



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 822 'A' OF 2014

IN THE MATTER OF THE ESTATE OF MACHIKA IKUTWA (DECEASED)

AND

MICHAEL SHISUBILI KIPLANG'AT.....PETITIONER/APPLICANT

VERSUS

JULIANA MWAYITSI ANYIKA.....OBJECTOR/RESPONDENT

R U L I N G

1. The petitioner/applicant has filed an application dated 24th January, 2017 seeking for orders that:-

1. That the objector/respondent be stopped forthwith from intermeddling with the estate of the deceased.

2. That the objector/respondent be ordered to demolish and remove the building which she has illegally erected on the land of the deceased.

3. That the objector/respondent be stopped from carrying out any work whatsoever on the estate of the deceased until she obtains an order of the court to do so.

4. That the objector/respondent be declared a condemnor of the court for having taken the law in her hands.

5. That the objector/respondent be condemned to pay costs of this application to the applicant.

2. The grounds in support of the application are that the objector has filed an objection against the petitioner's application to be issued with a grant of representation. That while the application was pending the objector/respondent has made a forcible entry into the estate of the deceased and constructed a dwelling house. Further that the respondent wants to prepare the land for the next season.

3. The application is supported by the affidavit of the applicant together with a supplementary affidavit in which he states that the objector filed the objection on the 25th May, 2015. That on the 3rd of September, 2014 she forcibly entered into the suitland and evicted him from the land and demolished his dwelling house and a latrine. That the deceased was his cousin and that he is the heir apparent as the deceased died without a wife or child. That the act of the respondent in constructing a house on the suit land when the objection proceedings are pending amounts to intermeddling with the estate of the deceased.

4. The application was opposed by the respondent through her replying affidavit deponed on 28th February, 2017. She states therein that she bought the suit land in 1975 and has been in occupation since then. That she has developed the land by planting trees and usually plants crops like maize and beans that the land is stony and she usually harvests stones from the land. That it is not true that she forcefully entered into the land when the succession cause was pending. That the applicant has never been in use of the land at any time.

5. The advocates for the parties filed written submissions. The advocates for the petitioner, **C. B. A. Mukabwa & Co. Advocates**, submitted that the respondent has not exhibited any agreement and consent of the Land Control Board to show that she bought the land from the deceased. That the respondent has admitted to harvesting stones from the land. That the illegal occupation of the estate of the deceased and the use of the stones from the estate amounts to intermeddling with the estate. That the respondent has embarked on constructing a dwelling house on the land.

6. The advocate for the respondent, **J. J. Mukavale**, submitted that the respondent has shown that she has been in occupation of the land since 1975. That she has been in use of the land and harvesting stones from the land. That the said activity cannot be construed to mean

wasting of the land. That if the petitioner was evicted in 2015 then he should have filed this application then. The advocate urged the court to dismiss the application for injunctive orders.

Analysis and Determination

7. The petitioner is seeking for injunctive orders against the respondent on the grounds that the respondent is in illegal occupation of the estate of the deceased, that she has erected a dwelling house on the land and that she has been harvesting stones therein and planting crops.

8. The principles for granting an injunction are well settled in **Giella –Vs- Cassman Brown & Co. Ltd (1973) EA 358** that:-

“The conditions for the grant of an interlocutory injunction are 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 an application on the balance of convenience.”

9. The petitioner says that he was evicted from the land in September, 2014. That would mean that the respondent has been in occupation of the land since then. The petitioner has thus stayed for 2½ years before filing this application during which time the respondent has been farming the land and harvesting stones from the land. He has not explained why he did not bring up the application immediately after he was evicted. Besides that the petitioner does not state the time when the respondent constructed the house on the land. He did not exhibit any photographs to show whether the house was under construction or was newly constructed.

10. Both parties have given contradictory affidavit evidence as to when the respondent entered into the occupation of the land. The respondent says that she bought the land from the deceased in 1975 and that she has been in occupation since then. She has filed witness statements in which she has attached a photocopy of what she says is a sale agreement.

11. The petitioner on the other hand says that the respondent entered into the land in 2014. Petitioner has however not laid any document before the court to show that the respondent entered into the land in 2014. If it is true that the respondent has been in occupation of the land since 1975 she can claim the land on the basis of the doctrine of adverse possession. The petitioner has not adduced sufficient evidence to meet the conditions for granting of a temporary injunction.

12. Upon examination of the evidence placed before the court I am of the view that the petitioner has not established a prima facie case with a probability of success. He has not established that if the orders sought are not granted he will suffer irreparable loss that cannot be compensated by way of damages. In the premises the application dated 24th January, 2017 is dismissed with costs to the respondent.

Delivered, dated and signed in open court at Kakamega this 22nd day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for Petitioner/Applicant

Mr. Mukabale for Objector/Respondent

Parties:

Petitioner/Applicant - absent

Objector/Respondent - absent

Court Assistant - George