



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 352 of 2011**

**ROSE WARUINU MUTHEMBA**

**(suing on her behalf and an administrator to the estate of**

**LOUIS JUGUNA MUTHEMBA DECEASED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**ROSALYNA DOLA OUKO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOHN AARON TAFARI OUKO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANDREW ATINDA OUKO**

**(sued on their behalf and administrators to the estate of**

**JASON ATINDA OUKO..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The application before me is a Notice of Motion dated 13<sup>th</sup> July 2011 brought by the Plaintiff under Order 40 Rules 1(a),(b), 2, 4(1), (2), and (3) of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act where the Plaintiff is seeking the following substantive orders

1) That the Honourable court be pleased to grant a permanent order of injunction restraining the Defendants from selling, disposing off, alienating or in any other way and manner interfering with the Plaintiff's quiet possession, occupation, use and enjoyment of all that plot known as plot number 44 being a portion of all that piece of land known as LR. 3589/6 - Lang'ata pending the pending the hearing and determination of the Originating Summons.

2) That costs of the application be borne by the Respondents.

The application is supported by the Plaintiff's affidavit sworn on 13<sup>th</sup> July 2011 in which the grounds in support of the application are detailed. The Plaintiff has stated that she is co- administrator to the estate of the late Louis Juguna Muthemba who was her husband prior to his death. The applicant's case is that prior to the demise of Louis Juguna Muthemba, the deceased had on 16<sup>th</sup> March 1979, contracted with Mr. and Mrs. Rodah Katheka Gicogo to purchase portion number 44 measuring approximately 5 acres which was a sub plot comprised in all that piece of land known as LR. 3589/6 - Lang'ata, Nairobi. The applicant states that the land was then registerd in the name of Jason Atinda Ouko and has annexed a copy of the sale agreement between Mr. and Mrs. Rodah Katheke Gicogo and Mr. Louis J. Muthemba (deceased)

dated 16<sup>th</sup> March 1979.

The applicant contends that the deceased paid Kshs 110,825/- to the 1<sup>st</sup> purchasers by way of refund of the monies previously paid to the vendor's agent which refund was duly acknowledged by House and Estates as per the copy of an acknowledgement letter dated 17<sup>th</sup> April 1979 as well as receipts acknowledging payment annexed to the Plaintiff's Supporting Affidavit. It is the applicant's case that having paid all the monies due, the deceased was granted vacant possession of the portion which he occupied until his death on 14<sup>th</sup> October 1985 after which the beneficiaries of the deceased's estate continued to enjoy possession without interruption or interference. The applicant alleges that they continued to pursue transfer of the premises from the vendor and thereafter with the administrators of his estate without success and copies of correspondences exchanged in this regard have been attached to the affidavit in support of the application.

The applicant states that the administrators of the vendor's estate, the late Jason Atinda Ouko intend and are in the process of disposing off the entire land in which the purchased premises are comprised prompting the applicant to lodge a caveat against the suit premises on 7<sup>th</sup> July 2011 in a bid to protect her interest as well as the interests of the estate. The applicant claims that her ownership is genuine and she has been paying the City Council of Nairobi Land Rates as per the payment receipts annexed to her affidavit. The applicant contends and avers that the property in disputes is in great danger of being wasted, damaged and /or alienated unless the orders sought are granted.

In a supplementary affidavit sworn on 5<sup>th</sup> June 2012 and filed in court on 7<sup>th</sup> June 2012, the Plaintiff has stated that during the entire transaction and in all dealings involving LR. No. 3589/6, Nairobi, the registered proprietor was represented by Mr. Fackson Wainaina Kagwe, Advocate who severally corresponded with the Plaintiff on the follow-up regarding the issuance of titles. The Plaintiff has annexed an affidavit sworn by the said Fackson Wainaina Kagwe on 1<sup>st</sup> March 2012. Mr. Fackson Wainaina Kagwe has stated that he was appointed by the late Jason Atinda Ouko to act for him regarding all the conveyancing transactions pertaining to LR. 3589/6. Further, that he was furnished with a list of buyers as per annexure FWKB in his affidavit where Mr. Muthemba Lui was listed as the purchaser of sub plot 15, in tandem with the sub division plan attached.

According to Mr. Fackson Wainaina Kagwe, Mrs. R. W. Muthemba, the wife of Muthemba Lui, was a purchaser to whom letters dated 4<sup>th</sup> November 1995, 11<sup>th</sup> December 1995 as well as 8<sup>th</sup> February 2001 were sent and copies whereof are exhibited. The purpose for the meetings and consultations that Mr. Kagwe was having with the purchasers was to facilitate completion of all the sale transactions that had been initiated including the sale to the Plaintiff. Mr. Fackson Wainaina Kagwe at Paragraph 8 of his affidavit confirms that Mr. Muthemba Lui is the beneficial owner of sub plot 15 now LR No. 3589/44 Lang'ata, Nairobi and that the full purchase price for the same was paid to the registered owner.

