



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 148 of 2012

NAHLA FADHIL (*suing through Daniel Mutua, her lawful Attorney*).....PLAINTIFF

VERSUS

MUMBO DERI MOYO.....DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 7th September, 2012 under a certificate of urgency on 11th September, 2012. Contemporaneously with the said Notice of Motion, the Plaintiff filed a Complaint, list of witnesses and witness statements.
2. The Notice of Motion filed on 11th September, 2012 sought for the following orders:
 - a) **The Honorable court be pleased to certify the matter as being extremely urgent and do give the same a priority date within the shortest period.**
 - b) **A mandatory injunction be issued compelling the defendant by himself, his servants and/or agent to exhume the body of Makosoma Kahindi the late son of the Defendant from Plot No. 15 (Group 1 – Takaungu) pending hearing and determination of the suit.**
 - c) **The defendant by himself, his servants and or agents, be restrained from dealing with the suit property in any manner whatsoever pending hearing and determination of the suit.**
 - d) **The OCS Kilifi and if necessary the District Officer to ensure compliance of the orders herein.**
 - e) **The Honourable court do issue any further orders that it may deem necessary in the interest of justice.**
 - f) **Costs of this application be provided for.**
3. The application was placed and ventilated before Hon. Justice Meoli on 11th September, 2012 *ex-parte*. The court considered the applicant's arguments on the urgency of the application and declined to certify the application urgent.
4. When the Notice of Motion came up for hearing inter-partes on 22nd October, 2012, the Defendant appeared in person and requested for more time to look for an advocate to represent him. His request was granted by the court. The application was adjourned and was fixed for hearing on 22nd November, 2012.

5. On 22nd November, 2012 the matter was called out but neither the Defendant nor his advocate were in court. The Plaintiff's advocate urged the court to allow him to proceed with his application notwithstanding the absence of the Defendant's advocates. The Plaintiff's counsel informed the court that he had not been served with any replying papers. He however admitted having been served with a Defence.

6. Upon perusal of the court file, I realized that indeed the Defendant, through Nyange Sharia Advocate had filed the Replying Affidavit on 20th November, 2012. It appears that the said Replying Affidavit was never served on the Plaintiff's counsel. He however proceeded to argue his application notwithstanding the non-service of the Replying Affidavit on his office.

7. The Plaintiff's counsel relied on the grounds on the face of the Notice of Motion which are summarized as follows:

(a) That the defendant is harvesting produce from the suit property with impunity and when forgiven he goes back.

(b) That the defendant has put up unauthorized structures on the suit property and continues to do so.

(c) The defendant has threatened and actually buried his son on the suit property.

(d) The defendant poses threat to the relatives and agents of the plaintiff the lawful owner of the property, and did assault Sultan Fadhil and the matter is pending in court in criminal case no. 975 of 2011.

8. The Plaintiff's counsel also relied on the supporting affidavit of Daniel Mutua, the holder of a power of attorney donated to him by Nahla Fadhil who is the Plaintiff in this case.

9. The Plaintiff's advocate submitted that the Defendant has committed several wrongs which he has not denied in his Defence. According to counsel, the applicant is the owner of the suit property, to wit plot number 15, Group I Takaungu. He referred the court to the certificate of postal search which is marked as annexure "DM-1A".

10. Counsel submitted that the Defendant has on numerous occasions attempted to sell the suit property as shown in annexure "DM-12". Annexure DM 12 is a judgment of the Senior Resident Magistrate, Kilifi in which the Defendant was imprisoned for one year for attempting to sell the suit property to a third party. It was the Plaintiff's case that the Defendant is a man of criminal tendencies.

11. It was the Plaintiff's advocate's further submissions that the Defendant used to occupy the suit property and that he was compensated for the temporary structures which he had erected on the land by one Amirali Tayabali. Consequently, counsel urged, the Defendant has no claim over the suit premises.

12. Mr. Obaga, counsel for the Plaintiff/Applicant urged the court to disregard the averments in the Defendant's Defence because the same is a farce and further that the Defendant will use any means to illegally acquire property of other people.

13. It was further urged on behalf of the Plaintiff that the Defendant buried his son on the suit property despite warnings from the Plaintiff. This, according to the plaintiff's affidavit, was an attempt by the Defendant to lay a claim on the suit property.

14. On the issue of whether the Defendant can lay any claim on the suit premises on the basis of adverse possession, Counsel urged that the Defendant had been arrested on numerous occasions and jailed over the suit property.

15. The Defendant filed a Defence through his advocate, Nyange Sharia, on 20th November, 2012 and a

Replying Affidavit sworn by himself on 20th November, 2012. As stated above, the Defendant's advocate was not in court on 22nd November, 2012 when the applicant argued the Notice of Motion. I am bound to look at the Replying Affidavit because it forms part of the court record.

