



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 136 OF 2014 (O.S)

JOSHUA NYABOGA NYAMBICHU PLAINTIFF

VERSUS

DAVID ARAKA OGENDI DEFENDANT

RULING

1. What is before me is the Plaintiff's application brought by way of Notice of Motion dated 17th April 2014 under Order 37 rules 1, 2 and 7, order 40 rules 1, 2, 3, 8 and 9 of the Civil Procedure Rules and section 37, 38 and 39 of the Limitation of Actions Act seeking the following order:-

“That the honourable court be pleased to grant an injunction to the applicant herein restraining the respondent by himself, his agents, servants, employees and any other person howsoever acting on his behalf from selling, mortgaging, transferring, destroying the house of the plaintiff herein, destroying fences, wasting, cultivating or in any other manner whatsoever interfering or further interfering with part of LR No. North Mugirango/Ikongge/791 measuring about 47 feet by 100 feet (hereinafter referred to as suit property) pending the hearing and determination of the suit herein”.

The plaintiff's application was premised on among others the following grounds;

- a. **The plaintiff bought the suit property on the 24th day of March 1977 from the defendant.**
- b. **He took vacant possession of the suit property immediately and caused it to be fenced.**
- c. **He has openly, peacefully, continuously and without any interruption resided on the suit property from the time he purchased it up to the time of filing this suit to the exclusion of the defendant.**
- d. **He has occupied the suit property for the last 37 years.**
- e. **The defendant did not apply to the Land Control Board for the consent to transfer the suit property to him even after he paid to the defendant full consideration.**
- f. **The defendant's claim over the suit property was extinguished after the expiry of 12 years of his (the plaintiff's) continuous occupation of the suit property.**

g. The foregoing notwithstanding, the defendant with the help of unruly youths armed with pangas and other crude weapons came to the suit property on the 23rd of April 2014 and destroyed his (the plaintiff's) fence, house, and maize crops on the suit property without a court order.

h. The defendant now wants to evict him from the suit property unlawfully in breach of his constitutional rights.

i. He stands to lose the suit property which he has occupied for the last 37 years to the defendant through unlawful eviction unless the court grants the orders sought.

2. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 29th April 2014. In his response to the application, the defendant contended that;

a. He is the registered owner of the suit property.

b. The plaintiff who is his neighbor owns and occupies all that parcel of land known as LR No. North Mugirango/Ikongge/792 (hereinafter referred to only as "Plot No.792").

c. The plaintiff purchased Plot No. 792 from him before 1977 and got registered as the owner thereof during the land adjudication.

d. After selling Plot No. 792 to the plaintiff he left for Kericho to look for employment and settled in Kericho up to 1986. He would however visit his home and the suit property occasionally in between.

e. When he came back to North Mugirango from Kericho in the year 1986, he found that while he was away the plaintiff had unilaterally and without his knowledge encroached upon a portion of the suit property and occupied the same.

f. He immediately took steps to stop the said trespass by using the local administrative institutions to restrain the plaintiff from encroaching on the suit property which encroachment the plaintiff stopped in the year 1996.

g. He never sold neither did he ever enter into any arrangement with the plaintiff or any other person for the sale of the suit property or any part thereof.

h. The purported agreement for sale annexed to the plaintiff's affidavit is a forgery and is calculated to hoodwink the court into believing a sale that never was.

i. During the first quarter of this year the plaintiff made attempts to encroach onto a portion of the suit property claiming that he had occupied the same up to the year 1986 and as such he was entitled to the same which attempts and maneuvers , he declined to accede to.

j. When the plaintiff started to put up a house on the suit property to assert his adverse possession claim. He resisted and disrupted the construction works by the plaintiff.

k. The plaintiff has never enjoyed possession and use of the suit property openly and continuously to warrant grant of the orders sought herein.

l. The plaintiff claim does not satisfy legal and factual threshold for an adverse possession claim.

m. The originating summons brought herein together with the Notice of Motion

application based thereon are frivolous and amounts to an abuse of the court process.

3. When the matter came before me on 4th June 2014, Mr. Mokuu, advocate appeared for the plaintiff while Mr. Mose, advocate appeared for the defendant. In his submission, Mr. Mokuu reiterated the contents of the plaintiff's affidavit in support of the application. He submitted that the plaintiff has occupied the suit property from 24th March 1977 to date peacefully, openly and without any interruption. He submitted further that the plaintiff has carried out extensive development on the suit property. The plaintiff's homestead is standing on the suit property. In addition, he has been carrying out farming activities thereon. Mr. Mokuu submitted that the plaintiff was compelled to come to court for protection when the defendant in the company of a group of unruly young men descended on the suit property on 3rd April 2014 and destroyed the fence he had put up around the suit property, the crops that were growing thereon and a permanent building that the plaintiff had put up on the property.

