



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO 49 OF 2019 (OS)

BENSON MUGWERI MUCHIRI.....APPLICANT

VERSUS

LILLIAN REGERIA KAGEENO NKATHA.....RESPONDENT

RULING

What is before Court for determination is the Plaintiff's application dated the 27th May, 2019 and the Defendant's application dated the 8th July, 2019. In the Application dated 27th May, 2019 brought pursuant to Order 40 rule 1 and 11 as well as Order 51 of the Civil Procedure Rules, Sections 3, 3A and 63 (e) of the Civil Procedure Act, the Applicant seeks orders of temporary injunction against the Respondent in respect to land reference number Kajiado/ Kitengela/ 8082 pending the outcome of the suit. The Application is premised on the grounds on the face of it and the affidavit of BENSON MUGWERU MUCHIRI where he deposes that together with his late wife Josephine Miringo Karongo, they purchased land reference number Kajiado/ Kitengela/ 8082 hereinafter referred to as the 'suit land' from one Elijah Lengete for Kshs. 500,000/= and took possession in 2002 by establishing a home thereon where he resides with his two children. He claims despite efforts to have the vendor Elijah Lengete transfer the suit land to them, he delayed and passed away in 2015. He insists they have been in occupation of suit land for 19 years openly and conspicuously by constructing a three bedroom residential home, installing electricity and water, erecting a fence and undertaking general farming. Further, that the wife's remains were interred on the suit land on 28th November, 2013. He explains that sometime in April, 2019 the Defendant through his agents stormed the suit land, cut off the fence and ferried construction materials. He contends that although the Defendant claims to be the registered owner of the suit land, she has never been in occupation of the same for 19 years. He reiterates that his eviction by the Defendant is imminent and his family will be rendered homeless unless the orders sought are granted.

The application is opposed by the Respondent LILLIAN REGERIA KAGEENU who filed a replying affidavit where she deposes that together with her daughter Caroline Nkatha they are the registered proprietors of the suit land which they purchased from Elijah Lengete Sane. She contends that when they visited the suit land there were no signs of any person living thereon and the area was largely undeveloped. Further, that they entered into a Sale Agreement dated the 10th May, 1999 and the purchase price was Kshs. 415, 144.80. She avers that upon finalizing the payment of the purchase price, the vendor obtained consent of the Land Control Board and the title deed was issued to them on 17th November, 1999. She insists thereafter the vendor relocated to the United States of America and could not transfer the suit land to the Plaintiff. She explains that when the Plaintiff was constructing on the suit land, they thought he was their neighbour but in 2010 when they sought the services of a surveyor to point out the beacons, they realized the said construction was done at the edge of their parcel of land. She avers that despite confronting the Plaintiff, he insisted he had constructed on his land. Further, after a meeting with the local Chief, it was agreed that they were to continue with their development plans and not to interfere with the portion of land occupied by the Plaintiff pending the resolution of the matter with the family of Elijah Lengete Sane. She states that they deposited building stones on the suit land in 2010 as they wanted to develop their land. Further, they later put up a chain link fence and let the Plaintiff have an access to his gate but despite this arrangement, he reported them to the Police and it was agreed that they should await the return of Mrs. Ruth Sane in February, 2019. She reiterates that the family of the vendor is looking for an alternative parcel of land to give the Plaintiff in exchange for the part of their land he occupies. Further, that after a meeting held on 3rd July, 2019 between the Plaintiff, Mrs. Ruth Sane, Defendant's husband, DCIO and Mrs Cecilia Mugambi, it was resolved that Mrs. Ruth Sane would excise an acre of her land and transfer it to the Plaintiff as long as the Plaintiff withdrew this case. She further claims that the Plaintiff failed to furnish them with proof of payment of the purchase price nor that he has been in occupation of the suit land. Further, that he has not sued the administrator of the estate of Mr. Sane. She avers that the Plaintiff has not met the requirements for the grant of an injunction. She further reiterates that the injunction sought shall affect the construction they are undertaking and that they had promised not to interfere with the portion of the suit land occupied by the Plaintiff pending amicable resolution of the matter with Mr. Elijah Lengete Sane's family. She opposes the averments in the originating summons and prays that the proceedings to continue as if the cause was begun by filing a Plaint. Further, that the Plaintiff is not deserving of the Orders sought in the Originating Summons and cannot claim orders of adverse possession yet they have allowed him to occupy a portion of their land. She contends that she cannot seek for eviction orders as against the Plaintiff through a reply to the Originating Summons.

In the Defendant's application filed on 8th July, 2019, brought pursuant to Order 37 Rules 16 – 19 and Order 51, 1 – 3 of the Civil Procedure Rules as well as Sections 1A, 1B & 3A of the Civil Procedure Act, she seeks for the Court to Order that the proceedings herein be deemed to have been commenced by filing a Plaint; Caroline Nkatha be enjoined as 2nd Defendant; Defendant be at liberty to file a Defence and Counterclaim and parties to file witness statements, list including bundle of documents and statement of issues. The Application is premised

on the grounds on the face of it and the affidavit of the Defendant which was filed in opposition to the Plaintiff's application for injunction. The Plaintiff opposed the application and filed a replying affidavit sworn by BENSON MUGWERI MUCHIRI where he is agreeable to Caroline Nkatha being enjoined in this suit. He does not object to the parties' filing witness statements, lists and bundle of documents as well as statement of issues. He opposes the prayer to convert the claim to have been commenced by Plaintiff and insists the suit herein is for adverse possession hence must be commenced by way of Originating Summons. He insists the parties will have an opportunity to parade before court all their documents and witnesses supporting their respective causes. He reiterates that the matter is straightforward as to whether he has acquired the suit land by way of adverse possession. He contends that in the replying affidavit, the Respondent has clearly responded to his claim. Further, the Respondent does not need to obtain a court order to evict him but only issue an eviction notice. He denies being given consent to occupy suit land and insists his occupation has been open, continuous as well as uninterrupted. He claims the negotiations alluded to by the Defendant were done on a without prejudice basis after he commenced the instant suit. He reiterates that his application for injunctive orders is warranted in view of the fact that the eviction by the Defendant is imminent.

Both the Plaintiff and Defendant filed their respective submissions to canvass the two applications.

Analysis and Determination

Upon consideration of the Plaintiff's application dated the 27th May, 2019 and the Defendant's application dated the 8th July, 2019 including the respective affidavits, annexures and submissions, I note the Plaintiff has conceded to the enjoining of Caroline Nkatha as a 2nd Defendant; parties' filing of witness statements, list and bundle of documents as well as statement of issues; hence the only remaining issues for determination are:

Whether the Plaintiff is entitled orders of temporary injunction in respect to suit land pending the outcome of the suit.

Whether the proceedings herein should be deemed to have commenced by filing a Plaintiff.

As to whether the Plaintiff is entitled to orders of temporary injunction in respect to the suit land pending the outcome of the suit. The Plaintiff in his submissions reiterated his claim above and insisted he has established a prima facie case to warrant the orders sought. He relied on the decisions of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**; **Satrose Ayuma & 11 Others Vs Registered Trustees of the Kenya Railways Staff Benefits Scheme & 2 Others**; **Suleiman Vs Amboseli Resort Limited (2004) KLR 589**; **Mrao Vs First American Bank of Kenya Limited & 2 others (2003) KLR 125**; **Samuel Kihamba Vs Mary Mbaisi (2015) eKLR**; **JM Gichanga Vs Cooperative Bank of Kenya Ltd (2005) eKLR** to buttress his arguments. The Defendant submitted that the Plaintiff had not established a prima facie case, failed to disclose material facts pertaining to the suit. Further, that she is the registered proprietor of the suit land and should not be restrained from developing her property. She insists the Plaintiff has not demonstrated to court that he is likely to suffer irreparable harm if the orders sought are declined. To buttress her arguments, she relied on various authorities including: **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**; **Jan Bonde Nielsen V Herman Phillipus Steyn also known as Hermanus Phillipus Steyn & 2 others (2012) eKLR**; **Suleiman Vs Amboseli Resort Limited (2004) KLR 589**; **Mrao Vs First American Bank of Kenya Limited & 2 others (2003) KLR 125**; **Kenya Akiba Micro Financing Limited V Ezekiel Chebii and 14 others**; **Bahadurali Ebrahim Shamji V Al Noor and 2 others (1998) eKLR**; **Uhuru Highway Development Limited V Central Bank of Kenya & 2 Others (1995) eKLR**; **Kenya Projects and Investments Ltd V Kenya Post Office Savings Bank Ltd Nairobi High Court Civil Case No. 2811 of 1995**; **Pius Kipchirchir Vs Frank Kimeli Tenai (2018) eKLR**; **Shepherd Homes Limited V Sandham (1970) 3 All ER 402**; **Kamau Muchuha V Ripples Ltd Court of Appeal at Nairobi, Civil Application No. 126 of 1992** and **E Muriu Kamau and Anor V National Bank of Kenya (2009) eKLR**.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the Plaintiff has established a prima facie case with probability of success, I wish to refer to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where the Court defined a prima facie case to mean a case where based on the facts presented a Tribunal can conclude there exists a right that has been infringed.

