REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2288 of 2007

FORTUNATUS CHARLES KAMAU…….....PLAINTIFF

V

THE ADMINISTRATORS OF THE ESTATE OF THE

LATE SERAH NJERI KANGETHE…….DEFENDANT

RULING

The plaintiff who is also the applicant in the interim application subject of this ruling came to this court, by way of an originating summons dated 16th day of November 2007. There are 2 questions for determination namely:-

(a) "Whether the plaintiff has acquired title and become the proprietor of LR. No. Dagoreti/Kangemi/711 by way of adverse possession.

(b) Whether the plaintiff should be registered as the proprietor of LR NO. Dagoreti/Kangemi/711 in place of Sarah Njeri Kangethe?"

Summons to enter appearance were taken out and the same served. The respondents who are the administrators of the estate of late Serah Njeri Kangethe were duly served and they entered appearance through counsel dated 18/12/2007 and filed on 18th December 2007. This was followed by the filing of a replying affidavit sworn by one Peris Nyiha Kangethe on 20th day of November 2008 in response to the originating summons.

An application for directions dated 3rd April 2000 and filed on 16th April 2008 appears to have been presented even before the Respondents made their response to the originating summons. The said directions were made on 30/5/2008 to the effect that the originating summons do proceed by way of Viva voce evidence and for this reason the originating summons is coming up for hearing on 13/07/2009.

During the pendence of the said hearing, the applicant has come to this court, and filed an interim application by way of chamber summons dated 9th day of June 2009. It is brought under order XXXVI rule 12 and order XXXIX rules 1, 2, 3 and 9 of the CPR. It seeks four prayers.

(a) Spent

(b) That an order of injunction do issue to restrain the defendant and or their employees and or their agents/ and or their servants and or assigns and anybody who so ever from interfering with the subject matter of this suit being a piece of land namely LR No. Dagoreti/Kangemi/711 pending the hearing and determination of this application interparties.

(c) That the defendants by themselves or their employees and or their agents and or their servants be restrained by an order of injunction from interfering with the plaintiffs' guiet possession, user and ownership of LR NO. Dagoreti/Kangemi/711 and more particularly from carrying out any acts of destruction, especially the cutting and clearing of trees or in any other manner whatsoever which interferes with the plaintiffs property rights in the suit property pending the hearing and determination of the suit by this honourable court.

(d) That costs of this application be borne by the defendants."

The grounds in support are set out in the body of the application, supporting affidavit, oral highlights in court, and case law. The major points are as follows:-

1. The applicant has filed the originating summons herein which is still pending for determination.

- The portion he is claiming had initially been part of a bigger portion of land parcel number LR. NO. Dagoreti/Kangemi/168 which had been registered in the name of one Ashford Kengethe King'ang'i who died in 1977.

- The subject plot LR. NO. Dagoreti/Kangemi 711 had been hived out from the said bigger portion. The applicant took possession of this land in 1973 although the circumstances under which he took possession of the same are not disclosed in paragraph 4 of the supporting affidavit.

- The activities the applicant carried on, on the said land is that he took possession, fenced it off and built an office block but one Ashford Kangethe King'angi passed away in 1977, before it was transferred to him. But neither the said Kangethe or his wife Serah both now deceased interfered with the applicants possession/occupation of the suit property which the applicant was using openly without let or hindrance.

- The suit herein is set down for hearing on 13/07/2009 but during the said pendence of the hearing date, the defendants attempted to trespass on the suit property on 25/05/2009 using hired people who threatened the applicants worker one Mr. Ochieng. Again on 06/06/20099 the defendants attempted to forcefully gain access, entry to the suit premises using hired men armed with pangas who had allegedly been sent by one of the administrators of the estate of one Serah Njeri Kangethe to clear the site, and threatened the applicants worker with violence.

- It is his stand that it is wrong for the defendants to sent hired men to interfere with his gueit enjoyment of the said suit premises before the determination of the suit.

The application went before Mbogholi J on the 10th day of June 2009 when it was certified agent but no interim orders were granted and the applicant was ordered to serve first. Thereafter a certificate of urgency exhibiting proof of urgency was filed on 16th day of June 2009. The applicant once more went before Mbogholi J on 18th day of June 2009 when the interim orders were granted.

There is a replying affidavit in opposition to the said application sworn by one Peris Nyiha Kangethe, on the 19th day of June 2009 and filed on the same 19th day of June 2009. The salient features of the same are as follows:-

- Concede that their father late Ashford Kangethe died in 1977.

