



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. APPLICATION NO. 304 OF 2010**

**WILLIAM MC TOUGH.....PLAINTIFF**

**VERSUS**

**LAWRENCE O. HONGO**

**(Being sued as the administrator of the estate of) MICHAEL HONGO  
AYIEKO.....DEFENDANT**

**RULING**

The plaintiff/applicant moved to the seat of justice by way of an originating summons seeking determination of questions amongst others whether him applicant purchased an identified portion of parcel Kisumu/Kogony/37 measuring approximately half of the original portion from the defendant on 3-3-1989, but the defendant todate failed to execute transfer documents in favour of the plaintiff, whether the plaintiff has overriding interest under section 30 (a) (d) and (g) of the Registered Land Act (Cap 300) Laws of Kenya of the identified portion of Kisumu/Kogony/33, whether the 2<sup>nd</sup> defendant is holding the title deed to Kisumu/Kogony/33 in trust for the plaintiff, whether the plaintiff is in adverse possession of a portion of land parcel No. Kisumu/Kogony/33, whether the honourable court ought to vest the suit land to the plaintiff, that if 2,3,4, and 5 above are in the affirmative, whether the Kisumu District Land Registrar should be directed to cause the sub-division of Kisumu/Kogony/33 and thereafter register the plaintiff as the registered absolute proprietor of his identified portion of land and lastly whether the plaintiff is entitled to the cost of this application.

On the originating summons the applicant has anchored an application dated the 12<sup>th</sup> day of November 2010 and filed on the 16<sup>th</sup> say of November 2010. Four reliefs are sought namely:-

(1) Spent.

(2) Vide prayer 2 and 3 that a temporary injunction do issue restraining the defendant by themselves, their agents, servants and or employees or otherwise jointly and severally from selling, transferring, trespassing, alienating, interfering, charging, sub-dividing, leasing or evicting the plaintiff or in any way whatsoever dealing with the property Kisumu/Kogony/33 pending the hearing and determination of the application in prayer 2 and plaintiffs originating summons dated 11-11-2010 and filed herein in prayer 3.

The grounds in support are setout in the body of the application and the supporting affidavit and in a

summary from these are that:-

- The applicant purchased the claimed portion of land from the deceased's father of the defendant in the year 1991.
- That he duly paid for the same as per the content of the exhibited documents and was put in its possession.
- It is his assertion that transfer was not effected in his name because of the emergence of a strange title No. 3012 believed to be for the same parcel of land.
- That upon the emergence of this strange parcel, he took up the issue with the lands registry concerned but they took long sorting out the issue leading to the death of the original owner and since then the defendant who took out a grant of representation to the estate of the vendor has refused to effect the transfer in his favour.
- It is his assertion that the subject parcel is very important to development of his other properties enumerated in paragraph 10 of the supporting affidavit as Kisumu/Kogony/3018/27,26 and 25.
- That he will be greatly prejudiced if he were to lose the subject property.
- That he has reliably learned that the respondent intends to dispose off the said property to 3<sup>rd</sup> parties hence the move to have him enjoined.
- It is the appellants stand that he has satisfied the ingredients required to be satisfied in order to earn an injunctive relief.

This court has scrutinized through the documentation exhibited and it has found that indeed there is in place the alleged sale agreement entered into in the year of 1989 annexure 1, and annexure 2 acknowledgement for payment, annexure 3-4 lands registry documents, 6 adjudication papers in the name of the applicant, 7 which stands to portray the existence of parcel 33, 3012 and 3044 all joined. 8 acknowledgement of payment, 9 correspondence to land registry on the purchase of said land, 13 documents relating to litigation over the same subject matter in the lower court which was discontinued before filing the current proceedings.

Interim orders were granted on the 16<sup>th</sup> day of November 2010. The respondent was served entered appearance and he filed a replying affidavit deposed on the 24<sup>th</sup> day of January 2011, and filed on the 25<sup>th</sup> day of January 2011. The salient features of the same are that to his knowledge the deponent has always lived, worked and built on parcel No. 33.

- To his knowledge, the plaintiff has never lived and worked on this portion of land.
- It is his testimony that land parcel No. 3012 is not fake. It exists on the ground.
- He is a stranger to the alleged sale allegedly entered into in the year 1989.
- In any case even if such a sale transaction took place as alleged by the applicant the same is unenforceable for lack of land control board consent.
- Further that the injury suffered by the applicant is one that can be compensated for by way of damages.

There is also in place grounds of opposition dated 25-1-2011 and filed the same date and these are:-

- (1) The originating summons is misconceived bad in law and totally inappropriate for the determination

of the matter in issue.

- (2) The claims by the applicant is totally statute barred and thus untenable in law.
- (3) The contract upon which the suit is grounded has become null and void totally un enforceable and the equitable remedy of trust cannot be grounded upon an illegality.
- (4) The plaintiff having come to court on the basis of purchase and this late the doctrine of adverse possession cannot apply to him and to that extent the suit is totally misconceived.
- (5) To grant the suit would be to sanction an illegality under the Land Control Act and the court has no jurisdiction to enforce an illegal contract.
- (6) There has not been possession by the plaintiff hence assertion of same is blatant lie which cannot sound a suit.
- (7) The plaintiffs remedy if any and if not statute barred is entitled to refund of the purchase price and no more hence no remedy sought.

