



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 215 of 1999

1. FRANCIS ORIKO

2. PETER PANYAKO.....APPLICANTS

- versus -

JACOB KUMALI MUNG'ALLA.....DEFENDANT/RESPONDENT

RULINGS

The applicants Francis Oriko and Peter Panyako filed this originating summons against one Jacob Kumali Mung'alla seeking determination of the following issues:

1. Whether the plaintiffs have acquired by share contributions, by adverse possession of parcel of land known as plot No 35 within Chepsaita Settlement Scheme comprising 62 acres having occupied their respective proportions nec vi nec clam nec precario since 1974.
2. Whether or not the plaintiffs are entitled to an order compelling the defendant to subdivide and register the plaintiffs as share proprietors of 30 acres and 15 acres respectively in plot No 35 within Chepsaita Settlement Scheme.
3. Whether or not the plaintiffs are entitled to costs of this originating summons.

The originating summons was accompanied by an application under certificate of urgency brought under order 39 rules 1, 2 and 7 and Order 21 rule 22 and 25 and section 3A of the Civil Procedure Act seeking orders that there be a temporary injunction restraining the defendant/respondent from evicting the plaintiffs/applicants from the parcel of land plot No 35 in Chepsaita Settlement Scheme until the hearing and determination of this suit, that there be a stay of eviction proceedings in Eldoret SPMCC No 930/1979 listed for hearing on the 18th October 1999 until the hearing and determination of this application, that the applications be heard interpartes and that costs be provided for.

The grounds are set out in the supporting affidavits, annexures and oral submissions in court and the main ones are that the applicant and his family have been occupying a portion of the suit land since 1974 and have extensively developed it to the tune of Kshs 1,200,000/-, that they have obtained a good title by way of adverse possession, that if evicted the suit will be rendered nugatory, that they have complied with the principles governing the granting of injunctions, that they will suffer irreparable harm if evicted and that the balance of convenience is in their favour because they are on the land, that the respondent has a title and so he will not be inconvenienced in any way, they deny filing this suit with a view of defeating justice, that the

issue of resjudicata does not arise as the case SPMCC No 920/79 was for eviction and not adverse possession.

The respondent has on the other hand opposed this application on the grounds of opposition filed and annexures and oral submissions in court and his main grounds are Order 21 rule 25 is not applicable as there is no decree for stay, that the issue of partnership has been raised but this was dealt with in the case of 920/79 in which the court heard both parties and came to the conclusion that there was no trust or partnership and that they (applicants) were entitled to a refund, of a loan paid towards the land which money has already been refunded, that the matter went to the court of appeal and the present applicant lost, that adverse possession cannot succeed because the applicant entered the land in 1974 and by 1979 a dispute had already arisen over the land and a case was filed by the respondent seeking possession and at the same time eviction, that the applicants filed a counter claim which was adjudicated upon and judgment given and it is their view that time ceased running when, the suit was filed in 1979, that there is a valid decree which is being enforced and the only reason why eviction has not succeeded is because there have been several applications by the applicants meant to defeat the respondent's judgment, that applicants should not be granted this relief as they have not disclosed material particulars namely that there have been other suits between the parties all of which have been resolved in favour of the respondent, that applicants were aggrieved by these orders and have sought relief up to the court of appeal but lost, that they have other parcels of land where they can move to with their families, that an injunction cannot issue in their favour as what they are claiming can be quantified and paid for in monetary terms, they still maintain that this application is just meant to defeat the lower court's decree as the applicants do not want to obey court orders, that proceedings before the elders do not hold as the matter has already been adjudicated upon by a court of law.

Upon hearing both parties to this application it is clear that in order for the applicants to succeed they have to bring themselves within the ambit of the principles governing the granting of the injunctions namely:

1. That they have a prima facie case with a high probability of success.
2. That damages will not be an adequate compensation and that if not granted they will suffer irreparable harm.
3. That the balance of convenience is in their favour.
4. One other principle which they have to satisfy is that.

This being an equitable remedy equity requires that he who comes to equity must come with clean hands. I have considered the submission and the depositions of both parties and find that applicants did not disclose that there have been previous proceedings between them on the same subject matter save that they mentioned an impending eviction which promoted these proceedings. The respondent has outlined and given particulars of these proceedings, their results are disclosed but copies not annexed and the court was requested to peruse the relevant files. I have indeed called and perused the same. The first one is in Eldoret RMCC No 920/79 which later changed to 878/86. This was between Jacob Kumali Mung'alla as plaintiff against Francis Oriko and Peter Panyako. I have failed to get copies of the pleadings of the file. The decision of the court is as follows from page 2, last paragraph, line 5 from the bottom continuing to page 3 –

“I find no evidence whatsoever that there was any indication that the plot was bought jointly by the three parties. I find as a fact that the plaintiff borrowed part of the sale price from the defendants and that he allowed them to stay on the plot as some sort of security for repayment thereof. It therefore follows that the moment the plaintiff decided to reverse the informal licence or permission he gave to the defendants to stay on the plot they became trespassers.

