



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Election Petition 253 of 2009

REGINA MWIKALI KITAVI.....PLAINTIFF

VERSUS

ONGATA WORKS LIMITED.....DEFENDANT

RULING

The plaintiff herein brought an action against the defendant by way of Originating Summons under Order XXXVI Rule 3D of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya for determination of two basic questions.

- 1. Whether the plaintiff has acquired title to entitled to be registered as proprietor of LR. No.209/10904 Embakasi Nairobi by way of adverse possession.**
- 2. Whether the plaintiff is entitled to a declaration that she has acquired the said title by way of adverse possession and an order that a certificate of title be issued in the name of the plaintiff as the proprietor thereof.**
- 3. Whether the plaintiff is entitled to the cost of the suit.**

Upon service the defendant filed a reply thereto in which it opposed the plaintiff's claim. Alongside the Originating Summons the plaintiff filed an application by way of Chamber Summons against the defendant for some injunction orders to restrain the defendant from entering, wasting, cultivating, trespassing or alienating, living, depositing materials, constructing, evicting or in any other way interfering with the plaintiff's parcel of land aforesaid.

On 29th May, 2009 Lady Justice Nambuye issued interim orders pending the hearing of the application inter partes. That application

has now been argued and is the subject of this ruling. Both learned counsel have filed written submissions which I have on record. Several authorities have also been cited. Most of the authorities however, relate to the main hearing where the parties have adduced evidence and the courts have had the benefit of the entire material. That is not the position here and I have to go by the material disclosed by affidavit evidence.

The defendant holds a title to the property. There is an affidavit by Mary Wangui Wambugu sworn on 18th June, 2009 in which she sets out the chronology of events leading to the acquisition of the said property by the defendant. On the other hand, the plaintiff has also sworn affidavits to advance her claim in that regard. Although the plaintiff said she had been paying rates in respect of the said property, she has not presented any evidence to that effect. On the other hand, the defendant through one of its Directors, the said Mary Wangui Wambugu, has presented sufficient documentary evidence to confirm that the defendant has been paying rates consistently to the City Council of Nairobi.

There is uncontroverted evidence on record that before the defendant purchased the said property due diligence was conducted by visiting the premises where the beacons were also identified and, as late as 2008 there was no occupant on the said parcel of land. That alone dislodges the claim by the plaintiff that she has been on the suit premises since 1989 to date which amounts to more than 20 years.

There is also evidence that the defendant sought the assistance of the Chief's office which issued notices to people alleged to have occupied the said land and that in the year 2008. Those people did not answer the summons by the Chief. There is also one disturbing issue that I have noted in this matter. The affidavit sworn by the plaintiff on 29th May, 2009 and her further affidavit sworn on 9th July, 2009 bear completely different signatures even to a lay man. This casts a very serious doubt as to the veracity of her claim and the contents of her affidavits.

For the plaintiff to benefit from the orders sought, she must establish a *prima facie* case with a probability of success and also show that if the orders are not granted she is likely to suffer loss that may not be adequately compensated by an award of damages. If the court is in doubt it shall decide the matter on a balance of convenience.

As of now, the defendant is the title holder and the plaintiff appears to be a trespasser. This position is anchored on the material produced by the two contending parties. The plaintiff has not presented a case with a probability of success and even if I were to find that damages are not adequate compensation, the balance of convenience tilts in favour of the title holder who is the defendant herein.

Accordingly, the application dated 29th May, 2009 is hereby dismissed. It follows that the injunction orders issued by Nambuye J. and which have been extended from time to time are hereby vacated. The defendant shall have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30th day of September, 2010.

A. MBOGHOLI MSAGHA
JUDGE