- Concede plaintiff moved into a small portion of the suit land in 1973 but moved out in 1982 January, and since then he has never been in possession.

- Concede the applicant had a tiny timber yard on the said portion but deny that he built an office block and fenced off the portion.

- Asserts that the applicants occupation of the said portion was strictly as a tenant who was paying rent to their late father and thereafter to their late mother.

- By the time their late mother died in 1988, the applicant had already moved from the premises.

- Denied use of force to gain entry to the said premises since the applicant had moved away from the land in 1982 and use of force to gain entry to the same was unnecessary.

- That the timber yard left behind by the applicant collapsed.

- In 1997 they cleared part of the land for cultivation.

- Since 1982 the respondent, have been letting out the premises to various people for cultivation and currently let out for car wash and hardware.

- Dispute the hiring and senting of Thugs to terrorize the applicant.

- They have been cutting down mature trees on the suit land from time to time.

- By reason of what has been stated above the court, is urged not to issue any injunctive orders.

In response to the replying affidavit, the applicant put in a supplementation affidavit whose salient features are that:-

- Denied moving out of the suit land in 1982.

- Destruction of the office block and fence were a subject of criminal prosecution of one Njeri King'angi who was convicted of malicious damage to property in criminal case No. 970 of 1998.

- The suit land was purchased and at no time has he ever been a tenant of the said premises.

- Denied ever having been let out to any other person.

- The applicant has hired M/S Eagle WATCH Security guards to guard the premises.

In their written skeleton arguments and oral highlights, counsel for the applicant reiterated the content of supporting affidavits and then added the following:-

-They have established a prima facie case with a probability of success, because there is demonstration that the applicant has been in exclusive possession of the suit property, since 1973, and the defendants acknowledged so by letter dated in 1996.

- That the ingredients for establishing adverse possession are present as the applicant has demonstrated that he has been in continuous occupation of the said suit land since taking possession in 1973.

- Attempt by the defendants to gain possession of the same in 1996 was resisted by the applicant reporting the matter to the police who prosecuted the perpetrators.

- At no time have the defendants ever filed suit against the applicant seeking possession.

- The demand letter by the respondents issued in 1996 was an admission by the defendants that the plaintiff/applicant is in possession.

-That the court, is invited to take note of the fact that despite the defendants being party to a consent hearing date, they went a head to attempt to evict the applicant unlawfully from the suit premises.

-The court, is also invited to believe the applicants' assertion that she has never been a tenant of the applicant more so when the period of the tenancy has not been specified or it is indefinate.

That as regards the second ingredient of whether the plaintiff will suffer irreparable loss that cannot be compensated for by way of damages, this too has also been established as the applicant has been in possession of the suit land for over 12 years and has developed the same in his own special way, and the facts put forward by them go to demonstrate that this is one of those cases with special circumstances where by though damages may be an adequate compensation, none the less the surrounding circumstances call for the 1st issuance of an injunctive relief as opposed to an award of damages.

The defendants on the other hand in their written skeleton arguments reiterated the grounds in the replying affidavit and then stressed the following points:-

- It is their stand that the plaintiff has not established a prima facie case with a probability of success because of the following:-

(i). There is no competent defendants before court, as the administrators of the estate of Serah Njeri Kangethe have not been named in that the entity sued is a non entity and in capable of being sued.

(ii). By reason of the provisions of section 79 of the law of succession Act cap 160 laws of Kenya and section 2 of the CPA, it is imperative that since a legal representative is a person who in law represents the estate of a deceased person, it follows that where such a person sues or he is sued in a representative capacity, or character, such a person can only sues or be sued in their own names. In the absence of that, there is no defendants against whom any court, order can issue or be enforced and since the defendants herein have not been named by name, there is no defendant in law and the should hold so.

(iii). They contend that the plaintiffs' entry into the premises was not adverse, but permissive as it is conceded by the applicant that he entered in the said premises pursuant to an agreement of sale which agreement has not been exhibited.

(iv). The court, is urged to believe the respondents assertion that the applicant entered the suit premises as a purchaser pursuant to a sale but which is denied.

(v). It is not clear when the applicant took possession of the suit land, as such it is not clear when the period of adverse possession started running, because if the applicant came into possession because of a sale, time does running until after repudiation of the contract of sale a matter not explicit on the face of the record.

(vi). The court, is invited to hold that since the defendants requested the applicant to leave in 1996, that is the year that this court should take to be the year when repudation of the contract of sale was repudited and from 1996 up to the date when the applicant came to court, 12 years had not lapsed.

