



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 487 of 2007 (OS)

ASPEL IRUNGU JONATHANPLAINTIFF/APPLICANT

VERSUS

PAULINE WANGUI NJUGUNA (sued as administrator

of the estate of Michael Macharia)DEFENDANT/RESPONDENT

RULING

The applicant - *Aspel Irungu Jonathan* is the plaintiff in the suit No. 487 of 2007 which commenced by Originating Summons, which is the subject of the current application. In this suit he claims 1.5 acres out of 2.6 acres owned by *Michael Macharia* out of *L.R. No. Loc. 10/Kahuti/450* which measures 2.43 Hectares.

This whole land was registered in the name of *Ben Macharia Jacob* who has since died, and has since been succeeded by *Mary Nyambura* Irungu by virtue of Succession Cause No. 1895 of 2001 according to copy of the extract of title annexed to the application.

The applicant wants to be declared the proprietor of the 1.5 acres, part of the suit land, by virtue of having been in occupation or possession of it for the prescribed period under the Limitation of Actions Act, Cap. 22, Laws of Kenya

And that the Land Registrar Murang'a be directed to transfer 1.5 acres of that land and have it registered in the name of the applicant.

In the Originating Summons, the plaintiff alleges that out of this land, 2.6 acres belongs to one *Michael Macharia*, and that out of that share, the applicant occupied 1.5 acres thereof in the year 1994 which he has been occupying peacefully and uninterrupted and therefore that he has acquired title to that portion by adverse possession.

The suit was filed in Court on 31st July 2007 and together with it was filed an application by way of Chamber Summons to seek a temporary injunction to issue against the defendant respondents, her agents/servants and/or all those claiming under her jointly and severally from entering and trespassing into a portion of 1.5 acres of occupied by the plaintiff/applicant out of 2.5 acres in *L.R. No. Loc.10/Kahuti/450* or interfering with the plaintiff/applicant's possession, occupation and user thereof and/or committing any acts of waste until the suit herein is heard and determined.

The applicant prayed that an order be made for the Officer Commanding Station Kahuro Police Station to assist in the enforcement of the Court's Order and for the costs of the application.

This application was supported by the grounds set out on the body thereof and the averments in the affidavit in support thereof.

The grounds set out on the body of the application are that on 13th July 2007 the defendant/respondent and her agents and/or servants entered and trespassed on the suit land and destroyed crops, maize sugarcane, bananas, coffee bushes and fell down trees therein the portion of 1.5 acres occupied by the plaintiff/applicant out of 2.6 acres in land reference number **L.R. No. Loc.10/Kahuti/450** belonging to **Michael Macharia** (deceased), that the defendant respondent and her agents and/or servants have threatened to forcibly and violently evict the applicant which act would defeat the ends of justice being met and would render the Originating Summons filed herein nugatory.

That unless the orders sought are expeditiously granted in the first instant the life and peaceful occupation of the applicant would be prejudiced and fatal. That the applicant entered the suit land in 1994 and had been in peaceful uninterrupted exclusive occupation and possession and therefore his equitable rights were binding on the land and has acquired title to the 1.5 acres he occupies out of 2.6 acres in land reference Loc. 10/Kahuti/450 by adverse possession of it for a period of twelve (12) years.

The supporting affidavit deponed to by the plaintiff/applicant and filed together with the application avers that he was put in possession of the 1.5 acres of the suit land by the deceased **Michael Macharia** and that he has been in such possession since the said **Macharia** died.

That he has enjoyed uninterrupted exclusive and peaceful occupation of the portion of land until 13th July 2007 when the defendant/respondent together with her agents and/or servants forcefully trespassed onto the suit land and destroyed crops as described in paragraph 7 of the supporting affidavit.

That the defendant/respondents and her agents and/or servants have committed other acts of trespass on the suit portion of land since 13th July 2007 with a view of cutting logs on the trees they felled.

Paragraph 11 of the affidavit refers to a Succession Cause in Murang'a Law Courts where the respondent was made the administrator of estate of the late **Michael Macharia** and in which the applicant was advised to pursue his purchaser's interest after the Succession Cause was determined.

