to prove possession since 1998, she may be able to claim title by adverse possession against the Plaintiff who was registered proprietor on the 6<sup>th</sup> December 2010 and who filed suit on 23<sup>rd</sup> February 2011. It must be in anticipatory defence to such claim that the Plaintiff pleads at paragraph 6 of her plaint that:

***“By virtue of the Defendant's said trespass there having been constant confrontations between the Plaintiff and the Defendant in respect of the suit property, accordingly, the Plaintiff avers that the Defendant does not enjoy or has never enjoyed peaceful, uninterpreted and/or exclusive occupation of the suit property and as such she cannot claim any colour of right to the suit property.” (sic)***

The Plaintiff's own witness statement dated 17<sup>th</sup> February 2011 and filed in the suit pursuant to the pretrial procedures confirms that the Respondent was in possession of the suit property, as follows:

***“Upon being registered as the proprietor, I went back to the suit property with the purposes of developing the same whence I found the Defendant residing thereon. When I informed her of my ownership, she refused to give vacant possession and/or room for me to carry out any development thereon.”***

(5) Having established that the respondent is in possession of the suit property, the Plaintiff's application must therefore be one for mandatory injunction although couched in negative prohibitory terms. In these circumstances, the principles for the grant of interlocutory mandatory injunction come into play: that although a mandatory injunction can be granted at an interlocutory stage, as well as at the hearing, it will only be granted in special circumstances where the case is clear. The issue for determination by the court at this stage is whether there are special circumstances and a clear case for the Plaintiff against the Defendant to justify the grant of the interlocutory order sought by the Plaintiff in the nature of a mandatory injunction.

(6) Although the Plaintiff has demonstrated her registration as the proprietor of the suit property, a fact which is not denied by the Respondent, the Respondent has set up two plausible defences in answer to the Plaintiff's claim: in one, on the basis of resulting trust of a purchaser of suit property and the other by allusion of the fact of possession adverse to the registered proprietor's title. Indeed, the Plaintiff's mother who was registered proprietor together with the said Rama Matano Mwaurinda who allegedly sold the property to the Respondent and her partner, has in a witness statement dated 17<sup>th</sup> February 2011 and filed together with the Plaint herein confirmed the sale transaction as follows:

***“I am the biological mother of the Plaintiff herein. I together with the Plaintiff's father, one Rama Matano Mwaurinda (now deceased) were the joint registered proprietors of the suit property. Sometimes in 1999 or thereabouts, I discovered that the Plaintiff's father was in the process of***

*disposing of the suit property by sale. He wanted my consent to execute this plan since I was the co-registered owner. Apparently, the would have been buyer was one Bent Koch a foreigner who passed on before the sale was completed. Sometimes in 2000, I left the country and upon my return during the same year, I discovered the Defendant was staying in the suit premises. I, together with the said Rama Matano, held several meetings on every occasion that I returned to the country with a view of informing her to vacate the suit premises which request she vehemently refused.”*

As held in **Chogera v. Kimani & 2 Others (2005) 2 KLR 214**, a registered proprietor's title is subject to trust even where such trust is not registered on the title or instrument of acquisition of the land.

(7) As held in the Court of Appeal decision in **Mbuthia v. Jimba Credit Finance Corporation & Another (1988) KLR 1**, the correct approach in dealing with an interlocutory application for injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. In view of the disputed facts relating to the Defendant's interest in the suit property and the period and nature of her possession thereof, I am not able to hold that the Plaintiff has a clear case of trespass against the Defendant. The Defendant may at the trial demonstrate that she has been in possession adverse to the title of the Plaintiff and others from whom the Plaintiff derives title for the statutory period of 12 years to support a prescriptive title. She may also demonstrate a sale transaction with the said Rama Matano with the consent of the alleged joint owner so as to support a purchaser's resulting trust against the Plaintiff's transfer of title. A mandatory injunction in the circumstances would be wholly unjustified at this interlocutory stage.

(8) Moreover, under the **Giella v. Casman Brown ((1973) EA 585)** test, the reasonable doubt raised by the above circumstances lead to the result that the Plaintiff has not demonstrated a prima facie. A consideration of the balance of convenience would support the maintenance of the status quo with the Respondent in possession rather than require her eviction therefrom before the hearing and final determination of the suit.

(9) Accordingly, the Plaintiff's Notice of Motion dated 17<sup>th</sup> February 2011 is dismissed with costs to the Defendant.

**Dated and delivered on this 28<sup>th</sup> day of November 2012.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of:

Mr. Wachira for the Plaintiff/Applicant

Mr. Nyongesa for Umara for the Defendant/Respondent

Miss Linda Osundwa - Court Clerk