



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO 808 OF 2013 [OS]

CHARLES MUSYOKA.....1ST PLAINTIFF
JACKSON KINYUNGU.....2ND PLAINTIFF
EDWARD MBUTHIA.....3RD PLAINTIFF
WILSON MAINA.....4TH PLAINTIFF
& 33 OTHERS.....PLAINTIFFS

=VERSUS=

UKWALA TRADING CO.LTD.....DEFENDANT

RULING

The applicants herein have brought this Notice of Motion application dated 4th July 2013 against the Defendant herein. It is brought under **Order 40 Rules 1, 2, and 4 , Order 5 Rule 17 (1 and 2) Order 51 of the Civil Procedure Rules and Sections 63 (c and e) , 1A, 1B and 3A of the Civil Procedure Act** for orders that:-

a. That pending the hearing and determination of this suit, the Respondent either by themselves, their servants, agents, employees, or otherwise howsoever be restricted from selling, alienating, disposing, offering for sale or in any other manner interfering with the applicants occupation and quiet possession of those parcels of land known as LR No. 209/10830/11 and 12 Nairobi measuring 0.2 hectares or thereabout.

b. That the cost of the application be borne by the Respondent.

The application was premised on the grounds stated on the face of the application and on the supporting affidavit of **Charles Musyoka**. These grounds are :-

a. That in 1994, the applicants entered and took possession of those parcels of land known as LR numbers 209/10830/11 and 12 Nairobi measuring 0.2 hectares, reclaimed and developed it from a swamp.

b. The applicants have lived on the said parcels for a period of over twelve (12) years.

c. The applicants occupation of the said parcels of land have been continuous , uninterrupted and without permission of the Respondent

d. The applicants have now commenced proceedings in this Honorable Court for a declaration that they have acquired the right to own the said plots by adverse possession.

e. The Respondent has threatened to demolish their structures constructed thereon and evict the Applicants.

f. The proceedings for a declaration that the applicants have acquired rights over the plots by adverse possession shall be prejudiced if the instant application is nor heard on a priority basis.

In his supporting Affidavit, **Charles Musyoka**, stated he is the 1st Plaintiff and duly authorized by the other plaintiffs to swear the affidavit on their behalf. He averred that on or about 1994, the Plaintiffs entered and/or took possession of parcel of land LR No. 209/10830/11 and 12 Nairobi which measures 0.2 hectares or thereabouts. (**Annextures CMI are copies of the certificate of Title for the said parcel of land.**)

He further averred that the said parcels of land were swampy and they literally reclaimed it by drawing the water and filling the land with soil excavated from construction sites. That now they have developed the two plots by putting up their dwelling houses and various shops as evidenced by **CM 2**. It was his contention that they have been in continuous occupation and possession of the two parcels of land without interruption from the Defendant and /or their predecessors. He also deposed that their occupation of the said plots has been continuous, uninterrupted, quiet, not forceful and without the permission of the Respondent and they have thus acquired title over the two parcels of land by adverse possession. That the Respondent has threatened to evict them from the said parcels of land and thus the application and he was apprehensive, that if the orders sought are not granted, the Respondent will evict them and render the suit nugatory.

The Respondent vehemently opposed the Notice of Motion. One **Prafula Savla**, a director of the Defendant Company swore a Replying Affidavit. He averred that the plaintiffs are trespassers who have illegally occupied private property and they have no **locus standi**, to file the suit or seek the orders in the Notice of Motion. That the applicants have not been on the suit land for more than one year and that the dwelling houses are temporary iron sheet structures.

Furthermore, the defunct City Council of Nairobi had given them Notice to move out as evidenced by **annexture PS2**. The Respondent deposed that there is another ELC No. 612/2012 against some of the Plaintiffs as shown by the **annexture PS4**. It was his contention that the Plaintiffs have moved to court to obtain orders fear of consequence of disobeying the orders of **ELC No. 612 of 2012** and their claim of adverse possession is misplaced and without any basis.

The Respondent further stated that the Defendant is the registered owner of the property and the plaintiffs cannot defeat its title by mere claim of adverse possession of private property whose title was issued long before such claim. He therefore averred that plaintiffs are infringing on the Defendants constitutional right to acquire property and so the deponent urged the court to dismiss the plaintiffs' application.

The applicants through **Charles Musyoka**, further filed a Supplementary Affidavit and averred that they entered the suit land without the consent of the Respondent, reclaimed it, and settled therein and hence the need for conservatory orders. It was further deposed that they have occupied the land since 1994 and hence have extensively developed the land for a period pf 19 years. Further that the Notice by the defunct City Council of Nairobi was given through the machination of the Respondent herein. The applicants denied existence of **ELC No. 612 of 2012** as alleged by the Respondent.

