



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.35 OF 2019

EMILY CHEPKORIR CHEPKWONY.....PLAINTIFF

VERSUS

PAUL CHANGTOEK.....DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant filing suit for adverse possession; respondent claiming that the applicant has never been in possession and that it is him who has been in possession; respondent having caused the applicant to be charged with the offence of forcible detainer; there being evidence of her possession before filing suit; applicant having a right to claim adverse possession; charge of forcible detainer not tenable in such circumstances; status quo on possession to be maintained pending hearing of the suit)

1.This suit was commenced through a plaint which was filed on 27 March 2019. The plaintiff has averred that she is in lawful occupation of the land parcel Nakuru/Saino Settlement Scheme/1354 measuring about 5 acres. She has pleaded that in the month of January 2018, the defendant unlawfully entered the suit property claiming to have a title deed to the same and that he proceeded to cut down the plaintiff's trees and constructed a store before causing the plaintiff and her husband to be arrested and charged with the offence of forcible detainer. She has averred that she has been in possession of the suit land for over 22 years and that she has acquired title by way of adverse possession. In the suit she wants a declaration that she is the lawful owner of the suit land, an order compelling the defendant to transfer the land to her, an order of eviction against the defendant, and a permanent injunction to restrain the defendant from the suit land.

2. Together with the plaint, the plaintiff filed an application seeking the following substantive orders which are prayers 3 and 5 of the application being :-

(a) That pending the hearing and determination of this suit this Honourable Court be pleased to issue orders of injunction to restrain the defendant whether by himself, his agents, employees, servants, assigns and any person or entity claiming through or under her (sic) from entering, charging, occupying, remaining, subdividing, alienating, selling or otherwise dealing with the land known as Nakuru/Saino Settlement Scheme/1354 contrary to the rights and/or interests of the applicant.

(b) That this Honourable Court be pleased to issue a mandatory injunction directing the defendant whether by himself, his employees, servants, agents or otherwise howsoever to demolish and remove all the illegal structures that the defendant has unlawfully erected and deposited on the parcel of land known as Nakuru/Saino Settlement Scheme/1354 pending the hearing and determination of the application inter partes (sic) .

3. In the supporting affidavit, the plaintiff has contended that in the year 1996, she entered the suit land which at the time was vacant land which had not been allocated to any person. She has stated that at the time, the land was forested and she cleared it. She expected that the said land would be allocated to her by the Saino Ogiek Settlement Scheme Committee but to her consternation, she missed out on the list of those who received title deeds in the year 2005. She however constructed a toilet and a semi-permanent house made of timber walls and iron sheet roofing, which she later converted into a kitchen after she constructed a second larger semi-permanent house. She has deposed that she constructed a fence around the property and has been tilling it growing maize and potatoes. In the year 2000, she has deposed that she planted approximately 171 eucalyptus trees which are now matured. She also constructed another semi-permanent house in the year 2010. She avers to have been on the land uninterrupted until 2018 when the defendant forcefully entered the land claiming ownership of it. She has stated that in January 2018, the defendant entered her husband's land parcel No. 1348 but was evicted and he then entered the suit land claiming ownership of it. She reported the matter to the Deputy County Commissioner Kuresoi North. She has averred that on 26 June 2018, the defendant forcefully entered the suit land and started erecting a new fence and cut down 14 of the eucalyptus trees that she had planted and used some of the timber from these trees to construct a store and sold off the logs. When she confronted the defendant, he produced a title deed. She reported the invasion to the village elder through a letter dated 1 October 2018 and she was referred to Kuresoi Police Station where she made a report on 11 October 2018. She also reported the unlawful cutting of the trees to the Assistant Chief on 9 October 2018. On 22 February 2019, she and her husband were summoned to the office of the Deputy County Commissioner, Kuresoi North , and were

arrested on charges of forcible detainer and threatening to kill the defendant. She has further mentioned that the National Land Commission had directed that no person should be evicted from his/her land until a caveat imposed on the Mau Complex is lifted and that the Commission wrote on 16 January 2016 that she should not be evicted. She wonders why the defendant has never claimed ownership of the land since the year 2005. She believes that she has acquired title by way of adverse possession.

4. The defendant has filed a replying affidavit to oppose the motion. He has deposed inter alia that he is the registered owner of the suit land having been allocated the land in the year 2005. He has stated that the plaintiff and her husband were allocated the land parcel Nakuru/Saino Settlement Scheme/1348 which they occupy. He has contended that after being issued with a title deed, he occupied the suit land and embarked on developments which included the construction of his house, cultivation and keeping of livestock in quiet and peaceful enjoyment of his property. He has mentioned that on 16 February 2018, he entered into an agreement with the plaintiff's husband, one Francis Sigilai which by extension he claims encompassed the plaintiff, whereby Mr. Sigilai agreed to vacate the suit land and allow him peaceful occupation and to relocate to his parcel No. 1348. He has denied that the plaintiff has ever been in occupation as alleged since she resides with her husband in the land parcel No. 1348 since the year 2005. He has claimed that the plaintiff and her husband are habitual offenders and that they have been charged in Molo Criminal Case No. 184 of 2019 with the offence of forcible entry, and malicious damage to property. He has alleged to have had a land dispute with the plaintiff's husband, who had invaded his property, and destroyed trees and advertised the property for sale. He has stated that through a letter dated 21 December 2018, the National Land Commission put the record straight by declaring the removal of the plaintiff's husband, and by extension the plaintiff, from the suit land. He believes that she has commenced this suit as a proxy of her husband whose name has been tainted by a plethora of criminal cases in Molo Law Courts. He has asserted that the plaintiff is a liar and a dishonest person who is neither in occupation nor has she ever set foot on the suit land and cannot claim it by way of adverse possession.

