



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 197 OF 2008

SAID MBARAK AWADH.....PLAINTIFF/APPLICANT

- VERSUS -

GILBERT MWAGANDA.....1<sup>ST</sup> DEFENDANT/RESPONDENT

FRANCIS GAMBO BEGAMBO.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

By his Chamber Summons application of **4<sup>th</sup> February, 2008** the plaintiff sought orders as follows:

***(i) a temporary injunction restraining the defendants by themselves, their workers, employees, agents or any other person whomsoever and whatsoever from interfering with the suit property, namely Plot No. 1640/III/MN (original No. 427/32/III/MN), whether by way of construction of a perimeter wall, fence or structure, or interfering in any other manner – pending the hearing and determination of this application;***

***(ii) directing the Registrar of Titles and the District Land Registrar, Mombasa to establish the exact position of the original beacons and to establish all the boundaries of plot No. 1640/III/MN in accordance with the deed plan duly registered.***

The grounds for the application were thus stated: the applicant is the registered owner of the suit land, and the original beacons and boundaries have been tampered with by the respondents; the defendants, without any colour of right, consent or justification, have interfered with the original beacons and boundaries of the plaintiff's land and have constructed semi-permanent, walled structures used as a church on the said plot, and have allowed encroachment on the said plot by those associated with the said church – thus inhibiting the plaintiff's right of possession over 2.5 acres of the suit land; the defendants are constructing a perimeter wall and other structures on the suit property.

In support of the foregoing grounds, the plaintiff swore an affidavit on **4<sup>th</sup> February, 2009** giving relevant information. The substance of the said affidavit runs as follows: the plaintiff is the registered owner of Plot No. 1640/III/MN (Original No. 427/32/III/MN); the defendants have interfered with the original beacons and boundaries and have constructed a church building on the plaintiff's land; the defendants

have allowed their associates to encroach the suit land; the defendants have started constructing perimeter walls and fences and structures on the suit property.

The 2<sup>nd</sup> defendant swore a replying affidavit on behalf of both defendants; he depones that the defendants have occupied the suit premises for twelve years; that his father, one **Gambo Mwagambo Ndago** had, some fourteen years earlier (**Gambo Mwagambo Ndago & Another v. Attorney-General & District Commissioner**, Kilifi, Mombasa HCCC No. 83 of 1994 (O.S.)) been awarded 8 acres of land on the mother-plot, No. 427/R/III/MN, and that this was in a suit challenging the exclusion of the plaintiffs (in that case) from the mother-plot which had originally belonged to one **Sheila Norton**; the suit plot had been shown in a surveyor's sketch map of 1991, as a sub-division from the mother-plot; by the Court order of 1994, the list of beneficiaries of the mother-plot was varied, and the defendants and their families were awarded five plots which, since then, they have occupied, for a period of more than twelve years; a second survey had taken place, with the effect that "[the] original beacons cannot be said to form the correct boundaries".

Learned counsel, **Mr. Opulu** submitted that the suit premises had originated from a sub-division of original Plot No. 427/32/III/MN, out of which there were a number of sub-plots allocated to different persons; he urged that the plaintiff was not a party to the Civil Suit No. 83(OS) which is said to have conferred certain of the plots upon the defendants herein; and that the plaintiff became the registered proprietor of Plot No. 1640/III/MN in **1996**, to which he (plaintiff) has an indefeasible title.

**Mr. Opulu** submitted that the defendants' annexed Court order and survey documents prove nothing, in derogation from the plaintiff's title: because the defendants were only declared to be beneficiaries of the **original** plot, No. 427/III/MN – and not of the plaintiff's plot, No. 1640/III/MN.

Counsel urged that the respondents have not displayed any ownership document in respect of the land they claimed; and that in these circumstances, the applicant merited the award of injunctive orders, on the well-known principles enunciated in **Giella v. Cassman Brown** [1973] E.A. 358:

- (i) ***there is to be a prima facie case, with a probability of success;***
- (ii) ***it has to be shown that the applicant is likely to suffer irreparable injury that cannot be adequately compensated in damages;***
- (iii) ***if there should be doubt, then the balance of convenience is to be taken into account.***

Counsel submitted that the applicant was seeking protection for the boundaries and beacons, before the suit was heard and determined. The applicant had shown, by documentation annexed to the supporting affidavit, that he has title to the suit premises, and a duly-registered deed plan. Counsel submitted that the original beacons had been installed in accordance with the law, following the conduct of a survey, followed by sub-division; that there had been no cancellation of the title; and that there had been no boundary dispute in respect of Plot No. 1640/III/MN.