(vii). The court, is invited to hold that since the applicant was a tenant from 1973 to 1982 no period of adverse possession could run until the tenancy had been terminated, but the applicant moved out of the premises in 1982 because he left on his own volition before the tenancy was terminated.

(viii). If this court, is inclined to believe the applicants assertion, that there was a sale, then in the absence of disclosing the completion date, then the period of adverse possession does not start running until after the lapse of the period of completion.

(ix). Contend of the affidavit in support of the certificate of urgency and its annextures go to show that it is the defendants who are in occupation.

(x). There is no documentary proof to show that the applicant has engaged any guards on the said property.

(xi). Should the court, find that there is an arguable case, then the court, should hold that this is a proper case whereby an award of damages would be adequate should the applicant win at the end of the day.

(xii). The balance of convenience also tilts in favour of the respondents, because if this court, orders otherwise it will amount to issuing a mandatory injunction.

(xiii). The case law does not also assist the applicant and on that account the interim application should be dismissed.

On case law the court, was referred to the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358.** This is a land mark case on the ingredients for granting of an injunctive relief. These are:-

(iv) An applicant must show a prima facie case with a probability of success.

(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vi) When the court is in doubt, it will decide the application on the balance of convenience.

There is also the case of **WAMBUGU VERSUS NJUGUNA (1983) KLR 172.** It is a court of appeal decision on adverse possession and it laid down the following principles:-

1. Possession in law follows the right to possess.

2. In order to acquire by the statute of limitations, title to land, which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. The dispossession that defeats his title are acts which are inconsistent with his enjoyment of the suit property for the purposes for which he intended to use it. The respondent could and did not prove that the applicant had either been disposed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent the title to that land by adverse possession.

3. The proper way of assessing proof of adverse possession, would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the document has proved that he has been in possession for the requisite number of years.

4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession became adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse. The two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land, being a licence from the appellant, although the respondent possession was exclusive and continuous but was not adverse, it only became adverse after the licence was determined.

5. The rule on permissive possession does not became adverse before the end of the period, during which the possessor is permitted to occupy the land. For the Respondents claim for adverse possession to succeed, he must have an effective right to make entry and recover possession of land. He could not have that effective right because the occupation was under a contract, or licence which had not been determined.

6. Adverse possession, means, that a person in possession in his favour time can run. Not all persons in possession can have time run in virtue of section 12 of the limitation of Actions Act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession.

7. where the 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, because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated. In his instance, time began to run once the appellant sent a letter to the respondent terminating t he agreement.

8. where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is, the claimants' possession is deemed to have become adverse to that of the owner, after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for the last twelve years after payment.

The case of **FREDRICK WAMBARI CHEGE VERSUS JAMES KARUME WANJANA, CLEMENT NJENGA WANJAMA AND GEORGE NDICHU WANJAMA NAIROBI HCCC NO. 5610 OF 1991 (OS)** decided by PJ Ransley on the 11th day of November 2004. At page 3 of the said judgement, line 8 from the top, the learned judge as he then was made observation that:-

" The issue is dispute in this matter is on what basis did the plaintiff enter into possession of suit premises,? if in fact he did so and was in possession of the land adverse possession and if so for how long"

At page 8 line 3 from the top, the learned judge as he then was went on;-

" In order to succeed, the plaintiff must show that he has been in continuous and un in irrupted possession of the suit premises for a period of not less than 12 years before the filing of this suit on the 12/10/1991 which was adverse to the will of the deceased and his personal representative"

At page 10 of the judgement, the learned judge as he then was quoted with approval the CAs decision in the case of **WAMBUGU VERSUS NJUGUNA (SUPRA)** whose holdings have already been set out herein. On the basis of that holding the learned judge held that in the case, he was seized of that "*the plaintiff entered into possession of the suit premises with the permission of the deceased and whilst the plaintiff paid the agreed installments, at the time of the death of the deceased he had taken no steps to terminate the plaintiffs occupation of the suit premises"*

References was also made to Halis burys laws of England Fourth Edition (Reissue) volume 28. At page 504 paragraph 77, there is defined **meaning and effect of adverse possession as**:-

"*No right of action to recover land accrues unless there is in the possession of some person, in whose favour the period of limitation can run"* (adverse possession).At page 506 paragraph 978 **loss of possession is defined thus:-**

"*An owner of land, may cease to be in possession of it, by reason of dispossession, or discontinuance of possession. Dispossession occurs where a person comes in and drives out the others from possession, discontinuance of possession occurs, where the person in possession goes out and is followed into possession by other persons and it would appear that possession must be continuous and exclusive; ……..Fencing off is most strong evidence of possession of surface land, but cultivation of the surface without fencing off has been held sufficient proof of possession"*

The case of **MOUNT CARMEL INVESTMENT LIMITED VERSUS PETER THURLOW LIMITED AND ANOTHER (1988) 3AER 129** where it was held interalia that

(a) The mere assertion by the true owner of a claim to possession of land in a letter sent to a squatter was

not sufficient to prevent the squatter obtaining title by adverse possession. Accordingly the letter sent to the defendants by the plaintiffs solicitors did not have the effect of causing the defendants to cease to be in possession for the purposes of acquiring title by adverse.

