



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 55 OF 2019 (O.S)

IN THE MATTER OF THE LAND REGISTRATION ACT 2012 (CAP 284) LAWS OF KENYA

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22) LAWS OF KENYA

BETWEEN

CHARLES OYANGE.....1ST APPLICANT

PAUL ONYANGO.....2ND APPLICANT

VICTOR WILLIAMS.....3RD APPLICANT

AND

OWUOR WAKENGA.....1ST RESPONDENT

RISPAR OMOLO ORONGE.....2ND RESPONDENT

NALINCHANDRA DEVCHAND DODHIA.....3RD RESPONDENT

RULING

CHARLES OYANGE, PAUL ONYANGO and VICTOR WILLIAMS (the 1st, 2nd and 3rd Applicants respectively) moved to this Court by an Originating Summons dated 6th December 2019 and filed on 9th December 2019 in which they impleaded **OWUOR WAKENGA, RISPAR OMOLO ORONGE, NALINCHANDRA DEVCHAND DODHIA and TUSHAH JAVERCHAND DODHIA** (the 1st, 2nd, 3rd and 4th Respondents respectively).

In the said Originating Summons, the Applicants sought a determination of several questions in relation to the land parcel **NO KISUMU/DAGO/288** (the suit land). Essentially, the Applicants are seeking orders that they have acquired by way of adverse possession the suit land and the Respondents title thereto has been extinguished by operation of law.

By a Notice of Motion dated 23rd July 2020 and filed herein on 24th July 2020, the Applicants citing the provisions of **Order 40 Rule 1(a) of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act** sought the following orders:-

1. Spent

2. Spent

3. A temporary injunction do issue against the Respondents, their employees, workers agents and/or whomsoever jointly and severally restraining them from entering into, evicting and/or interfering whatsoever with the Applicants' possession and occupation of the land parcel number KISUMU/DAGO/288 pending the hearing and determination of this suit.

4. The costs of this application be provided for.

The application is founded on the grounds set out therein and is also supported by the affidavit of the 1st Applicant also dated 23rd July 2020 and sworn on behalf of the other Applicants.

The gravamen of the application which is the subject of this ruling is that the Applicants are the bona fide owners of the suit land having occupied it peacefully and quietly for over 4 decades without interruption and are therefore entitled to the same by way of adverse possession. That on 22nd July 2020, the area Chief notified them that the Respondents intend to evict them from the suit land. That such eviction will be extremely prejudicial to them as the suit land is their only home. That they are willing to abide by the condition which the Court will impose.

In opposing the application, the 3rd Respondent with the authority of the others filed a replying affidavit dated 26th August 2020 in which he deponed, inter alia, that, the suit land belongs to the Respondents having been purchased from the **KENYA COMMERCIAL BANK** in 1980 following a Public Auction. That at the time of the purchase in 1980, the suit land was vacant and that the structures thereon had been put up by one **EVANS ONYANGO** and so the Respondents filed **KISUMU ENVIRONMENT AND LAND COURT CASE No 247 of 2013** seeking his eviction and obtained a Judgment on 24th October 2019 in their favour. That the Applicants are related to the said **EVANS ONYANGO** by virtue of being their eldest brother and in fact the structures that they occupy were constructed by him. Annexed to the replying affidavit is a copy of the Land Certificate in respect to the suit land registered in the names of the 3rd and 4th Respondents, copy of the Judgment in **KISUMU ENVIRONMENT AND LAND COURT CASE No 247 of 2013**, copy of Certificate of Search in respect to the suit land, transfer of land form executed by the 2nd respondent in respect to the suit land in favour of the 3rd and 4th Respondents, a charge of the suit land in favour of the **KENYA COMMERCIAL BANK** and the Discharge of Charge.

The Notice of Motion was placed before me on 1st September 2020 during the service week at the **KISUMU ENVIRONMENT AND LAND COURT** when both **MS MWANGI** holding brief for **MR ODENY** for the Applicants and **MR OMONDI** Counsel for the 3rd and 4th Respondents agreed that the application be canvassed by way of written submission. The Applicants were to file and serve their submissions within 7 days while the 3rd and 4th Respondents were to file their submissions within 7 days from the date of service. The ruling was scheduled for 30th September 2020. Both the 1st and 2nd Respondent were absent though served. However, by the time the file was placed before me on 18th September 2020 at **BUNGOMA ENVIRONMENT AND LAND COURT** for purposes of drafting the ruling, only the Applicants had filed their submissions.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by **MR ODENY** Counsel for the Applicants.

This being an application for temporary injunction, it shall be determined in light of the principles set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358** which are:-

- 1. The applicant must show the existence of a prima facie case with a probability of success at the trial.**
- 2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as:-

“..... a case 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.”

In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012**, the Court said as follows with regard to what constitutes 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 as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

The Court then went on to add 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.”

And as was held in **FILMS ROVER INTERNATIONAL .V. CANNON FILM SALE LTD 1986 3 ALL.E. R 772**, a Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong.”**

Finally, the remedy of a temporary injunction being an equitable remedy is granted at the discretion of the Court. A party must therefore approach the Court with clean hands.