In the current case, the Defendant together with her daughter Caroline Nkatha are the registered proprietors of the suit land. The Plaintiff who has lodged a claim for adverse possession has occupied a portion of the land and constructed thereon as evident in the picture annexed to the supporting affidavit. The Defendant in her supporting affidavit admitted that they had mutually agreed to let the Plaintiff occupy the portion of land where he resides pending the amicable resolution of this matter. Further, the Plaintiff admitted that the Defendant had already fenced off a portion of their land using chain link. The Defendant explained that she had deposited building materials on the suit land. I note the Applicant in his supporting affidavit did not inform Court that they had engaged in an amicable resolution of the dispute herein with the Defendant and allowed him to occupy a portion of the land. Further, that the vendor's wife was supposed to transfer to him one acre of land as compensation. From the annexed photographs, it is evident the portion he occupies is clearly demarcated and he is not on the whole of the suit land as claimed. Based on the facts above, I find that the Plaintiff is guilty of material non disclosure as they were engaged in negotiations over the suit land which he did not divulge in court. It is trite that injunction is an equitable remedy and a party seeking the same should come to court with clean hands.

In line with the principles enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and based on the facts before me, at this juncture, I find that the Plaintiff has not established a prima facie case as against the Defendant to warrant the injunctive orders sought. In further relying on the case of **Thomas Mumo Mangey (Suing on his own and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others (2018) eKLR**, where the Court of Appeal while citing in approval the case of **Nguruman Limited V Jan Bonde Nielsen & 2 others (2014) eKLR** held as follows: 'if the Applicant established a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie is not established, then irreparable injury

and balance of convenience need no consideration.’

I will not consider the remaining two conditions as the Plaintiff failed to meet the first condition set to warrant the grant of an injunction.

On the issue whether the proceedings herein should be deemed to have commenced by filing a Plaint. I note the claim herein is on adverse possession which is governed by Order 37 of the Civil Procedure Rules. The procedure in a claim for adverse possession is well stipulated in Order 37 Rule 7 (1) of the Civil Procedure Rules and couched in mandatory terms and as a Court, I decline to interfere with the same. I opine that the orders the Defendant seeks are best dealt with during directions. Further, if the Defendant seeks to lodge a counterclaim, she can lodge her claim in the replying affidavit which the court can consider in its decision. In the circumstance, I will decline to allow the said prayer. I will however proceed to allow the parties to comply with Order 11 by filing their respective witness statements including documents and Caroline Nkatha to be enjoined in this suit.

It is against the foregoing that I will decline to allow the Plaintiff’s Application dated 27th May, 2019 and proceed to allow the Defendant’s Application dated 8th July, 2019 in terms of prayers 2 and 4 only but decline prayers No. 1, 3 and 5.

Costs will be in the cause.

Dated Signed and Delivered via email this 7th Day of May 2020.

CHRISTINE OCHIENG

JUDGE