



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 409 OF 2000

MARTHA MOTHONI & SIX OTHERS.....APPLICANT

VERSUS

HALIMA MOHAMMED ALI.....DEFENDANT

RULING

This is the plaintiffs application dated 7.3.2002 for the following main orders:

1.
2.
3.
4. That status quo ante be restored
5. That Respondent be restrained by a temporary injunction from evicting plaintiffs or in any other manner howsoever interfering with the plaintiffs possession of suit land L.R No. 6875/2 and 3 pending hearing and determination of the suit.

The application is based on the Originating Summons in which plaintiffs seeks the following reliefs.

1. A declaration that the plaintiff and over 70 others have acquired title by adverse possession to 160 acres or there abouts of L.R No. 6875/1 and 6875/2
2. A mandatory injunction restraining the respondent and or her servants agents from evicting or in any other manner howsoever interfering with plaintiffs possession and enjoyment of the suit land, that is, 160 acres of L.R No. 6875/2 and 6875/3 do issue.

The Originating summons is supported by joint affidavit of the seven named applicants who are suing on their own behalf and on behalf of over seventy others.

The applicants claim to have entered and occupied 160 acres of the 570 acres of L.R No. 6875 which belonged to Mohamood Ali Guled in 1978.

They claim to have entered into the suit land openly, without force and as of right. They claim to have been in adverse possession of the land for over 12 years. They aver that on 13.12.2001 and 14/12/2001 about 40 people accompanied by seventeen armed Administration Police Officers forcefully evicted them from the suit land; burned down and destroyed their homesteads; houses and other properties thus

rendering them homeless.

They aver that the eviction was unlawful and that after the eviction defendants destroyed the applicants crops and flattened graves which are on the suit land.

The defendant is the daughter of Mohammed Ali Guled and his personal representative According to her, the said Mohamed Ali Guled died on 3.4.97. She has filed a replying affidavit sworn on 18.3.2002; further replying affidavit sworn on 22.3.2002 and the affidavit sworn on 16.4.2002. Those affidavits set out in detail the version of the defendants case.

In the relevant parts, she states that her father leased the land to Paulo Bindi and Angelia Wairimu Bindi in 1979 with an option to purchase. It is her case that the subsequent sale did not materialize and that the applicants entered into the land Paulo Bindi and Agelica Wairimu Bindi.

It is also her case that Paulo Bindi had entered into an agreement with applicants whereof applicants paid to Paulo Bindi and Agelica Wairimyu for a portion of the suit premises. According to the defendant, her father Mohamood Ali Guled filed a suit – High Court Nyeri. HCC No. 235/97 against Paulo Bindi and Angelica Bindi seeking their eviction and that the suit was determined in favour of her father in 1994. She has annexed a copy of the Judgment in that suit delivered on 13.5.94. In that judgment, the court ordered

“that the defendants jointly and severally their servants and agents and all parties claiming under them must deliver up to plaintiff vacant possession of suit lands L.R Nos 6875/2 and 6875/3 within 90 days here of”

The respondent states that the applicants were evicted through an eviction order issued on 28.11.2001 in Nyeri High Court Civil case No. 235 of 1979. She annexed a copy of the eviction order. The Defendants asserts that the dispute is res judicata vide Nyeri HCCC No. 235/79.

The applicants deny that they were servants agents of Mr. Paulo Bindi and Mrs Angelica Wairimu Bindi. They deny that they entered into the suit land through Mr. Paulo Bindi. They claim that they occupied 160 acres while Mr. Paulo Bindi occupied the rest of the land. The applicant’s counsel contends inter alia, that:

- (i) The decree in Nyeri HCCC NO. 235/79 did not include the applicants as applicants were not servants or agents of Paulo Bindi and as they were not claiming the land through him.
- (ii) The notices issued to applicants to vacate contained a threat to institute legal proceedings if applicants failed to vacate thereby showing that respondent’s lawyers knew that applicants were not covered by the decree of the Nyeri High court.
- (iii) That the Warrant of eviction does not comply with the decree in so far as it refers to “anyone else
- (iv) Eviction of applicants was extra judicial and court has a duty to restore the status quo ante so that the law will be upheld.

This is not the trial of the applicants claim for adverse possession. There is no application to strike out the plaintiffs suit. The issue whether or not the plaintiffs suit has merit and whether or not the suit is res judicata will be determined at the appropriate time. The circumstances under which applicants took possession of the suit land is disputed. I am unable at this stage to express any provisional view as to whether or not the applicants have

established a prima facie case for adverse possession with a probability of success.

But, the fact that applicants have been evicted from the suit land does not ipso facto defeat their claim to the land by adverse possession. Time will be computed from the time they took possession up to the time

they were dispossessed.

The prayer for interlocutory injunction to restrain the defendant from evicting plaintiffs from the suit land pending the determination of the suit has been overtaken by events, for by their own admission, the applicants were evicted from the suit land on 13th and 14th December 2001. The suit and the application were filed on 7.3.2002 over 2 ½ months after the event.

The main concern of the applicant at this stage is that status quo ante should be restored. By that prayer the applicants are indirectly praying for a mandatory injunction such as the one sought in the originating summons. It seems that the mandatory injunction is sought on the ground that the eviction of the applicants from the suit land was unlawful. The applicants

counsel has referred to the case of Kamau Mucuha versus The Ripples Ltd - Civil Application No. NAI 186 of 1992. A mandatory injunction can be granted at an interlocutory stage but as that decision shows, before the court grants such a mandatory injunction it must, inter alia, feel a high degree of assurance that the applicants case is meritorious.

At present, applicants have no title to the suit land. The title belongs to the Respondent . To get the title the applicants will have to prove their claim to the land by adverse possession at the trial.

Secondly, it is now apparent that the applicants were evicted from the suit land through an eviction order issued by High Court in Nyeri in HCCC NO. 235/79. It is submitted that the eviction order does not comply with the decree.

But it is clear from the judgment of the court in the Nyeri case that Mohammed Ali Guled was given possession of the whole land comprised in LR Nos 6875/2 and 3. The 160 acres claimed by applicants were not excluded . The eviction order commanded the Court Bailiff to give plaintiff in the suit vacant possession of L.R No. 6875/2 and L.R No 6875/3. Until the present suit is heard and until court finds that the applicants did not enter into the land through Paulo Bindi, the Court cannot as a matter of fact say at this stage that the eviction order does not comply with the decree. The applicants have not moved the High Court Nyeri to correct the order of eviction. I have no jurisdiction to interfere with the orders issued by High Court Nyeri.

Thirdly the order sought is discretionary. The applicants were evicted from the suit land more than 5 months ago. It would be unjust to order defendant to give applicants vacant possession after such a relatively long time and before the applicants have established their claim to the land by adverse possession. Such an order is likely to cause a breach of peace. The appropriate remedy should have been an order to preserve the suit land pending litigation but applicants have not sought such an order.

In the circumstances of this case it cannot be said at this stage that respondent gained possession through a planned and blatant unlawful act.

From the foregoing, I regret to say that the applicants are not entitled to mandatory injunction. Consequently, I dismiss the application with costs in the cause

E.
Judge
13.6.2002

M.

Githinji

Mr. Mungala holding brief for Martha Karua present

Mr. Riitho present

Order: Ruling to be typed and copy supplied to the respective

advocates as prayed

E. M. Githinji

Judge