



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 996 of 2012

ROBERT MWIGAI AYANGE.....PLAINTIFF

VS

RASTO MATUNDA AINO.....DEFENDANT

(Application for injunction – principles to be applied in an application for injunction – Adverse possession – suit land measuring 2 acres – applicant seeking adverse possession to 5 acres of land – applicant concealing material facts – defendant alleging boundary dispute – prima facie case not established – application for injunction dismissed)

R U L I N G

The application before me is an application dated 23 May 2012 brought under the provisions of Order 40 Rules 1,2 and 3 of the Civil Procedure Rules. It is an application for an injunction to restrain the defendant from interfering with the suit land registered as Nandi/Chepkumia/64, pending the hearing and determination of this suit. The application is opposed.

This being an application for injunction, I will follow the principles laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. I will need to be satisfied that the plaintiff has laid out a prima facie case with a probability of success; that irreparable loss will be occasioned to him which cannot be compensated by an award of damages; and if in doubt, decide the matter on a balance of convenience. To determine whether a party has demonstrated a prima facie case with a probability of success, the court needs to evaluate the case of the applicant from the material presented in the form of pleadings, the application and the supporting affidavit. Where the respondent has responded to the suit and application, the assessment of the applicant's case must be gauged against the defences raised by the respondent. The court then needs to embark on a careful, but preliminary assessment of the case of the applicant as gauged by the defence of the respondent. It is from this assessment that a court will determine whether a prima facie case with a probability of success has been laid out.

What then is the plaintiff's case ?

The plaintiff commenced this suit by way of Originating Summons filed on 23 May 2012. The O.S is brought under the provisions of Section 38 of the Limitation of Actions Act, CAP 22, Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules. Principally, it is the applicant's case that he has obtained title to 5 acres of the land parcel Nandi/Chepkumia/64 by way of adverse possession. It is his case that he bought 5 acres of the suit land from one Ezekiel Kisia (deceased) on or about 16 July 1978 and has been living on the said portion to date. It is further his case that Ezekiel died before he could transfer the suit land to the applicant. The applicant has averred that on or about the 27 September 2010, the defendant came to the suit land and claimed that he was the registered owner of the same. The applicant has thus sought cancellation of the defendant's title and a declaration that he has acquired title to 5 acres of the suit land by adverse possession. Alongside the O.S the plaintiff filed this application for injunction to restrain

the defendant from interfering with his possession pending the hearing and determination of this suit.

The defendant/respondent has replied to the O.S by filing an Affidavit and has also responded to the application for injunction by filing a Replying Affidavit. It is his case that both he and the plaintiff bought portions of land from Ezekiel Kisia (deceased). It is the respondent's case that he bought his portion of 0.73 ha, about 2 acres, in 1980, and that he took possession of the same and planted trees. He has deponed that the plaintiff equally took possession of the portion that he purchased from Ezekiel, settled on the same and in fact obtained title for the said portion which was and still is registered as Nandi/Chepkumia Block 1(Kipkatoi)/69 measuring 2.45Ha (approximately 6 acres). The respondent on the other hand got himself registered as owner of his portion of 0.73 ha, which was and still is registered as Nandi/Chepkumia Block 1(kipkatoi)/64 which is the suit land.

It is his case that the two parcels border each other and that the two have been having a boundary dispute which had been referred to the District Surveyor in March 2012. The respondent annexed copies of the two titles and summons from the District Surveyor summoning the two parties herein to appear at the disputed boundary. The respondent has deponed that the applicant has concealed material facts, has lied to court that he lives on the suit land with his family, that he has no other land , and that he has been in possession of the suit land.

It is against this background that I have to decide this application for injunction.

ARGUMENTS OF THE PARTIES

This application for injunction was argued before me on the 5 December 2012. Mr. H.K Ng'eno argued the application on behalf of Mr. Andambi, learned counsel for the applicant. He referred me to the O.S, its supporting affidavit, and to the subject application and the supporting affidavit. He argued that the applicant has been in possession of the suit land for 34 years and is entitled to the same by adverse possession. He asked me to restrain the defendant from interference with the suit land.

Mr. Akenga, on behalf of the respondent, urged me to dismiss the application. He referred me to the Replying Affidavit of the respondent and asked me to find that the issue herein is a boundary dispute and not a case of adverse possession.

DETERMINATION.

This being an application for injunction I will first need to determine whether the applicant has set out a prima facie case. As earlier set out, it is the applicant's case that he has acquired title to 5 acres of the suit land by adverse possession. The applicant did not annex a certified copy of the title to his O.S or to his application which is a requirement of Order 37 Rule 7. The same provides that :-

7. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

Nevertheless, the respondent has annexed a copy of the said title to his replying affidavit. The copy of title annexed as Nandi/Chepkumia/ Chepkumia Block I (Kipkatoi)/64 indicates that the suit land measures 0.73 Hectares. In my estimation this is slightly under 2 acres of land. I do not see how the applicant can then seek a declaration that he is entitled to five acres out of a land parcel measuring less than 2 acres.

I also find that the applicant has failed to reveal material facts. In his Supporting Affidavit, the applicant has deponed as follows in paragraph 9 i.e

9. *THAT , I don't know how he got the land registered in his names (attached herewith and marked '3' the get copy of search) (which was not attached) since, I and many other people who bought land*

from the late Kisia do not have title deeds.

This is obviously not true as the Respondent has annexed to his Replying Affidavit a copy of the title to Nandi/Chepkumia/ Chepkumia Block I (Kipkatoi)/69 which shows the applicant as its registered owner. I am inclined to believe the respondent's version, at least at this preliminary stage, that they bought the suit lands from the late Ezekiel Kisia and they all got registered as owners of their respective parcels. The respondent has stated that there exists a boundary dispute as the applicant has been encroaching onto his parcel of land. He has attached documents to show that the District Land Surveyor is seized of the dispute. This has not been controverted by the applicant by way of a supplementary affidavit.

For the above reasons, I am not convinced that the applicant has demonstrated a case with a probability of success. I need not therefore consider the other principles of *Giella vs Cassman Brown*. I hereby dismiss the application for injunction with costs to the respondent.

DATED and DELIVERED on 20/12/ 2012

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mr. S. Anditi holding brief for Mr. Andambi of M/s Andambi & Co for plaintiff.

Mr. Arap Mitei holding brief for Mr. Mukavale of M/s Mukavale & Co for the defendant.