



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 607 OF 2003

JOSEPH MUIRU & TWO OTHERS PLAINTIFF

VERSUS

JANE NJERI KIMANI DEFENDANT

RULING

The proceedings were commenced by way of an Originating summons filed on 17th June 2003. The Plaintiffs are seeking a declaration that they have become the owners of the suit property L.R. No. Limuru/Bibirioni/T.512, by way of adverse possession. The said plaintiffs are also seeking further consequential orders that would result in the Defendant transferring the suit property to them, so that they would thereby become the registered owners thereof.

On the same date when suit was filed the plaintiffs simultaneously filed an application pursuant to the provisions of Order XXXIX rules 1, 2 and 2A (2) of the Civil Procedure Rules. The gist of the application is that the Plaintiffs are asking this court to grant them an injunction which would restrain the Defendant from trespassing onto the suit property and also from interfering with the Plaintiff's possession, occupation and user of the said property. A further Order that was being sought was specifically to restrain the Defendants from interfering with the Plaintiff's National Conference of Pastors and Bishops which had been scheduled for 20th June 2003.

The application was first brought ex parte on 18th June 2003, when Rimita J. granted the orders sought for a limited duration. The application was argued inter partes on 22/1/04. The Plaintiffs submitted that the interim injunction ought to be granted, so that it remains in force until the hearing and determination of the suit.

The Plaintiffs submitted that they had been in possession of the suit property since 1975. Indeed they had built a church on the property. By virtue of the continued long occupation of the property, the Plaintiffs now contend that they ought to be deemed the rightful owners of the property, by virtue of the doctrine of adverse possession. But in the meantime, the Plaintiffs are seeking an injunction to restrain the Defendant from interfering with the Plaintiffs occupation, possession and user of the property. This application was prompted by the actions of the Defendant, when they demolished the Plaintiffs' 2 pit latrines. The Defendants are also said to have threatened to evict the Plaintiffs from the suit property.

In reply to the Plaintiffs' application the Defendant has asserted that the Plaintiffs have failed to make out any prima facie case with a probability of success. The Defendant says that the Plaintiffs have not illustrated that they had been continuous un-interrupted possession for more than 12 years. The Defendant pointed out that the plaintiffs had themselves admitted in the affidavit of Francis Ndungi Kagia that their possession had been interrupted several times before this suit was instituted. The relevant paragraphs in the affidavit are numbered 8, 9, 10 and 11, by which Mr. Kagia talked about the Defendant's threats to evict the Plaintiff, and also the destruction of the Plaintiffs 2 pit latrines. These actions occurred on 31st

may 2003, 9th and 10th June 2003.

This court notes that the Plaintiffs assertion that they had been in occupation of the suit premises since 1975 has not been challenged by the Defendant. If that be the case therefore, it would appear that by the time of the Defendant's actions of interruption in May and June 2003, the Plaintiffs would actually have already been in occupation for about 28 years.

In any event the Defendant's actions in themselves may probably be insufficient to amount to such disruption to the Plaintiffs possession as would in law be deemed to have disrupted the Plaintiffs possession and occupation of the suit property.

The Defendant has submitted that there is no evidence that her late husband had given the property to the Plaintiffs. In order to prove that the property was given to them, the Plaintiffs ought to have adduced evidence of an Agreement for Sale or a Deed of Gift, says the Defendant. The absence of such a document contravenes the provisions of Section 3 (1) of the Law of Contract Act, it is said by the Defendant. The Defendant also attacks the Plaintiffs case as being weak on account of the absence of the consent of the Land Control Board.

I hold the view that the Defendant appears to have misapprehended the case being put forward by the Plaintiffs. As I understand it, the Plaintiffs' contention is that they have become entitled to ownership by virtue of operation of law, through the doctrine of adverse possession. The Plaintiffs are not claiming title by virtue of having either purchased the property or by virtue of it having been given to them as a gift.

I am fortified in my decision by the Judgment of the Court of Appeal in Civil Appeal No. 73 of 1982 *The Public Trustee & Mrs Beatrice Muthoni vs Kamau Wanduru*, whereat the court held as follows:

“The ownership of land of whatever type is also mutable by operation of law, e.g. by succession or by adverse possession. Provisions of the Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land”.

The upshot of the foregoing is that I find that the Plaintiffs have put forward a prima facie case with a probability of success. In effect the Plaintiffs have satisfied this court on the first limb of the tests for the award of an interim injunction. This court must then proceed to ask itself whether or not damages would be an adequate remedy.

In the light of the unchallenged fact that the Plaintiffs have built a 2-storeyed building comprising a church, a hall and an administration block on the suit property, I find that if Defendant is allowed to evict the Plaintiffs, the said Plaintiffs would suffer irreparable loss and damage.

Finally, I do also wish to emphasize the fact that if there had been any doubt in my mind, (and there was none), about the question as to whether or not damages would adequately pay for the Plaintiffs loss and damage, I would definitely say that the balance of convenience weighs in favour of the Plaintiff.

It therefore follows that the Plaintiffs application dated 17th June 2003, succeeds.

Accordingly, I now grant the following orders:-

- (i) The Defendant is hereby restrained, by herself, her servants or agents howsoever from trespassing on L.R. NO. LIMURU/BIBIRIONI/T.512, and also from interfering with the Plaintiffs possession, actual occupation and user of the said property until this suit is heard and determined.
- (ii) Costs of this application are awarded to the Plaintiffs.
- (iii) Hearing dates to be fixed on a priority basis.

Dated at Nairobi this 9th day of February 2004.

FRED A. OCHIENG

Ag. JUDGE