



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. E003 OF 2020 (OS)

ELIZABETH WANJIRU GAKUYA.....PLAINTIFF

VERSUS

GERALD MWANGI MATHENGE.....DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 13th October, 2020 grounded upon **Section 38 of the Limitation of Actions Act (Cap. 22), Order 37 rule 7 of the Civil Procedure Rules (the Rules)**, and **all enabling provisions of the law** the Plaintiff sought adverse possession of *Title No. Mutara/Mutara Block II/1544 (Uruku) (the suit property)* against the Defendant who is the registered proprietor thereof. The said summons was supported by an affidavit sworn by the Plaintiff on 13th October, 2020. It was contended that she had been in open, continuous and uninterrupted possession and occupation of the suit property since 2003.

B. THE PLAINTIFF'S APPLICATION

2. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 13th October, 2020 expressed to be based upon **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 40 rules 1, 2, 3 and 4, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 (the Rules)**, and **all enabling provisions of the law** seeking the following orders:

(a) Spent.

(b) Spent.

(c) That the O.C.S. Subego Police Post to ensure compliance with the orders issued by this honourable court.

(d) That pending the hearing and determination of this suit a temporary injunction do issue restraining the Respondent by himself, his agents, servants or employees from trespassing, erecting structures, transferring, leasing, alienating, interfering and/or dealing with L.R. Mutara/Mutara Block II/1544 (Uruku) in a manner that is adverse to the rights and interests of the Applicant.

(e) That the costs of this application be borne by the Respondent.

3. The application was supported by the supporting affidavit sworn by the Plaintiff on 13th October, 2020 and the exhibits thereto. The Plaintiff contended that the Defendant had invaded or encroached upon the suit property in August, 2020 by entering the land and cutting down trees, destroying the fence and constructing a structure thereon. It was the Plaintiff's case that she had been in open, continuous and uninterrupted possession of the suit property since 2003 hence she had acquired prescriptive rights over it under the **Limitation of Actions Act (Cap. 22)**.

C. THE DEFENDANT'S RESPONSE

4. The Defendant filed a notice of preliminary objection dated 25th November, 2020 raising two objections to the suit and application. The first was that the limitation period of 12 years had not lapsed under the **Limitation of Actions Act**. The second was that the Defendant was only registered as proprietor of the suit property on 11th April, 2018 hence the doctrine of adverse possession was not applicable to him.

5. The Defendant also filed a replying affidavit sworn on 25th November, 2020 opposing the application on several grounds. First, that he was the absolute registered owner of the suit property which he purchased for valuable consideration. Second, that the Plaintiff was merely a trespasser on the suit property since she owned her own parcel No. 1341 in the same locality. Third, that the doctrine of adverse possession was not applicable to the Plaintiff since she trespassed into the suit property in 2016. Finally, it was contended that the Plaintiff's documents in support of her claim were forgeries. The court was consequently urged to dismiss the application with costs.

D. DIRECTIONS ON SUBMISSIONS

6. When the application was listed for hearing on 16th March, 2021 it was directed that both the Plaintiff's application and the Defendant's preliminary objection shall be canvassed together through written submissions. The parties were given 14 days each which to file and exchange their respective submissions. The record, however, shows that the Plaintiff's submissions were filed on 28th May, 2021 whereas the Defendant's submissions were filed on 26th May, 2021.

E. THE ISSUES FOR DETERMINATION

7. The court has perused the Plaintiff's notice of motion dated 28th October, 2020, the Defendant's preliminary objection dated 25th November 2020, the replying affidavit in opposition thereto and the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether there is merit in the Defendant's preliminary objection dated 25th November, 2020.*

(b) *Whether the Plaintiff has made out a case for the grant of the interim orders sought.*

(c) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATION

(a) **Whether there is merit in the Defendant's preliminary objection dated 25th November, 2020**

8. The court has considered the submissions and material on record on this issue. The gist of the Defendant's notice of preliminary objection was that the Plaintiff's claim for adverse possession was premature and untenable in law on account of two reasons. First, that the Plaintiff had only entered the suit property in 2016 hence falling short of the statutory limitation period of 12 years. Second, that the Defendant was registered as proprietor of the suit property in 2018 hence 12 years had not passed by the time the Plaintiff's originating summons was filed in 2020. The Defendant cited **Gitu v Ndung'u [2001] eKLR** and **Ephantus Mihigo Ngotho v John Kongwalei Sawe and Another [2018] eKLR** in support of the preliminary objection.