16. The Defendant has deponed in his Replying Affidavit that the Plaintiff/Applicant is not the absolute owner of the suit property. He avers that the suit property belongs to one Khadija Abdalla Fidali, the legal heir to the Estate of the late Abdulhussein Noorbhai who was the registered owner of the suit property. The Defendant has annexed the Grant of Letters of Administration Intestate in support of this argument.

17. The Respondent has also stated in his Replying Affidavit that he has never been employed or compensated by one Amirali Tayabali, or that the said Amirali Tayabali was the owner of the suit property as claimed by the Plaintiff in his supporting affidavit. He however admits that he buried his son on the suit premises because he was never served with a court order barring the said burial from taking place.

18. The Respondent denies the averment by the plaintiff that he has no respect for the rule of law but admits that he was once arrested and forced to affix his thumb print on a document whose contents he never understood. Finally, the Defendant depones that he has been in open, continuous occupation of the suit plot; that the applicant is not a Kenyan citizen and therefore cannot lawfully acquire freehold title in Kenya and that a mandatory injunction ought not to be granted at an interlocutory stage.

19. I have carefully considered the Plaintiff's advocates submissions, the Notice of Motion dated 7th September, 2012 together with the supporting affidavit and the Defendant's Replying Affidavit sworn on 20th November, 2012. The Plaintiff is seeking for a mandatory and a prohibitory injunction.

20. A mandatory injunction should only be granted in clear cases. In the case of **Kenya Breweries Ltd Vs W. Okeyo; Civil Appeal No. 332 of 2000** the Court of Appeal adopted the criteria outlined in the celebrated case of **Locabail International vs Agro Export (1986)1 ALL ER 905**, where it was held as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of Special Circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff...”

21. Is this a clear case for the purpose of allowing a mandatory injunction as prayed in the Plaintiff's Notice of Motion? That is my task. My other task in this application is to determine on the material before me whether the applicant has established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the main suit.

22. I will also determine whether, even if such a case exists, the applicant has shown that he will suffer loss that is incapable of compensation by an award of damages. If in doubt about the two I will decide on a balance of convenience. These are the well known principles in the **Giella Vs Cassman Brown** case.

23. A *prima facie* case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court or 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 an explanation or rebuttal from the letter.”

24. The Plaintiff has annexed on his supporting affidavit a copy of the certificate of postal search as at 21st November, 2011. The said search shows that the suit property, to wit, plot 15 - Group 1

TAKAUNGU is registered in the names of Nahla Fadhil (the Plaintiff) & Gulamabbas Sulmanyi in the ration of $\frac{3}{4}$ to $\frac{1}{4}$ respectively. The suit property measures 22.95 acres. It is the Plaintiff's case that she bought the suit property from one Amirali Tayabali who owned $\frac{1}{4}$ of the shares of the suit property via an indenture of transfer dated 21st January 2009. The said indenture has been annexed on the supporting affidavit as "DM 2".

25. According to the Plaintiff, the said Amirali Tayabali once employed the Defendant though the Defendant has denied that fact in his Replying Affidavit. The Defendant depones that the said Amirali Tayabali Sulemanyi is a total stranger to him.

26. The Defendant further denies that he was ever compensated for the crops he had planted on a portion of the suit property and the structures that he had erected. The Plaintiff relied on an agreement between Amirali T. Sulemanyi and the Defendant (Annexure DM3) to prove the compensation claim, a document which the Defendant says he was forced to affix his thumb print after he was arrested. I have perused the purported agreement and it states that the Defendant was being compensated for the cassava plants and the three *makuti* structures that belonged to the Defendant.

27. The Plaintiff has also annexed on her Supporting Affidavit a copy of the order from the Senior Resident Magistrate's Court, Kilifi in SRMCC No. 535 of 2008 in which the Defendant's suit was dismissed for want of *locus standi*. The Plaintiff states in his Supporting Affidavit that the Defendant filed the suit in 2008 after learning that the Plaintiff had purchased the suit property. The Defendant did not explain in his Replying Affidavit the circumstances under which he filed SMCC NO. 535 of 2008.

28. After purchasing $\frac{1}{4}$ shares of the suit property from one Amirali T. Sulemanji, the Plaintiff states in his affidavit that she further purchased $\frac{1}{2}$ shares belonging to Murtaz Shabir and Qutbuddin Shabbir Tayabali vide an indenture dated 28th January, 2010 - "DM9)". The said indenture has comprehensively described the suit property as "*parcel of land more particularly delineated and described in Land Survey Plan Number 2208 annexed to the Certificate of Ownership No. 439 issued by the Recorder of Titles at Mombasa...*"

29. The Plaintiff has also annexed on his affidavit an agreement dated 12th September, 2009 showing the purchase of the remaining $\frac{1}{4}$ share of the suit property from Kayamali Gulamabbas and Mustansir Gulamabbas, the heirs and beneficial owners of the estate of the late Gulamabbas Sulemanji. The said agreement is marked as annexure DM10. The agreement in essence completed the purchase of the suit property by the Plaintiff and *prima facie* conferred the ownership of the entire suit property to her.

