



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 843 OF 2013 (OS)

DAVID KAVYU & 12 OTHERS.....APPLICANTS

VERSUS

MWANGAGI MBINDIYO

(Sued as Representative of JOHN MBINDIYO MUTINDA)....RESPONDENT

RULING

Following the Applicants' application dated 15/7/2013, this court granted ex-prate orders of injunction restraining the Respondent from dispossessing, evicting and or in any other way interfering with the Applicants' possession and occupation of **Land Parcel No.819** (Originally Yatta B2/Kwa-vonza/201) pending the hearing and determination of the application. It is this order that the Applicant prays that it be confirmed pending the determination of the suit. The application is premised on grounds that the Applicants have been in open and continuous possession of the suit parcel since 1996 and they shall be rendered landless and destitute if the Orders sought are not granted.

The application is supported by an affidavit sworn on **15/7/2013**, by one of the Applicants, **Ndunda Munyao**. He deposes that they have been in occupation thereof and have built homesteads since 18/7/1996 when they were settled there by area councilor, **Philip Kathukya Nyumba**. It is his deposition that the property belongs to the **John Mbindiyo Mutinda**, (Deceased) who had wanted to surrender it for purposes of building Divisional Headquarters. However, the said Headquarters was built elsewhere and the Applicants settled thereon. The deponent states that they have been in occupation thereof, openly and with the full knowledge of the deceased during his lifetime, without his objections and even after his death without any interference from his family. Thus, they have acquired the land by way of adverse possession. The deponent states that they have now learnt that the land has now been sub-divided and therefore pray that the status quo presently existing on the ground be maintained pending the determination of the suit.

The application is opposed by the Respondent who filed a notice of Preliminary Objection, and Grounds of Objection. In the Preliminary Objection dated 25/7/2013, the Respondent averred that the application and Originating Summons is bad in law and incompetent and therefore should be struck out with costs on grounds that: it is based on the **Provisions of Order 37 Rule 7 of the Civil Procedure Rules**; it does not disclose the legal capacity in which their claim is based; the proprietorship of the suit parcel was determined in Succession Cause No. 99 of 2008 on 8/12/2010; it involves the estate of a deceased proprietor; no right had accrued to the Applicants at the time of death of the deceased; and the Applicants

have no registrable interests in the suit land.

In the Grounds of Opposition dated 25/7/2013, the Respondent averred that the application is bad in law in so far as it is based on the provisions of Order 40 Rule 1 of the Civil Procedure Rules. Secondly, that the provisions of Section 1A, 1B and 3A are not applicable to the application at hand. The Respondent also averred that the application is bad in law as it is based on an incompetent suit and also that the merits of the application does not meet the standard required by law for the grant of an injunction.

The application was canvassed by way of written submissions. Ochieng Ogutu & Co. Advocates for the Applicants filed submissions dated 27/3/2014 wherein counsel submitted that the Applicants have satisfied the requirements for the grant of an injunction as set out in the **Giella v Cassman Brown Case** by establishing that they have been in open and uninterrupted possession of the suit property for a period of over 12 years which occupation entitles them title to ownership by way of adverse possession. It was counsel's submission that the Applicants stood to suffer irreparable loss which may not be adequately compensated if the injunction is not granted since the Applicants have settled on the property. As regards the balance of convenience counsel submitted that the same tilts in favour of the Applicants in that it is just to maintain the status quo pending the determination of the suit than evict later to be returned in the event their claim succeeds.

In respect to the Respondent's averments, counsel submitted that there is nothing incompetent with about the suit and that the Applicants had disclosed that their suit is based on a claim for adverse possession. It was submitted that proprietorship of land is not determined by a succession cause but is merely passed to another. Thus, the mere fact that the suit property has been subject of a succession cause does not bar the Applicants from pursuing their claim of adverse possession. Counsel submitted that the cause of action survives the proprietor so long as it can be established that the deceased did not evict or sue the Applicants during his lifetime.

Kinyua Musyoki & Company Advocates for the Respondent filed submissions dated 27/3/2014. Counsel submitted that the deceased died on 25/10/2007, prior to the filing of this suit and before the expiration of the 12 years from the date of the alleged entry into the suit property on 18/7/1996. Consequently, the Applicants cannot have acquired right to ownership by way of adverse possession. It was counsel's submissions that upon the demise of the deceased, the suit property became part of his estate subject to the provisions of the Law of Succession Act. Counsel submitted that the property was a subject matter in **Kitui SPM Succession Cause No.99 of 2008** and ownership thereto determined by the said court. Counsel urged the court to uphold the preliminary objection and strike out the originating summons together with the interlocutory applications with costs.

Having now considered the written submissions and the pleadings generally, I make the following findings;

Before I delve into the merits of the application, it is proper for the court to address the Preliminary Objection filed by the Respondent in opposition to the application. The Respondent avers that the originating summons together with the application is incompetent reasons which have been outlined hereinabove. What constitutes a preliminary objection was set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696.**

a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It

cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

I have perused preliminary objection, grounds of which do not raise any question of law but issues of fact which has to be ascertained and such determination can only be done upon evaluation of evidence. Whether or not the Applicants have established that they are entitled to title of the suit property by operation of the law is a matter of evidence. The first ground of the preliminary objection was that the suit is incompetent as it is based the provisions of Order 37 Rule 7 of the Civil Procedure Rules. The suit herein is a claim of ownership of title by way of adverse possession. The rules of procedure governing such claim are in fact Order 37 Rule 7. It is my finding, with respect, that this ground of objection is illogical.

As regards the Grounds of Objection, the Respondent reiterated that the application is bad in law as it is based on the provisions of Order 40 Rule 1 and also that it is based on an incompetent suit. This court has already found that the suit is proper before court, having been brought under the correct provisions of the law. In that regard, issues of incompetence does not arise. Secondly, whereas the claim is for acquisition of title by way of adverse possession, the Applicant has approached this court for a temporary order of injunction pending the determination of the suit. The procedure for approaching the court for such an interim relief is under Order 40 Rule 1 which gives the court discretion to restrain an action, in this case eviction or interfering with possession, pending the determination of the suit.

The Respondent also states that the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act are inapplicable in this case. These sections provide for the objective of the Act, the duty and inherent powers of the Court. These provisions are relevant in all applications brought under the Act, and there is no harm in invoking such provisions alongside the relevant provisions to the subject matter before court. It is my considered view that the Respondent’s grounds of objection are not well reasoned out.

As to whether the Applicants have demonstrated that theirs is a prima facie case, they annexed photographs showing structures built thereon. It is also noteworthy that adverse possession is the acquisition of property by operation of the law whose effect is that the proprietary rights and interest of a registered owner is extinguished in favour of the adverse possessor. It is a statutory right under the Limitations of Actions Act, and therefore an overriding interest under Section **28(h) over the Land Registration Act (Section 30(f) of the Registered Land Act, now repealed)**. which provides as follows:-

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register

(h) rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.

This statutory provision can only be applicable if it is shown, *inter-alia*, that the Applicant has been in twelve continuous and uninterrupted years of adverse possession of the suit land. It is trite Law that ***the burden of proving title by adverse possession rests upon the person asserting it. He proves it on the usual standard of proof in civil cases namely, on a balance of probability.*** See **Salim - Vs – Boyd & Another (1971) EA 550.** The trial is the only arena where the Applicant is afforded an opportunity to prove her claim of adverse possession. Thus, is it only fair, reasonable and just that the suit property be preserved pending the outcome of the suit.

The upshot of the foregoing is that the Court will issue the following Orders;

1. The Respondent by himself, his agents, and/or servants hereby restrained from dispossessing, evicting and or in any way interfering with the Applicants’ possession and occupation of Land Parcel No.819 (Originally Yatta B2/Kwa-vonza/201) pending the hearing and determination of

the suit.

2. The Respondent's preliminary objection dated 25/7/2013 is hereby dismissed.

3. Parties are hereby directed to comply with the provisions of Order 11 of the Civil Procedure Rules, without delay.

4. Costs of the application be in the cause.

Dated, Signed and Delivered this 13th day of **October** 2014

L.GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

Kamau: Court Clerk

L.GACHERU

JUDGE