



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 22 OF 2019

JEREMIAH NYABONGONYE ATANDI.....PLAINTIFF/APPLICANT

VERSUS

MATHEW MASAKA OTUMBO.....1ST DEFENDANT/RESPONDENT

NYAKONI OTUMBO MAGETO.....2ND DEFENDANT RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 24.6.2019 the Plaintiff /Applicant seeks an inhibition against any dealings, transactions and/or dispositions relating to and/or concerning transactions in respect of a portion of land measuring 21m by 82m being part of that property known as NYARIBARI CHACHE/B/B/BOBURIA/8789 registered in the name of the Defendants herein.

BACKGROUND

2. The application is anchored on the grounds stated on the face of the Notice of Motion together with the Applicant's supporting affidavit sworn on the 24th June 2019. The Applicant depones that he has been in occupation of a portion of land measuring 21m by 82m which is part of the property known as NYARIBARI CHACHE/B/B/BOBURIA/8789, originally comprised in land parcel No. NYARIBARI CHACHE/B/B/BOBURIA/2472 which is now sub-divided and registered in the names of the defendants since 1960. He depones that the said portion of land originally formed part of his property known as NYARIBARI CHACHE/B/B/BOBURIA/4291 but upon demarcation and registration of the said portions, the said portion measuring 21m by 82m was registered as forming part of land parcel No. NYARIBARI CHACHE/B/B/BOBURIA/2724 (now sub-divided). He contends that the said registration was occasioned by error due to the fact that there is an access road that curved the portion measuring 21m by 82m from his larger parcel of land known as NYARIBARI CHACHE/B/B/BOBURIA/4291.

3. It is his further contention that he has been in continuous open and uninterrupted occupation of the said portion of land since the 1960s until sometime in 2019 when the Defendants started threatening his occupation thereof. He reported that matter to the chief and also sought the intervention of the County Surveyor who confirmed the position on the ground and prepared a report which he has annexed to his affidavit.

4. It is the Applicant's contention that notwithstanding the registration of the said portion of land in the name of the Defendants, he has been in adverse possession thereof and has therefore acquired prescriptive rights thereto. The Defendants' intention to sub-divide and evict him from the said portion of land will therefore destroy the substratum of his Originating Summons and defeat his suit.

5. The application is resisted by the Defendants through the Replying Affidavit of Mathew Masaka Otumbo, the 1st Defendant herein sworn on 1st October 2019 and the Further Affidavit sworn on 7th November 2019. He depones that his father had 5 wives and the Applicant is his step brother from the second house while he and the 2nd respondent are from the first house.

6. He depones that the Respondents are the registered owners of the suit property and they are in occupation of the said parcel of land as they have put up permanent houses thereon. He further contends that the Applicant has his own separate parcel of land and he wants to dispossess the Respondents. He depones that before dividing his land among his children their father had planted coffee and after demarcation, the coffee was found to be on the Applicant's land. Since their father was the one benefitting from the coffee he allowed the Applicant to temporarily use the Respondent's land but since their father died, he is supposed to leave the Respondent's land and occupy the said portion. He further depones that owing to their advanced age, the Defendants intend to sub-divide their property and divide it among their sons during their life-time. He contends that the boundaries of land parcel No. NYARIBARI CHACHE/B/B/BOBURIA/8789 and the Applicant's land

parcel No. NYARIBARI CHACHE/B/B/BOBURIA/4291 are well marked and the applicant should confine himself to his portion.

ANALYSIS AND DETERMINATION

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

8. In order for the court to exercise its discretion in granting injunctive relief the Applicant must meet the conditions 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.”

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”

9. The Applicant’s main contention is that since he has filed Originating Summons for adverse possession in respect of the suit property, if the orders sought are not granted, the substratum of his suit will be destroyed. In his submissions counsel for the Respondents submitted that the Applicant has not established that he is entitled to the suit property by way of adverse possession. With respect, this is premature as adverse possession cannot be established at this interlocutory stage. In the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988)KLR**, the court stated as follows: -

“in an application for interlocutory injunctions, 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

10. At this stage all that the Applicant is required to demonstrate is that he has a prima facie case with a probability of success. It is therefore my finding that the Applicant has established a prima case.

11. The second condition that the Applicant is required to meet is to demonstrate that if the order for temporary injunction is not granted, he will suffer irreparable loss. The Applicant has already alluded to the fact that if the suit property is alienated or disposed of the sub-stratum of his suit will be destroyed. Although I am not persuaded that an inhibition should be issued in manner envisaged by the Applicant, in the interest of justice and for the sake of preserving the subject matter, I am of the view that the status quo should be maintained. The upshot is that I find merit in the application and order that the status quo be maintained pending the hearing and determination of the suit herein. This means that the Respondents may continue to use the suit property but they may not, transfer, charge or part with possession thereof pending the hearing and determination of the suit herein.

The costs of the application shall be in the cause.

Dated signed and delivered electronically via zoom this 23rd day of April 2020.

J.M ONYANGO

JUDGE.