



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CIVIL CASE NO. 6 OF 2007(O.S)

MICHAEL OGWENO MBOGO.....1ST PLAINTIFF

JACKTON KOLO MUGA.....2ND PLAINTIFF

ALPHONCE ONYANGO MBOGO.....3RD PLAINTIFF

PETER OTIENO MBOGO.....4TH PLAINTIFF

VERSUS

PETER ALBERT ODUOR.....1ST DEFENDANT

SILAS ONYANGO ODHIAMBO 2ND DEFENDANT

RULING

1. This suit was filed on 30th January, 2007. For the last six (6) years, no attempts have been made by the parties to prepare the same for full hearing. Instead, the parties have resorted to filing applications one after the other for interlocutory reliefs. What is before me is one such application by the 2nd defendant. The application itself was filed two years ago and has been pending

hearing since then. I have raised the above issues so as to express my displeasure with the tendency of litigants to prefer interlocutory applications over full hearings. The 2nd defendant's application before me is dated 2nd November, 2011. The same was brought under Order 40 rule 1 and 2 of the Civil Procedure Rules, sections 1A, 3, 3A, 63 (c) and (e) of the Civil Procedure Act. The application sought three principal prayers namely; a temporary injunction to restrain the Plaintiffs from entering, cultivating, removing, alienating and/or wasting all that parcel of land known as **LR. No. Kabondo/Kakangutu East/853** (hereinafter known as "**the suit property**"), a mandatory injunction directing the Plaintiffs to remove the temporary structures that they have placed on the suit property and an order of eviction against the defendants from the suit property. The application was supported by the affidavit of the 2nd defendant sworn on 3rd November, 2012 in which he deposed that he is the registered proprietor of the suit

property and that the defendants entered the suit property forcefully and commenced cultivation and excavation of bricks therefrom without his consent an act which caused him loss and damage. The 2nd defendant deposed further that the acts of the defendants aforesaid denied him access and enjoyment of the suit property in exercise of his proprietary rights over the same under sections 27 and 28 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The 2nd defendant's application was

opposed by the Plaintiffs through a replying affidavit sworn by the 2nd Plaintiff on 30th November, 2011. In the said affidavit, the Plaintiffs contended that they have been in open, free and uninterrupted occupation of the suit property since the year 1995. The Plaintiffs contended that they entered and occupied the suit property before the 2nd defendant was registered as the proprietor thereof a fact which according to the Plaintiffs has been acknowledged by the 1st defendant who sold the suit property to the 2nd defendant. The Plaintiffs contended that they have never

moved out of the suit property since they occupied the same in 1995 and that by the time the 1st and the 2nd defendants were entering into agreement for sale with respect thereto, the 2nd defendant who resides in the neighborhood was aware of the Plaintiffs occupation of the same. The Plaintiffs denied the 2nd defendant's allegation that they had just entered the suit property. The Plaintiffs contended that since they have been in possession of the suit property all along, it is only fair that they remain in possession pending the hearing and determination of this suit. The Plaintiffs contended that by the time the 2nd defendant purchased the suit property from the 1st defendant, the 1st defendant's interest in the property had been extinguished and as such, the 1st defendant had no valid title that could be passed to the 2nd defendant. The 2nd defendant's rights if any on the suit property were therefore subject to the rights that the Plaintiffs had acquired over the said property. The Plaintiffs contended

further that since the 2nd defendant has not lodged a counter-claim against the Plaintiffs the prayers sought in this application are sought in vacuum and as such cannot be granted.

2. On 28th May, 2012, the parties agreed to argue the 2nd defendant's application by way of written submissions. The Plaintiffs filed their written submissions on 4th July, 2012 while the 2nd defendant filed his submissions on 28th January, 2013. I have considered the 2nd defendant's application, the affidavit filed in support thereof and the 2nd defendant's advocates' written submissions. I have also considered the affidavit filed by the Plaintiffs in opposition of the application and the written submissions filed by the Plaintiffs' advocates. As I have stated above, the 2nd defendant has sought in this application a prohibitory and mandatory injunction and an order of eviction. On the 2nd defendant's prayer for interlocutory injunction, I would wish to dispose of a preliminary point that was raised by the Plaintiffs before I consider the prayer on merit. The Plaintiffs had

