



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET
ELC CASE NO. 30 OF 2020

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULE, 2010

AND

IN THE MATTER OF ADVERSE POSSESSION OF PARCEL NO. UASIN GISHU/NDALAT/30

AND

IN THE MATTER OF THE APPLICANTS HAVING ACQUIRED PRESCRIPTIVE RIGHTS BY WAY OF ADVERSE POSSESSION ON A PORTION OF LAND COMPRISING 14.8 ACRES IN PARCEL NO. UASIN GISHU/NDALAT/30

BETWEEN

KIMAGUT ARAP KIYAI.....1ST APPLICANT

JANE JESANG TARUS.....2ND APPLICANT

ISAAC KIPROP KEMBOI.....3RD APPLICANT

SIMON KIPKORIR CHICHIR.....4TH APPLICANT

ELIUD TIROP TOO.....5TH APPLICANT

VERSUS

SAMUEL MATUNDA MUCHINA.....RESPONDENT

RULING

This ruling is in respect of two applications dated 22nd June 2020 and 28th July 2020 respectively by the applicants seeking for the following orders:

- a. Spent
- b. This court be please to issue an injunction against the respondent, his servants and/or agents from evicting the applicants from the suit parcel UASIN GISHU/NDALAT/30 pending the hearing and determination of this application inter partes.
- c. This court be please to issue an injunction against the respondent, his servants and/or agents from evicting the applicants from the suit parcel UASIN GISHU/NDALAT/30 pending the hearing and determination of this suit.
- d. Costs of this application be in the cause.

The court certified the application as urgent and granted orders of status quo to be maintained. This matter came up for mention on 27th July 2020 when counsel for the respondent submitted that the applicants obtained orders of status quo which is an abuse of the court process as this matter is related to ELC No. 133 of 2014 which was due for delivery of ruling and that the applicants are the interested parties in the said suit.

Counsel urged the court to peruse the Judgment in ELC No 133 of 2014 and vacate the orders of status quo. The court upon perusal of the Judgment vacated the status quo orders. This gave rise to the application dated 28th July 2020 seeking for the following orders:

- a. That the court be pleased to set aside its orders of 27th July 2020 and reinstate the interim orders issued on 9th July 2020 pending the hearing and determination of the application dated 22nd June 202.
- b. That the costs of this application be provided for.

APPLICANTS' CASE

Counsel for the applicant submitted that he experienced technical challenges in joining the online session on the day the matter was fixed for inter partes hearing of the application.

Mr Yego further submitted that allowing the application will not prejudice the respondent as the order was meant to preserve the subject matter of the main suit and failure would render the main suit nugatory. Counsel relied on the grounds on the face of the application and the supporting affidavit filed in court.

There was no response filed by the respondent as at the time of writing this ruling in respect of the application dated 28th July 2020.

APPLICANTS' SUBMISSIONS IN APPLICATION DATED 22ND JUNE 2020

Counsel submitted on the grounds the applicants rely on to warrant the issuance of the orders as:

- a. That the respondent instituted proceedings in **ELDORET ELC NO 133 OF 2014** against third parties and obtained eviction orders against them but are desirous of evicting the applicants, their agents and/ or servants from the suit parcel regardless of the fact that they were not parties to the said suit.
- b. The applicants have been in occupation of the suit parcel for more than 12 years and were not served with the court documents in **ELDORET ELC NO 133 OF 2014** by the respondent.
- c. The respondent is likely to evict the applicants from the suit land following the eviction orders he obtained in **ELDORET ELC NO 133 OF 2014**.
- d. The applicants were not parties to **ELDORET ELC NO 133 OF 2014** and not subject to the orders in the said suit.
- e. That this application has been brought promptly.

Counsel relied on the case of **Giella Vs Casman Brown [1973] EA** on the principles that guide the grant of temporary injunctions. On the issue whether the applicants have established a prima facie case, counsel submitted that the applicants filed an Originating Summons dated 15th June 2020 seeking that they be declared to have acquired ownership of the suit land through adverse possession having been on the land for more than 12 years.

Counsel further submitted that the respondent has since obtained orders of eviction vide **ELDORET ELC NO 133 OF 2014** against the defendants and is desirous of evicting the applicants. That the applicants having purchased their respective portions are the legal owners having purchased either directly from the respondent or from other purchasers who had entered into sale agreements with the respondent. Counsel therefore urged the court to find that the applicants have established a prima facie case.

On the second issue as to whether the applicants will suffer irreparable harm, counsel submitted that the applicants have built permanent homes of their respective portions and have planted maize which they depend on for their subsistence. Further that the intended evictions will render the applicants homeless which will cause immense suffering not capable of being compensated by damages.

