



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 191 of 1008

MARGARET AKOTH OLANG'.....PLAINTIFF

VERSUS

MAMA JUMA BAYA

JUMA BAYA

BAKARI NGOWA

FRANKLIN MURAMBA MWARUA

LALO MWAKUPHA.....DEFENDANTS

RULING

By her plaint filed in this court on 30th July 2008, the plaintiff avers *inter alia* that she is the registered proprietor of two parcels of land known as Subdivision Number 2051 (Original No. 222/1) section V Mainland North and Number 220 Section V Mainland North since 1977. Her case is that although the defendants have been variously warned that the said plots belong to the plaintiff, they seem hell bent on moving into the said properties in defiance and disregard of the plaintiff's registered interest therein. The plaintiff therefore fears that unless restrained the defendants may not only settle in the said properties but may invite other trespassers to do the same with the result that the plaintiff stands to suffer irreparable damages.

Simultaneously with the filing of the plaint the plaintiff lodged the present Chamber Summons for the interlocutory relief of a prohibitory injunction. The injunction is sought in the following terms:

“That this Honourable Court be pleased to restrain the defendants by themselves, their agents, employees or assigns from moving into remaining and/or in any way or manner whatsoever interfering with the plaintiff's interest in and quiet possession of the aforesaid properties pending the hearing and determination of this suit.”

The application is expressed to be brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act. It is based on the grounds that the plaintiff is the bonafide registered proprietor of the subject properties and the defendants are no more than trespassers.

The application is supported by an affidavit sworn by the plaintiff on 30th July 2008. She has also sworn two other affidavits. There is a supplementary affidavit sworn on 1st August 2008 and another one sworn on 20th August 2008. The supporting affidavit of 30th July 2008 merely restates the averments in the plaint. The supplementary affidavit of 1st August 2008 has exhibited copies of a provisional certificate of title No. 6632/12 and a certificate of title for No. 34112/1. The supplementary affidavit sworn on 20th August 2008 was filed in response to the replying affidavits sworn by the 3rd and 5th defendants. To the affidavit are annexed a certificate of Postal Search in respect of Title No. 2617 (L.R. No. 222 Section V/MN). Land Rates Receipts, a sale agreement between the plaintiff and M/S Kenya Power & Lighting Company Limited some letters exchanged and photographs.

The 1st, 2nd, 3rd and 5th defendants have opposed the application on the basis of replying affidavits sworn by the 3rd and 5th defendants on 12th August 2008. The 3rd defendant filed a further affidavit on 27th August 2008. In a nutshell the said defendants allege continuous uninterrupted occupation of the subject properties and thereby set up the defence of adverse possession. The plaintiff denies the said allegation in her further supplementary affidavit of 20th August 2008 aforesaid.

The application was debated before me on 27th August 2008 by Mr. Wameyo, Learned counsel for the plaintiff, Mr. Mwaboza, Learned counsel for the 1st, 2nd and 3rd defendants and Mr. Ouma, Learned counsel for the 5th defendant. Learned counsel reiterated the averments in their clients' respective affidavits and urged their clients' respective positions.

I have carefully considered the application, the affidavits filed, their annexures, the submissions of Learned counsel and the cases cited. Having done so, I take the following view of this matter. The prerequisites for the grant of an interlocutory injunction were well stated in the precedent setting case of **Giella – v – Cassman Brown & Company Limited [1973] EA 358**. The are: First the applicant must establish a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. So, has the applicant established a prima facie case with a probability of success at the trial? The plaintiff has not identified the properties in respect which she seeks injunctive relief in the body of her chamber summons. Secondly, in her plaint her properties are identified as "Subdivision Number 2051 (original 222/1) Section V Mainland North and Number 220 Section V Mainland North."

With respect to the first title the plaintiff has exhibited a copy of a Certificate of a Postal Search dated 7th August 2008 which shows that the title has been sub-divided and a new one issued. That postal search is annexed to the plaintiff's affidavit sworn on 20th August 2008. The plaintiff has deponed in paragraph 3 of that affidavit that she is the registered owner of plot No. 222/V/MN and 220/V/MN. The said annexure belies that averment because plot No. 222/V/MV has been closed on sub-division. The postal search does not state when the sub-division was effected. In paragraph 5 of the same affidavit the plaintiff has deponed that the encumbrances marked in the said certificate of postal search were effected following an agreement between the plaintiff and M/s Kenya Power & Lighting Company Limited. The said agreement is annexed to the said affidavit. I have perused the annexed certificate of postal search. No encumbrance is mentioned anywhere therein. I have also perused the said sale agreement. It refers to LR No. 2021/VI/MN (Original 222/MN/V). The plaintiff has not explained the nexus between the said LR No. 2021/V/MN and the suit property described in the plaint. Besides, the sale agreement suggests that L.R. No. 2021/V/M.V. is a sub-division of LR No. 222/MN/V. Yet L.R. No. 2021/V/MN comprises 18 acres as stated in the said agreement which was the total size of L.R. No. 222/MN/V before sub-division, according to the certificate of postal search. In paragraph 10 of the same affidavit, the plaintiff swears that her interest is in plot Nos. 222/V/MN and 220/V/MN. It is clear therefore that the plaintiff's averments with respect to the first title in her supplementary affidavit sworn and filed on 20th August 2008 conflict with her averments in the supporting affidavit sworn on 30th July 2008 and her supplementary affidavit sworn on 1st August 2008. The affidavit further introduces M/S Kenya Power &

Lighting Company Limited as a party interested in the subject property. Yet it has not been joined in the suit.

With respect to the second title i.e. No. 220 Section V Mainland North, the plaintiff has exhibited a copy of a certificate of ownership marked as “MAO 3 (b)” and a provisional certificate of the same marking. However, in the supplementary affidavit sworn and filed on 20th August 2008 the plaintiff deponed, in paragraph 4 thereof that she has always paid Municipal Council Rates. In this regard, she has exhibited a Land Rates Receipt No. 111138070 issued on 12th August 2008. The receipt is however in the name of an entity called Magingo Gen. Renovator. The plaintiff has not explained the nexus between the said entity and herself.

The 1st, 2nd and 3rd defendants’ response to the plaintiff’s application is that plot No. 222/V/MN is their ancestral land on which they have, together with their family members, resided since time immemorial. They contend that their occupation of the said plot has been peaceful, continuous, quiet and undisturbed and 8 acres thereof being utilized by them. They therefore claim to be beneficial owners of the said portion by adverse possession.

The 5th defendant on his part contends that he has lived in the area since his birth in 1971 and has never invaded or settled on the plaintiff’s land. He has exhibited various photographs which he says indicate the land on which he resides.

I have anxiously considered the conflicting affidavit evidence. Whereas the plaintiff has presented conflicting evidence of title with respect to the title she describes variously as LR No. Sub-Division Number 2051 (Original No. 222/1), Section V Mainland North, Plot No. 222/V/MN and LR NO. 2021/V/M.N. (Original No. 222/MN/V), it is not seriously disputed that she owns property in the area in dispute. That property is in addition to Land Parcel Number 220 Section V Mainland North.

The 1st, 2nd and 3rd defendants lay claim to 8 acres of what they describe as plot No. 222/V/MN on two grounds. The first claim is that the said piece of land is their ancestral land and the second ground for resisting the plaintiff’s application is that they have acquired right over the piece through adverse possession. The 5th defendant on the other hand denies invading or squatting on any of the plaintiff’s properties. He however swears that he has lived in the area since his birth in the year 1971, but not on the plaintiff’s land.

On the above material, I have not been persuaded at this stage that the 1st, 2nd, 3rd and 5th defendants can be described as trespassers upon the plaintiff’s property. The claim made by the 1st, 2nd and 3rd defendants is one recognized in law. That claim cannot however, be conclusively determined at this interlocutory stage. As for the 5th defendant the plaintiff’s claim against him at this stage would have been on firmer ground if a surveyor’s report would have been obtained to establish where he alleges he stays vis-à-vis the plaintiff’s properties.

The position of the 1st, 2nd, 3rd and 5th defendants in this case is distinguishable from the position of the respondents in **Civil Appeal No. 111 of 2002: JAJ Super Power Cash and Carry Limited – v – Nairobi City Council and 2 others (UR)**. In that case, the court determined the respondents to be trespassers and accordingly were to give way to the appellant who was a registered proprietor. I have found above that the 1st, 2nd, 3rd and 5th defendants cannot at this stage be described as trespassers as their claim is recognized in law and if established it is a shield against the plaintiff’s claim.

The case of **Mwinyi Hamisi Ali Kombo & 2 others – v – Darius Mbela & 4 others: HCCC No. 64 of 2004 (UR)** is also distinguishable from the present case. In that case my Learned brother Sergon J decided the application ex parte in the sense that neither the respondent nor his counsel attended at the inter partes hearing of the application. I am not sure that the Learned Judge would have come to the same conclusion if he had heard the respondents before his decision.

In the premises, I am not persuaded that the plaintiff has established a prima facie case with a probability of success at the trial. I need not therefore consider the second and third criteria for the grant of an interlocutory injunction. However, even if it would have been necessary to consider the second criteria, I would have had no difficulty in holding that the injury to be suffered by the plaintiff is quite capable of being quantified and damages would be an adequate compensation. The plaintiff has no sentimental attachment to the suit properties. As to the balance of convenience, I am of the view that the same tilts in favour of declining the temporary injunction. I say so because such an order at this stage would pre-empt determination of the parties conflicting interests taking into account the fact that the plaintiff has sought an injunction on a permanent basis and a declaration that she is the sole proprietor of the suit properties whereas the 1st, 2nd and 3rd defendants claim a portion of the suit properties by adverse possession.

Before concluding this matter, I will very briefly touch on the plaintiff's objection to the affidavits filed by the 1st, 2nd, 3rd and 5th defendants on the basis that the affidavits do not disclose the place of a bode of the deponents. I agree that in that regard the affidavits offend the provisions of Order XVIII Rule 4 of the Civil Procedure Rules. In my view however, that defect is not fatal and as the plaintiff has not demonstrated how she has been prejudiced, the defect cannot vitiate the affidavits. In any event, the defect is a mere irregularity in my view and notwithstanding the same, the affidavits are receivable under the provisions of Rules 3 (proviso) and 7 of Order XVIII of the Civil Procedure Rules.

Lastly, it has not been shown that the 4th defendant was served with the application under consideration. In the premises, I will not make any orders against him.

The upshot of this matter is that the plaintiff's application for injunctive relief dated 29th July 2008 is declined. The same is dismissed.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF SEPTEMBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kenga holding brief for Mwaboza for the 1st, 2nd and 3rd defendants, Kiume holding brief for Wameyo for the plaintiff and Okanga holding brief for Ouma for the 5th defendant.

F. AZANGALALA

JUDGE

17TH SEPTEMBER 2008