submitted that the remedy of interlocutory injunction is not available to the 2nd defendant because the 2nd defendant has not mounted a counter-claim against the Plaintiffs. The Plaintiffs did not cite any authority in support of this submission neither did the 2nd defendant in response thereto. On my part, I am of the view that where a dispute exists over a property which is claimed by both the Plaintiff and the defendant like in the present case, the remedy of interlocutory injunction would be available to both the Plaintiff and the defendant if the same is intended to protect the subject property or to maintain the status quo in relation thereto pending the hearing and determination of the dispute between the parties irrespective of whether the defendant has lodged a counter-claim or not against the Plaintiff. On this view, I am supported by the persuasive decision of Harris J. in the case of, **Njoroge Kironyo & Others vs. Kironyo Njoroge [1976-80] 1 KLR 132**. Having disposed of that preliminary issue, I would now consider on merit the prayers for prohibitory and mandatory

injunction by the 2nd defendant. The principles to be applied in application for temporary prohibitory and mandatory injunction are now settled. For a temporary prohibitory injunction, an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. These were laid down in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**. Different principles however apply to applications for temporary mandatory injunction. The granting of a temporary mandatory injunction effectively determines a case before trial. An applicant for a temporary mandatory injunction must therefore demonstrate that

he has very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. The applicant must also fulfill the usual conditions necessary for granting interlocutory

injunction set out herein above. In the case of **Shepherd Homes Ltd. –vs- Sandham [1971] 1 ch.340, Meggery J.** had this to say on interlocutory mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but

at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

In the case of, **Redland Bricks Ltd –vs- Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction **“is a jurisdiction to be exercised sparingly and with caution but in the proper case, unhesitatingly”**. Applying the foregoing principles to this case, the question that I need to answer is whether the 2nd defendant has satisfied the court that he has unusually strong and

clear case against the Plaintiffs that warrants the issuance of the interlocutory prohibitory and mandatory injunction sought.

This suit was brought by the Plaintiffs seeking a declaration that the defendants’ right to recover the suit property is barred by the Limitation of Actions Act, Cap. 22 Laws of Kenya and, thereby extinguished on account of the Plaintiffs open, peaceful and continuous occupation of the suit property for a period of over 12 years. The Plaintiffs also sought an order for their registration as the proprietors of the suit property in place of the 2nd defendant. In their affidavit in support of their Originating Summons, the Plaintiffs contended as they have contended herein that they have occupied and used the suit property continuously since 1995 and

that when the 2nd defendant acquired the title to the suit property on 21st April, 2010, they were in occupation thereof and are still in occupation. It is on the basis of that occupation that they moved the court for the orders mentioned above. The 2nd defendant has

not placed any material before me to clearly disapprove the Plaintiff’s contention that they have occupied the suit property since 1995 and that when the 2nd defendant purchased the suit property and became the registered proprietor thereof, the Plaintiffs were with the knowledge of the 2nd defendant in possession of the suit property. The 2nd defendant has also not demonstrated that the Plaintiffs entered the suit property forcefully after he became the registered owner thereof and commenced the acts complained of by the 2nd defendant. Lastly, the 2nd defendant has not demonstrated that he has been in possession of the suit property at any one time after or before acquiring the same. The Plaintiffs’ claim being one for adverse possession, the 2nd defendant can only succeed in defeating the same if the 2nd defendant demonstrates that the Plaintiffs have never been in occupation of the suit property as claimed. This is what the 2nd defendant was supposed to establish in this

application on a prima facie basis so as to justify the granting of the orders sought. In my view the 2nd defendant has made mere allegations without any material to back it up. The 2nd defendant has failed to establish that he has a prima facie case or defence for that matter against the Plaintiffs’ claim herein to justify the granting of the interlocutory prohibitory injunction sought. As I stated earlier the granting of an interlocutory mandatory injunction would require “unusually strong case”. The 2nd defendant having failed to establish even a prima facie case is not entitled to interlocutory mandatory injunction. That leaves the 2nd defendant’s prayer for eviction. The 2nd defendant did not lay a basis for this prayer either in the application or in his written submissions. In my view, this prayer at interlocutory stage is in the

nature of a mandatory injunction. As I have already found herein above, the 2nd defendant has not established a case that warrants the granting of a mandatory injunction.

3. In conclusion, it is my finding that the 2nd defendant has failed to

satisfy the conditions for granting interlocutory injunction. The application dated 2nd November, 2011 is therefore not for granting. The same is hereby dismissed with costs to the Plaintiffs. It is my hope that the disposal of this application will now open the way for the hearing of the main suit and that the parties would take appropriate steps to set down the matter for pre-trial directions.

Signed, dated and delivered at Kisii this 7th day of November, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ochwangi for the plaintiffs

No appearance for the 1st defendant

No appearance for the 2nd defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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