Parties elected to file written skeleton arguments. Those for the plaintiff are dated 23-3-2011 and filed on 24-3-2011 and scheming through them reveals that they are a reiteration of the deponements and contents of the exhibits exhibited in support of the application and high lights from the case law relied upon. More is the case of **Public Trustee-VS- Wandiuuru [1984] KLR 311** where the court of appeal held inter alia that:-

- (i) The applicant's cause of action arose from the agreement of sale but the claim of adverse possession under the limitation of action Act Cap 22.**
- (ii) The provision of the land control Act Cap 302 apply where there is a claim to the title to agricultural land based on an agreement being a transaction dealing in the land and not where the claim is based on a operation of law such as adverse possession.**
- (iii) The appellant had acquired an indefeasible title to land by being in continuous un interrupted and exclusive adverse possession of it for twelve years.**
- (iv) The period of twelve years began from the day the appellant and her husband took possession of the land as that was the day when the respondents possessions was discontinued and not on the last day by which an application for the consent of the land control board was required to have been made under the land control Act as that Act did not apply to the applicant's claim**
- (v) The respondents' title to the suit land was subject to the second appellants overriding interest over the land under the Registrar of Land Act.**

The case of **Samuel Miki Waweru -VS- Jane Njeri Ruchu** decided by the court of appeal on the 2<sup>nd</sup> day of February 2007. At page 5 line 12 from the bottom the following observation was made:-

“In our view where a purchaser or lessee of land in a controlled transaction is permitted by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the land control Act for lack of consent of the land control board such provision is formulated by the apportion of the law and the continued possession if not illegal becomes adverse from the time the transaction becomes void”.

The case of **Peter Thuo Kairu -VS- Kuria Gacheru [1988] 2 KAR III** also decided by the court of appeal where it was held inter alia that:

**“The law relating to presumption affect not only present holders of the title but their predecessors”.**

The case of **Ghazi Abdul Hamad –VS- George Awiti Omoro Kisumu HCCC No. 177 of 2009** decided by Ali- Aroni J on the 29<sup>th</sup> day of October 201 where the learned judge found the sale agreement produced by the plaintiff as proof of the plaintiffs initial entry into the property as the intended purchaser. The judge found further that the agreement was vitiated by the operation of law namely failure to obtain consent from the land control board within 6 months.

The case of **Giella –VS- Cassaman Brown [1973] EA 358** where it was held inter alia that in order to succeed in an application for an injunctive relief:-

- (i) An applicant must show a prima facie case with a probability of success.**
- (ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- (iii) When the court is in doubt it will decide the application on the balance of convenience.**

The defendant's written submissions are dated the 30<sup>th</sup> day of March 2011 and filed the same date. The following has been stressed:-

- It is not in contention that the defendant is the right proprietor of parcel number Kisumu/Kogony/33 and has been in actual and continuous possession to the present day.
- The principles governing the relief being sought were settled by the case of **Giella-VS- Cassman Brown (Supra)**.
- There is no prima-facie case because in the absence of the consent by relevant land control board within the prescribed period of time implied trust is incapable of being created.
- Contends that the claimant has never been in possession of the suit land and for this reason a prima facie case on the basis of adverse possession does not rise.
- There is no challenge to the respondent's depositions that the applicant has never been in possession of the suit land.
- The court also invited to take note that the applicant has failed to identify the exact location on the ground of the alleged purchased portion.
- There is no likelihood of suffering irreparable damage as the applicant can be compensated by means of damages and a refund of the purchase price if any In terms of the provisions of section 7 (1) of the Land Control Board Act which mandates the refund of the purchase price under a void contract.
- The balance of convenience tilts in favour of the respondent.

On case law the court was referred to the case of **Wambugu-VS- Njuguna [1983] KLR 172**, decided by the court of appeal where it was held inter alia that:-

- (1) The general principle is that until the contrary is proved, possession in law follows the right to possess.
- (2) In order to acquire by the statute of limitation title to land, which has a know owner, that owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title areas which are in consistent with his enjoyment of the land for the purposes for which he intended to use it.
- (3) The limitation of actions Act on adverse possession contemplates two concepts, dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be

whether or not the title holder has been disposed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

The case of **Kanda –VS- Kanda & Others [2008] IEA 158**, decided by the court of appeal.

- 1) The claim for title by adverse possession is to be mandatory sought by way of originating summons under order XXXVI rule 30 of the CPR and this rule having been breached the claim could not succeed .**
- 2) The appellant became the registered owner in 1997 after the suit had been lodged.**
- 3) Prior to that the settlement Fund trustees were the registered properties and title to them was not extinguished by the statute of limitation.**
- 4) The suit land was agricultural land and no consent of the relevant land control board had been obtained for declaration of trust. Prior to 1976 the creation of trust did not constitute any other disposal or dealing in land for the purposes of section 6 (1) as of the Land Control Act and therefore did not require the consent of the land control board. However section 6 (2) of the Land Control Act which was introduced by the statute law (Repeal and Misc. Amendments Act 1980) extends the provisions of section 6,7 of the Land Control Act to the declaration of trust in agricultural land.**

This court has given due consideration to the fore setout rival arguments and the same considered in the light of the principles of case law relied upon by either side, and in this court's opinion the following are own framed questions for the determination in the disposal of this interim application:-

- 1) What are the general observations made by this court of the rival arguments at this interim stage?**
- 2) What relief is the applicant seeking from the court?**
- 3) What ingredients are required to be established by the applicant before earning the said relief?**
- 4) Has the applicant bought himself within the ambit of those principles or not?**
- 5) What final orders are to be made herein in the disposal of this interim application?**

In response to own framed questions the general observation made by this court of the paper work so far placed before the court herein is as follows:-

- (1)The proceedings herein have been initiated by way of an originating summons seeking adverse possession and the interim relief sought is meant to safeguard that interest pending the hearing and determination of the suit.
- (2) There is reliance placed on a sale agreement made way back in 1989 which did not received the blessings of the area Land Control Board consent it is not disputed that this procedural requirement was required to have been gone into.
- (3) It is clear that the exact acreage of the land sought to be protected is not indicated, what is sought to be protected is a portion of parcel number 33.
- (4) There is a demonstration of competing assertions where by both sides claim to have been in continuous possession to the exclusion of the other.
- (5) The issues of creation of trust adverse possession lack of Land Control Board consent in so far as

they go to touch on the issue of the establishment of a prima facie case is concerned touches not only the interim application but also the main claim. Care therefore has to be exercised to ensure that the disposal of the interim application does not preempt the disposal of the main claim.

(6) The alleged original vendor passed on and the current defendant/respondent is the current administrator of the estate of the alleged deceased vendor.

(7) There is a clear insistence on the part of the respondent that no sale took place and no adverse possession has ever taken place.

In response to own framed question 2, 3 and 4, it is clear from the reading of the content of the interim application as well as the supporting documentation that the applicant is seeking an injunctive relief on two fronts namely the purchase front and the adverse possession front.

This court has applied the ingredients for the granting of an injunctive relief to the purchase front and the court finds this faulted for the following reasons:-

(i) A prima-facie case based on purchase of agricultural land would be caught up by non compliance with the provisions of the Land Control Act Cap 302 L.O.K which states clearly that in order for a purchaser's transaction to be upheld and protected it has to receive the blessing of the area land control board consent. It is undisputed by both sides, that this procedural step was not undertaken.

(ii) The same provisions of the Land Control Board Act Cap 302 of the Laws of Kenya stipulates clearly that any money paid under a void transaction is recoverable by way of a civil debt this therefore satisfies the ingredient of denial of an injunctive relief on the basis of there being ability to compensate the injustice suffered by way of damages.

This court has judicial notice that the only circumstance under which damages though adequate compensation can be withheld in favour of an injunctive relief is in a situation where the opponent has acted in a high handed and oppressive manner towards the applicant. Herein a part from complaining that the defendant intends to dispose off the subject matter to 3<sup>rd</sup> parties, there is no complaint of high handedness towards the applicant. More so where there is assertion by the applicant that he is infact in occupation, possession and use of the subject matter. For this reason the applicant's plea of entitlement to an injunctive relief on account of likelihood of suffering of injury incapable of being compensated for by way damages stand ousted.

(i) The balance of convenience does not tilt in favour of the applicant getting an injunctive relief but compensation.

(b) A prima facie case on the basis of protection of a right acquired through adverse possession has been demonstrated to exist because of the following:-

(i) The right of a claim of a right based on adverse possession has to be established through adduction of evidence which evidence has to be tested through cross examination. The applicant is therefore entitled to be heard on this assertion.

(ii) Payment of damages is not one of the relief or remedies available to a claimant of a right through adverse possession it is therefore necessary for the subject matter of the proceedings to be preserved in the state in which it is, pending the hearing and determination of the originating summons.

(iii) The balance of convenience also tilts in favour of the applicant limited to protection from transfer of the suit land from the defendant to 3<sup>rd</sup> parties pending the hearing and determination of the originating summons. No prejudice will be suffered by the applicant or the respondent since both claim to be in possession and in use of the same.

For the reason given in the assessment, this court is inclined to grant the relief sought in paragraph 2

limited to acts which would tend divest the property from the defendant. An order therefore be and is hereby issued to the effect that:-

(a) A temporary injunction do issue restraining the defendant by themselves, their agents, servants and or employees or otherwise jointly and severally from selling, transferring, charging and or sub- diving land parcel No. Kisumju/Kogony/33 pending the hearing and determination of the originating summons.

(b) Since the issue of the correct possession on the ground is yet to be established each party will bear own costs.

**Dated, Read and Delivered at Kisumu this 8<sup>th</sup> day of July 2011.**

**ROSELYN N. NAMBUYE**

**JUDGE**

RNN/va