The parties herein consented to canvass the instant Notice of Motion by way of written submissions. I have now carefully considered the pleadings herein, the annextures thereto and the relevant laws. I have also considered the written submissions and I make the following findings:-

The applicants have sought for injunctive order which is an equitable remedy. The said remedy is granted at the discretion of the court which discretion must be exercised judicially (See **Hasmukh Khetshi Shah Vs Tinga Tranders ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628.**

The principles guiding the court in deciding whether to grant or reject an application for injunction have been stated in various judicial decisions. The said guiding principles were well laid out in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 (EA) 358**

a. He has a prima facie case with probability of success.

b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

*c. When the court is in doubt, to decide the case on a balance of convenience. (See **EA Industries Vs. Trufoods (1972) EA 920.**)*

The applicants herein must therefore satisfy the above stated principles to warrant the court grant the orders sought.

Firstly, the applicants have to establish that they have a prima – facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** prima facie case was described as:-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

Have the applicants herein established that they have a *prima facie case*?

In arriving at a finding on whether there is a prima facie case or not, I am mindful to the fact that the applicants are not required at the interlocutory stage to prove their case (See **Isaack Awoundo & 4 Others Vs Mount Kulal ltd, Civil App. No. 191 of 1997.**)

The court is also not required to determine the very issues which will be canvassed at the trial with finality. All that the court is entitled to look at is whether the applicants qualify for an injunction using the usual criteria (See **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case No. 1118 of 2002.**)

The applicants herein have alleged that they have been in occupation of the suit land since 1994 . That they have developed the same and have been in a continuous, uninterrupted occupation for a period of 19 years. They therefore claimed that they are entitled to claim title to the suit land by way of adverse possession.

From the copies of certificates of title attached to the applicants Notice of Motion, the suit land was transferred to the Defendant herein on 26/11/2013. The Defendant is therefore the registered owner of the suit land and under **Section 26(1) of the land Registration Act**, that is conclusive evidence of proprietorship. The section provides as follows:-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

The Defendant/Respondent being the Registered proprietor of this suit property is protected by **Article 40(2) (a)** of the Constitution 2010 which provides:-

40. (1) every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

Though the applicants alleged that they have been in occupation of the suit land since 1994, and some of them have been running small business, there was no evidence brought to court to support that allegation such as production of business licenses. This court cannot hold and find that the applicants have been in continuous and uninterrupted occupation for about 19 years on this suit land. The court finds that the applicants have not established a prima facie case with probability of success.

The second principle is whether the applicants will suffer irreparable loss which cannot be compensated by an award of damages.

In his Supplementary Affidavit, **Charles Musyoka** averred that the plaintiffs entered into the Respondent's land without the Respondent's consent. He further averred that Respondent can call them trespassers if he so wishes. The applicants are therefore aware that they are trespassers on the suitland. They entered on the said suit land at their own risk. The photographs attached to the affidavit show that the buildings are temporary structures. The applicants cannot claim that they have extensively developed the said land. Whatever expenses incurred in reclaiming the land can be valued and assessed and paid in monetary value. The applicants have also not produced any notice of eviction or threat to evict them by the Respondent.

There is no eminent danger posed by the Respondent herein to the applicants. The applicants could have even sought to be enjoined in **ELC No. 612 of 2012** to protect their interests. Having carefully considered the circumstances herein, I find that the applicants have not established that they will suffer irreparable loss which cannot be compensated by an award of damages.

On the third principle of balance of convenience, I will concur with the Respondent's submissions that the Defendant being the registered owner of the suit land enjoys exclusive right to the property as provided by **Section 24 (a) of the Land Registration Act** which provides as follows:-

24. Subject to this Act—

(a) “ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and”

The Respondent's right to property is also protected by the Constitution. For the above reasons, I find that the balance of convenience tilts in favour of Respondent herein.

From the foregoing, the Court finds that the applicants' Notice of Motion dated 4th July 2013 is not merited. The same is dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered this **9th** day of **May, 2014**

L. GACHERU

JUDGE

In the Presence of:-

Mr. Chebii for the Plaintiffs/Applicants

None attendance for the Defendant/Respondent

Lukas: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open court in the presence of Mr Chebii for Plaintiffs/Applicants and None attendance for Defendant/Respondent.

L. GACHERU

JUDGE

9/5/2014