



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 164 OF 2011

BARNABAS KIMARU CHEIYO PLAINTIFF

VERSUS

JAMES CHERUIYOT BOIT 1ST DEFENDANT
GEOFFREY KIRWA BOIT 2ND DEFENDANT
VICTORIA JEBET ROTICH 3RD DEFENDANT

RULING

The application dated 27th September 2011 is by the Plaintiff against the first defendant even though it would in one way or the other affect the second and third defendants in as much as they are parties to the Originating Summons dated and filed herein on the same 27th September 2011.

The basic order sought at this juncture is for a temporary injunction to issue against the third respondent restraining her whether by herself, agents/servants/employees from disposing off, transferring, selling, offering for sale, leasing, charging and alienating, the parcel of land known as **MOIBEN/MOIBEN BLOCK 6 (KABIYET)/7** and also to restrain the third defendant from evicting the plaintiff or interfering with his occupation of the said parcel of land.

The grounds in support of the application are that:-

- (a) **The third defendant is the registered proprietor of the suit property which she acquired from the first and second defendants.**
- (b) **The plaintiff has occupied and used ten acres comprised in the suit land from 1985 and his interest thereon was not disclosed to the third defendant by the first and second defendants.**
- (c) **The plaintiff has acquired the said ten (10) acres comprised in the suit land by adverse possession and is entitled thereto as of right.**
- (d) **The third defendant has now threatened to evict the plaintiff from the suit land in total disregard of the plaintiff's entitlement.**
- (e) **The plaintiff and his family do not have an alternative land to settle on and have extensively developed the said ten acres over the years.**
- (f) **The threatened eviction will cause great loss and damage to the plaintiff and his family while the grant of the orders sought herein will cause no prejudice to the third defendant.**

These grounds are enhanced and fortified by the plaintiff's supporting affidavit dated 27th September 2011 and further affidavit dated 26th October 2011.

In response to the said affidavit, the first defendant filed a replying affidavit dated 17th October 2011 while the third defendant filed grounds of opposition and replying affidavit both dated 17th October 2011.

At the hearing of the application, **MR. OMONDI**, learned Counsel appeared for the plaintiff while **MR. NGALA**, learned Counsel, and **MR. CHEBII**, learned Counsel, appeared for the first, second and third defendants respectively.

In their respective submissions, the learned Counsels reiterated and highlighted the contents of their respective affidavits. Basically, the conditions for the grant of a temporary or interlocutory injunction were set out in the leading case of **GIELLA V. CASSMAN BROWN [1973]EA 359**. These are that an applicant must show a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on the balance of convenience.

With regard to the first condition, the plaintiff states that in 1985 he was employed as a farm worker by one Paul Boit (now deceased) who did not reside in the suit premises but had his goats on the property under the care of the plaintiff who was shown a place within the property to put up a farm house to be used by himself while taking care of the property. It was agreed between himself and the deceased Paul Boit that he would not be paid a salary and in return, he would be allocated part of the land for farming purposes and earn a living while taking care of the land. In that regard, he was given ten acres for his usage and benefit. The deceased visited the property from time to time and approved both the plaintiff's works and occupation of the ten acres. Upon the demise of the deceased in 1992, his widow, Priscilla Boit (also deceased) took over the land without interfering with the plaintiff's use and occupation of the ten acres. When he married in 1990, the plaintiff established his matrimonial home in the suit property and continues to live there with his family upto date.

The plaintiff further states that after the death of Priscilla Boit in 2008, her sons who are the first and second defendants herein took over the property and never interfered with the ten acres which he has exclusively occupied since 1985. The third defendant who had previously leased part of the land had never also interfered with his ten acres but after purchasing the entire portion from the first and second defendant, the third defendant has now threatened to evict the plaintiff from the ten acres. In his further affidavit, the plaintiff contends that he is still in occupation of the suit property and has been in such occupation openly and without interruption from 1985. He also contends that he does not claim to be a squatter on the land since his entitlement to the ten acres is known.

