



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC. CASE NO. 106 OF 2015

DULCIE LOVEDAY SPENCER [Suing on her own behalf

and on behalf of the Estate of

Frank Heahcote Howitt].....APPLICANT

VERSUS

JONATHAN STEWART COULSON.....1ST RESPONDENT

WILLIAM COULSON.....2ND RESPONDENT

MARY SHAW COULSON[sued as Executors

and Administrators of the estate

of TERENCE GORDON COULSON].....3RD RESPONDENT

JAIMIE COULSON.....4TH RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 6th March 2015 in which the plaintiff/applicant seeks for an order of temporary injunction restraining the respondents, their agents and or servants from leasing, selling, offering for sale, advertising, threatening to sell, trespassing on, subdividing, charging or in any other way dealing with or doing anything that may be deemed to be a violation of the applicant’s legal right of quiet possession and occupation of the parcel of land known as Land Reference Number 13114/7 situated at Langata (hereinafter referred to as the” suit property”) pending the hearing and determination of this suit.

The application is premised on the grounds appearing on its face together with the supporting affidavit of Dulcie Loveday Spencer, the plaintiff/applicant, sworn on 6th March 2015, in which she averred that she brings this suit both on her own behalf and on behalf of the estate of her late brother Frank Heathcote Howitt, who died on 6th May 2013 (hereinafter referred to as the “deceased”). She averred that she has been in occupation of the suit property since the year 1977 when the deceased bought the same for Kshs 80,000/- from one June Elizabeth Rosalyn Anderson. She added that upon purchase of the suit property both she and the deceased constructed a permanent house where they have been living. She averred further that she still continues to reside there even after the death of the deceased. She added that up to the time of his death, the deceased was never married and had no children leaving the plaintiff/applicant as his only dependant. She added that she and deceased continuously paid both land rent and rates for the suit property since the year 1977 and all invoices from the now-defunct City Council of Nairobi have always been addressed to the deceased. She then stated that after the death of the deceased, she was shocked when the fourth respondent together with his brothers Billy Coulson and Philip Coulson came to the suit property and informed her that their late father Terence Gordon Coulson had purchased the suit property from the deceased in the year 1987 and they required her to vacate the suit property as they intended to sell it to potential buyers. She then stated that she immediately instructed her advocate to carry out a search on the suit property at the land registry and discovered to her utter dismay that the suit property was transferred and registered in the name of Terence Gordon Coulson and Malcolm Rex Higgins on 30th December 1987 as tenants in common. She further averred that the deceased had never at any time informed her of any purported transfer of the suit property and that she had lived thereon without any interference from the respondents and neither did she ever come across any evidence to suggest that the suit property had changed hands. She further averred that there has been no explanation from the respondents as to why they did not take possession of the suit property when the same was purportedly transferred to them on 30th December 1987. It was her averment that she had lived on the suit property for nearly 38 years without any interference from the respondents and that as per the advice of her advocate she has acquired rights or interests over the suit

property by way of adverse possession having been in possession for more than 12 years by virtue of the provisions of the Limitation of Actions Act. She further averred that she is now 89 years old and has lived on the suit property since 1977 to date and has no other home and would be rendered destitute and homeless if evicted out of the suit property. She also stated that the respondents and their agents have been bringing prospective buyers to the suit property to view the same and she is apprehensive that she will soon be evicted from the suit property to pave way for the new owner unless this Honourable Court allows this Application.

The application is contested. The first respondent, Jonathan Stewart Phillip Coulson, filed his replying affidavit sworn on 30th April 2015 in which he averred that he together with the second and third respondents are joint executors of the estate of Terence Gordon Coulson. He averred further that he is also authorised by Mrs Sarah Higgins, the sole executrix of the estate of Malcolm Rex Higgins, to swear this affidavit on her behalf. He averred that by the agreement for sale dated 8th December 1987, the deceased agreed to sell the suit property to Terence Gordon Coulson and Malcolm Rex Higgins for the sum of Kshs. 2 million. He further averred that by a transfer dated 17th December 1987 between the deceased on the one part and Terence Gordon Coulson and Malcolm Rex Higgins of the other part, the deceased transferred the suit property to them as tenants in common in equal shares absolutely. He further averred that as a consequence, on 30th December 1987, by entry number six on the certificate of title for the suit property, the transfer of the suit property to Terence Gordon Coulson and Malcolm Rex Higgins was registered, making them the absolute and indefeasible owners of the suit property. He annexed a copy of the certificate of title as proof. It was his averment that under the said agreement for sale, it was expressly provided that the suit property was sold subject to the deceased's right to occupy it rent free until 31st March 1988 whereupon vacant possession would be given to the purchasers Terence Gordon Coulson and Malcolm Rex Higgins. It was his further averment that upon the date of 31st March 1988 reaching, the deceased sought to be allowed to continue residing on the suit property on compassionate grounds. He further averred that the owners of the suit property, Terence Gordon Coulson and Malcolm Rex Higgins, allowed the deceased to continue residing on the suit property subject to the execution of a formal licence agreement, a copy of which he annexed. It comprised of a licence to occupy made on 17th July 2002 in which the deceased acknowledged to have been in non-exclusive possession of the suit property since he sold it on 30th December 1987. He admitted that the plaintiff applicant is the deceased's half-sister who lived with him in the suit property for many years including when the property was sold in 1987. However it was his contention that by the said licence, Terence Gordon Coulson and Malcolm Rex Higgins acknowledged having allowed the deceased and his family, which included the plaintiff applicant, to have non-exclusive possession of the suit property since the suit property had been purchased by them on 30th December 1987. He averred that it is with the permission and licence of Terence Gordon Coulson and Malcolm Rex Higgins that the deceased and his family including the plaintiff applicant was residing on the suit property and her occupation thereon cannot be said to have been adverse to the interest of the owners of the suit property. On those grounds he contended that the plaintiff applicant is not entitled to continue to remain in possession of the suit property and this application should be dismissed with costs.