In paragraph 13 of the affidavit the deponent states that unless the defendant/respondent and/or his agents and/or servants are restrained by an order of injunction he will suffer substantial economic loss, irreparable damage and that the Originating Summons filed herein will be rendered nugatory.

A replying affidavit to this application was deponed to by the defendant/respondent and filed in Court on 4th September 2007. She states that the plaintiff/applicant is not in possession of the portion of the suit land he is claiming and that it is being used by the beneficiaries.

That the application is a non-starter and wholly incompetent as it is based on a suit with absolutely no chance of success because the sale agreement upon which the plaintiff/applicant relied on in the Succession Cause was dated 1st October 1996 which is only eleven (11) years and that this agreement clearly states at the foot thereof that all earlier agreements (lease agreements are now termed null and void).

That the period prior to 1st October 1996 was of a lease, hence with the owner's permission and that it cannot be counted when reckoning time.

That the Originating summons cannot be rendered nugatory if no mandatory injunction is granted as to grant the orders sought will in effect be installing the plaintiff/applicant on the land yet his occupation has ceased to be.

That the supporting affidavit is based on falsehood in that even the area he refers to as 1.5 acres does not exist as the 2.6 acres have not been internally surveyed.

That the plaintiff/applicant has his own land on which he has built and on which he relies for his livelihood and not on the 1.5 acre portion.

That during the Succession Cause, the plaintiff/applicant pursued his claim as a creditor/purchaser, thus acknowledging the deceased title to the land.

In Court on 26th September 2007 counsel for the parties appeared to submit on the application. **Kinuthia** submitted for the applicant while **Mbuthia** did so for the respondent.

Kinuthia stated that the plaintiff/applicant was claiming the land under a contract of sale.

From the submission of counsel it was the applicant herein who filed the Succession Cause at Murang'a Magistrate's Court but that he lost the case when the respondent was declared the administratrix of **Michael Macharia's** estate.

That it was after the plaintiff/applicant herein lost in the Succession Cause that he filed this case by Originating Summons seeking an order of adverse possession of 1.5 acres out of plot **No. Loc. 10/Kahuti/450**.

That after the respondent was issued with letters of administration to the estate of **Michael Macharia** she and her agents tried to forcefully evict the applicant from the portion of the suit land without notice or a Court order.

That though the applicant reported the matter to the police, the later sought a Court order in order to enforce law and Order; and this is why he is seeking an injunctive order from this court in order to maintain the status quo.

According to counsel, if these orders are not granted the applicant will suffer irreparable loss and damage because his property are still on the land including coffee, maize, sugarcane, bananas and Napier grass and trees.

That the applicant had established a prima facie case with high chances of success to enable the grant of an order of injunction.

That since the applicant is still on the plot in dispute, the balance of convenience tilts on his side. **Mr. Mbuthia** submitted that the applicant was not in possession of the portion of the land he is claiming out of **L.R. No. Loc. 10/Kahuti/450** – at the time this suit was filed. That he had sought a mandatory injunction either in the suit or the application for injunction.

That there was no case capable of success as disclosed in the replying affidavit. According to the applicant counsel even if we go by the earlier agreement, the applicant had been on the suit land for only eleven (11) years and not the mandatory twelve (12) years as required under **Order XXXIV** Civil Procedure Rules. That nevertheless the earlier agreements were declared null and void by mutual agreement of the parties and that the suit filed for adverse possession is premature.

Counsel submitted that loss of crops is not irreparable loss. That balance of convenience tilts in favour of the respondent hence temporary injunction should not be issued and that the order made on 6th September 2007 (exparte) should be set aside.

In reply, counsel for the applicant submitted that the agreement dated 1st October 1996 was made as an acknowledgment that the vendor had already received the purchase price of **Kshs.400,000/=**.

The issue of adverse possession arises as a result of payment of the last installment. That a purchaser acquires adverse possession having entered the land as such but that the land was not transferred to him.