4. He submitted that unless the orders sought are granted, the plaintiff is likely to suffer irreparable loss as he would lose his home and other developments on the suit property. Counsel submitted that even if the application is considered on a balance of convenience, the same would tilt in favour of the plaintiff. Mr. Mokuu referred the court to the photographs attached to the plaintiff's affidavit in support of the application. He referred the court to the photograph marked "A" which he pointed out to be the building which the plaintiff has put up on the suit property. He also referred to the photograph marked "B" which he said is the same building but with a portion thereof destroyed by the defendant and his hired gang. He also referred the court to the other photographs which showed maize plantation belonging to the plaintiff and which is said to be on the suit property.

5. Mr. Mose for the defendant also reiterated the contents of the defendant's replying affidavit. Mr. Mose submitted that the plaintiff has been the defendant's neighbour since 1977 and that all along the plaintiff has been in occupation of Plot No.792 which is owned by the plaintiff. Counsel submitted that Plot No. 792 was sold to the plaintiff by the defendant in the year 1977 and following that sale, the original parcel of land that was owned by the defendant was subdivided into two portions thus giving rise to LR No. North Mugirango/Ikongwe/791 which is owned by the plaintiff and LR No. North Mugirango/Ikongwe/792 which is owned by the defendant. Counsel submitted that it is Plot No.792 that the plaintiff purchased from the defendant and which he has occupied since 1977.

6. Mr. Mose submitted further that the plaintiff had taken advantage of the defendant who had been intermittent in his stay at home. He submitted that the defendant had allowed the plaintiff to occasionally graze his cattle on the suit property on a temporary basis which created only a license in favour of the plaintiff and nothing more. He submitted that the ingredients of adverse possession have not been established by the plaintiff. Mr. Mose referred to annexure "JMM1" to the plaintiff's affidavit which he submitted was clear that the suit property is registered in defendant's name. He submitted further that the plaintiff's claim over suit property is not based on any agreement for sale. Counsel submitted that if the alleged agreement for sale said to have been made in 1977 existed then the plaintiff should have sought to have the property transferred to him earlier.

7. He submitted that, the plaintiff's annexure "JMM2" does not amount to an agreement for sale of land as there is no land reference indicated therein. Counsel denied the plaintiff's claim that he has developed the suit property. He submitted that the developments referred to by the plaintiff are on the plaintiff's own parcel of land namely, Plot No.792. Counsel submitted that it was in the month of April, 2014 that the plaintiff attempted to enter the suit property and to put up structures thereon. He submitted that the construction of structures on the suit property by the plaintiff which commenced in April 2014 amounted to trespass on the said property. Counsel accused the plaintiff of seeking to unjustly enrich himself at the expense of the defendant.

8. Finally, Mr. Mose submitted that the plaintiff has not established a claim to land by adverse possession since the plaintiff has not occupied the suit property for uninterrupted period of 12 years or more. He submitted that attempts that were made by the plaintiff to enter into the suit property amounted to illegal intrusion on private property. He urged the court to dismiss the plaintiff's application. In reply, Mr. Mokuu reiterated his earlier submission that the plaintiff has occupied the suit property since 1977.

He submitted that it is not in dispute that there are crops on the suit property which have been planted by the plaintiff. He submitted further that the issues raised by both parties can only be determined at the trial and as such it would only be in order that the prevailing status quo is maintained pending the trial of the suit.

9. This being an application for injunction, it has to be considered in light of the principles set out in the case of **Giella vs. Cassman Brown Ltd (1973) E. A 358**, namely;

I. An applicant for a temporary injunction must satisfy the court that he has a prima facie case with a probability of success.

II. He must also demonstrate that he will otherwise suffer irreparable injury which cannot be compensated in damages unless the injunction is granted and;

III. If in doubt, the court will determine the application on a balance of convenience.

The question that I need to answer is whether the plaintiff has made out a prima facie case with a probability of success against the defendant. If the answer to that question is in the affirmative, I will proceed to consider whether the plaintiff is likely to suffer irreparable loss if the injunction sought is not granted. In the case of **Mrao vs. First American Bank of Kenya and 2 Others [2003] KLR 125**, a prima facie case was defined as follows;

“a prima facie case in a civil application includes but is 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 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.”