(b) *Once the title, to land, was extinguished by adverse possession any claim for mesne profits by the true owner was also extinguished. Accordingly since the plaintiff could not assert its title in the face of the defendants adverse possession,* the *plaintiff was not entitled to damages for trespass"*

The case of ***PRUDENTIAL ASSURANCE CO. LIMITED VERSUS LONDON RESIDUARY BODY AND OTHERS (1992) 3AERS 04*** *on* adverse possession it was held interalia that:-

Agrant for an un certain term or duration did not create a lease, since it was beyond the power of a land lord, and his tenant to create a term which was uncertain. Accordingly the 1930 agreement did not create an estate in the land, because it purported to grant a term of uncertain duration. However, because the tenant had entered pursuant to the agreement, and paid the yearly rent, he had become a tenant from year to year, and that tenancy was then for a term certain because each party had the power to determine by six months notice. Since the land lord, the LRB, had served such a notice, the plaintiffs tenancy had been validity terminated.

The case of ***MUIGAI VERSUS HOUSING FINANCE COMPANY OF KENYA LIMITED AND ANOTHER (2002) 2KLR 332*** where it was held inter alia that:-

" *It is not an in exorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. (*At page 336 paragraph 37-43 to page 337 paragraph 1-19 Ringera J as he then was made the following observations:-

" *As regards damages, I must say that in my understanding of the law, it is not an inexorable rule, that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law, would unduly lean infavour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust, but it would also be seen to be unjust. I think that is why the East African Court of appeal couched the second condition in very careful terms, by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word 'normally' the court, was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury, the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind include the strength or otherwise of the applicants case for a violation or threatened violation of its legal rights, and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say: " money is not everything at all times and in all circumstances and don't you think you can violate another citizens rights only at the pain of damages"*

The case of **SELINA IMILI MAMBILI VERSUS MARKO MAMBILI KISUMU CA NO. 167 OF 2001.** *The disputants were a daughter and father. Daughter divorced and the father gave her one acre of land to, live on. Later signed papers allegedly in respect of the one acre, O.S taken out by the father. Issue was whether the daughter had acquired the entire portion of land on which the father alleged to have settled her on, by adverse possession of the whole portion. At page 4 of the judgement line 6 from the top, the law lords of the CA summarized the judgement of the superior court on the dispute in 17 lines. The evidence that the court, faced was that the plaintiffs father with his witnesses said the father used the rest of the land, save the one acre given to the daughter. Where as the daughter and her witness said she was using the whole land. The superior court found for the plaintiff.*

Arguments raised before the CA by the appellant was that cultivation is not sufficient for one to acquire adverse possession of the land. One has to physically live on the land. At page 8 of the judgement, the learned law lords of the CA quoted with approval from Halis Burys laws of England 3rd Edition volume 24 at paragraph 482, page 252 thus:

"The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his

suit against such other person. The rightful owner is not dispossessed so long as he has all the enjoyment of the property that is possible, and where land is not capable of use and enjoyment there can be no dispossession by mere absence *of use and enjoyment. To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession"*

At page 9 line 11 from the bottom the Court of Appeal quoted with approval, the case of **AHMED ABDULKARIM AND ANOTHER VERSUS MEMBERS OF LANDS AND MINES AND ANOTHER (1958) EA 436** thus:-

" *Before possession can be adverse, there must be denial of another right by an open assertion of a hostile title, with notice thereof to the other either express or inferred, from notorious acts and circumstances, and the burden of proof rests upon the persons claiming title by adverse possession."*

Applying those principles to the dispute before them, the Court of Appeal upheld the finding of the superior court, page 10 line 2 from the tops, thus:-

" *in our view the respondent clearly continued cultivating the land in dispute from 1975 when the appellant gained title to the land whether fraudulent or not and the appellant never challenged the respondents act until 1993 when the respondent objected to her having a church built on the suit land. We cannot find any misdirection on the part of the learned judge of the superior court, on this aspect of the case".*

Due consideration has been made by this court of the afore set out rival arguments, as regards this interim application, for an injunctive relief, in the light of guiding principles applicable to the granting of the said injunctive relief to a desiring litigant, as well as principles guiding the basis of asserting the entitlement to the said injunctive relief. This court, has endevoured to set them out herein in extenso and as such it will only bear them in mind when drawing out the necessary conclusions on the subject. This being the case, then the simple task of this court, is to determine whether on the facts demonstrated herein, the applicant has brought himself within the ambit of the ingredients governing the granting of those relief one hand, and on the other hand whether the respondent has ousted those ingredients by reason of the facts demonstrated.

