



NO.129

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 222 OF 2013(O.S)

JULIA MORAA NYANDWARO

(Suing as the administratrix of the estate of

Moses Atandi Ogoti).....APPLICANT

VERSUS

CHRISTOPHER NYAMWEYA MONAYO1ST RESPONDENT

AGNES KEMUMA MOGERE.....2ND RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 14th May, 2013 brought under Order 40 Rules 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya. The applicant in this application is seeking a temporary injunction to restrain the respondents from alienating, transferring, evicting the applicant or in any manner whatsoever interfering with 2 ½ acres out of all that parcel of land known as LR.No. Wanjare/Bokeire/5225 (hereinafter referred to as “**Plot No. 5225**”) pending the hearing and determination of this suit. The application is supported by the affidavit of the applicant sworn on 14th May, 2013. The applicant’s claim against the respondents which forms the basis for the current application for injunction has been brought by way of Originating Summons dated 14th May, 2013. In the Originating Summons, the applicant is seeking, a declaration that she has acquired and/or is entitled on account of adverse possession for a period of more than 12 years to all that portion of land measuring 2 ½ acres or thereabouts out of LR. No. Wanjare/Bokeire/ 5224 (hereinafter referred to as “Plot No. 5224) and LR. No. Wanjare/Bokeire/ 5225 (“**Plot No. 5225**”) which is occupied by the applicant. The said portion of land measuring 2 ½ acres which the applicant is claiming from Plot No. 5224 and Plot No. 5225 is hereinafter referred to as “**the suit property**”. The applicant has also sought an order that the applicant be registered as the proprietor of the suit property. The applicant’s suit and application for interlocutory injunction are premised on the ground that the applicant has occupied the suit property which is registered in the names of the respondents for uninterrupted period exceeding 12 years and as such the applicant has acquired ownership thereof by adverse possession. In his affidavits in support of the Originating Summons and the application for injunction, the applicant deposed that the applicant’s deceased husband, Moses Atandi Ogoti (Moses Atandi Ogoti and applicant, Julia Moraa Nyandwaro shall all be referred to hereinafter

jointly and severally as “**the applicant**” where the context so admits) purchased the suit property sometimes in the year 1985 from the previous owners, Zacharia Ondingi Abobo and Zablun Abobo who held the suit property in common in equal shares.

The agreement for sale was made between the applicant and Zablun Abobo who held ½ share in the suit property. The applicant had purchased a portion of LR. No. Wanjare/Bokeire/154 (“Plot No. 154”) which was then owned by the said Zacharia Ondingi Abobo and Zablun Abobo (hereinafter referred to as “**the previous owners**”). The applicant took possession of the suit property soon after the purchase and commenced cultivation thereon. The previous owners of Plot No. 154 subdivided the same in 1986 which subdivision gave rise to LR. Nos. Wanjare/Bokeire/ 2245 and 2246 (hereinafter **Plot No. 2245 and Plot No. 2246**). The previous owners transferred Plot No. 2246 to the 1st respondent on 19th November, 1986 and retained Plot No. 2245 in their name. The applicant claims that when the said sub-division was done, the applicant was in possession and remained in possession of the portion of the original portion of Plot No. 154 that was sold to her which now fell within Plot No. 2245. The applicant claims that the previous owners died between 1994 and 1998 and that under circumstances which are unclear, the 1st respondent caused Plot No. 2245 to be transferred to his name on 14th February, 2008. The 1st respondent then caused the said plot to be sub-divided into two portions in the year 2012 which sub-division gave rise to Plot No. 5224 and Plot No. 5225 on which plots lies the suit property. On 31st August, 2012, the 1st respondent transferred Plot No. 5225 to the 2nd respondent while retaining Plot No. 5224 into his name. The applicant claims that the portion of the original parcel of land that the applicant purchased from the original owners which measures 2 ½ acres (the suit property) and which she has occupied over the years despite all the aforesaid transaction fall within Plot No. 5224 and Plot No. 5225. The applicant contends that the 1st respondent’s acquisition of Plot No. 2245 the validity of which is questionable, the sub-division of the said plot by the 1st respondent and the sale of a portion thereof namely, Plot No. 5225 to the 2nd respondent cannot defeat the applicant’s adverse possession claim over the suit property. The applicant claims that on 11th April, 2013 the 2nd respondent entered Plot No. 5225 and fenced off the same thereby evicting the applicant from a portion of the suit property. The applicant claims that the 2nd respondent has no right to evict her from Plot No. 5225 because the plot is part of the suit property in which she has acquired interest by adverse possession. It is on account of the foregoing that the applicant has brought the present notice of motion application.

