



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

E.L.C NO 132 OF 2015

MELISA ANDAYI ONGATYA

(Suing on behalf of HENRY ANGATIA BWIRE.....PLAINTIFF

VERSUS

AUGUSTINE OMELE OTABAT.....1ST DEFENDANT

OBARASA OTABAT MUSA.....2ND DEFENDANT

KANOTI EBEL OTABAT.....3RD DEFENDANT

RULING

1. The application for determination before me is a Motion on notice dated 14th February, 2017 indicated to have been filed on 4th February, 2017. The applicant - **MELISSA ANDAYI ONGATIA** - is seeking various orders against three people named as the respondents. The three people are **AUGUSTINE OMELE OTAGUT**, **OBARASA OTABAT MUSA** and **KANOTI EBEL OTABAT**. The application is brought under Order 40 Rules 2(1), (2), 3 (1), Order 51 Rule 10 (2) of the Civil Procedure Rules together with all other enabling law.

2. The relevant prayers for consideration at this stage are as follows:

Prayer 2: That the honourable court do issue an order of injunction against the defendants/respondents, their servants, workers, agents or any other person authorised by them and/or acting through them restraining them from interfering with L.R NO SOUTH TESO/CHAKOL/321 on which the plaintiff resides pending hearing and determination of the suit or until further orders of the court.

Prayer 3: That the O.C.S – Andugosi Police Station does assist in implementing this order.

Prayer 5: That costs of this application be provided for.

3. The application is anchored on grounds, inter alia, that the respondents have stopped the applicant from use of L.R SOUTH TESO/CHAKOL/321 and threatened to harm her; that the plaintiff is the rightful owner of the land, having been in occupation of it for over 25 years to the exclusion of the respondents; that the respondents actions are causing the applicant financial loss as her business deals in produce obtained from the land; and finally that the respondents actions are actuated by malice. The supporting affidavit that came with the application amplified the grounds.

4. The application was responded to by the respondents vide a replying affidavit dated 9th February, 2018 and filed in court on the same date. It was said to have no merits and it was deposed, inter alia, that the applicant is not in actual occupation of the land as she has already been stopped from using it. It was averred too that the applicant has neither been in use nor cultivated it for over 25 years as she alleges.

5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 15th March, 2018. It was submitted, inter alia, that the applicant rights as an adverse possessor rank higher in priority than those of a registered owner. On that basis, she was said to have established a *prima facie* case.

6. The applicant also submitted that her application “for injunction is unchallenged, it has not been contested, it should therefore be allowed.” But had the application even been contested, submitted the applicant further, it would not have amounted to much, given the fact of “continuous adverse possession by the applicant” and also the fact that the “Respondents have acquiesced to the occupation...”. Two cases **KAHINDI NGALI MWAGANDI VS MTANALEWA: ELC NO. 108/2011, MALINDI (O.S)** and **ANN ITUMBI KISELI VS JAMES MURIUKI MURIITHI. ELC NO. 163/2012, MALINDI (O.S)** were cited and availed to court for guidance and/or persuasion. The cases actually explore what adverse possession is and what is required to prove it.

7. The respondents submissions were filed on 15th March, 2018. It was submitted, interalia, that the applicant has not met the threshold set in the *Locus classicus* case of **GIELA VS CASSMAN BROWN & CO. LTD: (1973) EA 358**. The threshold requires that the applicant establishes that he has a *prima facie* case with a probability of success; that it be demonstrated that there is a likelihood of suffering irreparable loss that cannot be compensated with damages; and that in case of doubts as to these two requirements, then the balance of convenience should be resolved to.

8. According to the respondents, the applicant allegedly purchased land from somebody who was never its owner and who therefore could not conduct a lawful sale. It was pointed out too that the allegations of the applicant show that she has not been in exclusive use of the land. This, they submitted, shows that her claim of adverse possession cannot succeed.

9. I have considered the application, the responses made, rival submissions, and the other pleadings on record generally. The applicant sued the first two respondents on 20th November, 2015 claiming adverse possession of land parcel no. L.R NO: SOUTH TESO/CHAKOL/321. She claimed that her late husband - **HENRY ANGATIA BWIRE** - bought it from one **BEN KITU OMACHARI** in 1973 and went into possession after purchase. That possession is said to have since turned adverse and the applicant wants to become the registered owner of the land. The first two respondents responded to the suit vide a replying affidavit dated 21st December, 2015. They denied the applicant's claim.

10. There are some shortcomings in both the suit filed by the applicant and the application now under consideration. As regards the suit, it is easy to appreciate why the 1st respondent - **AUGUSTINE OMELE OTABA** – is sued; he is the legal representative of the deceased registered owner and the grant availed shows him as such. But it is not easy to understand why the 2nd respondent is sued. He is neither the registered owner of the land nor is he shown to be a legal representative of the deceased owner. Adverse possession consists in challenging the title of registered owners or their representatives. The 2nd respondent is neither of these. Why is he sued? Can the applicant legitimately claim she has a *prima facie* case against the second respondent? I think not.

11. In the application now under consideration another new party is also enjoined. He is **KANOTI EBEL OTABAT**. No leave of court was sought to enjoin this new party. The court does not know of any case that the applicant has against him. Given that injunctive orders are sought against parties to a suit or those acting through them, how does the new party fit into all this? Can the applicant also claim she has a *prima facie* case against KANOTI? I think not too.

12. But the shortcomings pointed out are not the only problems in the matter. A look at the Originating Summons show that the applicant is also seeking to be given vacant possession of the land and/or to evict the respondents. The respondents submissions have taken an issue with that and pointed out that the applicant claims to be in exclusive possession yet she still seeks eviction and/or vacant possession. I agree with the respondents. You can not talk of exclusive possession, meaning you are the sole possessor, and at the same time seek vacant possession or eviction. The question to ask is: Are those against whom you seek vacant possession or eviction not possessors too? How can you term your possession exclusive in a scenario like that?

13. The point here is that the applicant has not done a good job of convincing the court that she is in exclusive possession. Her position is contradictory. She talks of being in exclusive possession while at the same time implying that the respondents are on the land and need to be evicted.

14. But I think the applicant has also failed to sufficiently demonstrate the second requirement namely: That she will suffer irreparable loss that can not be compensated with damages. She talked of loss of earnings from produce derived from the land. Can't the produce be assessed in monetary terms for compensation? I think it can. The position in law is that *prima facie*, you don't get injunctive orders where damages are an adequate remedy. The onus to prove that damages are not an adequate remedy is always on the applicant.

She failed to demonstrate it here. I take the position that the applicant can be compensated. I also think that she should have undertaken to pay damages if it turns out that she is wrong in her allegations.

15. The consideration of the balance of convenience only comes when the court is doubtful regarding the first two requirements spelt out in Giela's case (ante). I am not in doubt here as to the fact that the applicant has completely failed to establish the first two requirements. I will not therefore consider the balance of convenience.

16. The upshot when all is considered is that the application herein is one for dismissal. I hereby dismiss with costs to the respondents.

Dated and signed at Kericho this 10th day of March, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 10th day of March, 2020.

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A. OMOLLO

JUDGE