



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO.178 OF 2018

ELIZABETH TEMBE MASHA.....PLAINTIFF

-VERSUS-

MICHAEL ARINA KNIGHT.....DEFENDANT

RULING

1. By a Notice of Motion dated 6th August 2018 brought under Section 1B and 3A of the Civil Procedure Act and Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following orders:

1. That this matter be certified urgent and service be dispensed with in the first instance.

2. That this Honourable Court be pleased to grant a Temporary Order of Injunction restraining the Defendant/Respondent by himself, servants and/or agents or anybody authorized by him from constructing, evicting, carrying out destruction and/or any further dealing on the land interfering with the Plaintiff's proprietary rights, interests and/or ownership of PLOT NUMBER 21188/I/MN pending the hearing of the Application inter parties.

3. That this Honourable Court be pleased to grant a temporary order allowing the Plaintiff/Applicant together with her family access to their house in PLOT NUMBER 21188/I/MN being their only known home pending the hearing and determination of the suit.

2. The Application is premised on the following grounds:

a) The Plaintiff/Applicant have been in occupation of the land known as 21188/I/MN for over 32 years and have constructed a house of a permanent nature, have crop plants such as bananas, vegetable and maize on the land without the permission of the Defendant.

b) The exercise threatens the Plaintiff's homestead, her children's graveyard and crops and the eviction will render her and her family homeless and deny her right to property as per Article 40 of the Constitution and the right of state to provide and guarantee shelter.

c) The Plaintiff/Applicant would therefore suffer irreparable loss and hardship unless the Defendant/Respondent is restrained by this Honourable Court from evicting the Plaintiff/Applicant.

d) Only an injunction will prevent an injustice and hardship from being visited on the Plaintiff/Applicant.

3. The Application is supported by the affidavit of the Plaintiff sworn on 6th August 2018 in which she depones that for the period of over 32 years the Plaintiff and her family have been in occupation of the suit land measuring 2.023Ha. She avers that as occupants of the suit land they have invested heavily and constructed a permanent house which has been their home and planted thereon crops such as maize, bananas and vegetables. The Applicant has attached copies of photographs showing their home and crops. The Plaintiff avers that the suit land also houses graves of their family members who also lived on the land and were born therein. The Plaintiff further avers that her husband passed on sometime in the year 2016 and his family insisted that he be buried at Malindi. That when they returned from attending the funeral, they were denied access to their home. The Plaintiff contends that the Defendant has taken advantage of her status as a widow to lock them out of their house and has employed guards to deny them access to their home while threatening them of dire consequences if they went back. The Plaintiff states that her family have been residents of the suit plot and have never known any other place and thus have nowhere else to reside. It is the Plaintiff's contention that their continued denial of access to the land shall render the Application and the suit nugatory as they shall be homeless and their crops destroyed or damaged.

4. In opposing the Application, the Defendant filed a Replying Affidavit sworn on 15th October 2018 in which he depones *inter alia* that the Plaintiff is a total stranger to him. The Defendant avers that PLOT NO. 21188/I/MN does not exist as at now because the same was formerly PLOT NO. 13585/I/MN which later changed to PLOT NO. 21188/I/MN upon change of user from Agricultural to residential and has been sub-divided into various subdivisions being PLOT NOS. 21189 TO 21231. The Defendant avers that the Plaintiff has never occupied or resided on the suit property.

5. The Defendant avers that sometime in May 2012, he had an interest to purchase PLOT NO. 13585/I/MN from one ZAINAB HAJI and made inquiries from the area Assistant Chief of Mwembelegeza Sub-Location who on 4th May 2012 confirmed that the property belonged to the said Zainab Haji and had no squatters residing in it and no one was claiming the same. He has attached copies of the searches one of which confirmed the ownership of PLOT NO. 13585/I/MN as Zainab Haji. The Defendant avers that on 9th July 2012 he entered into an Agreement for sale wherein he purchased the said plot and on 17th July 2012 a Transfer was duly effected in his favour. A copy of the Agreement for sale, Transfer, Valuation form and stamp duty payment receipts have been annexed.

6. The Defendant avers that in June 2015 he applied for change of user of the property from Agricultural to Residential and obtained consent and upon surrender, a certificate of Title was issued in his name on 8th December 2016. The Defendant states that he sub-divided the said plot into forty three (43) new plots, and Title of NO. 21188/I/MN was formerly closed. The Defendant avers that the children and relatives of the Plaintiff did approach him through a neighbour and the Defendant's caretaker whereby they confirmed that the suit property belonged to the Defendant and that the Plaintiff has never resided on it. The Defendant states that the Plaintiff's deceased husband sought permission from him to temporarily occupy the suit property with his children for a short period and during that stay they never built any structure nor planted crops. It is the Defendant's contention that the Application is a non-starter, incompetent, bad in law, mischievous, vexatious and lacks merit and ought to be dismissed.

7. The Application was canvassed by way of written submissions. In her submissions dated 7th February 2019, the Plaintiff submitted *inter alia*, that she has stayed in the suit property for more than 32 years, built a house and planted crops. It is the Plaintiff's submissions that she has established title under adverse possession for being in actual, open and notorious, exclusive, hostile and continuous occupation since 1987. The Plaintiff submitted that the Defendant has already taken possession and prevented the Plaintiff from gaining entry into the suit property. It is the Plaintiff's submission that the Defendant's action has caused her loss which is irreparable. The Plaintiff relied on the case of **Chevron (K) Ltd –v- Harrison Charo wa Shutu (2016)eKLR; Peter Mbiri Michuki –v- Samule Mvau Michuki (2014)eKLR; Gulam Miriam Noordin –v- Julius Charo Karisa (2015)eKLR; Joseph Gachumi Kiritu –v- Lawrence Munyambu Kabura; and Joseph Mutafari Situma –v- Nicholas Makhamu Cherongo (2007)eKLR; all in support of the principles on adverse possession.**

8. The Defendant filed his submissions dated 15th March 2019 in which he submitted *inter alia*, that the Plaintiff has not proved the elements of adverse possession and relied on the case of **Maweu –v- Liu Ranching & Farming Cooperative Society (1985)KLR and Wambugu –v-Njuguna (1983)KLR 173. And relying on the case of Vincent Koskei –v- Bernard Koskei (2018)eKLR, Mrao –v- First American Bank of Kenya Limited (2003)eKLR and Nguruman Limited –v- Jan Bonde Nielsen & 2 Others (2014)eKLR**, the Defendant submitted that the Plaintiff has not established a *prima facie* case and has not demonstrated the likelihood of irreparable damage to warrant the injunctive order, adding that the balance of convenience is not in the Plaintiff's favour. The Defendant further submitted that directions on the main originating summons have not been given hence the Plaintiff's submissions are totally irrelevant.

9. I have considered the Application, the affidavits in support and against, the rival submissions as well as the authorities cited. The essence of the Plaintiff's case is that she has acquired the land known as PLOT NUMBER 21188/I/MN by way of adverse possession and that the Defendant has taken possession and has denied her access to the suit property. In the Application, the Plaintiff seeks an order allowing her access back to the suit property pending the hearing and determination of the suit.

10. The principles to be applied when considering an Application for temporary injunction are well settled. In the case of **Giella –v- Cassman Brown (1973) EA 358**, the conditions were laid and that is:

“First the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. And thirdly, if the court is in doubt, it will decide an Application on a balance of convenience.”

11. In this case, the Plaintiff avers that she has been in occupation of the suit property for over 32 years. The Plaintiff avers that her husband passed on sometime in 2016 and his family insisted that he be buried in Malindi. The Plaintiff states that when they returned from the funeral, they were denied access to their home by the Defendant. The Plaintiff now wants the court to issue an order granting her access. This order, in my view, is in the nature of a mandatory injunction. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in **the Giella- V- Cassman Brown** case for the standard of approach is higher.

12. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) IALL 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory Application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”

13. In this case the Plaintiff avers that she has been in occupation in the suit property for over 32 years until 2016 when she went to bury her late husband in Malindi. The Defendant has denied the Plaintiff's allegations. Indeed the Defendant has pleaded that the suit PLOT

NO.21188/I/MN does not exist as at now because the same has been subdivided into various plots. I note that the Plaintiff conceded that currently she is no longer in occupation of the suit property. Indeed the Plaintiff has not given any explanation of what action she took from 2016 until August 2018 when this suit and Application was filed in court. The Plaintiff's submissions, as rightly submitted by the Defendant, are totally irrelevant in this Application as it focuses on the main suit.

14. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has not been made out. No special circumstances had been shown by the Plaintiff and the case is not one that I can consider a clear one that can be decided at once or in a summary manner. From the evidence on record, I find that the Plaintiff has not been established a prima facie case with a probability of success against the Defendant. Secondly, the Plaintiff has not shown that she stands to suffer irreparable harm not compensable in damages. Before the Application was filed, it is clear that the Applicant had been out of the suit plot for over two years, that is from 2016 to August 2018. Whatever damage she may suffer in my view can be quantified in damages. The balance of convenience, if I had doubt, rests with the Defendant who is the registered proprietor of the property and who is currently in possession and occupation.

15. The upshot is that the Notice of Motion dated 6th August 2018 is without merit and the same is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Nabwana holding brief for Tindi for Plaintiff/Applicant

Omwenga for Defendant/Respondent

Esther Court Assistant

C.K. YANO

JUDGE