2. The applicant’s application was opposed by the 2nd respondent. In her affidavit in reply sworn on 23rd May, 2013, the 2nd respondent contended that she is the registered proprietor of Plot No. 5225 part of which the applicant has claimed herein by adverse possession. The 2nd respondent denied that the applicant has been in occupation of Plot No. 5225 for over 25 years as she has claimed. The 2nd respondent contended that she has been in occupation of Plot No. 5225 since the year 2011 and that she has planted maize and sugar cane thereon. The 2nd respondent contended that the orders sought by the applicant if granted would subject the 2nd respondent to immense difficulty as she would not be able to attend to her maize and sugar cane plants aforesaid. The 2nd respondent contended further that the applicant has nothing on the suit property and that the balance of convenience would tilt in favour of refusing the injunction sought.
3. The application was argued on 27th May, 2013 when Mr. Bosire advocate appeared for the applicant while Mr. Soire Advocate appeared for the 2nd respondent. On behalf of the applicant, Mr. Bosire submitted that the applicant has put before the court sufficient evidence in proof of the fact that the applicant purchased the suit property. Counsel submitted that the last installment of the purchase price was paid by the applicant in the year 1988 and as such by the year 2000, the applicant had acquired title to the suit property by adverse possession. The applicant’s advocate submitted that the rights that were acquired by the respondents herein over the suit property subsequent to year 2000, were subject to the applicant’s aforesaid right that had already accrued. Counsel also submitted that the respondents had acquired the titles to the suit property unlawfully since the previous owners thereof died on 4th September, 1994 and 9th

November, 1998 respectively and no letters of administration has been obtained with respect to their estates. The suit property could not therefore have been transferred to the respondents lawfully. The applicant's advocate submitted further that the applicant was in occupation of the suit property until 2nd April, 2013 when the 2nd respondent entered Plot No. 5225 and fenced it off. The applicant's advocate contended that the applicant has established a prima facie case against the respondents to warrant the granting of the orders sought.

4. In response to the applicant's advocate's submissions, the 2nd respondent's advocate submitted that the applicant has failed to place before the court evidence in proof of her adverse possession claim. Counsel submitted that the material placed before the court by the applicant is insufficient to prove the existence of peaceful and quiet possession by the applicant of the suit property. Counsel submitted that it is the 2nd respondent who is in possession of Plot No. 5225 which she has occupied since the year 2011 when she purchased the same from the 1st respondent. Counsel submitted that the 1st respondent had acquired Plot No. 2245 from which Plot No. 5225 originated in the year 1986 and as such he had the right to sell the same to the 2nd defendant. Counsel accused the applicant of material non-disclosure in that she failed to disclose to the court that the 2nd respondent is actually in possession of Plot No. 5225 and has planted sugar cane and maize thereon.
5. I have considered the applicant's case for interlocutory injunction and the response thereto by the 2nd respondent. This is the view I take of the matter. The applicant's suit on the basis of which the present injunction application has been brought is seeking title to land registered in the names of the respondents by adverse possession. The applicant claims that she had entered into an agreement for sale with the previous owners with respect to a portion of the parcel of land then known as Plot No.154. The said agreement is said to have been entered into between the years 1984 and 1988 when the last payment of the purchase price was made. The applicant claims that she took possession of the suit property soon after the same was sold to her and that she has remained in possession over the years until 4th April, 2013 when the 2nd respondent entered Plot No. 5225 and fenced the same. The applicant claims that while she was in possession of the suit property, the previous owners sub-divided Plot No. 154 into two (Plot No. 2245 and Plot No.2246) and sold one portion(Plot No. 2246) to the 1st respondent while the second portion(Plot No. 2245) remained in the name of the previous owners. The applicant claims that the suit property fell within this Plot No. 2245 that remained in the name of the previous owners. The applicant contended that several years after the death of the previous owners, the 1st respondent unlawfully and un-procedurally caused Plot No. 2245 to be transferred to his name without first obtaining letters of administration with respect to the estate of the previous owners. Upon obtaining the title of Plot No. 2245 as aforesaid, the 1st respondent sub-divided the same into two portions (Plot No. 5224 and Plot No. 5225). The 1st respondent thereafter transferred Plot No. 5225 to the 2nd respondent who thereafter proceeded to fence the same. The applicant contends that the transfer of Plot No. 2245 to the 1st respondent's name, the subsequent sub-division thereof and the transfer of a portion thereof to the 2nd respondent were made subject to the right of the applicant that she had acquired over the suit property by virtue of continuous occupation thereof for a period of over 25 years. The 2nd respondent's act of fencing off Plot No. 5225 was therefore inconsistent with and amounted to a violation of that right. The applicant now wants that right protected by an order of injunction pending the hearing and determination of this suit. It is not clear from the record as to what portion of Plot No. 154 (**the original plot**) was sold by the previous owners to the applicant. The applicant has not produced a copy of one agreement for sale that was entered into between the applicant and the previous owners concerning the suit property. What the applicant has annexed to her affidavit are copies of various agreements for sale and acknowledgments of payment of purchase price for various pieces of land. It not even clear from the said agreements and acknowledgments as to the parcel numbers for the pieces of land were being purchased. It seems as if the applicant had purchased three pieces of land, one for Ksh. 10,000.00 on 16th May, 1985, the second one for Ksh. 6750.00 on 9th November, 1985 and the

third one on 9th April, 1988. There is also an acknowledgment of payment dated 1st December, 1984 which suggests that there may have been another agreement for sale that was entered into in 1984. The same is however not exhibited. From the foregoing it is difficult to discern how the applicant has come up with the 2 ½ acres which she claims to have acquired through adverse possession. Without any information as to the measurement of the portion of the original plot (Plot No. 154) that was sold by the previous owners to the applicant, it becomes difficult to appreciate the applicant's claim over 2 ½ acres of Plot No. 5224 and Plot No. 5225. Even without any mention in the agreements for sale aforesaid as to the measurements of the portion of the original plot that was sold by the previous owners to the applicant, the applicant should have placed some material before the court to prove that the portion of the original plot that has all along been in her possession measures 2 ½ acres so as to justify her claim over the entire parcel of land comprised in Plot No. 5225 and a portion measuring 0.30 hectares out of Plot No. 5224. In addition to the adverse possession claim, the applicant also contended that the respondents obtained Plot No. 5224 and Plot No. 5225 unlawfully by acquiring title thereto without first obtaining letters of administration of the estate of the previous owners. For the adverse possession claim, the 2nd respondent contended that the applicant has failed to prove the ingredients of adverse possession. The 2nd respondent did not however respond to the applicant's contention that the titles to Plot No. 5224 and Plot No. 5225 were obtained by the respondents unlawfully. The 1st respondent did not respond to the application while the 2nd respondent in her response did not explain how she acquired the suit property. The 2nd respondent who claimed to have acquired Plot No. 5225 through purchase from the 1st respondent did not exhibit, the agreement for sale or the transfer.