In response to the said replying affidavit, the plaintiff applicant filed a supplementary affidavit sworn on 18th June 2015 and filed on 19th June 2015 in which she averred that the alleged sale of the suit property was void and a nullity. She denied that the deceased signed the transfer dated 17th December 1987 since the signature appearing on the transfer was forged. She maintained that the purported entry in the certificate of title was effected fraudulently and that is the reason why the respondents waited until the death of the deceased in the year 2013 before they could lay claim on the suit property. It was her averment that at the hearing of the substantive suit, she would avail evidence to prove that the transfer of the suit property was perpetuated through fraud and misrepresentation of facts. It was her further averment that the respondents confirmed that she lived in the suit property with the deceased for many years and the deceased could not have transferred the suit property without her knowledge and she only came to be aware of the purported sale after his death when the respondent demanded that she vacate the suit property.

In response thereto the first respondent filed his replying affidavit sworn on 9th October 2015 and filed on the same date, in which he produced a copy of the agreement for sale dated 8th December 1987 which had erroneously been left out in the first replying affidavit. He denied allegations of fraud by the applicant and put the plaintiff applicant to strict proof to establish the alleged fraud and misrepresentation of facts. It was his further averment that the deceased was facing major financial troubles and was having difficulties in repaying a loan facility with Standard Chartered Bank Limited. He further averred that it was upon the payment of the purchase price by his late father to the deceased that saw the deceased settle the outstanding amount with Standard Chartered Bank Ltd who issued the discharge of charge on 17th December 1987. He added that all the above transactions are confirmed by the entries on the certificate of title, a copy of which he produced. It is on that ground that he sought for this application to be dismissed with costs.

The issue arising for determination is whether or not to grant the prayer of a temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”*Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise*

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, the Plaintiff/Applicant has asserted that she is entitled to an order of temporary injunction based on adverse possession. She has claimed that she has been resident on the suit property for 38 years which exceeds the statutory minimum of 12 years given in the Limitation for **Actions Act. Under Section 38(1)** of the **Limitation of Actions Act**, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. For one to sustain a claim for adverse possession, he must demonstrate possession that is *nec vi, nec clam* and *nec precario*; that is, possession which is without force, without secrecy, and without permission. Such possession must also be accompanied by the necessary *animus possidendi*, which is an intention to acquire the land as one's own. Such possession must have been continuous and uninterrupted for duration of at least 12 years.

In this particular suit, the respondents have challenged the plaintiff applicant's claim to the suit property on the ground that her occupation was with permission under the licence agreement made on 17th July 2002. I have looked at this license agreement and have confirmed that it allowed the deceased permission to remain in occupation of the suit property by himself and his family. The only family he had was the plaintiff applicant. Clearly, the plaintiff applicant's stay on the suit property was with permission from the owners thereof. In the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 72 of 1982**, the Court of Appeal held as follows:

“A person who occupies another person's land with that persons consent cannot be said to be in adverse possession as in reality, he has not dispossessed the owner of the land and the possession is not illegal.”

In the case of **Jandu –vs- Kirpal [1975] EA 225** the court made a finding that:

“The rule of “permissive possession” is that possession does not become adverse before the end of the period which the possessor is permitted to occupy the land”.

My finding at this interlocutory stage is that the plaintiff applicant continued to remain in occupation of the suit property with permission from the owners thereof and has therefore not satisfied all the conditions for adverse possession. She has therefore failed to demonstrate to this court that she has a prima facie case with a probability of success at the main trial.

In light of the foregoing, the court finds that the Defendants have not satisfied the claim on adverse possession as she was given permission to remain in possession of the suit property together with the deceased by the two owners Terence Gordon Coulson and Malcolm Rex Higgins.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this application. Each party shall bear their costs.

SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 12TH DAY OF APRIL 2018.

MARY M. GITUMBI

JUDGE

DELIVERED BY HON. MR. JUSTICE SAMSON OKONGO THIS 19TH DAY OF APRIL 2018.

SAMSON OKONGO

PRESIDING JUDGE