The first ingredient is one that requires the applicant to demonstrate a prima facie case with a probability of success. It is on record as extensively set out herein that all that the applicant has done by reason of his deponement in the two affidavits, as well as the certificate for urgency, through the counsels arguments, both oral and written, case law cited by them, is that, their stand is that there is evidence of adverse possession and that they are sure of succeeding by reason of that demonstration. The respondents on the other hand have also attempted to demonstrate that on the basis of their deponements, and arguments, the claim of adverse possession will not succeed. In this courts opinion, a deep analysis is of those arguments will preempt the very back borne of the main originating summons and its defence. It is therefore unsafe for the court, to make a pronouncement on the matter at this interim stage as to whether the grounds demonstrated support or oust the assertion for adverse possession. It is sufficient to say that the point is arguable.

As for the second ingredient, indeed it is rightfully submitted that compensation can be quantified and paid for in monetary terms. The applicant mentioned developments in a special way, none of which have been mentioned. The above not withstanding, the applicant says that there is qualification to that general rule and this court agrees, with that argument, that an injunctive relief being an equitable relief, Equity, will not allow any party to a proceeding to trample on another rights at the pain of having an ability to pay damages. Any court, of law, which would encourage such an attitude will be in effect nurturing impunity, impurity and disrespect for the law and 6 others rights. The holding not withstanding, the court, cannot loose sight of the qualification attached to this requirement, namely, the opponent must be shown to have acted in a high handed and oppressive manner or in flagrant disregard and disrespect to the law.

Applying this to the facts herein, it is clear from the record that the interim application was not filed simultaneously with the filing of the originating summons, because there was no immediate threat. It is alleged by the applicant that the threat came after the matter had been fixed for main hearing. Photographs have been exhibited of freshly excavated land. The respondents do not seem to be contesting this. In this courts', opinion, if it is true that the excavation is fresh, and recent, in the wake of an impending inter parties hearing, this is a fit action that can be termed as high handed, and oppressive, in that it is calculated to drive the applicant out of the suit premises, may be to disturb the balance before the final determination of the suit. For this reason this court, is satisfied that this is not a fit case where damages can be stated to be awardable, although they may be adequate. Because it would be in flagrant disregard of the law, if the respondents were to be allowed to eject the applicant from the suit premises before the determination of the O.S.

As for the balance of the convenience, each party says they are on the land. There is agreement by the respondents, that indeed at one time the applicant was on the land but moved out voluntarily in 1982, a matter disputed by the applicant who alleges that had that been the case, the respondent would not have issued a notice to vacate in 1996. Be that as it may, the applicants say he had a timber yard on the land. Where as the respondents says that they had been leasing out land to various persons, whose particulars and periods of such leases are not given. Further no documents have been annexed to demonstrate the same. In the absence of such demonstration, this court, is not in a position to rule conclusively that the respondents have access to the suit premises, other than the recent acts of excavation which have occured when the matter is already pending in court. For this reason interests of justice would demand that the land remain in the present state of no development on the land other than those on the land as at the time the O.S was, filed pending hearing and determination of the O.S.

Issues was raised about failure to name the administrators of the estate as contributing towards the disentitling the applicants of this relief because in the manner the respondents are described, they are incapable of being identified.Due consideration has been made by this court, of this arguments and the court, is of the opinion, that the omission is a point of objection to the main O.S, and not the interim application. 2ndly it is a matter that can be rectified through an amendment even through an oral amendment, since the estate for which the administrators are being sued, has been identified and there is no argument that there are other similar estates that can cause confusion as to which is which.

For the reasons given in the assessment, the court, is of the view that it will not be wise for this court, to make orders disturbing the status quo until in the determination of the O.S. The court therefore makes an order that status quo be maintained on the ground in that neither party do carry out any developments on the land, till determination of the originating summons.

(2) Matter ordered to be disposed off on priority basis.

(3) Costs in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY 2009

R.N. NAMBUYE

JUDGE