



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 31 of 2008 (O.S.)

GILBERT NGOTA----- PLAINTIFF

V E R S U S

AGINEDAH CHANZU AMBASA -----

DEFENDANT

R U L I N G

The Plaintiff's application dated 12th January 2009 is for an interlocutory injunction pending the hearing and determination of the suit. It seeks to restrain the defendant from entering onto, wasting, ploughing, cultivating, alienating or in any manner dealing with the suit property L.R. NO. SOUTH MARAGOLI/MAHANGA/341.

The plaintiff concedes that the respondent was the registered proprietor of the suit property. However, he asserts that he had been in occupation of, and had been using the said property for a period of over forty (40) years.

The plaintiff says that he first moved onto the property in 1968, after his father bought it from the respondent's father-in-law. Since then, the plaintiff asserts that he had planted trees and other crops on the suit property.

The plaintiff's father died in 1994, whilst the defendant's father-in-law died in 1991.

It is the plaintiff's case that between 1968 and 1991, when the defendant's father-in-law died, the latter never lay any claim to the suit property, as he was well aware that he had sold the land to the plaintiff's father.

It is also the plaintiff's case that after his father passed away in 1994, the plaintiff continued to occupy and to utilize the land in issue, without any hindrance or interruption from the defendant. In effect, by the time the plaintiff instituted these proceedings, on 22nd May 2008, he had been in occupation for about 14 years.

Meanwhile, the person from whom the plaintiff got the land had occupied the property for about 26 years.

However, it is also significant that the plaintiff conceded that the defendant had filed VIHIGA L.D.T. Case No. 5/2004. That might suggest that when about ten years had lapsed since the death of the plaintiff's father, the defendant begun laying claim to the suit land.

Would that claim be capable of being construed as an interruption of the plaintiff's peaceable enjoyment of the use and occupation of the suit land?

Would such an interruption, if indeed it can be so construed, imply that the plaintiff had not yet stayed on the land for over 12 years before the defendant lay claim to the land in issue?

Those are questions which will need to be looked at carefully during the hearing. Then again, there is the question whether the claim by the defendant, which she made in 2004, could undo the rights which may have accrued to the plaintiff's father after 26 years of occupation of the suit land. That question is significant because the claim by the defendant cannot have any legal foundation unless it is traced from her father-in-law. Similarly, the claim by the plaintiff can be originally traced to his father.

For now, it does appear to me that the plaintiff has established a prima facie case with a probability of success, as he has been in occupation of the suit land for over 30 years. I say so because from 1968 to 2004 is about 36 years.

It remains to be seen if a title which may have been lost through adverse possession can be reclaimed through a succession cause, as the defendant appears to have done.

In order to safeguard the land which is the subject matter of the suit herein, so that the plaintiff does not suffer irreparable loss, in the event that the land is either alienated or sub-divided, I do now order as follows'

(i) *There shall issue forthwith an injunction to restrain the defendant from alienating, wasting, charging, entering onto, ploughing or in any other manner dealing with the suit land L.R. NO. SOUTH MARAGOLI/MAHANGA/341, until the suit is heard and determined.*

(ii) *The plaintiff may use the suit land until the suit is heard and determined. However, he shall not alienate or encumber the land in any manner whatsoever.*

(iii) *The costs of the application dated 12th January 2009 shall be in the cause.*

(iv) *The Originating Summons shall be set down for hearing on a priority basis. In that regard, the plaintiff is directed to take out and serve an application for directions within the next 30 days of this ruling.*

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 28TH day of April, 2009.

FRED A. OCHIENG

J U D G E