10. What has emerged from the pleadings, affidavits and submissions made before me is that the defendant was and still is the registered proprietor of the suit property. This fact is not in dispute. On the other hand, the plaintiff has claimed that he had entered into an agreement with the defendant for the purchase of the suit property and was given possession thereof pending transfer. The plaintiff has attached to his affidavit in support of the application a copy of a sale agreement said to have been made between the plaintiff and the defendant over the suit property. The plaintiff has claimed that the defendant declined to apply for consent of the Land Control Board to have the suit property transferred to the plaintiff. The defendant on the other hand has claimed that the sale agreement annexed to the plaintiff's affidavit is a forgery and that the plaintiff has not occupied the suit property from the year 1977 as he has claimed. The defendant has contended that what was sold to the plaintiff is Plot No.792 which is registered in the name of the plaintiff and not the suit property. The defendant has contended that the plaintiff is in occupation of Plot No.792 and not the suit property which he attempted to encroach into in the year 1986 and earlier this year and was repulsed. I would not be able at this stage to determine whether the sale agreement (annexture “JNN2”) attached to the plaintiff's affidavit in support of the present application is forgery or not. The same applies to the issue whether what the plaintiff bought and took possession of in the year 1977 was Plot No.792 or the suit property. These are issues which can only be determined at the trial.

11. The plaintiff's argument however is not so much grounded on the sale agreement aforesaid but on the allegation that he has lived on the suit property since 1977 openly, continuously and without any interruption by the defendant. The plaintiff has contended that he planted crops on the suit property and has even built a home thereon. As I have stated above, these contentions by the plaintiff have been denied by the defendant who has claimed that in fact the plaintiff is the owner of Plot No. 792 while the defendant is the owner of the suit property. The defendant has contended that the two parcels of land border each other and that the house which the plaintiff claims to have built on the suit property is actually on land parcel Plot No. 792. The defendant has admitted however that he had been away from the suit property for about 6 years and that while he was in Kericho where he had moved to look for

employment, the plaintiff used to graze on the suit property but he did not at any one time occupy the suit property openly for uninterrupted period of 12 years so as to be said to have dispossessed him of the same. As I have stated above, I would not be able to determine these issues on affidavit evidence. I am unable to say whether the buildings and crops shown in the photographs annexed to the plaintiff's affidavit are on the suit property or on Plot No.792. This is more so because the plaintiff has not denied that the defendant sold to him Plot No.792 in the year 1977 and that Plot No.792 shares a boundary with the suit property.

12. Due to the foregoing, I am doubtful if the plaintiff has established a prima facie case against the defendant with a probability of success. The issues raised by the defendant above have raised doubt on the merit of the plaintiff's case. I am equally doubtful if the plaintiff would suffer irreparable harm unless the orders sought are granted. This is because it is not clear to me whether the plaintiff's residence and the building shown in the photographs annexed to the plaintiff's affidavit are on the suit property or on plot No. 792. In view of the foregoing, the plaintiff's application falls for consideration on a balance of convenience. In the circumstances of this case, I am of the opinion that the balance of convenience would tilt in favour of maintaining the status quo pending the determination of the issue of ownership of the suit property at the trial. Since the plaintiff was in possession of the disputed property prior to the filing of this suit and is still in possession pursuant to the ex parte order that was given herein on 24th April, 2014, I am of the view that justice would be served if he remains in such possession undisturbed pending the hearing and determination of this suit. In the case of **Simon K. Meto & 2 Others vs. Austine Murgor & 3 Others [2014] eKLR** my brother Munyao J. faced with the same dilemma stated as follows;

“Following the principles of Giella vs. Cassman Brown I am uncertain as to the strengths of both the plaintiff's and defendant's case and I think for the purpose of this application, I would rather make a decision based on a balance of convenience I also think that it would be prudent for purposes of conserving the subject matter of the suit that I issue an order of injunction barring the defendants from subdividing, selling, leasing, charging or in any other way encounter or interfere with the land in dispute. The status quo prevails until the final determination of this suit.”

13. Due to the foregoing, I hereby grant prayer (iii) in the plaintiff's Notice of Motion application dated 17th April, 2014. The cost of this application shall be in the cause.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Begi h/b for Mose for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE