



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC OS E17 OF 2020**

**IN THE MATTER OF LAND REGISTRATION LAND ACT CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF SECTION 7, 17, AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22**

**AND**

**IN THE MATTER OF LAND PARCEL NUMBER KISUMU/BLOCK/4/296**

**AND**

**IN THE MATTER OF SILAS OKAL OUNDU AND MARY AUMA ONDU**

**AND**

**IN THE MATTER OF ORDER 31 RULE 7 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**SILA OKAL ONDU.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARY AUMA ONDU.....DEFENDANT/RESPONDENT**

**RULING**

By Originating Summons dated 22/10/2020 the plaintiff claims adverse possession in parcel number Kisumu/Block 4/296 having been in quiet peaceful continues all uninterrupted period exceeding 12 years. The plaintiff claims that the Defendant's property interest has been extinguished by virtue of the plaintiff's adverse possession and that the defendant is now holding the title in trust for the plaintiff. That the title issued to the defendant should now be revoked and cancelled and the title transferred to the plaintiff. The application is based on grounds that:

1. Despite the registration of the title of the said land parcel number KISUMU/BLOCK 4/296, in the name of MARY AUMA ONDU, the Plaintiff/Applicant herein has continued to stay of the said parcel of land uninterrupted, undisturbed, peacefully and as of right and without any interference for over 12 years from 2002, a period cumulatively totalling to more than 18 years to date.
2. The Plaintiffs have been exercising all the rights of ownership over parcel number KISUMU/BLOCK 4/296, without any interference from the Defendant and have built on the suit property a residential flat that was duly approved by the County Government of Kisumu in the year 2004 that he has been occupying and leased to tenants to-date.

3. The Defendant proprietary interests in the said land parcel number KISUMU/BLOCK 4/296 have been extinguished by operation of the law and that she is now holding the title in trust for the Plaintiff/Applicant.

4. That it would be just and equitable if the parcel number KISUMU/BLOCK 4/296 should now be registered in the name of the Plaintiff by virtue of his continuous, peaceful, exclusive and uninterrupted occupation of the same for a period of more than 12 years and/or cumulatively more than 18 years as from 2002 to date.

Accompanying to originating summons is an application for temporary injunction dated 22/10/2020. The Plaintiff seeks orders that the defendant be restrained from trespassing onto, developing, alienating, disposing off or in any other way howsoever interfering with the applicant's quiet enjoyment of the property. The Plaintiff claims to have secured possession and use of the property with the approval and knowledge of the defendant with agreement that he would assume full and lawful ownership of the suit property. He has been in possession for more than 12 years.

The Defendant on her part states that she is the registered owner of the suit property and has developed every inch of the property and has never given any inch of the property to the Plaintiff. She has annexed the form of transfer of the property, certificate of lease, lease, the invoice for plan approval fees, building inspection fees, Height inspection fees dated 31/12/2004. She has attached the official receipt of the Kisumu municipal Council dated 31/12/2004 in respect of the approved plans.

I have considered the rival submissions and do find that it is not in dispute that the respondent is the registered owner of the suit property. However, it is in dispute that the defendant gifted the plaintiff with the suit property and permitted him to secure ownership. There is no evidence of such gift in writing. The Plaintiff has not responded to the allegations by the defendant that she developed the property and in respect of the approved plans.

The defendant states that she constructed the buildings on the land but allowed his brother to supervise the property by collecting rent and paying the caretaker, the balance was to be ploughed back into the property. The property is occupied by tenants and not the Plaintiffs.

There are three main principles applicable to the granting of an interlocutory injunction in Kenya. These are:

1. Prima facie case
2. Irreparable injury
3. Balance of convenience

These principles were set out in the case of East Africa Industries Ltd v. Trufoods Ltd[1972] EA 420. These were reiterated in the case of Giella v. Cassman Brown[1973] EA358.

In East Africa Industries Ltd v. Trufoods Ltd, Spry, V-P (CAEA) said:

**“A plaintiff has to show a prima facie case with a probability of success and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.”**

In Giella v. Cassman Brown, the Court said,

**“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 normally be 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 the application on a balance of convenience.”**

I do find that the Plaintiff has not proved on a prima facie basis that he is in adverse possession of the property. Even if he is in possession of the property it is with the approval of the defendant as he admits in his supporting affidavit. On the issue of irreparable harm or loss, I do find that the plaintiff has not disclosed the amount of money he is receiving from the rents in respect of the property and that the defendant is not capable of paying back if the plaintiff succeeds in his case.

The balance of convenience tilt towards this courts making an order that the rental income from the suit property be deposited in court, but there is no request for such an order.

The upshot of the above is that the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic*

*and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**