These are submissions advanced herein for consideration and decision.

When two parties enter into an agreement relating to the purchase and/or sale of land, there are certain aspects to be considered in respect of this transaction. They include the application for and receipt of Land control Board consent and possession of the land.

These are not the same considerations given to a claim of land by way of adverse possession and it is not correct as counsel for the applicant put in reply to the submissions by counsel for the respondent that the plaintiff herein acquired this land by adverse possession when he entered it in 1994 after finalizing the purchase price.

Considerations for a claim of land by adverse possession, as I understand them, involve the applicant's entry on such land, fully defined and titled, under licence or permission by the proprietor thereof, which licence or permission is at one point in time withdrawn but without any action being taken to effect this withdrawal for the period stipulated under section 7 of the Limitation of Actions Act. And it is this revocation/withdrawal which gives rise to the concept of adverse possession.

These considerations are not clearly disclosed in this application and if they will be outlined at all will await the hearing of the main application in the Originating Summons.

So far, I am not convinced the plot being claimed in the Originating Summons is clearly defined. The applicant claims 1.5 acres out of 2.6 acres owned by **Michael Macharia** in **Location 10/Kahuti/450**.

The extract of title annexed to the Originating summons gives the original proprietor of the above land as **Ben Macharia Jacob**. The land is 2.43 hectares.

Entry number 3 thereon shows that the following persons have portions on that land, namely:

Livingston Irungu 1.3 acres

Michael Macharia 2.6 acres

Samwel Mwangi 2.6 acres

These add up to about 6.5 acres which to me are clearly in excess of 2.43 Hectares shown on the extract of title.

But that notwithstanding, the name of the applicant herein does not feature on this title.

Entry number 5 made on 19th September 2002 shows that the plot **Loc. 10/Kahuti/450** was transferred to **Mary Nyambura Irungu** through **Succession Cause No. 1985 of 2001**. There is then entry number 6 of the same date 19th September 2002 which shows **Mary Nyambura** and **Patrick Kibebe Irungu** were given the suit land **Loc. 10/Kahuti/450** to hold in trust for themselves and other children in **Succession Cause No. 1895 of 2001**; Nairobi. This entry also shows that **Samwel Mwangi** has 2.6 acres while **Michael Macharia** has 2.6 acres but the name of Livingston Irungu is missing from this list.

Title deed was issued on 22nd November 2002 as per entry number 7.

The certificate of Official Search obtained on 6th July 2007 has the details as per entry number 6 and 7 of the extract of title annexed to the Originating summons.

Though **Michael Macharia** is said to own 2.6 acres of the whole land, and that he died on 15th April 2000 (see his Certificate of Death on replying affidavit), he was never been issued with title to his portion. There is no indication he left anybody surviving him who is entitled to his estate except the submissions of counsel for the applicant herein that the respondent is the sister of the said **Michael Macharia**.

And as I have said that the deceased **Michael Macharia** never received title to his share of 2.6 acres in

Loc. 10/Kahuti/450, so has not the respondent herein received any such title, and going by the procedural requirement that such title or copy thereof should be annexed to an application for letters of administration to the estate of the deceased person, then I do not know on what basis the respondent was issued with letters of administration in respect to the estate of **Michael Macharia** at Murang'a Senior Resident Magistrate's Court without this extract being annexed to the application.

There is an agreement of sale dated 1st October 1990 annexed to the replying affidavit which nullified all earlier agreements of sale of the suit portion of the land and which, so far as I see, does not assist the applicant in anyway in the Originating Summons.

Given all these circumstances and my sentiments echoed herein before, I am not convinced that the conditions set out in the case of **Giella v. Cassman Brown & Co. Ltd [1973] E.A. 358** have been met to enable me make an order of injunction sought herein.

Whether or not the applicant occupied the suit land by the time the respondent received the purported letters of administration from Murang'a Magistrate's Court is neither here nor there.

I dismiss this application with no order for costs.

Delivered, dated and signed at Nairobi this 23rd day of October 2007.

D. K. S. AGANYANYA

JUDGE