Mr Yego submitted that if the respondent is not restrained the respondent may execute the judgment and render the suit nugatory. Counsel cited the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** where the court stated that:

“ Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

Counsel urged the court to find that the balance of convenience tilts in favour of the applicants as they have been in continuous, open, exclusive and uninterrupted occupation for a period exceeding 12 years hence is in adverse possession of the suit land. Counsel cited the case

of **Ali Katsao Katana V Kassim Mohammed Omar & 5 others [2018] eKLR** where Yano J. referred to the case of **Amir Suleiman v Amboseli Resort Limited [2004] eKLR** on the general principle for grant of an order of maintenance of status quo for a greater justice than to let the status quo to be disrupted.

Counsel therefore urged the court to allow the application as prayed.

RESPONDENTS SUBMISSIONS

Counsel relied on the replying affidavit and a further affidavits sworn by the respondent in opposition to the application. Counsel submitted on the principles for grant of injunctions and cited the case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 Others [2003] eKLR**. where the court defined what a prima facie case is.

Mr. Mogambi submitted that the applicants have a duty to demonstrate that a legal right has been infringed so as to call for a rebuttal by the respondent. That the applicants have not established a prima facie case and their right of entitlement vide adverse possession. Counsel relied on the case of **Kimani Ruchire V Swift RutherFords & Company Limited [1980] KLR** 10 at page 16 letter B, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

Counsel submitted that the respondent has refuted knowledge of the applicants’ occupation in his replying affidavit at para 3(h) which has not been rebutted by the applicants. That if the respondent was aware of applicants’ occupation then he could have enjoined them in ELC No. 133 of 2014.

Mr Mogambi further submitted that the applicants have deponed that they bought land from either the respondent or other purchasers but the applicants have not annexed the agreements. That if the applicants are purchasers as they claim then they would be on the suit land with the consent of the respondent which renders any claim for adverse possession untenable.

Counsel cited the case of **Benjamin Murima & Others V Gladys Njeri Civil Appeal No 213 of 1996** where it was held that :

“In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse”.

Counsel therefore urged the court to dismiss the two applications with costs as the applicants have not met the threshold for grant of injunctions.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the applicants are entitled to the orders of injunction, whether the applicants have established a prima facie case with a probability of success and whether is the order is not granted the applicants will suffer irreparable harm. The court must also deal with the application to reinstate the orders of status quo that were vacated.

The applicants filed an Originating Summons seeking to be declared that they have acquired the suit land by adverse possession and also filed an application for injunction restraining the respondents from interfering with the suit land. The court gave an order of status quo to be maintained and urged the applicants to serve the application for inter partes hearing.

On the day of the hearing, counsel for the respondent alerted the court of a similar case in respect of the same suit of land being ELC No 133 of 2014 which the court had already rendered a judgment in favour of the respondent and granted orders of eviction. The applicants filed an application as interested parties which application was determined

Upon the determination of the application, the applicants filed this suit seeking for orders of adverse possession while there was a ruling that was pending in ELC No 133 of 2014. The court therefore vacated the orders of status quo as it was an abuse of court process after perusing the proceedings in ELC No 133 of 2014. The applicants failed to disclose to this court that there was another related file ELC No. 133 of 2014, which was pending ruling and thus the reason why this court vacated the order on maintenance of status quo.

Parties are required to give full disclosure of material facts to the court, especially when a party appears ex-parte. In this case, the order was granted ex-parte and thus full disclosure was necessary, the parties and counsel were expected to act in utmost good faith. Parties are expected to come to court with honesty and integrity, when the facts are disclosed then the offending party suffers the consequences.

In the case of **BAHADURALI EBRAHIM SHAMJI vs AL NOOR JAMAL & 2 OTHERS [1998] eKLR** the Court of Appeal stated that;

"There is a compelling duty on the applicant to make a full and fair disclosure of all material facts."

I therefore find that the application dated 28th July 2020 for reinstatement of orders of status quo is not merited and is dismissed with costs to the respondent.

On the application for injunction, the principles of grant of injunction are well established and I need not reinvent the wheel. The issue is whether the applicants have established a prima facie case with a probability of success. The applicants have claimed that they have been in occupation for a period exceeding 12 years hence the claim for adverse possession. The applicants further claimed that they are in occupation either by purchase from the respondent or other purchasers of which they have not annexed any agreements to prove the same. If that is the case, then it would be true that they are in occupation with the consent of the respondent which is not in tandem with the doctrine of adverse possession. This alone throws doubt on the applicants' quest to establish a prima facie case.

The other issue that if the applicants are really in occupation as they claim, then they should have been aware of ELC No 133 of 2014 which the respondent had gotten a Judgement in his favour. The respondent could have enjoined them in the case if they were in occupation. I find that the applicants have not established a prima facie case with a probability of success.

On the issue of whether the applicants will suffer irreparable harm, having found that they have not established a prima facie case with a probability of success, I also find that there is no harm that the applicants will suffer if the orders are not granted. The applicants' claim is based on adverse possession which they have to lay the foundation before the court can rely on such as prima facie evidence. The applicant has put forth the bare minimum even though the court is not dealing with the merits of the claim for adverse possession at this stage it must have a sneak preview of the case.

I have considered the applications, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 4th DAY OF November, 2020

DR. M. A. ODENY

JUDGE