



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 36 OF 1995

ISAAC J. HUNJA.....PLAINTIFF

VERSUS

MICHAEL NDERITU GACHURU & ANOTHER..... DEFENDANT

RULING

This is the plaintiffs 29.4.99 application dated for three orders of injunction namely; to restrain defendants from interfering with plaintiffs uses of land parcel no. Othaya/Kihuguru//570; to restrain from trespassing on the same land and to restrain defendant from wrongful possession of 43 cut trees and possession of them. The application is supported by the affidavit of the plaintiff. The defendants have filed grounds of opposition and 2nd defendant has filed a replying affidavit.

I have studied the plaint and the defence and counter claim.

I have also studied the contents of the affidavit.

It is admitted that plaintiff is the registered owner of land parcel No. Othaya/Kihuguru 570. His claim in the plaint is for damages for trees cut from the land in 1994, and in 1995.

In para 4 of the defence and counter claim, defendants (2nd defendant) claims that in 1974 he had charged the land which chargor threatened to sell. Defendant then took a loan from plaintiff of shs 2000 and it was agreed that plaintiff would clear the loan and on top of that defendant would pay a further shs 10,000 to 2nd defendant which he never did. In para 5 of the counterclaim, 2nd defendant avers that later plaintiff unlawfully transferred the land to himself. He claims that the transfer was unlawful and void. He counter claims for rectification of the register or alternatively that plaintiffs title has been extinguished by adverse possession.

It is clear from the counter claim that 2nd defendant does not specifically say that he sold the land to the plaintiff. But in para 5 and 6 of the replying affidavit, 2nd defendant says that plaintiff has not to-date paid full purchase price and that he relied on the plaintiff to redeem his land in 1974 but plaintiff betrayed the trust and registered the land in his name upon redemption and thereafter failed to pay for the land.

The second defendants claim is equivocal. He seems to say that plaintiff wrongfully transferred his land to himself and also that plaintiff failed to pay the purchase price. This fact must be taken into account.

Further, it appears from the Defence and counterclaim that it is about 1974 when plaintiff unlawfully transferred the lands in dispute to himself without 2nd defendants consent. The counterclaim was filed on 19.2.96 - over 20 years since the alleged illegal registration. By the limitation of Actions Act, a claim to recover land must be brought before expiry of 12 years. The 2nd defendant claim is therefore prima facie time barred. Further the counter claim seems an after thought because 2nd defendants did not file a suit since 1974 to recover land from the plaintiff.

The second defendant alternatively counter claims for land by adverse possession. He claims that he has acquired title by adverse possession. A claim to land by adverse possession must be brought by originating summons (order XXXVI Rule 3D CP Rules). So, there is no competent claim to recover land by adverse possession.

The claim that plaintiff is registered as a trustee for first defendant is vague and contains no particulars of trust. There is no prayer for a declaration of trust in the Defence and counter claim.

It is apparent that plaintiff does not live on the land He give specific dates when trespass was committed. The 2nd defendant admits that he has been cutting trees, cultivating the land and burning charcoal. He also admits to have sold trees. Defendants counsel in the cause of his submissions, said that he knows the land in dispute and that there is tea bushes which are overgrown. It appears that defendants do not live on the land for how could they have allowed the tea bushes to overgrow if they are living there? In the circumstances of the case, it is improbable that defendants have been continuously occupying the land in dispute.

Plaintiff has been the registered owner for many years. Defendants admit that they have been cultivating the land and cutting down trees, burning charcoal and selling some trees, the acts plaintiff is complaining about. As I have attempted to show above defendants count has no strong likelihood of success.

In al circumstances of the case, it is just and equitable that status quo be maintained pending the determination of the suit.

Consequently, I allow the application with costs in the cause and grant orders of injunction in terms of prayers nos 2, 3, and 4 of the application until the determination of the suit or until further orders of the court.

E. M. Githinji

Judge

24.2.2000

Mr. M'Inoti present

Mr. Kingara present