



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

EL C (O.S) CASE NO. 7 OF 2021

IN THE MATTER OF TITLE DEED NUMBER SOUTH MUGIRANGO/BOIKANGA/2432

IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 OF LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 (AS AMENDED)

AND

IN THE MATTER OF ORDER 37 RULES 1 & 7 OF THE CIVIL PROCEDURE RULES 2020

BETWEEN

CATHOLIC DIOCESE OF KISII.....PLAINTIFF/APPLICANT

VERSUS

ALVIN MAGANGE.....DEFENDANT/RESPONDENT

RULING

1. This ruling pertains to the Applicant's Notice of Motion dated 7th June 2021 which was filed together with the Originating Summons. In the said application the Applicant seeks a temporary injunction to restrain the Defendant/Respondent by himself, his children and/or family members, agents, servants, assignees, legal representatives or any other persons acting on his instructions directly or indirectly from entering into a portion of land measuring 0.3 Hectares or thereabouts forming part of land parcel number SOUTH MUGIRANGO/BOIKANGA/2432 registered in the name of the Respondent and evicting the Applicant and/or demolishing the Applicant's church or damaging the church building or doing any other thing whatsoever which is meant to prevent the Applicant's members from worshipping or in any way interfering with the Applicant and her members' peaceful occupation, possession and/or use of the said portion of land pending the hearing and determination of the suit herein.

2. The application is premised on the grounds set forth in the Notice of Motion and the Supporting Affidavit of Father Richard Nyangoto sworn on the 7th June 2021. The gist of the said affidavit is that the Applicant church was given a portion of the suit property by one Basibika Nyarangi as a gift way back in 1989. The Applicant initially constructed a temporary church in 1992 where her members have been worshipping. They subsequently started constructing a permanent church in 2015 without any objection from the Respondent. The Applicant only became aware that the Respondent had been registered as the owner of the suit property when he fenced off the suit property and demanded that the Applicant stop holding its church services in the said church. It is the Applicant's contention that since the church has been in peaceful and uninterrupted occupation of the suit property since 1989, she is entitled to the same by way of adverse possession.

3. In response to the application the Respondent filed a Replying Affidavit sworn on the 9th July 2021 in which he deposes that he was registered as the owner of the suit property in 2011 as per the annexed title deed. He avers that the suit property was purchased by his father in 1977 but he died before it was transferred to him. The suit property was subsequently registered in the Respondent's name to hold the same in trust for his siblings. He further deposes that the land was initially registered as L.R No. SOUTH MUGIRANGO/BOIKANGA/2111 and it was subsequently sub-divided into 3 portions being SOUTH MUGIRANGO/BOIKANGA/2431, 2432 and 2433.

4. It is his contention that Basibika Nyarangi who is alleged to have donated a parcel of land to the Respondent is the registered owner of L.R No SOUTH MUGIRANGO/BOIKANGA/2431 while he is the registered owner of L.R No SOUTH MUGIRANGO/BOIKANGA/2432 and therefore the Applicant has no lawful claim over his land.

5. The Respondent further contends that the Applicant has not demonstrated that they are entitled to the suit property by way of adverse

possession nor have they met the threshold for a temporary injunction.

6. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

7. The main issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction.

ANALYSIS AND DETERMINATION

8. The conditions that one must meet in order for the court to grant a temporary injunction were set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

9. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

Whether the Plaintiff has demonstrated that he has a prima facie case with a probability of success

10. Learned counsel for the Plaintiff contended that the Plaintiff is entitled to a portion of the suit property currently registered in the Defendant's name measuring 0.3 Hectares by way of adverse possession as the Plaintiff has been in quiet, peaceful and uninterrupted occupation of the said portion since 1989. It is his further contention that adverse possession can only be proved at the main hearing. Counsel has placed reliance on the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR** where the Court held as follows:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and 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 an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put on a preponderance of probabilities. This means that the court takes the view that on the face of it the applicant's case is more likely than not to succeed.”

11. This position was also stated in the case of **Mbuthia v Jimba Credit Corporation Ltd (1988) KLR** where the court stated that:

“In an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases”

12. The principle that can be gleaned from the above cited case is that at this interlocutory stage, the court should not make up its mind on whether the Applicant has a foolproof case as all that the Applicant needs to demonstrate is that he has an arguable case. In the circumstances, I am of the view that the Applicant has demonstrated that she has a prima facie case with a probability of success.

13. The second condition which the Applicant must satisfy is to demonstrate that if the order of injunction is not granted, the Applicant shall suffer irreparable loss.

14. It is not in dispute that the Applicant has constructed a building on the suit property where they have been worshipping for almost 30 years. Even though counsel for the Respondent has argued that they could look for an alternative place of worship, it is not lost to me that the reason why the church was built on the suit property was to cater for those who could not walk long distances to the next church. In the case of **Evans Muuru David v James Njenga Ndungi & Another (2013) eKLR** the court observed as follows:

“Given the circumstances of the matter, in the event that the applicant is successful at the trial, damages would not be an adequate remedy considering he plaintiff has a building on the suit premises and unless a conservatory order is given, the building could be demolished before the suit is determined”.

15. Lastly, regarding the balance of convenience, I am of the considered view that the Applicant who has invested in the suit property would be greatly inconvenienced if her worshippers who have been worshipping in the Church constructed on the suit property are prevented from accessing the church before the case is heard and determined. The balance of convenience therefore tilts in favour of the Applicant. However, the Applicant should not carry out any further developments on the suit property pending the hearing and determination of this suit.

16. The upshot is that the application is merited and I grant it and make the following orders:

a) A temporary injunction is hereby granted restraining the Defendant/ Respondent by himself, his children and/or family members, agents, servants, assignees, legal representatives or any other persons acting on his instructions directly or indirectly from entering into a portion of land measuring 0.3 Hectares or thereabouts forming part of land parcel number SOUTH MUGIRANGO/BOIKANGA/2432 registered in the name of the Respondent and evicting the Applicant and/or demolishing the Applicant's church or damaging the church building or doing any other thing whatsoever which is meant to prevent the Applicant's members from worshipping or in any way interfering with the Applicant and her members' peaceful occupation, possession and/or use of the said portion of land pending the hearing and determination of the suit herein.

b) The Applicant shall occupy and use the suit property but she shall not carry out any further developments on the suit property until the case is heard and determined.

c) If this suit is not set down for hearing within one year the orders of injunction shall automatically lapse.

d) The costs of this application shall be in the cause.

DATED SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE