



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 349 of 2009

HENRY NDOGO BIBIA.....PLAINTIFF

VERSUS

ANTONY WAITITU IGANJO.....DEFENDANT

RULING

The applicant having filed an originating summons for, among other reliefs, that he is entitled by adverse possession to parcel of land No.NAKURU/RARE/NGURIGA/396, has now brought chamber summons dated 16th December, 2009 for temporary orders to restrain the respondent from selling, alienating, charging or evicting or in any way dealing with the suit land pending the hearing and determination of the originating summons.

It is the applicant's contention that he has been in actual, quiet and uninterrupted occupation of the suit property since 1975; that he was issued with the title to the suit property on 28th November, 1979; that in 1983 he charged the suit property to obtain a loan from Kenya Flour Mills (1975) Limited. He later learnt that the suit property had been transferred to a person called **Francis Igacho Motahi**. He instituted Nakuru S.R.M.C.C.No.6 of 1985 but the suit file disappeared before it was determined.

On 19th November, 2009, the respondent visited the suit property claiming the same. Upon conducting a search, the applicant confirmed that indeed the suit property had been transferred and title deed issued to the respondent on 16th November, 2009. The respondent has threatened the applicant with eviction hence the originating summons and this application.

In response, the respondent confirms that he was registered proprietor of the suit property on 16th November, 2009. He further confirms that it is his father who purchased the suit property in a public auction after which he evicted the applicant for vacant possession; that the applicant having defaulted in the repayment of a loan and the property having been sold in the exercise of statutory power of sale, he cannot redeem it through the back door.

I have considered these averments and the only authority by the respondent's counsel – **Wanje Vs. Saikwa** (No.2) (1984) KLR 284. For an interlocutory injunction to issue, there must be *prima facie* case with a probability of success at the trial. Secondly, it must be shown that the applicant may otherwise suffer substantial loss, not capable of compensation by an award of damages. But should the court be in doubt, it must decide the matter on a balance of convenience. See **Geilla Vs. Cassman Brown & Company Limited** (1973) EA 358.

In determining the question of *prima facie* case, the court is not called upon to make any definite findings either of fact or law. That can only be done at the trial. Has the applicant demonstrated a *prima facie* case? His claim is based on adverse possession and therefore at the trial he will be required to establish that-

- i) a known owner of the suit property has lost his right to the suit property either by being dispossessed of it or by having discontinued his possession of it
- ii) that he has been in uninterrupted actual possession of the suit property for over 12 years
- iii) that for this period, he has been in possession openly and without permission or agreement of the respondent.

See **Ng'ati Farmers Co-operative Society Limited Vs. Councillor John Ledidi & 15 others** (2009) e KLR.

To constitute dispossession of a proprietor the adverse possessor must do acts which are inconsistent with the owner's enjoyment of the soil. See **Wanje Vs. Saikwa** (supra). The instant claim is quite interesting. The applicant has been the registered owner since 28th November, 1979 although he has been in possession since 1975. Having failed to service a loan advanced to him in 1983 on the security of

the suit property, the suit property was sold in an auction to the respondent's father in 1984. The applicant challenged the sale in a suit being Nakuru SRMCC No.6 of 1985 which has not been finalized as the court file is said to have disappeared and is therefore still pending determination.

According to the applicant, he has never vacated the suit property since he occupied it in 1975, the auction notwithstanding. But the respondent maintains that the applicant was evicted from the suit property after it was sold in an auction. In the second limb of that argument, the respondent states that even if the applicant was not evicted, time could only run against him (the respondent) from 2009 when he was registered the proprietor.

I stated earlier that this is an interesting claim because it is based on the fact that the applicant is holding over after his suit property was sold pursuant to a statutory power of sale. There is no doubt that the title to the suit property passed over to the respondent's father in 1984. The applicant's claim can only be based on the period between 1984 and 2009, a period of 25 years.

The question that will be answered conclusively at the trial is whether the applicant continued in possession or whether that possession was interrupted. *Prima facie*, however, it appears that the applicant has been in possession. That is apparent from the respondent's averment which seems to suggest that that possession has no effect upon his title which he only acquired in 2009. Possession would become adverse as against the respondent's predecessor in title – but that will be determined by the trial court.

Again there is averment that as late as on 16th December, 2009, the respondent made a report to the police who in turn summoned the applicant with regard to an offence of forcible detainer. Thirdly, the applicant has been able to demonstrate that the affidavit sworn by **Francis Koigu Kiraguri** in support of the respondent's averment, that the suit land is leased to a third party cannot be correct.

Finally on this, the applicant had demonstrated through affidavits of his neighbours that his occupation of the suit property has not been interrupted. I am, for these reasons, persuaded that the applicant has demonstrated a *prima facie* case. That *prima facie* case points to the occupation of the suit property by the applicant, hence the balance of convenience is in his favour and the respondent can be compensated by an award of damages after all the suit property was purchased from an auction.

In the result, there will be an injunction in terms of **paragraph 3** of the **chamber summons** dated 15th December, 2009 pending the hearing and determination of the originating summons. Costs in the cause.

Dated, Signed and Delivered at Nakuru this 6th day of July, 2010.

W. OUKO
JUDGE