9. The court is of the opinion that the Defendant is of the strong view that the Plaintiff's claim for adverse possession is so weak and hopeless hence it should be canvassed and terminated at the interlocutory stage. However, the court should be wary of conducting a mini-trial for the purpose of assessing the validity of the Plaintiff's claim at the interlocutory stage and without the benefit of a full trial. The court should be particularly cautious where there is a dispute as to some factual matters.

10. As was held in the case of **Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd [1969] EA 696** a preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the claimant are true. It cannot be validly raised if any facts have to be investigated or ascertained. The court has noted from the material on record that whereas the Plaintiff pleaded that she had been in occupation of the suit property since 2003 the Defendant contended that she entered the suit property in 2016. The Defendant is now urging to determine its preliminary objection on the basis that the Plaintiff entered the suit property in 2016. Clearly, the date of entry is a contested fact which can only be investigated and determined at the trial. The court is further of the opinion that the mere fact that the Defendant was registered as proprietor in 2018 is not necessarily conclusive evidence that time could only run with effect from 2018. Accordingly, the court finds that the Defendant's objection does not fall within the four corners of a preliminary objection as known to law hence the court is inclined to overrule it.

(b) **Whether the Plaintiff has made out a case for the grant of the interim orders sought**

11. Whereas the Plaintiff contended that she had satisfied the requirements for the grant of an injunction, the Defendant contended otherwise. As was held in the case of **Giella v Cassman Brown & Company Ltd [1973] EA 358**, an applicant must demonstrate a *prima facie* case with a probability of success and that he shall otherwise suffer irreparable loss or damage in the absence of an injunction. Where the court is in doubt on the second principle, it shall decide the case on a balance of convenience.

12. The court is satisfied from the material on record that the Plaintiff has made out a *prima facie* case. It is evident from the material on record that she has been in occupation of the suit property for a considerable period of time and that she has developed the same. In her application, the Plaintiff averred that the Defendant had invaded the suit property in August 2020, destroyed the fence, felled some trees and constructed a structure thereon. The court has noted that the Defendant did not dispute any of those details in his replying affidavit sworn on 25th November, 2020. The Defendant simply maintained that he was the registered proprietor of the suit property; that the Plaintiff was merely a trespasser; and that her supporting documents were forgeries.

13. On the second principle, the court is satisfied from the material on record that having settled on the suit property for a considerable period of time, the Plaintiff shall suffer irreparable loss should she be evicted or should the suit property be alienated during the pendency of the suit. The court is of the opinion that in addition to preventing the eviction of the Plaintiff from the suit property, it has a duty to preserve the

suit property pending the hearing and determination of the suit so that it becomes available to the successful party upon conclusion of the litigation.

14. Even if the court were to consider the balance of convenience, the same would tilt in favour of the Plaintiff. The material on record shows that the Plaintiff has been in possession of the suit property even prior to the filing of the suit. The Plaintiff appears to have made some developments on the suit property over the years. The court is thus of the opinion that Plaintiff shall suffer greater hardship by refusing the injunction than the Defendant shall suffer by granting the same. Accordingly, the court is inclined to grant the orders sought as shall be specified hereafter.

(c) Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jannohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the main suit is still pending the court is of the opinion that costs of the preliminary objection and the application should be in the cause.

G. CONCLUSION AND DISPOSAL

16. The upshot of the foregoing is that the court finds no merit in the Defendant's preliminary objection but finds merit in the Plaintiff's application for interim orders. Accordingly, the court makes the following orders for disposal of the application and the preliminary objection:

(a) The Defendant's notice of preliminary objection dated 25th November, 2020 is hereby overruled.

(b) That pending the hearing and determination of the suit an interim injunction be and is hereby granted restraining the Defendant from evicting the Plaintiff, transferring, leasing, alienating, dealing with or interfering with Title No. Mutara/Mutara Block II/(Uruku).

(c) The OCS Subego Police Post shall ensure compliance with order No. (b) above in so far as eviction is concerned.

(d) Costs of the preliminary objection and the application shall be in the cause.

Orders accordingly.

RULING DATED AND SIGNED AT NAIVASHA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 22ND DAY OF JULY 2021.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

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Y. M. ANGIMA

ELC JUDGE