



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE 62 OF 2005

RICHARD KONZOLO OBIMBO..... 1ST PLAINTIFF/APPLICANT

TIMOTHY OBIMBO2ND PLAINTIFF/APPLICANT

V E R S U S

ROSEMARY NALISI OTWERE 1ST DEFENDANT/RESPONDENT

SHADRACK MUGANDA OTWERE 2ND DEFENDANT/RESPONDENT

R U L I N G

The suit herein was commenced by way of Originating Summons by Messrs Richard Konzolo Obimbo and Timothy Obimbo (the Applicants) against Messrs Rosemary Nalisi Otwere, Shadrack Muganda Otwere and Stanley Otwere (the Respondents). The applicants seek under section 38 (1) of the Limitation of Actions Act, Cap 22, to be registered as the proprietors of the parcel of land known as Kakamega/Lyadyuwa/1045 (“he suit land”) in place of the Respondents on the ground that their (applicants) open continuous and adverse possession of more than 12 years has extinguished the title of the Respondents to the land.

The Respondents have in their defence denied the Applicants claims in the main suit on the grounds that the occupation of the suit land by the Applicants was not adverse as the Respondents had licensed the Applicants to be in possession and further because the suit land has been subdivided and title No. Kakamega/Lyadyuwa/1045 no longer exists and finally because it is re judicata in that there is pending in the Sabatia Land Disputes Tribunal a claim by the Applicants for the suit land.

The matter for my ruling is the application by chamber summons dated 19-7-2006 made by the Respondents seeking temporary injunction to restrain the Applicants from “uprooting and/or interfering with the existing boundaries of the suit land now held under three different title numbers Maragoli/Lyadyuwa/1963, 1964 and 1965 and from trespassing, utilizing, tilling or laying claim to the portions of the said parcels, and in the alternative, status quo prevailing at the time of filing of the suit be maintained. The application was opposed by the applicants who filed grounds of opposition dated 17-10-06.

When the application came up for hearing before me on 24-4-2007, Mrs. Lusinde, learned Counsel for the Respondents who were seeking the injunction, urged the court to grant the order because the Respondents were the legal owners of the suit land.

Mrs. Osodo, learned counsel for the applicants, urged the court to reject the application on the ground that the Respondents had failed to establish the principles necessary for the grant of injunction. Mrs. Osodo contended that the applicants were not capable of trespassing on the land.

Have the Respondents made out a case for the grant of injunction they seek? Have they established the existence of the principles necessary for the grant of interlocutory injunction?

I have perused the interlocutory application and the grounds of opposition and have given due consideration to the submissions made by both counsel. The suit by the Respondents is predicated on the premise that before the suit was filed, the title of the Respondents to the suit land had been extinguished by the Applicant's continuous, open, and uninterrupted adverse possession of more than 12 years. Whether the Applicants will succeed in establishing their claim will depend on the evidence. The application for the injunction sought is premised on the basis that the Respondents are the legal owners of the suit land. But this is a moot point now because although the Respondents may hold the legal title in the registers, notionally their title may not exist in law because it is alleged to have been extinguished. Moreover, to grant the injunction sought would prejudice the suit and effectively pull the carpet from under the feet of the Applicants. It would amount to determining the main suit before or without hearing the parties on merit. That would not be in the interest of justice. It would do violence to the rights of the applicants under section 38 (1) of the Limitation of Actions Act Cap 22, to apply to be registered in place of the respondents on the ground that they (the Applicants) have acquired title to the suit land by adverse possession.

In the context of the facts in this case, it cannot be said that the Respondents have a prima facie case with a probability of success. That can only be discerned after oral evidence has been adduced. As the applicants have been in possession prior to the institution of this suit, and as their claim is premised on section 38 (1) of the Limitation of Actions Act, the allegation that they are trespassing on the suit land cannot hold good. It cannot arise at this juncture.

The Respondents have raised the point that the claim for adverse possession by the applicants is with regard to land title No. Kakamega/Lyaduywa/1045 and that as the Respondents did in the year 2001 subdivide the said land into three parcels which now carry title Nos. Maragoli/Lyaduywa/1963, 1964 and 1965 the suit cannot succeed. But the land is the same, albeit, bearing different title numbers. The Applicants should have searched the title before filing the suit and quoted the correct title numbers. If adverse possession is proved and it is shown that title No. Kakamega/Lyaduywa/1045 had been extinguished, the fact of its subdivision and issuance of new title numbers would not defeat the claim, although amendment to bring in the new title numbers would be imperative. All that an applicant under section 38 (1) supra has to show so as to apply for an order that he be registered as the proprietor of the land is that he has become entitled by adverse possession to land which is registered under the Registered Land Act or the Government Lands Act, or the Land Titles Act.

I am unable to exercise my discretion to grant the injunction sought. It would be wrong in law and unjust to do so in the context of this case. The application is dismissed with costs to the applicants.

Delivered, dated and signed at Kakamega this 22nd .day of November, 2007

G. B. M. KARIUKI

J U D G E