In his submissions, learned Counsel for the plaintiff contended that the beneficial and/or equitable owners of the suit property have used it without interfering with the plaintiff's possession. These were firstly, Paul Boit, followed by the first and second defendants and now the third defendant. Learned Counsel submitted that the main suit is premised on S. 38 of the Limitation of Actions Act and that the plaintiff is claiming by adverse possession ten acres of the suit property. Counsel further submitted that the interests of Paul or Willy Boit and the first and second defendants over the ten acres occupied by the plaintiff have been extinguished by prescription. Therefore, such interest could not be sold to the third defendant and under S. 30 (f) of the Registered Land Act (RLA), the third defendant acquired the land when overriding interests were in existence. Consequently, and on the basis of the decision of the Court of Appeal in **NJUGUNA NDATHO VS. MASAI IFUMO & OTHERS COURT OF APPEAL NO. 231 OF 1999 AT NAKURU**, the plaintiff has established a prima facie case with a probability of success. The plaintiff's learned Counsel did not address the two other conditions for the grant of an interlocutory injunction. It may therefore be opined that reliance has been placed more on the first condition and not the rest of the conditions.

In his replying affidavit, the first defendant contends that the plaintiff has not been in actual occupation of the suit property which is now registered in the name of the third defendant whose interests thereon are

indefeasible. Further the plaintiff's claim has no merits, discloses no cause of action and has no chance of success.

The first defendant also contends that the plaintiff was paid all his wages and there was no agreement to give him ten acres of the land in lieu of wages. Further, having been a worker, the plaintiff is estopped from claiming ownership of the land by adverse possession. Further, the interests of Willie Arap Boit (deceased) and Paul Boit were properly transferred and vested in the third defendant. In his submissions, Counsel for the first defendant submitted that the legal issue arising herein is whether an employee whose initial entry into the land was by virtue of an employer/employee relationships can assert a claim to the land. Counsel cited S. 39 of the Limitation of Actions Act and S. 120 of the Evidence Act and contended that the plaintiff cannot claim limitation as he was not a squatter nor a bona-fide purchaser and is estopped from pleading limitation. Further, the alleged agreement between the plaintiff and Paul Boit was not made in accordance with S. 3 (3) of the Law of Contract Act (Cap 23 LOK) and under S.41 of the Law of Limitation Act, limitation cannot run against the Government since annexure No. 1 in the first defendant's affidavit shows that between 3rd March 1994 and 6th August 2009, the property was registered in the name of the Government of Kenya.

Learned Counsel contended that the interests of the first and second defendant in the property were not extinguished because the property was previously owned by the Government of Kenya.

For all the foregoing reasons, learned Counsel for the first and second defendants contend that the plaintiff has failed to establish a prima facie case with a probability of success. Reliance was placed on the provisions of the law of contract Act, the Registered Land Act and the authorities cited in the first and second defendant's list of authorities dated 31st October 2011.

In her replying affidavit, the third defendant avers that the plaintiff entered the suit property as a worker in the year 2000 and that there was no agreement that he was to be given ten acres of the land and no such land was ever given to him.

The third defendant also avers that since the year 2001 when she purchased the entire portion of land she had leased and planted wheat in the entire portion while the plaintiff occupied only two (2) acres on the understanding that he was a worker taking care of the farm and that he needed two acres to grow his own food for subsistence only. He is therefore estopped from claiming that he became owner by adverse possession.

The third defendant contends that even though she had previously leased the land, her rights were merged and became that of the registered proprietor when she purchased the land in 2001 and registered it in 2009. Being so registered, her rights under S. 27 of the RLA are indefeasible.

In his submissions, learned Counsel for the third defendant associated himself with the submissions made by the first and second defendants and contended that from the extract exhibited herein, the plaintiff has been on the land for only three (3) years and would not be entitled to adverse possession. He (plaintiff) had no rights at all such that the doctrine of estoppel would apply in the present circumstances.

Counsel further contended that there is nothing to show that Paul Boit, Willy Boit and the first and second defendants did acts which were inconsistent with their interests in the land. Further, S. 30 (g) of the RLA would not arise in favour of the plaintiff. He has not established a prima-facie interest greater than that of the third respondent. Further, Paul Boit was not a registered proprietor. The possession of the plaintiff ought to be adverse to that of the registered proprietor. Learned Counsel contended that since the plaintiff's claim is based on equity, equity must follow the law.

Responding to the submissions by all the defendant, learned counsel for the plaintiff agreed that equity follows the law and under S. 30 (f) of the RLA overriding interests are recognized such that even if the third defendant is the registered proprietor, the law recognizes the plaintiff's rights therein.

On S. 3 of the Law of Contract Act, Counsel submitted that it is irrelevant since it was enunciated in 1990

and the transaction herein occurred in 1985. Counsel submitted that adverse possession may only be proved against the registered proprietor which Paul Boit was not.

On S. 41 of the Limitation Act, Counsel submitted that it does not favour the defendant's since they agree that the third defendant purchased the land in 2001 while second plaintiff has been in the land since 1987. The 3rd defendant could not have acquired the land in 2009 if she was in possession in 2001 and if that was so, then the title is questionable if the land belonged to the Government of Kenya.

Considering all the foregoing submissions in the light of the grounds for the application, it is apparent that the registered proprietor of the suit property is the third defendant who acquired it from the first and second defendants. It is also apparent that the plaintiff has been in occupation of part of the suit property. Whereas he alleges that his occupation is confined to only ten (10) acres, the third defendant alleges that the occupation is confined to only two (2) acres. The period of occupation is most crucial and from the annexures contained in the plaintiff's further supporting affidavit, it appears that the plaintiff's occupation of the suit property has been for a period extending from either 1985 or 1989.

In the first defendant's replying affidavit, there is an annexure marked exhibit No. 2 indicating that the plaintiff may have commenced occupation of the land in 1987. In the same affidavit there is an extract copy of the register (i.e. annexure marked exhibit No. 1) indicating that the property belonged to the Government of Kenya in 1994 upto 2009 when it shifted to the late Willie Arap Boit and then the first and second defendant and eventually the third defendant.

The extract does not reflect the period prior to 1994. It is however evident that prior to that period, the presumed owners of the land were members of the first and second defendant's family i.e. Willie Arap Boit and Paul Boit (both deceased). Indeed, the extract shows that the land moved from the late Willy Arap Boit to the first and second defendant.

There being no substantial dispute that the plaintiff has been in occupation of part of the suit property and that such occupation has been continuous and uninterrupted for a considerable period of time, it remains to be seen whether the occupation or possession was adverse to the interests of the actual or presumed owners of the land. Of course, if prior to 1994 the land belonged to the Government of Kenya, the doctrine of adverse possession would not apply by dint of S. 41 of the Limitation of Actions Act.

The manner in which the plaintiff took possession of part of the land would be crucial in determining whether by fact and law, the plaintiff would be entitled to ten acres of the suit property by way of adverse possession. Such determination would however not be possible at this interlocutory stage as it would require additional evidential facts in a complete trial in which all relevant and necessary facts and all applicable laws will be placed before the court to render a conclusive decision on the matter.

As for now, the view of this Court is that it is not possible on the basis of the facts availed in this application to say whether or not the plaintiff has established a prima facie case with a probability of success. However, the facts raised by both sides are arguable and fit for resolution after a full trial by "viva voce" evidence. Consequently, even without examining the remaining two conditions for the grant of an interlocutory injunction, it would be necessary to preserve the "status quo" existing between the parties pending a final determination of this matter. In that regard the application is allowed in terms of prayers (b) and (c) on condition that a date for the hearing of Originating Summons dated 27th September 2011 by way of "viva-voce" evidence be fixed by the plaintiff within the next two (2) months from this date hereof. In default, the interim injunctive orders be vacated forthwith. Ordered accordingly.

J. R. KARANJA
JUDGE

[Read and signed this 4th day of November 2011]
[In the presence of all the parties)