Learned counsel contested the respondents' claim in this suit, to the suit premises by **adverse possession**, on the basis that "no proceedings for adverse possession have been instituted in any Court". Counsel relied on the Court of Appeal decision in **Ndatho v. Itumo & Two Others** [2002] 2KLR 637, for the principle that a claim by adverse possession cannot be made incidentally, but must be specially lodged by Originating Summons. The following are the relevant words of that Court:

***"The question that next arises is: were the respondents entitled to invoke the doctrine of adverse possession to claim title to the suit land by way of a counter-claim in the suit? The learned judge, despite the provisions of Order XXXVI, rule 3D of the Civil Procedure Rules, thought they could so counter-claim. He did not see any injustice caused to the appellant in the circumstances. This Court has on several occasions held that title by adverse possession is to be sought by way of an originating summons under Order XXXVI rule 3D of the Civil Procedure Rules. The claim for title by virtue of adverse possession by way of a cross-claim in a suit was misconceived."***

**Mr. Opolu** submitted that the orders sought would not prejudice the respondents.

Learned counsel, **Mr. Kenga**, for the defendants, however, submitted that the applicant had failed to show a *prima facie* case; and he courageously advanced the adverse-possession thesis, even though counsel sought to dress this as “defence of limitation”. Counsel relied on s.7 of the Limitation of Actions Act (Cap. 22, Laws of Kenya), which thus provides:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

Counsel further invoked a passage in the High Court’s (**Ringera, J** as he then was) decision in **Wasui v. Musumba** [2002]1KLR 396 (at p.405):

**“On the impact of prescriptive rights in respect of one title on subsequent titles to the same land, I agree with the submissions of counsel for the applicant that if the applicant had been in adverse possession of the land of Wilson Odari for 12 years prior to 1993 when it was subdivided and other titles registered, the proprietors of the new titles would not have been able to shake off his rights. As I understand the law, prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof.”**

There is, however, some coincidental common cause between the parties – on the delimitations of the plots in question: the plaintiff wants to have beacons and boundaries re-established (on the basis that the defendants have interfered with these); and counsel for the defendants asserts that “for the plaintiff to seek injunctive orders, he must be able to know and ascertain, as well as prove to the Court, where his plot is and the boundaries.” This shows that there is a *boundary-ascertainment* issue; and so any claim of limitation under the Limitation of Actions Act, or akin to the doctrine of adverse possession, can only occupy a secondary place, after the first question is settled, as to the *identities of the plots* in question.

Just as the foregoing point stands in favour of the plaintiff’s case, so does one of the prayers resolve in the *defendants’* favour; in the words of counsel for the defendants: “How can he....be seeking injunctive orders and at the same time seeking the assistance of a surveyor? Is he sure of his plot? He must first ascertain the size of his alleged plot and the boundaries, before convincing the Court that he does indeed deserve the orders of injunction”.

Counsel has gone further to contest the applicant’s prayers for a surveyor to re-install beacons and boundaries: that, what is here sought are final orders which should await the disposal of the main cause. On that basis, furthermore, counsel urged that the prayers made be refused: because injunctive orders can only be granted in *clear circumstances*. Counsel urged: “orders of clarification and ascertainment cannot be granted alongside injunctive orders, as the latter can only be granted after the former [have been supported by] cogent evidence.....”

Out of L.R. No. 427/32/III/MN there arose a good number of sub-plots each bearing its own identity, and one of these is **L.R. No. 1640/III/MN** which is registered in the name of the plaintiff/applicant. From the evidence on record, it has not been claimed that the defendants are wrongfully occupying the whole of L.R. No. 1640/III/MN which is registered in the name of the plaintiff; and the logical inference is that a significant part of the land occupied by the defendants falls over the mother-plot, L.R. No. 427/32/III/MN. On the facts now before the Court, the trespassory occupation alleged by the plaintiff is unascertained – particularly because the plaintiff cannot identify the *beacons* and the *boundary* in certain sections, and he has sued, seeking Court orders for ascertainment of the same by surveyors. And as already remarked, the claim of adverse possession is out of place and out of turn, in terms of civil procedure.

The contest, therefore, is *not* one for resolution by orders of injunction; such orders must be directed to known persons and to identifiable premises.

Since no valid case has been made for a temporary injunction, the prayer for orders directing a survey and boundary installation to be conducted, lacks a supporting foundation in the context of this interlocutory

application.

That means the two sets of prayers have the same fate; they will fail together. It becomes clear that the plaintiff's application was not justified; because the prior question, that of establishing beacons and boundaries, is fully set out in pleadings No. 7 and No. 8 in the plaint, the issues are meant for the **full trial**, and thereupon, **a suitable decree** shall be made. An order of injunction is inappropriate, during the pendency of the foregoing issues in Court.

I will make orders as follows:

- (1) ***The plaintiff's prayer for injunctive orders is disallowed.***
- (2) ***The parties shall take a priority date at the Registry, for the hearing of the main suit.***
- (3) ***Pending the hearing and determination of the main suit, the status quo shall be maintained.***
- (4) ***The costs of this application shall be borne by the plaintiff/applicant, in any event.***

**DATED and DELIVERED at MOMBASA this 29<sup>th</sup> day of October, 2010.**

**J. B. OJWANG**

**JUDGE**

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Plaintiff/Applicant: ***Mr. Opulu***

For the Defendants/Respondents: ***Mr. Kenga***