The applicant's submissions on the matter are dated 11<sup>th</sup> May 2012 and were filed in court on 14<sup>th</sup> May 2012. Counsel for the applicant has submitted that a clear and arguable claim to the suit property has been established. The registered proprietor acknowledges the Sale Agreement of 16<sup>th</sup> March, 1979 and that the Applicant was granted possession pending completion. The plaintiff further submits that the applicant has been in continuous and un-interrupted possession for 32 years together with her deceased husband and by herself for over 27 years since the demise of her husband. It is submitted for the applicant that for purposes of adverse possession, the reason and basis for possession is immaterial as long as the entry was peaceful and the possession is adverse to the title of the registered proprietor and reliance has been placed on the case of **Ndiga -vs- Okelo(2004)eKLR**. Counsel submits that adverse possession is given effect under sections 7, 37 and 38 of the Limitations of Action Act and the case of **Bejoy Chundra -vs- Kally Proсно (1878)4 Cal. 327** has been relied on.

The applicant states that her possession was for a specific and identifiable part of the whole of the vendor's land which has at all material times been demarcated and delineated and identified as plot No. 15 on the survey plan and having a L.R. No. 3589/44. Counsel has relied on the case of **Gatimu Kinguru - vs- Muya Gathangi HCCC No. 176 of 1973** as well as the case of **Githu -vs- Ndete(1984)KLR 776**

where the court held that time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor.

Further, counsel for the applicant has submitted that the balance of convenience lies in favour of the party in occupation and who would be greatly prejudiced and inconvenienced if the status quo were disturbed. Counsel has contended that by virtue of the applicant's occupation and use of the premises for over 32 years, damages would not sufficiently remedy any inconvenience she may suffer if her possession is compromised before the hearing and determination of the suit.

The application is opposed by the 2<sup>nd</sup> Respondent who has filed a replying affidavit sworn on 13<sup>th</sup> December 2011 where it is stated that the estate of the late Jason Atinda Ouko is the registered owner of the entire property known as LR. No. 3589/6, IR 23229 which has never been subdivided. The 2<sup>nd</sup> Respondent has annexed a copy of the certificate of title as evidence. The 2<sup>nd</sup> Respondent has contended that the land claimed by the Plaintiff being plot no. 44 is un-delienated, undefined and nonexistent land. According to the 2<sup>nd</sup> Respondent, the Plaintiff cannot sustain a claim in adverse possession as the portion occupied was granted and recognized by the deceased owner.

The 2<sup>nd</sup> Respondent has alleged that the Plaintiff has never had exclusive and physical use of the portion claimed and has stated that the occupation has not been peaceful and free from interruption. It is the 2<sup>nd</sup> Respondent's case that the late Jason Atinda Ouko has never abandoned his land or been a missing owner. The 2<sup>nd</sup> Respondent has annexed pictures of part of the portion claimed to demonstrate that there is neither notorious and open occupation nor physical and exclusive use of the portion claimed by the Plaintiff. According to the 2<sup>nd</sup> Respondent, the Plaintiff's occupation was with the owner's recognition of the purchaser's interest and further, that the Plaintiff never had the intention to dispossess the true owner by adverse possession thereby lacking sufficient intention to dispossess and an intention to possess.

The Defendants in their submissions dated 6<sup>th</sup> June 2012 relied on the case of **Giella -vs- Cassman Brown (1973)EA 358** and submitted that the Plaintiff has not demonstrated a prima facie case with a probability of success. Counsel for the Defendants cited the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd CA No. 39 of 2002** where the court defined a prima facie case as one that is more than an arguable case and where the evidence shows an infringement of a right and the probability of success of the applicant's case upon trial. Counsel for the Defendants contended that in order to assess the strength of the Plaintiff's case, the principles governing the doctrine of adverse possession must be examined and relied on the case of **Little Dale -vs- Liverpool College(1900)1Ch 19**.

The Defendants submitted that a person claiming through adverse possession must show dispossession or discontinuance by the property owner and a taking of possession by the adverse possessor. Counsel relied on the cases of **Mbira -vs- Gachuhi (2002)1EA 137** and **Sisto Wambugu**

**-vs- Kamau Njuguna CA No. 10 of 1982**. The Defendants have submitted that the Plaintiff having deponed that she entered into the land pursuant to a sale agreement, the Plaintiff cannot lay a claim for adverse possession since her occupation was not adverse but permissive and further, that the permissive occupation was never determined. In support of this submission, counsel relied on the case of **Mungania -vs- Imanyara CA No. 15 of 1984** where it was held that until an agreement is terminated or rescinded, possession is not adverse to anyone as required by section 7 and 13 of the Limitations of Actions Act. Reliance was also placed on the case of **Samuel Miki Waweru -vs- Jane Njeri Richu CA No. 122 of 2001** for the proposition that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.

