



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 124 OF 2008
DAMA CHARO.....PLAINTIFF
VERSUS
1. THE MUNICIPAL COUNCIL OF MOMBASA
2. TAIB ALI BAJABER
3. ABDALLA ALI BAJABER.....RESPONDENTS

RULING

In her Originating Summons lodged on 19th May 2008, the plaintiff claims that she is entitled to one acre of L.R. 62/1/MN CR No. 7037 by reason of adverse possession. In her affidavit in support of the Originating Summons, she deponed that she commenced her adverse possession when she married her husband (now deceased) in 1980 and has since been in such possession to the date of her Originating Summons.

Simultaneously with the filing of the Originating Summons, the plaintiff lodged an application by way of a Notice of Motion seeking two primary orders of the court expressed as follows:-

(a) That Taib Ali Bajaber and Abdalla Ali Bajaber be restrained by an order of injunction from transferring, leasing, selling, charging or in any way dealing with sub-division Nos. 4733, 4734, 4735, 4736, 4737, 4738, 4739, 4740, 4741, 4742, 4743, 4744, 4747, 4748, 4751, 4752, 4755, 4756, 4759, 4760, 4797, 4788, 4789, 4790, 4791, 4805, 4806, 4809, 4822, 8575, 8576, 8577, 8578, 8579, 8580, 8581, 8582 and 8583 all given CR No. 23339 and any other sub-division on plot No. 62/1/MN pending the hearing of the Originating Summons herein.

(b) That the Registrar of Titles be directed to register a prohibition against the said Titles.

The application was expressed to be brought under the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Rule and Sections 144, 169 (a) and 177 of the Local Government Act. The application was predicted on the same reasons given in the Originating Summons. The application was supported by an affidavit of the plaintiff sworn on 6th June 2008. The application was opposed by the 2nd and 3rd defendants on the basis of a replying affidavit sworn by 3rd defendant and by the 1st defendant on the basis of Grounds of Opposition filed by its advocates.

When the application came up before me for hearing counsel agreed to file written submissions. In the event, only the plaintiff, the 2nd and 3rd defendants filed their written submissions through their counsel.

I have not been able to trace any submissions on behalf of the 1st defendant.

In a nutshell, the plaintiff's case is that she has been in possession of the suit piece of land since 1980 when she married her late husband Charo Mudzomba Baya. She has deponed that her stay on the suit property has since been peaceful, continuous and uninterrupted. In the premises, in the interest of justice the restraining order sought should issue.

In the replying affidavit, the 2nd and 3rd defendants contend that they purchased the suit land for Kshs. 9 million in the year 1995 and they are lawfully registered as lessees of the 1st defendant. They further contend that most of the sub-divisions of the suit land have been transferred elsewhere and that the plaintiff has no *locus standi* to bring this action and has no house on any part of the suit property. The 1st defendant opposed the application on the grounds, *inter alia*, that the application is misconceived and has been brought in bad faith.

I have considered the application, the affidavits filed both in support of the application and in opposition thereto together with the record. I have also given due consideration to the submissions made to me by counsel appearing. Having done so, I take the following view of the matter. I will consider the application in the light of the well known principles laid down in the rule making case of **Giella – v – Cassman Brown & Company & Another [1973] EA 358**. The principles are as follows:- First the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

The plaintiff will at the trial be required to prove, of course on a balance of probabilities, that she has acquired the suit property by adverse possession. She has deponed in her affidavit that she has lived thereon since 1980 and what is the response of the 2nd and 3rd defendant? The relevant paragraph in the replying affidavit is eleven (11) and it reads as follows:-

“(11) That further still in reply to paragraph 7 of the supporting affidavit, I have been informed by my Advocates on record which advice I verily believe to be true that there is no house built on the suit plots and the suit plots as shown by the annexures on record belong to the Municipal Council of Mombasa and we are just lessees and as such the claim for adverse possession cannot stand against the Municipal Council.”

It is intriguing that with regard to the plaintiff's express averment that she has been in possession of the suit property since the year 1980, the 2nd and 3rd defendants have no personal knowledge of that fact and had to rely on information given to them by their counsel. The defendants further resist the plaintiff's contention on the basis that the house alleged to belong to the plaintiff, in fact belongs to the Municipal Council of Mombasa. Yet the said council has not filed an affidavit in opposition to the plaintiff's application.

On the issue of possession, therefore, the plaintiff has, prima facie, persuaded me that she is in possession of the suit property. As to whether she will establish that such possession is adverse as against the defendants has to await the trial. In those premises, I find that the plaintiff has established a prima facie case with a probability of success. She has therefore met the first condition for the grant of an interlocutory injunction. I also find that the injury which the plaintiff may suffer if the injunction is refused may not be adequately compensated in damages. The plaintiff has deponed that the property comprises her matrimonial home where she has lived since her marriage to her late husband in 1980. The value of such property cannot easily be quantified.

Regarding balance of convenience, I have come to the conclusion that the same tilts in favour of granting the injunction otherwise the subject property may be alienated which event will render this application and even the suit a mere academic exercise.

The upshot is that the plaintiff's application dated 6th June 2008 is allowed in terms of prayers 2 and 3 thereof. The orders are granted on the condition that the applicant shall file an undertaking under oath as to damages within the next seven (7) days.

Costs shall be in the cause.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Okumu holding brief for Mr. Kenzi for the Plaintiff, Mr. Lumatete for the 1st Respondent and Mr. Njoroge for the 2nd and 3rd Respondents.

F. AZANGALALA

JUDGE

18TH JUNE 2009