30. The Defendant refutes that the Plaintiff is the owner of the suit property. He has annexed on his Replying Affidavit the Indenture dated 25/07/2/2012 which shows that the suit property, amongst other properties was transmitted to Batuli Yusuf Fidali, Fidali Mohamed Fidali, Fatma Abdallah Fidali and Faku Abdallah Fidali by Khadija Abdalla Fidali, the Administrator of the estate of the late Shabbir Hussein Tayabali. The Defendant avers in his Replying Affidavit, without offering any evidence, that there is a dispute between the plaintiff and Khadija Abdalla Fidali over the ownership of the suit property.

31. The Certificate of Postal Search dated 21st November, 2011 shows the registered owners of the suit property as Nahla Fadhil ($\frac{3}{4}$) share and Gulamabbas Sulemanji ($\frac{1}{4}$). Annexure DM 10 is an agreement between the purported beneficiaries of the estate Gulamabbas Sulemanji and the Plaintiff.

32. Consequently, the Plaintiff has shown by way of the Certificate of Postal Search, the indentures and the agreement between herself and the beneficiaries of the estate Gulamabbas Sulemanji that she is the owner of the suit property.

33. There could be a dispute or disputes on the suit property between the Plaintiff and one Khadija Abdalla Fidali as stated by the Defendant. However, the said dispute or disputes, *prima facie*, does not affect the legitimate rights or expectations of the Plaintiff over the suit property, more so as between

herself and the Defendant in the present suit.

34. The Defendant further depones in his Replying Affidavit that he has been in continuous occupation of the suit property for over 30 years. He does not elaborate this statement any further. The Defendant does not state from whom he is claiming adverse possession and whether his claim is for a portion of the land or the whole 22.95 acres.

35. It is trite law that no action to recover land accrues unless the land is in possession of some persons in whose favour the period of limitation can run. The possession is after all adverse, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Pursuant to the provisions of section 9(1) and 13 of the Limitation Act, dispossession and discontinuance must go together. Section 7 and 17 of the Limitation of Actions Act is also clear that for a party to succeed in a claim for adverse possession he must show exclusive uninterrupted possession of the land without fraud for twelve years.

36. The Defendant has deponed that he has been in possession of the suit property for over 30 years. However, according to the submissions by the Plaintiff's advocate, the alleged possession of the suit property has been interrupted on so many occasions including the Defendant being arrested and charged in court for attempting to fraudulently sell the suit property. This, prima facie, is an interruption of possession of the suit property.

37. The failure by the Defendant to clearly and concisely plead under which circumstances he took possession and the person in whose favour the period of limitation is running makes his claim of adverse possession, at an interlocutory stage weak. It could be possible that at the hearing of the suit, the issue of adverse possession would be much more clearer. However, and based on the material placed before the court for now, the Defendant appears to be a trespasser on the suit property.

38. For the above reasons, I am convinced that the Plaintiff has established a *prima facie* case to warrant the grant of prayer number "c" of the Notice of Motion. I am also convinced that unless a prohibitory injunction is issued, the Plaintiff will suffer irreparable loss in the event the Defendant sales the suit property as he has attempted to do.

39. As was stated in the **Locabail International Case**, a mandatory Injunction can only be granted at an interlocutory stage in clear cases and where the court thinks that the matter ought to be decided once or where the injunction was directed at a simple and summary act which could easily be remedied. The court, it was held, must feel a high sense of assurance.

40. Putting the above principles in perspective, it is clear in my mind that the exhumation of a body at an interlocutory stage, and in a matter where the Defendant has raised the issue of adverse possession albeit, on the face of his Replying Affidavit, unmeritorious, is not a simple and summary act which can be remedied later on. I do not feel a high sense of assurance to order for the exhumation of the Defendant's son's body which was buried on the suit property.

41. I have perused the Plaintiff's undated Plaintiff and the same does not have a prayer for a mandatory injunction. In my view, such an omission, in addition to the reasons I have given above, renders the prayer for a mandatory injunction in the Notice of Motion a non-starter. The same cannot be granted in the absence of a corresponding prayer in the Plaintiff.

42. In conclusion, and for avoidance of doubt, I make the following orders:

(a) The application dated 7th September, 2012 be allowed in terms of prayer numbers c, d and f.

(b) Prayer number b for a mandatory injunction is declined.

Delivered this 13th day of December, 2012.

O. A. Angote
JUDGE