Guided by the above, and having perused the rival affidavits herein, it is not contested that the Applicants are infact in occupation of the suit land. In paragraphs 3, 4, 5, 6 and 7 of the supporting affidavit, the 1st Applicant has deponed as follows: -

3: **“That I know as of my personal knowledge that we are the bona fide owners of land parcel NO KISUMU/DAGO/288 by virtue of having a claim of adverse possession against it’s registered owners.”**

4: **“That we have been living on the whole parcel of land enjoying peaceful, quiet and un – interrupted possession for the past 4 decades.”**

5: **“That we have constructed dwelling structures where we have lived as of right to the total exclusion of the Respondents.”**

6: **“That I know as of my personal knowledge that no one has ever approached us claiming ownership of the suit parcel of land.”**

7: **“That however, on 22nd July 2020 we were notified by our area Chief that the Respondents herein intend to evict us from the suit parcel of land.”**

In response to those averments, the 3rd Respondent has averred as follows in paragraphs 5, 6, 7, 8 and 9 of his replying affidavit: -

5: **“That I know of my own knowledge that we bought the said parcel of land when it was vacant from Kenya Commercial bank by public auction in or about the year 1980.”**

6: **“That facts stated in paragraph 4 are false as at the time of purchasing the said parcel of land it was vacant and not occupied by anyone.”**

7: **“That the dwelling structures talked about by the Applicants were put up by one EVANS ONYANGO the reason why we came to Court to seek redress through CIVIL SUIT No 247 of 2013 wherein vide a Judgment dated 24th day of October 2019 the trial Judge ordered the said EVANS to give vacant possession within 30 days. Annexed and marked NDD – 3 copy of the said Judgment.”**

8: **“That I know of my own knowledge that the Applicants herein are related to the said EVANS ONYANGO the defendant in the forestated suit by virtue of being their eldest brother and that the averment that he is a stranger to them is false and made in bad faith and coined to hoodwink this Honourable Court to grant them the orders sought in the aforesaid application. Annexed and marked NDD – 4 (a) and (b) copy of affidavit of service by HENRY ODERA OSANGO sworn on 10.01.2012 and application dated 24th July 2012.”**

9: **“That I know of my own knowledge that the Applicants herein are the same stated strangers who have occupied the semi – permanent structures constructed by one EVANS ONYANGO who refused to vacate the parcel of land as stated in our joint statement.”**

It is clear from paragraph 9 of the replying affidavit that the Applicants are indeed in occupation of the suit land and utilize the structures put up by EVANS ONYANGO against whom the Respondents have obtained eviction orders. Occupation and possession of land is a matter of fact and in view of the Respondents own admission, the Applicants are infact in occupation of the suit land. However, whether or not that occupation meets the threshold of orders in adverse possession will be a matter to be determined by the trial Court. This Court cannot at this stage **“examine the merit of the case closely”** – NGURUMAN .V. JAN BONDE NIELSEN (supra). As the persons in possession, the Applicants have in my view demonstrated that they have a right which is threatened with violation and at this stage, the Court is not concerned with whether they will establish that right at the trial. On the material placed before me, I am persuaded that the Applicants have established a prima facie case that calls for rebuttal by the Respondents.

On the issue of irreparable loss that cannot adequately be compensated by an award of damages, the Applicants have annexed to their plaint photographs of several grave sites presumably of their relations. The 1st Applicant has also deponed in paragraph 10 of his supporting affidavit that the suit land is their **“only known home”** and therefore they will be **“extremely prejudiced”** if they are evicted. I have no doubt that if the Applicants are evicted and the grave sites on the suit land desecrated, that will no doubt be irreparable loss that cannot adequately be compensated by an award of damages should they eventually prevail at the trial. The only prejudice that the Respondents will suffer is that they will have to wait until this matter is determined. They however still retain the legal ownership of the suit land by virtue of being the registered proprietors thereof. This Court must therefore take into account what the Court of Appeal stated in **GEORGE ORAGO .V. GEORGE JAGALO & OTHERS C.A CIVIL APPEAL No of 2009 [2010 eKLR]** that where the Applicant is in possession, the denial of any injunction would have the effect of dispossessing him of the land in dispute. Taking cue from the case of **FILMS ROVER INTERNATIONAL** (supra), the lower risk of injustice dictates that I take the route of granting the application rather than disallowing the same.

The up – shot of the above is that the Notice of Motion dated 23rd July 2020 and filed herein on 24th July 2020 is allowed in the following terms: -

1. A temporary order of injunction is issued restraining the Respondents, their employees, workers agents and/or whomsoever jointly and severally restraining them from entering into, evicting and/or interfering whatsoever with the Applicants’ possession and occupation of the land parcel NO KISUMU/DAGO/288 pending the hearing and determination of this suit.

3. The parties are directed to comply with all the pre – trial directions so that this suit is heard and determined within 12 months from the date of this ruling.

3. Costs shall be in the cause.

Boaz N. Olao.

J U D G E

30th September 2020.

Ruling dated and signed at **BUNGOMA** this 30th day of September 2020. The same is delivered on this 30th day of September 2020 by way of electronic mail in keeping with the **COVID – 19** guidelines as was advised to the parties on 1st September 2020.

Boaz N. Olao.

J U D G E

30th September 2020.