6. The applicant is claiming the suit property on the ground that she has acquired title to the same by adverse possession through open, quiet and uninterrupted possession and occupation of the same for a period of over 25 years reckoned from 1988. In the case of **Salim –vs- Boyd & another [1971] E.A. 550**, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the subject land for a period of 12 years or more. The applicant was therefore under a duty to demonstrate to the court on a prima facie basis that she has been in open, continuous and uninterrupted occupation of the suit property for a period of 12 years or more. The applicant claims that she purchased the suit property from the previous owners between 1984 and 1988 and that she took possession immediately upon purchase which possession continued until the 2nd respondent entered the suit property and fenced it off on 4th April, 2013. As I have already mentioned above, the applicant did not explain how she arrived at 2 ½ acres comprised in the suit property which she is claiming from the respondents. The applicant did not also place any evidence before the court to prove that the applicant has been in possession of the claimed 2 ½ acres comprised in the suit property since 1984. The applicant claimed that she has been cultivating the suit property from the year 1984 to date. No evidence of such cultivation was placed before the court. Due to the foregoing, I am not satisfied that the applicant has on a prima facie basis established that she has had open, quiet and uninterrupted possession of the suit property for a period of or exceeding 12 years. The other issue that casts doubt on the veracity of the applicant's claim to the suit property through adverse possession is the applicant's claim that she entered into and has all along occupied the said property as a purchaser thereof. The applicant has not explained how and when her occupation became adverse to the previous owners of the suit property and the respondents herein. The applicant had a duty to explain how her entry into the suit property pursuant to an agreement for sale became adverse to the registered proprietors thereof. In the case of, **Wambugu vs. Njuguna (1983) KLR 172**, it was held that not all persons in possession can have time run in their favour. A person who occupies land that he claims to belong to him as of right cannot claim that such occupation is adverse to the interest of the registered proprietor of such land. An adverse possessor must have no right to be on the land claimed other than his entry and occupation thereof. See also the persuasive case of, **Mbira-vs-Gachuhi [2002] 1 EA 132**. Due to the foregoing, I doubt whether the applicant has a prima facie case against the respondents based on adverse possession.
7. A part from establishing a prima facie case with a probability of success, the applicant was also supposed to show that unless the orders sought are granted, the applicant would suffer irreparable

harm in accordance with the principles that were enunciated in the case of **Giella –vs- Cassman Brown [1973] KLR 358**. I am not persuaded that the applicant stands to suffer irreparable harm if the orders sought are not granted. The applicant has not shown the nature of the activity if any that she is carrying out on the suit property. The applicant has only claimed without any proof that she has been cultivating the suit property a fact which is disputed by the 2nd respondent who has claimed that she is the one who has planted maize and sugar cane on the suit property. Having expressed my doubt as to whether the plaintiff has established a prima facie case with a probability of success and whether she stands to suffer irreparable harm if the orders sought are not granted, the applicant's application now falls for consideration on a balance of convenience. The 2nd respondent has a legal title to the suit property and claims to be in possession thereof since the year 2011. The applicant has no legal title to the suit property but also claims to be in possession of the same since the year 1984 and that her proprietorship rights over the same have accrued and are threatened by the 2nd respondent. On the material that has been placed before me, I am unable at this stage to determine whether the applicant has actually been in possession of the suit property. I am inclined in the circumstances to let possession remain with the 2nd respondent who has the title to the suit property. I would however make an order preserving the suit property pending the hearing and determination of this suit. This court has power under **Section 13(7) (a) of the Environment and Land Court Act, No. 19 of 2011** as read with **Section 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya** to make preservative orders. Due to the foregoing, the applicant's Notice of Motion application dated 14th May, 2013 is dismissed. I however order that the 2nd respondent by herself or through her servants or agents shall not sell, lease, charge or transfer all that parcel of land known as LR. No. Wanjare/ Bokeire/ 5225 pending the hearing and determination of this suit. The costs of the application shall be in the cause.

Signed, dated and delivered at KISII this 7th day of October, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Bosire for the Applicants

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Mobis Court Clerk.

S. OKONG'O,

JUDGE.

E&LCC.NO.222 OF 2013(O.S)