



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT BUNGOMA

CIVIL SUIT NO.26 OF 2011 (O.S)

IN THE MATTER OF LAND REFERENCES NO.NDIVISI/NDIVISI/1640

AND

IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

JOSEPH MUMERO WANYAMA.....APPLICANT

~VRS~

JAFRED WANJALA LYANI.....RESPONDENT

RULING

The Respondent was the registered proprietor of land parcel no.Ndivisi/Ndivisi/1552. On 25/5/1996 the Applicant agreed (annexure JWN-1) to buy 2 acres of the land at Ksh.120,000/= which was paid. The portion being sold had trees, bananas and other developments thereon. The parties agreed to negotiate the value of these items at a later stage so that it could be paid by the Applicant before subdivision and transfer of the land. The Applicant states that he immediately went into possession and occupation of the bought portion and begun to utilize it by planting maize, beans and vegetables. He subsequently found out that the Respondent had secretly subdivided parcel no.Ndivisi/Ndivisi/1552 into several portions. The

portion the Applicant was now occupying was no.Ndivisi/Ndivisi/1640. He kept reminding the Respondent to transfer the portion to him but that was not done. On 12/3/2011 he was surprised to find strangers cultivating this portion. They told him that they had bought the same from the Respondent.

The Applicant filed this suit by way of originating summons seeking a declaration that he has become entitled to parcel no.Ndivisi/Ndivisi/1640 by adverse possession on account of having been in exclusive, open and continuous possession and occupation without interruption since 1996. He asked that it be found that the interest of the Respondent in the land has been extinguished.

Filed along with the suit was a motion under Order 40 rule 1 of the Civil Procedure Rules, sections 3A and 63 (e) of the Civil Procedure Act and section 128 of the Registered Land Act Cap.300 seeking a temporary injunction to restrain the Respondent, and all those acting under him, from encroaching and constructing on, cultivating, disposing of or in any other way interfering with the suit land until the case is heard and determined. The Applicant further sought that the Land Registrar of Bungoma be inhibited from registering any transaction on the title. Regarding this prayer, it is basic that it seeks to stop the Land Registrar from carrying out his work in relation to this land. He was not made a party to the suit or application. It would be unusual to give an order against him without affording a hearing.

The Respondent filed a replying affidavit to admit that there was a sale agreement but stated that there was an outstanding issue regarding trees, bananas and other developments whose price was neither negotiated nor paid. He alleged that the Applicant had instead wantonly destroyed the trees and bananas growing on the land after which he had kept off the same. When on 12/2/2002 the Respondent sought to be paid Ksh.78,900/= for the developments, the Applicant lodged a caution on the land. The Respondent complained to the Land Registrar of Bungoma who on 29/3/2011 gave notice to the Applicant to remove the caution. Instead, the Applicant filed this suit. In the meantime, on 14/3/2011, the Respondent had sold the land to one Hesborn Murule Lusweti to whom the land had been transferred. Lusweti has since occupied the land and has since commenced developments thereon.

The Applicant swore a supplementary affidavit to say that following the agreement with the Respondent, he was shown a portion to occupy. A few months later, the Respondent told him that he had sold this portion to a third party. It was this portion that had the trees, bananas and developments in question. The Respondent moved him to another portion which was vacant and undeveloped. It is this second portion that it is now the suit land and which the Applicant says he has occupied since 1996. He denied the claim by the Respondent that he had ceased to occupy or develop the suit land for any period. He stated that at the time of the alleged sale of the land to Lusweti he had obtained and served an ex-parte injunction even to the buyer. He denied that Lusweti was in occupation. He stated that Lusweti was hurriedly putting up structures on the suit land in disobedience of the court order.

The Applicant will have to join Lusweti in these proceedings. This is because Lusweti has since acquired an interest in the land. The question is whether he can be enjoined through this application when he is not a party. It should be borne in mind that sections 27 and 28 of the Registered Land Act entitle him to an absolute and indefeasible claim of the land.

The Applicant states that he has been on the suit land continuously and without interruption since 1996. The Respondent states that on 12/2/2002 he wrote to the Applicant to pay Ksh.78,900/= as per the agreement failing which he would consider the agreement breached and would re-sell the land. The Applicant does not dispute that he received the letter. He states that he considered the request for payment as being irrelevant given that the Respondent had taken him to a portion different from what had been agreed on. He did not, however, respond to the letter. The question is whether the letter should be seen as an interruption to the Applicant's quiet enjoyment of the suit land. Was this letter a notice to the

Applicant to pay or vacate? Given what the parties had agreed in terms of trees and bananas, can it be said that the Applicant was in exclusive possession with leave and license of the Respondent and that as long as they had not agreed on the value of these developments the license had not been determined? Can it be said that until the license was determined, the occupation was not adverse but with permission?
(Wambugu v Njuguna [1983] KLR 172).

My view is that, considering the principles in **Giella v Cassman Brown and Company Ltd [1973] EA 358** and the facts of this case, the Applicant has not made a case to warrant the prayers in the application. The application is dismissed with costs.

Dated and delivered at Bungoma this 8th day of November, 2011 in the presence of Ms Mumalasi for the Plaintiff and the Defendants and Lilian Gimose the court clerk.

A. O. MUCHELULE

JUDGE