



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

Civil Case 41 of 2012

IN THE MATTER OF LAND REFERENCE NO.ELGON/NAMORIO/371

AND

IN THE MATTER OF SECTIONS 7,17 AND 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

ETYANG MURUNYA EMEJE.....APPLICANT

~VRS~

VICTOR MARUI CHEMONGESI.....RESPONDENT

RULING

Land parcel no.Elgon/Namorio/371 is registered in the name of the Respondent. This is since 29/5/2004. Before this, and since 1/4/1969, it was registered in the name of his father Samuel Chemonges. When Samuel died the Respondent succeeded him and obtained the registration.

The Applicant is the son of the deceased Jairo Burunya Emeje. His case is that in 1969 the deceased purchased land measuring 36 yards for Ksh.1300/= from one Masai Chemonges. The parties entered into a written agreement (“*EME – 2*”). The deceased began to utilize the portion. In 1980 the deceased allocated him the portion. The portion shared a common boundary with land parcel no.Elgon/Namorio/371. In December 2011 the Respondent destroyed the common boundary and erected a new one. He entered the Applicant’s portion and prepared it to plant as if it was his land. When the Applicant went to the lands office and was shown the registry maps. He found that since 1969 his portion has been part of the Respondent’s title. He filed this suit under Order 37 rules 1 and 3 of the Civil Procedure Rules and sections 7, 17 and 38 of the Limitation of Actions Act (Cap.22) claiming that he has since 1969 openly, exclusively and continuously without interruption used, possessed and occupied the portion. This is for a period in excess of 12 years. He sought a determination that he has since acquired the portion by adverse possession after the Respondent’s claim to it has been extinguished. He asked to be registered as the absolute proprietor of the portion in place of the Respondent.

Along with the suit he filed a motion under sections 3, 3A and 63 (e) of the Civil Procedure Act and Order 40 rules 1,2 and 3 of the Civil Procedure Rules for a temporary injunction to restrain the Respondent, and all those acting under him, from encroaching on the portion, constructing thereon, cultivating, disposing or in any other manner interfering with his occupation of the portion in the title until the suit is heard and determined. In support of the application he annexed photos showing his houses erected on the portion and the trees he planted and which are growing on the same.

The Respondent opposed the application. His case is that he is the absolute registered proprietor of all the land in the title. He denied that the Applicant has been in occupation of any portion of it since 1980, or at all. He denied that the Applicant's father bought the 36 yards or any portion, of the title. He denied sharing any boundary with the Applicant. He stated that during the inter-tribal disturbances of 2008 that affected Mt. Elgon area, the Applicant's houses were destroyed. The Applicant requested him to be allowed in his (the Respondent's) houses on the title. When the disturbances were over the Respondent, through an advocate, wrote to him to vacate which he did in November 2011. The Respondent stated that the houses and the property whose photos the Applicant exhibited are his (the Respondent's).

The Applicant swore a supplementary affidavit denied having approached the Respondent for accommodation. He denied having left the portion at any time, and denied receiving the notice to vacate from here. He stated that he is still occupying the portion on which he has constructed several houses and planted eucalyptus trees, coffee, bananas and avocado.

I have considered the application, affidavits and the written submissions filed on behalf of the parties. It is trite that an interlocutory injunction can only be issued if the applicant can demonstrate that he has a *prima facie* case that will probably succeed; if it is shown that if the injunction is not granted he will suffer irreparable harm or loss and, if the court is in doubt, it will decide the case on the balance of convenience (**Giella v. Cassman Brown & Co. Ltd [1973] EA 358**).

The Applicant has a limited grant ("*EME-1*") in respect of the estate of his late father and has availed an agreement dated 30/9/1969 ("*EME-2*") to show that the deceased bought a portion of land measuring 36 yards for Ksh.1300/= from one Masai Chemonges. It is his case that the deceased occupied the land until 1980 when he gave it to him and that since then he has lived on and developed the portion. I agree with the Respondent that the agreement does not say that the portion was part of Elgon/Namorio/371. Nonetheless, the applicant says that he continued to live here until 2011 when he discovered it formed part of the Respondent's title.

There are houses and developments on the disputed portion. Both parties claim them. For the Applicant, these houses and trees, etc, are evidence of his long stay on the portion. For the Respondent, these are his property which the Applicant requested to occupy and use for a while but that he has since vacated from them. The Applicant insists he is still on the portion. Certainly, this conflicting evidence will be subjected to the usual inquiry and proof at hearing. But, my preliminary view is that the Applicant has a *prima facie* case.

If I am wrong, and the Applicant is on the same portion which is registered in the name of the Respondent who has a *prima facie* right to deal with it as he wishes, there is the risk that the latter may remove the former from there. Given the alleged developments, the Applicant and his family would be put to irreparable harm and loss. In any case, the Applicant is making a claim to only a portion of the title, and therefore the Respondent has the rest of his 11 hectares to occupy, use and develop. It would be convenient to allow for the hearing and determination of this suit when the Applicant is in place.

It is for these reasons that I allow the application whose terms shall be that the Respondent, and all those acting under him, shall, until the suit is heard and determined, be restrained by temporary injunction from interfering with the Applicant's use, occupation and possession of the 36 yards on land parcel no.Elgon/Namorio/371. I ask that costs do abide the suit.

Dated, signed and delivered at Bungoma this 11th day of July 2012.

A. O. MUCHELULE
JUDGE