REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 352 OF 2017

WILLIAM KIPKINYOR ROTICH.....PLAINTIFF

VERSUS

PAUL KIPROP KARONEY.....DEFENDANT

RULING

This ruling is in respect of an application dated 19th October 2017 brought by way of notice of motion by the plaintiff/applicant for orders:

1) Spent.

2) That pending the hearing and determination of this application, the Honourable court be pleased to issue a temporary injunction restraining the defendant/respondent by himself, his agents, servants, employees and/or any other person acting on his behalf from encroaching, trespassing into, alienating, occupying, cultivating, claiming leasing or interfering with the plaintiff/applicant's peaceful possession, occupation and use and/or in any other way whatsoever dealing with the parcel of land known as NANDI/KAPTICH/233.

3) That pending the hearing and determination of this suit herein the honourable court be pleased to issue a temporary injunction restraining the defendant/respondent by himself, his agents, servants, employees and/or any other person acting on his behalf from encroaching, trespassing into, alienating, occupying, cultivating, claiming leasing or interfering with the plaintiff/applicant's peaceful possession, occupation and use and/or in any other way whatsoever dealing with the parcel of land known as NANDI/KAPTICH/233.

4) That costs of this application be provided for.

This application was brought under certificate of urgency when the court certified it as urgent and directed that the applicant serves the application within 7 days for inter partes hearing.

Mr. Murgor Counsel for the applicant argued the application and relied on the grounds on the face of the application together with the supporting affidavit. He submitted that the applicant had annexed a copy of the title deed registered in his name and an official search. It was Counsel's further submission that the defendant has filed a defence relying on the doctrine of adverse possession claiming a portion of 2.8acres of the land.

Counsel also submitted that the applicant has clearly stated in his pleadings that he is the registered owner of the suit land and that he has sold part of the suit land to 3rd parties who are not parties to this suit. That what is in issue is a portion measuring 2.5acres and that it is trite law that for a person to plead the doctrine of adverse possession one must proceed by way of an originating summons and must prove that he has been in continuous, uninterrupted occupation for a period of 12 years.

It was further Counsel's submission that the respondent admitted in his replying affidavit and defence that he lives on the adjacent land which is on a different title. Counsel also submitted that from the witness statement it is evident that it is the witness who is in occupation of the suit land and not the respondent and that the trees on the photos are on the boundary.

Counsel cited the case of **TERESA WACHUKA GACHIRA v JOSEPH MWANGI GACHIRA [2009] eKLR** Nyeri Civil Appeal No. 325 of 2003 which he stated that the court observed that failure to follow procedure is fatal to the suit. Counsel submitted that one cannot proceed by way of counter claim for adverse possession. Further that the defendants decided to lay claim when the plaintiff allowed one Anna Mugun to graze on the suit land.

Mr. Murgor also submitted that the suit land is charged as a collateral to Standard Chartered Bank Ltd. He therefore prayed that the application be allowed as prayed.

Defendant's Submission

Mr. Tororei Counsel for the defendant/respondent opposed the application and relied on the replying affidavit together with the annexures. He stated that the principles for grant of injunctions are well settled as per the Giella Casman Brown case. He submitted that the applicant has not demonstrated a prima facie case against the defendant and that unless the orders sought are granted he would suffer irreparable harm.

Counsel further submitted that the particulars of loss must be specifically pleaded and anchored on facts and that from the pleadings the applicant is not likely to suffer any loss. Counsel stated that it is not in dispute that the defendant has been in occupation for a period of more than 12 years and that he has planted trees on the suit premises.

Mr. Tororei submitted that there is a danger that if the orders sought are granted, then it would amount to constructive eviction. Further that it is not true that for a person to advance a claim of adverse possession then the claimant must have built a house on the premises. Counsel urged the court to find that the fact that the defendant has put up a fence, planted trees and pasture constitutes use of the suit land.

The respondent's Counsel also submitted that the defendant has preferred a counterclaim to be registered as a proprietor of 2.8acres and that the procedure adopted is allowed by the law. He cited the case of Civil Appeal No. 17 of 2016 where this procedure of claiming adverse possession by way of counterclaim was adopted.

On the issue that the land is charged to the bank, Counsel cited the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** Civil Appeal No. 83 of 2016 whereby it was held that a charge does not constitute use of land. He therefore urged the court to dismiss the applicant's application with costs to the defendant.

Plaintiff's Counsel reiterated his submissions and stated that the balance of convenience lies in favour of the applicant and that no loss or prejudice will be occasion to the defendant.

Analysis and determination

This is an application for grant of temporary injunction. The issues for determination in this case are whether the applicant has met the threshold for grant of injunctions as was laid down in the case of **GIELLA v. CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

> "***The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

Even though courts are guided by the principles as enunciated in the Giella case, courts must also not turn a blind eye to the circumstances of a case. Each case must be dealt with on its own merits and there are certain cases which have compelling circumstances whereby if the orders sought are not granted, the substratum of the case might be affected.

Both parties relied on their affidavits and the annexed documentation to support their claim. To support his claim of ownership of the suit property, the plaintiff annexed a copy of his title deed registered in his name. The Defendant on this part also laid claim on the suit property on the basis of the doctrine of adverse possession and annexed some photographs of trees and a fence.

The defendant claimed that he does not stay on the suit land but has fenced it and planted trees on it. He also admitted that he has a parcel of land which is adjacent to the suit land where he stays. The defendant stated that he has been using the 2.8 acres which belongs to the plaintiff.

It is not in dispute that the plaintiff is the registered owner of the suit land as he has produced a title deed in his name. The defendant also admits that the suit land is registered in the plaintiff's name only that he claims it through adverse possession. It is further not in dispute that the defendant does not stay on the suit land but claims that he has been using it for grazing and has planted trees. It is further admitted by the defendant that he lives on land adjacent to the suit land.

The defendant has not stated how he came into possession of the suit land and why he thinks that he should be allowed to continue using land that does not belong to him if at all. Does it mean that any person can plant trees and fence an adjacent land which does not belong to them as the defendant wants the court to believe? The issue as to whether the defendant has acquired the suit land by adverse possession is a matter to be determined during the full hearing.

On the issue of whether a defendant can claim adverse possession by way of counterclaim, with due respect to Counsel for the applicant, I wish to state that it is proper as there would be no need to file a separate originating summons and yet the claim is arising as a defence.

Even though this is an issue to be tackled at the hearing, it is important to clarify that being in adverse possession does not necessarily mean building a house. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. This is not to say that I am dealing with the issue of adverse possession but it was submitted by counsel therefore I had to deal with it.

The production of a title deed by the plaintiff is prima facie evidence that he is the rightful owner of the suit property. In this case it is clear that he is the rightful owner as the defendant does not dispute that the title is in the plaintiff's name.

Section 26 (1) of the Land Registration Act states as follows:

"The Certificate of Title issued by the Registrar upon registration … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner… and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

I find that the plaintiff has established a prima facie case with a probability of success in this case.

On the second limb whether damages would be an adequate compensation, land is unique and persons have sentimental attachments which might not be given monetary value. That is the reason why Kenyans are very litigious even for small pieces of land. I find that from the evidence on record that damages would not be adequate compensation for the plaintiff. The defendant will also not suffer any prejudice if the orders are granted as he admitted that he does not reside on the suit land. Therefore the balance of convenience tilts in favour of the plaintiff to conserve the substratum of the suit.

I find that the application has merit and is therefore allowed as prayed.

Dated and delivered at Eldoret this 2nd day of October, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Murgor for Plaintiff/Applicant and in the absence of Mr. Tororei for the Defendant/Respondent.

Mr. Koech: Court Assistant.