It was further submitted for the Defendants that possession involves more than mere factual presence on land as it comprises particular mindset in relation to presence. Counsel contended that possession will attach to a party only if he or she has factual possession (*factum possessionis*) and the requisite intention to possess (*animus possidendi*). As to whether the Plaintiff stands to suffer irreparable injury if the order sought is not granted, counsel for the Defendants submitted that since the Plaintiff had failed to establish

an arguable case, the court ought not consider this test. Counsel reiterated that the Defendants had shown that there is neither notorious, open or physical exclusive use of the claimed portion. Counsel for the Defendants submitted that no justice would accrue from issuing an injunction against the Defendants where the Plaintiff had no established claim over the suit property. Counsel reiterated that plot no. 44 in respect of which the injunction is sought is undelinated, undefined and nonexistent as title to land LR 3589/6 has never been subdivided. Lastly, it was submitted for the Defendants that section 23 of the Registration of Titles Act (now repealed) gives an absolute and indefeasible title to the owner in the absence of fraud and misrepresentation to which the owner is a party. Reliance was also placed on Article 40 of the Constitution which guarantees the right to property and the Defendants argued that no reasons had been advanced to warrant interference with their title.

Having considered the brief facts of the matter and the rival submissions by the parties I now turn to consider whether the applicant has satisfied the conditions for grant of a temporary injunction.

In my view, the applicant has an arguable claim having established that her late husband bought 5 acres of the suit land in 1979. This fact has not been rebutted by the Defendants whose only contention is that the Plaintiff has continued to occupy the premises as beneficial owners pending the transfer of the legal interest in accordance with the sale agreement. The Defendants have insisted that the Plaintiff has not brought evidence to show that the permissive occupation was ever determined.

Courts have held that occupation can only be with permission or adverse, and have further stated that the two concepts cannot co-exist. In the case of **Wambugu -vs- Njuguna (1983) KLR 172**, the court held that where a claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase and further, that the possession can only become adverse once the contract is repudiated. Similarly, the court of appeal in the case of **Samuel Miki Waweru -vs- Jane Njeri Richu [2007] eKLR**, espoused the legal position thus:-

***"it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. "***

In the instant matter the Plaintiff/Applicant claims that the full purchase price was paid to the defendant and the defendant does not dispute this fact and at any rate there is acknowledgment of the payment by the defendant's agents. Applying the holding in the *Wambugu vs. Njuguna Case (supra)* that possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price it may be stated that the strict requirement of intention to dispossess the owner in a claim of adverse possession is negated in instances where the possession is pursuant to an agreement of sale and the purchaser has fully paid the purchase price.

In the present case possession by the plaintiff was pursuant to a sale agreement and it is not disputed that he plaintiff entered into possession and has remained in possession initially through her deceased husband and subsequently by herself as administrator of her late husband's estate. I am in the circumstances persuaded that the plaintiff applicant has demonstrated and has established she has a prima facie case with a probability of success.

As to whether damages would be an adequate remedy if the order of restraint is not granted I would answer in the negative. The plaintiff has been in possession and occupation of the suit property identified as plot No. 44 which as per the sale agreement was identified as Plot E L.R. 3589/6 and subsequently on the survey plan as No. 15 L.R. No. 3589/44 for a period in excess of 32 years and I would not consider damages would adequately compensate the plaintiff in case the Plaintiff is successful in the suit. I need not consider the balance of convenience having held that the plaintiff has established a prima facie case and that an award of damages would not be an adequate remedy in case the application is not granted and the plaintiff is successful at the trial. If I were to express myself on the issue of the balance of convenience I would also resolve the same in favour of the Plaintiff/Applicant as in my opinion the balance of convenience would tilt in favour of the party in possession considering the plaintiff has

deponed that she has semi permanent rental houses on the portion of land the subject of the sale a fact the defendant has acknowledged at paragraph 18(e) of the replying affidavit by Aaron Tafari Ouko.

In the premises and for all the reasons hereinabove stated I find and hold that the plaintiff's application dated 13<sup>th</sup> July, 2011 has merit and I hereby grant the order of injunction sought in terms of prayer No. (3) of the Notice of Motion.

I award the costs of the application to the Plaintiff.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant