



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL CASE NO.55 OF 2011

EVANS ELUKERE

KEN MAMAIAPPLICANTS
=VERSUS=

ALBERT OCHOKOLO
PETER OCHOKOLORESPONDENTS

R U L I N G

The Applicants Evans Elukere, Ken Mamai and Beatrice Wasike in the application dated 20.09.11 seek for injunctive orders against the respondent that they be compelled to open the gate and doors for the applicants to allow them peaceful and quiet occupation of the premises on L.R. South Teso/Angoromo/3823 until the determination of this suit. The second prayer seeks for an inhibition and/prohibition order restraining the Respondents from transferring or interfering with land parcel No.South Teso Angoromo/3823 until this suit is determined. Thirdly, the applicants seek for order that the O.C.S. Busia be ordered to ensure that the orders are obeyed.

The grounds relied on are contained in the supporting affidavit of Ken Namai and in the face of the application which may be summarized thus:

- a) that the suit land belonged to the now deceased father of the applicants and it was transferred to the respondents without the applicants knowledge.
- b) that the applicants were born on the land and have enjoyed quiet and undisturbed possession for about 20-25 years;
- c) that the Respondents have homes in the premises which were established for them by the deceased;
- d) that the applicants have now been evicted by the respondents from their homes.

The Respondents opposed the application. In the replying affidavit of the first Respondent Albert Ochokolo, it is deponed that the land was transferred to the respondents by the deceased when the applicants were of the age of minority. That the applicants have their own land L.R. S.Teso Angoromo/3822 situated in Busia town and on which the 1st and 2nd applicants have a home. It is denied that the 3rd Applicant has been evicted from the home in the suit premises. The Respondents argue that the premises is a commercial plot and not agricultural land as the Applicants have demonstrated. The Respondents have annexed pictures of the building on Plot no.3823 and another one on Plot number

3822. From the pictures, the two buildings are three storey which is evidence of developed commercial plots.

The 1st Respondent states that Plot No.3822 still in the name of their deceased father and that is the property to which the Applicants are entitled to.

The Applicants in their supplementary affidavit did not reply to the issues of ownership and entitlement of the two plots as explained by the respondents. It is an established legal principle that any allegations which are expressly denied are admitted. It is not disputed that the suit premises belonged to the father of the Respondents who is also the father of the 1st and 2nd applicants. The deceased is also the late husband of the 3rd applicant and that the 1st and 2nd applicants are the children of the 3rd applicant.

It is not in dispute that the land was transferred to the Respondents during the lifetime of the deceased. The Applicants do not allege that there was any fraud or misrepresentation in the transfer. All they claim is that the transfer was done without their knowledge. The applicants lived on the plot by virtue of being the children of their deceased father. Their claim in this suit is for adverse possession of the land. It is established law that a party who enters into the land of another with the consent of the owner, cannot claim adverse possession. The entry into the land and the occupation thereof must be adverse to the interests of the registered owner for a claim of diverse possession to succeed.

This court was referred to Bungoma HCCC 83 of 2001 (O.S) where Hon. Judge Muchelule ruled that a wife who was living on the land with her husband's consent could not claim adverse possession against her husband. I agree entirely with the said ruling. I find the ruling relevant in that the applicants also lived on the suit premises with the consent of their late father.

It is not in dispute that the Respondents are the registered owners of the suit premises. The applicants had been dispossessed of the land by the time they filed this suit. One who has been dispossessed of the land has very slim chances of success on a claim of adverse possession. Why did the applicants wait until they were evicted to come to court in this matter if they honestly believed that they had prescriptive rights over the land? It is said that when transfer of the land was made to the Respondents in 2001, the applicants were less than 15 years old. The issue of the applicant's age was not disputed. The applicants did not therefore possess the capacity to claim title by way of adverse possession at the time ownership changed hands. If the applicants were around 15 years in 2001, they required to attain the capacity to claim title which would only happen about three (3) years after the transfer. It goes without saying that when the applicants stayed on the land they were not possessed of the capacity to claim title by prescription. The land belonged to the deceased in 2001 who transferred it voluntarily to the Respondents during his lifetime.

For Ken Mamai to swear the supporting affidavit on behalf of the 1st and 3rd applicants, he needed their authority to do so. The Affidavit in its introductory paragraphs does not indicate that there was such authority. Neither is there a letter of authority annexed to the application. In effect the 1st and 3rd Applicants cannot be said to be part and parcel of the application before the court.

The Applicants annexed a copy of register for the suit premises to the initial Originating Summons but not to the amended summons. Sections 1(a) and 1(b) of the Civil Procedure Act focuses on the overriding objective as opposed to technicalities. The court has discretion to allow the plaintiff time to comply with the law where such a situation arises. The principles which must be satisfied in an application for an injunction made under Order 40 Rule 1 are that:

- a) the respondent has demonstrated that he is likely to suffer substantial loss or injury if the orders sought are denied;
- b) that the injury or loss may not be compensated in way of damages;
- c) that the applicant must show he has a prima facie case with probability of success;

d) that in case of doubt, the court should resolve the matter in the balance of convenience.

These principles as laid down in the case of Giella VS. Cassman Brown were echoed in the case relied on by the applicant Eldoret HCCC no.50 of 2002 Kitur VS Standard Bank & 2 others. In the foregoing analysis I have demonstrated that the applicant has to make up a prima facie case. The other conditions have also not been satisfied. This court is not in doubt and will therefore not apply the principle of balance of convenience.

I come to a conclusion that this application has no merit and I dismiss it with costs.

F.N. MUCHEMI
JUDGE.

Ruling delivered and dated on the **6th** day of **December 2011**

In the presence of Mr. Situma for Respondents and Mr. Onsongo for Applicants.

F.N. MUCHEMI
JUDGE.