In any event even if I had found that an attempt to create a trust had been made such a trust became void because the consent of the appropriate land control board had not been obtained.

It is unfortunate that the parties did not go and seek appropriate legal advice when purchasing the property.

In the result therefore I enter judgment for the plaintiff declaring that he is the sole proprietor of Plot No 35 Chepsaita Settlement Scheme and dismiss the defendants counter claim.

There shall be no order as to costs.”

The foregoing decision gave birth to Eldoret HCCA No 10/80 between Francis Oriko and Peter Panyako as appellants against Jacob Kumali Mung'alla as the respondent. It was an appeal against the decree in the lower court's case dated on 25th June 1980 and issued on 1st October 1981. The appeal was heard and judgment delivered on 31/1/81 whereby the appeal was dismissed with costs to the respondents. From here the matter went to the court of appeal vide Court of Appeal Case No 58/81 between Francis Oriko and Peter Kumali as appellants versus Jacob Kumali Mung'alla as the respondent. By an order issued on 20th March 1984 the said appeal was ordered by consent of both parties to be withdrawn with costs to the respondent.

There is also Eldoret SRMCC No 346/83 between Francis Oriko Umuguya as the plaintiff against Jacob Okumali Omungal. This file gave birth to Eldoret High Court Mis Civ Application No 12/83. A ruling was delivered in the miscellaneous file dated and delivered at Eldoret on 30th May, 1983. The applicant was Jacob Kumali Mungala as the applicant against Francis Oriko Omugula and Peter Panyako Zablon as the respondents. He sought a declaration that Eldoret SRMCC No 346/83 filed by respondents on 6th April 1983 at the Resident Magistrate's Court Eldoret is resjudicata and consequently that it must be struck out. It is observed in the ruling that the respondents had filed case No 920/79 involving same parties same parcel of land No 33 Chepsaita Settlement Scheme. That the Resident Magistrate decided that case in favour of the applicant. Thereafter the respondents appeal was dismissed vide HCCA No 10/80. That the respondents application to appeal out of time to the court of appeal was dismissed. In the circumstances the honourable judge declared suit No 346/83 resjudicata and therefore incompetent and it was struck off. The orders are dated 30th May 1983.

The applicants who are Francis Oriko and Peter Panyako have filed this originating summons seeking adverse possession of the suit land No 35 Chapsaita Settlement Scheme and on the strength of that pleading they seek to restrain the respondent from evicting them from the suit land.

Eviction orders are being sought in SRMCC No 920/79.

From the foregoing it is clear as contended by the respondents that in order for the applicant to have a prima facie case there must have been continuous, peaceful, uninterrupted occupation of the suit land for a period of 12 years with the knowledge of the respondent. The records outlined above show that parties started casing in 1977 and the matter went up to the court of appeal ending in 1984. I agree that the cases interrupted the period from running and it had to start running afresh and there is no way the applicants can claim adverse possession from 1974.

Apparently after the court of appeal decision there was a silence till around 1993-1994 when proceedings were taken in the matter against and so this also interrupted the period from running. It follows that from 1994 to the year 2000 a period of 12 years has not elapsed. Secondly the issue of share contribution was dealt with in RMCC 920/79, HCC No 10/80 and CA 58/81 and I agree with the respondents contention that those matters are resjudicata. Thirdly the applicants did not give a history of the previous litigations between them and so they

came to this court with unclean hands.

All the foregoing go to show that the applicants do not have a prima facie case with a high probability of success. As for the record ingredients there is no way applicants can suffer irreparable harm. The matter has been substantially adjudicated upon and if there is any issue of compensation involved the same can be computed and paid for by way of damages. In fact as observed by the respondent's lawyers part of this money has been computed.

As for balance of convenience it does not tilt in their favour despite the fact that they have been on the land for many years since 1974 in view of the litigation which has transpired between them. All the orders referred to are in favour of the respondent and so the balance of convenience tilts in his favour.

For the reasons given and the fact that the applicants came to court with unclean hands by failing to disclose material facts and particulars of previous litigation between them they cannot get any interim orders.

The application is therefore refused with costs to the respondent.

Dated and delivered at Eldoret this 17th day of February, 2000.

R NAMBUYE

JUDGE.