



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 9 OF 2020

(Formerly Bungoma CM's ELC No. 170 of 2018)

JAMES KIMALENI SANGURA..... PLAINTIFF

VERSUS

JOSEPH BUYUNI MWAYAFU..... DEFENDANT

RULING

BUNGOMA ELC CASE No 9 of 2020 (formerly **BUNGOMA CMCC No 170 of 2018**) and **BUNGOMA CMCC No 186 of 2018** having been consolidated, the lead file became **BUNGOMA ELC CASE No 9 of 2020**. Directions were subsequently issued that the Originating Summons in **BUNGOMA ELC CASE No 9 of 2020** would be the plaintiff. The plaint in **BUNGOMA CMCC No 186 of 2018** would be the defence and Counter – Claim.

In **BUNGOMA ELC CASE No 9 of 2020** **JAMES KIMALENI SANGURA** (the plaintiff) sought through his amended Originating Summons filed on 19th November 2018 that he has acquired by way of adverse possession the land parcel **NO EAST BUKUSU/NORTH SANG'ALO 185** (now **2884** and **2885**) having occupied it peacefully, continuously and un – interrupted for a period exceeding 12 years.

JOSEPH BUYUNI MWAYAFU (the 1st defendant) filed a reply to the Originating Summons stating that no adverse possession can arise with respect to the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/1805** (now **2884** and **2885**) hereinafter the suit land. He added that he has filed a suit for the eviction of the plaintiff following a Judgment of the Court in case **No 36 of 2001**.

On the other hand, in **BUNGOMA CMCC No 186 of 2018** **JOSEPH BUYUNI MWAYAFU** (1st defendant) filed a suit against **JAMES KIMALENI SANGURA, STEPHEN WALUBI, NANJULULU MUKHWANA, WILLIAM WAMBANI, DUNCAN MASINDE** and **BEATRICE WAKHISI** seeking their eviction from the suit land on the basis that he is the registered proprietor thereof following orders issued in Appeal case **No 36 of 2001** which had quashed earlier orders issued by the **KANDUYI LAND DISPUTES TRIBUNAL CASE No 50 of 1997**.

A defence was filed by the plaintiff, **STEPHEN WALUBI** and **WILLIAM WAMBANI** claiming that they have been in possession of the suit land for over 12 years and are entitled to it by way of adverse possession. The other 3rd, 5th and 6th defendants appear not to have filed any defence and indeed a request for Judgment against them was filed on 4th June 2019 before the suit was transferred to the Court.

The record shows that prior to the transfer of **CMCC No 186 of 2018** to this Court, one **TELILA NASIKE WELEKHE** was enjoined in these proceedings as an Interested Party following orders issued by the Chief Magistrate **HON J. KING'ORI** on 10th July 2018. That was not brought to the attention of this Court when it made orders consolidating the suits on 19th February 2020. Indeed, **MR TSIMONJERO** Counsel for the said Interested Party was not present. The said **TELILA NASIKE WELEKHE** proceeded to file her statement of defence on 6th August 2018 and is therefore the 7th defendant herein.

The application subject of this ruling only concerns the plaintiff and 1st defendant and not the other parties. This Court will therefore proceed to consider it notwithstanding that the 7th defendant was not served as no prejudice will be caused to her.

What calls for my determination is the plaintiff's application dated 12th July 2021 seeking the following remedies against the 1st defendant: -

1. Spent

2. Spent

3. That an order of temporary injunction be issued against the 1st defendant his agents, servants, employees, assignees, personal representatives and/or any other person claiming under his title or jointly from entering, ploughing, charging, interfering, leasing, selling disposing or making any development on the suit land referred to as EAST BUKUSU/NORTH SANG'ALO/1805 (formerly 2884 and 2885) pending the hearing and final determination of the suit herein.

4. That an order be issued to the County Land Registrar and the County Surveyor restraining them from dealing with or making any registration or entry on the register of L. R. NO EAST BUKUSU/ NORTH SANG'ALO/1805 (formerly 2884 and 2885) pending the hearing and determination of the suit herein.

5. That the Court be pleased to issue any other orders preserving the suit land herein pending the hearing and determination of this suit.

6. That the defendant be condemned to pay the costs of this application.

The application is supported by the plaintiff's affidavit also dated 12th July 2021 and the grounds set out therein.

The gist of the application is that the Applicant is in occupation of the suit land and has filed a suit claiming to have acquired it by way of adverse possession. That he has been served with summons to attend a boundary determination on 14th July 2021 regarding land parcels **NO EAST BUKUSU/NORTH SANG'ALO/ 1805, 1806, 1807 and 1808** by the County Survey Office Bungoma requiring his attendance at the site. That the said summon purport to execute the decree issued in 2017 in **Bungoma High Court Civil Appeal No 36 of 2001**. That it will be prejudicial to his case if the 1st defendant deals with the suit land and the register before the hearing date.

When the application was placed before me on 14th July 2021. I granted prayers 1 and 2 and directed that it be canvassed by way of written submissions. The Plaintiff/Applicant was required to file and serve his submissions within 14 days while the 1st Defendant/Respondent would have 14 days from the date of service within which to file his response and submissions. The matter would then be mentioned on 16th August 2021 to confirm compliance. However, all that is on record are the submissions by the 1st defendant/Respondent but they are in respect to an application dated 7th May 2015 being the Interested Party's application to be enjoined herein. That application was in fact dated 7th May 2018 and was determined by **HON J KING'ORI (CHIEF MAGISTRATE)** on 10th July 2018. Most significantly, the 1st Defendant/Respondent did not file any response to the Plaintiff/Applicant's Notice of Motion dated 12th July 2021 and which is the subject of this ruling. The application is therefore not opposed.