5. When the matter first came before me, I granted interim orders in favour of the plaintiff. At the inter partes hearing of the application, I was unable to reconcile the very disparate facts claimed by the plaintiff and the defendant. I therefore directed the District Land Surveyor and the District Land Registrar, to visit the site and prepare a report on the occupation of the suit land. A report was filed and I have taken note of its contents. The report states that there is a barbed wire fence said to have been put up by the defendant. On the land, there are four temporary structures, one which is said to be occupied by the plaintiff, and the others by the defendant's son. There was a demolished structure that belonged to the plaintiff. On the land were crops said to have been grown by the defendant's son, and there were also eucalyptus trees said to have been planted by the plaintiff's husband.

6. What I have before me is an application for injunction and the principles upon which an application of this nature is determined were well articulated in the case of *Giella vs Cassman Brown (1973) EA 358*. To succeed, the applicant needs to demonstrate a prima facie case with a probability of success; show that she stands to suffer irreparable loss if the injunction is not given; and where the court is in doubt, it will decide the application based on a balance of convenience.

7. The plaintiff claims that she is entitled to ownership of the suit land by way of adverse possession. She has contended that she came into possession in the year 1996 and settled on this land. However, when titles were being distributed, she did not get title to this land but instead the same was given to the defendant. It is indeed common ground that the defendant was issued with a title deed on 12 October 2005. It is also common ground that the husband of the plaintiff was allotted title to the land parcel Nakuru/Saino Settlement Scheme/ 1348. However, the plaintiff asserts that she kept possession of the suit land even after titles were issued in the year 2005, and that she built structures on this land, and cultivated the same, until the defendant emerged in the year 2018. The defendant's version is that the plaintiff has never stepped on this land.

8. I am not, at this juncture, persuaded by the explanation of the defendant. Despite the defendant stating that he is the one who has been in occupation since the year 2005, he does not deny that there are mature eucalyptus trees on the land, which he himself did not plant. It is also a fact that there are structures on the land which were not put up by the defendant but by the plaintiff. I also do not see how the defendant could have entered into an agreement on 16 February 2018, with the husband of the plaintiff, for the latter to move out of the suit land. I do not see how the defendant could have engaged the plaintiff's husband to move out if indeed the plaintiff's husband was not in some sort of possession of the suit land. It should be noted that in this suit, it is the plaintiff who has filed suit on her own behalf, and she is perfectly entitled to do so. The fact that she is married does not negate her individual right to claim the suit land by way of adverse possession. She could very well have taken possession of the land and kept it, despite being married, and despite her husband being the owner of the land parcel No. 1348. The fact that her husband entered into an agreement with the defendant, does not bind her, as she is not privy to it, and it cannot be argued that that by entering into that agreement, the plaintiff's husband, by extension committed the plaintiff to the terms thereof.

9. I am of the opinion that the person who has not come clean is actually the defendant. He has not explained what exactly he was doing on the suit land since 2005, and if indeed he was in occupation, how come the plaintiff had built structures on the land. He has also been loud to say that the plaintiff and her husband have a litany of cases in Molo court but he did not show any to me, save for the one that he complained. It is apparent to me, at least at this stage of the proceedings, that the plaintiff has been in occupation of the suit land and that she has been in occupation for a considerable period of time. Whether that occupation entitles her to the suit land by way of adverse possession will be determined fully at the hearing of the suit, but I am of the view that the plaintiff has established a prima facie case with a probability of success. I am further of the view that she stands to suffer irreparable loss if her possession of the land is disturbed.

10. I am alive to the fact that there has been disruptions to the plaintiff's possession, and she now occupies a portion, and not the whole of the suit land. It is apparent that parties spent a considerable amount of time trying to sort out the dispute in offices that had no jurisdiction to do so, such as the National Land Commission and the Chief, and within that period, the defendant took possession of part of the suit land and also caused the plaintiff and her husband to be charged with the offence of forcible detainer and malicious damage to property. Since she did not come to court promptly, and given that position, the defendant took possession of a part of the land, I will allow the application to the extent that the plaintiff's possession of the land that she currently occupies, not to be disturbed until this suit is heard and determined. In fact, on 9 April 2019, when the matter came before me, there was consensus that on the land there are two homesteads where one is occupied by a family living on it courtesy of the plaintiff. This position should be maintained. The defendant should not interfere with this homestead, or with the portion of land that they still cultivate, and they should be allowed free ingress and egress without being harassed. The defendant should also not interfere with the mature eucalyptus trees until this case is heard and determined.

11. It has been disclosed to me that there is a case where the plaintiff and her husband have been charged with forcible detainer. In light of the fact that the plaintiff claims this land by way of adverse possession, such criminal charges cannot hold, for the plaintiff has a right to make a claim based on adverse possession for the land, and the nature of such a case is that a person is in possession of land whose title is held by another person. I therefore order that the proceedings in Molo Criminal Case No. 184 of 2019 be terminated forthwith and further direct that this order be served upon the Magistrate presiding over the said case.

12. I will allow this application to the extent above and the plaintiff will also have the costs of the application.

13. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 25th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Cheruto holding brief for Mr. Bore for the plaintiff.

Mr. Olaly Cheche holding brief for Mr. Terer for the defendant.

Court Assistants: Janepher Nelima/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU