



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND CASE NO 274 OF 2013 (O.S)

DAVID KIUNGA KITHINJI.....PLAINTIFF/APPLICANT

VERSUS

LUKA BUNDI KIUGU.....DEFENDANT/RESPONDENT

RULING

This application is dated 10th October, 2013 and seeks orders:-

1. ***THAT*** this application be certified urgent and be heard ex-parte in the first instance.
2. ***THAT*** this Honourable Court be pleased to issue an order of injunction restraining the defendant by himself, agents, servants or employees from entering, interfering, damaging the plaintiff's property on L.R.NO. ABOTHUGUCHI/IGANE/665 or interfering with the plaintiffs' possession thereof until this application is heard inter-partes.
3. ***THAT*** this Honourable Court be pleased to issue an order of injunction restraining the defendant by himself, agents, servants or employees from entering , interfering, damaging the plaintiff's property on L.R NO. ABOTHUGUCHI/IGANE/665 or interfering with the Plaintiff's possession thereof until this suit is heard and finalized.
4. ***THAT*** this Honourable Court be pleased to issue an order of inhibition restraining any dealings whatsoever with land reference Number ABOTHUGUCHI/IGANE/665 until this suit is heard and determined or as the Court may direct.
5. ***THAT*** the costs of this Application be provided for.

This application is supported by the affidavit of DAVID KIUNGA KITHINJI and has the following grounds:-

- a. ***The plaintiff has lived on land reference No. ABOTHUGUCHI/IGANE/665 for over 12 years and made extensive developments apart from making it his home.***
- b. ***THAT*** the defendant who comes from the area knows that the plaintiff and his family have occupied the Land for over 20 years.
- c. ***THAT*** the defendant has threatened and is organizing to use unorthodox means to evict the plaintiffs.
- d. ***THAT*** for interests of justice the plaintiff and the land should be protected and preserved by

this Honourable Courts as if the order is not issued the plaintiff will suffer irreparable damage.

The applicant submits that he moved into the suitland in 1976 and has developed the land extensively and has acquired title to Parcel No ABOTHUGUCHI/IGANE/665 by way of adverse possession. He has submitted that the Injunctive orders he seeks through this application are meant to preserve the suit land pending the hearing and determination of this suit. He contends that he has a prima facie case with probability of success as the defendants title had been extinguished through adverse possession. The applicant has cited the following cases as authorities to buttress his propositions:

1. ***Virgina Wanjiku Mwangi Versus David Mwangi Jotham Kamu -E&L Case No. 860 of 2011 KRL.***
2. ***Kiproech Kangongo Versus Chebii Yego (2013) e KLR.***
3. ***Giella Versus Cassman Brown.***
4. ***Dr. Patrick Muigi Mungai & 2 Others Versus Afrison Export Import Limited and Another (2014) e KLR.***

The defendant has opposed the application. He submits that the plaintiff was using the land under license of the original owner and as such can not claim to have acquired the land by way of adverse person.

The defendant has proffered the case of ***Symon Gatutu Kimamo and 587 others Versus East African Portland Cement Company Limited [2011] e KLR*** to demonstrate how adverse possession can be acquired. He has also proffered the case of ***Kimoi Ruto and Another Versus Samuel Kipkosgei Keitany and Another [2014] e KLR*** which quoted the case of ***JA PYE (Oxford) Limited Versus Grakem (2003) / AC 419*** where Lord Browne -Wilkinson stated as follows:-

“ In order for possession to be one that is able to sustain a claim for adverse possession, such possession must have two necessary elements being: (1) a sufficient degree of physical custody and control- “factual possession and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit.

“ the intention to possess”. Thus simple mere possession, without these two elements, is not enough to hold up a claim for adverse possession”.

The defendant submits that the claim by the plaintiff that he had acquired adverse possession was extinguished when the suit land was transferred to him by one Peter Muthuku Ngatari. He also submits that the Plaintiff had not demonstrated that he had satisfied the elements required for adverse possession to take effect and therefore had not demonstrated that he had a prima facie case.

I have considered the respective averments and Submissions tendered by the parties. I have also considered the authorities they have proffered to buttress their propositions.

I do find that many of the issues the parties have raised in their Submissions can not be determined at the Intelocutory stage as they delve into disputed facts. These issues include whether or not the Plaintiff had satisfied all elements required for adverse possession to take place. They also include the claim by the defendant that the plaintiff had lived on the suitland as a licensee of the original registered owner of the land.

The Court of Appeal in the case of ***Mbuthia Versus Jumba Credit Corporation [1988] KLR 1*** had eruditely given guidance regarding how Courts should move when considering issuance of Injunctive Orders. The Court opined as follows:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The

lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”

I do not wish to make definitive findings of disputed facts at this interlocutory stage.

Having weighed the respective weights of the propositions proffered by the parties, I find that the defendant who is the registered owner of the suitland has tendered weightier

assertions than those offered by the Plaintiff. I decline to issue Injunctive Orders against the defendant who is the registered owner of the suitland when the issue regarding whether or not the plaintiff was a licensee of the original registered owner of the land has not been determined. However, in the interest of justice, and to preserve the suitland, I find that it is desirable that an Order of Inhibition to be registered against the suit land be granted.

I issue the following orders:

1. ***Prayers 2 and 3 for Injunctive Orders are denied.***
2. ***Prayer 4 is granted and an order of Inhibition restraining any dealings with land Reference Number Abothuguchi/Igane/665 is issued until this suit is heard and determined.***
3. ***Costs shall be in the cause.***

It is so ordered.

Delivered in open Court at Meru this 3rd day of November, 2015 in the presence of:

CC:

Daniel /Lilian

Rimita for the Plaintiff /Applicant

Mwirigi for Defendant /Respondent

P. M. NJOROGE

JUDGE