I have considered the application, un – opposed as it is. From the documents filed herein, it is clear that the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/1805** was first registered in the name of the 1st defendant on 19th September 1983 and thereafter in the name of **TECLA OMINA WEKESA** on 5th June 1984 before that title was closed on 8th May 1996 following its sub – division to create parcels **NO EAST BUKUSU/NORTH SANG'ALO/2884 and 2885** which are registered in the names of **TECLA OMINA NEKESA** and **STEPHEN WALUBI MAKOKHA** respectively as per the Certificate of Search issued on 31st July 2018. However, the sub – division of the land parcel **NO EAST BUKUSU/ NORTH SANG'ALO/1805** which was pursuant to a decision of the **KANDUYI LAND DISPUTES TRIBUNAL** as up – held by the **WESTERN PROVINCE LAND DISPUTES APPEALS COMMITTEE** was set aside by **MUKUNYA J** on 10th March 2017 in **BUNGOMA HIGH COURT CIVIL APPEAL No 36 of 2001**. The Judge directed that the Land Registrar Bungoma reinstate the register as it was prior to the decision of the **WESTERN PROVINCE LAND DISPUTES APPEALS COMMITTEE**'s decision. It is not clear if that decision was effected but if the Certificates of Search produced herein are anything to go by, it would seem that the land parcels **NO EAST BUKUSU/SOUTH SANG'ALO/2884 and 2885** still appear in the register of the Land Registry Bungoma contrary to the orders issued in **BUNGOMA HIGH COURT CIVIL APPEAL No 36 of 2001**. The Judge having made a finding that the decision of the **WESTERN PROVINCE APPEALS COMMITTEE** was **“a nullity,”** it follows that in law, the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/1805** was reverted to the name of the 1st defendant.

It is the plaintiff's case that he is the one in occupation of the suit land and seeks orders to injunct the 1st defendant, his agents, servants, employees, assignees, representative or any other person claiming under him from entering, ploughing, changing, interfering, leasing, selling or developing the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/1805** and also an order restraining the County Land Registrar and Surveyor from making any entry on the register of the said land. Annexed to the application is a letter dated 25th June 2021 from the County Surveyor Bungoma inviting the plaintiff, the 1st defendant as well as other parties to attend a site visit on 14th July 2021 when the verification of the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/1805, 1806, 1807 and 1808** would be carried out.

In the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358**, the following conditions were laid down with regard to when a Court will grant a temporary injunction. These are: -

1. The Applicant must show a prima facie case with a probability of success of the trial.

2. Secondly, that a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which will not adequately be compensated by an award of damages.

3. If in doubt, the Court will determine the application on a balance of convenience.

In **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD .V. TWO OTHERS C.A C IVIL APPEAL No 39 of 2002 [2000 eKLR]**, a prima facie case was defined as: -

“..... a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In the case of **FIRMS ROVER INTERNATIONAL .V. CANNON FILM SALE LTD 1986 3 ALL E R 772**, the Court stated that while considering such an application, the Court will take the route that appears to carry the lower risk of injustice should it turn out to have been wrong.

As in **NGURUMAN LTD .V. JAN BONDE NIELSEN & TWO OTHERS C.A CIVIL APPEAL No 77 of 2012**, it was held that in considering whether or not a prima facie case has been established, the Court must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for the injunction has a right which has been or is threatened with violation.

The plaintiff's claim that he is in occupation of the suit land is not rebutted. Indeed, that is why he has moved to this Court for orders in adverse possession. A prima facie case has, in my view, been established on the material on record.

In his supporting affidavit dated 13th April 2018 filed together with the initial Originating Summons, the plaintiff states that having taken possession of the suit land in 1969 or thereabout, he constructed a house and has even buried his late mother and children on the said land without any resistance from the 1st defendant. Given those averments which were not rebutted, I am persuaded that any interference with the suit land will result in irreparable loss or injury to the plaintiff which cannot be adequately compensated by an award of costs especially if the suit land is sold and the graves hereon are desecrated.

If I was in any doubt, which I am not, I would still hold that this balance or convenience is in favour of granting the order for temporary injunction.

With regard to the second prayer, it is clear that the County Surveyor intended to visit the suit land on 14th July 2021 for purposes of identification of its boundary together with the boundary of land parcels **NO EAST BUKUSU/ NORTH SANG'ALO/1806, 1807 and 1808**. This Court did issue an ex parte order on 14th July 2021 restraining the County Land Registrar and Surveyor from undertaking that exercise pending the hearing inter – parte. The purpose of a temporary injunction is to preserve the property in dispute pending the trial. Clearly therefore, if the boundary of the suit land is altered before the trial, other parcels of land may be created thus interfering with the plaintiff's right and the substratum of the case will have been destroyed before the trial. Clearly therefore, the application is merited and there is need to issue the orders sought in order to preserve the suit land pending the hearing and determination of the suit.

The up – shot of the above is that the Notice of Motion dated 12th July 2021 is hereby allowed with no orders as to costs.

The parties shall ensure that they expedite compliance with the pre – trial directions and have this suit heard and determined within the next 12 months otherwise the temporary injunction shall lapse unless the Court directs otherwise.

BOAZ N. OLAO.

J U D G E

23RD SEPTEMBER 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF SEPTEMBER 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

23RD SEPTEMBER 2021.