



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 229 OF 2017 (O.S)

IN THE MATTER OF: CR 1137 SECTION 11/MN/242

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF 5.45 ACRES OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

NICODEMUS NGALA

ISSA K. KANDA

KENANI AYUB & 85 OTHERS.....APPLICANTS

-VERSUS-

SALIM MOHAMED SALIM.....RESPONDENT

RULING

1. The 3 applicants moved the Court vide their application dated 22nd August 2017 premised on the provisions of Order 40 of Civil Procedure Rules seeking orders:

1. Spent

2. Spent

3. That the defendants their employees, agents and/or servants be restrained from in any way interfering with the plaintiffs' quiet possession and enjoyment of the suit premises namely plots Nos. CR 1137 Section 11/MN/242 situated at Mishomoroni, Mombasa County pending the hearing and determination of this suit.

4. That the costs of this application be provided for.

2. The application is premised on the grounds listed on the face of it and the affidavit of Nicodemus Ngala. Mr Ngala deposes inter alia that on 15th August 2017, the Respondent started fencing & digging terraces as well as disposing the suit property as a result of which the applicants became unable to utilize, occupy and or access their homes. That the Respondent needs to be immediately restrained from any further unlawful & illegal interference with the said plots. The applicants annexed photographs evidencing fencing.

3. The application is opposed by the replying affidavit of Salim Mohamed Salim Bakhresa the named Respondent. He deposed that the application is full of falsehoods & misrepresentations. He denied that the applicants have ever been in possession of the suit land which averments he supported by letters from the Chief & village headman annexed as '**SMS – 1**'. Mr Salim deposed further that he charged the suit property to Barclays Bank in 2002. That in 2012 he decided to share the land amongst his kin and caused a subdivision to be done as per annexure '**SMS – 3**'. He urged the Court to dismiss the application.

4. The parties agreed to argue the application by filing of written submissions. The applicant filed alongside his written submissions on 25.1.2018 a supplementary affidavit without leave of the Court. In relation to the present application and in response to the defendant's replying affidavit, Mr Ngala deposed that they have been cultivating the land and denied the existence of a house 50 years old on the land. That the Respondent forcefully came on the land in late 2015 and put up iron – sheet structure in which he lives in and forced them to stop

cultivating. That the letters from the Chief's office is partisan.

5. In their submissions, the applicant states that they have acquired the suit land by way of adverse possession. That they have been and still are using a well dug during the colonial times. They cited the case of **Jeresion Murithi Magambo vs James Nkonge & 2 others (2010) eKLR** where the trial Court held that **"cultivation of the surface without fencing is sufficient proof of possession."** I wish to point out however that this case is not relevant at this interlocutory stage of the proceedings since the hearing of the main suit is yet to commence for parties to prove their claim. The applicants' submissions have not addressed itself to any of the 3 principles of prima facie case, irreparable harm or balance of convenience to be proved for a party to be entitled to a grant of orders of temporary injunction.

6. The Respondent has submitted that the Applicants have not demonstrated they have a prima facie case with a probability of success. That neither do they cultivate the suit land nor have they put up any permanent structures on it. That prima facie case can only be established where the applicants have been in continuous and uninterrupted possession of the land. The cases cited by the Respondent in support of this submissions were all in respect of final decisions made on the merits of the claim for adverse possession i.e. **Wambugu vs Njuguna (1983) KLR 174, Hamisi Omar Juma & 152 others vs Amraalbai Rajshi & Another (2014) EKLR et al.**

7. The Respondent also submitted that the Applicants will not suffer any irreparable loss. Further that the balance of convenience tilts in his (Respondent's) favour. On his preliminary objection, he stated that the suit was defective for non-compliance with Order 37 rule 7. He urged the Court to strike out the entire suit.

8. I have considered all the issues raised by the pleadings and the submissions. On whether to grant the orders sought, the applicants deposed thus:

At paragraph 3 of the affidavit in support of the application;

"That on 15.8.2017 the Respondent started fencing, digging terraces and started disposing off the suit premises after we have filed the adverse possession proceedings."

At paragraph 8 of the supplementary affidavit;

"That the Respondent only came on the land with force in late 2015 and put up the iron-sheet structure in which he lives in and forced us to stop cultivating which we did to avoid bloodshed".

9. The suit herein was filed on 22nd June 2017. Going by paragraph 8 of the supplementary affidavit, this was after the Respondent had stopped the Applicants from cultivating the land. A temporary injunction cannot be used to undo what has already been done. The plaintiffs have admitted that they stopped cultivating the land in 2015 to avoid bloodshed which was a good thing. However they took too long to move the Court for the injunctive reliefs which is an equitable remedy and the equitable doctrine of **"delay defeats equity"** as well as **'equity aids the vigilant'** would not allow the Court to grant the orders sought in prayer No 3 of the application.

10. The Applicants having not addressed the Court on the heading of irreparable loss and balance of convenience, the Court is unable to comprehend the nature of the irreparable loss to be suffered by the applicants merely on the face of the pleadings. Further the balance of convenience in my view tilts in favour of the Respondent. The applicants have admitted under oath that they do not live on the land and was using the same for cultivation until the Respondent stopped them in late 2015. For this reason, it is my considered opinion and I so hold that the application dated 22.8.17 fails to meet the threshold of granting orders of injunction as prayed. The same is dismissed.

11. The Respondent also urged a preliminary objection that the suit is defective for failing to annex a certified extract of the register of the suit title. The plaintiffs have however annexed a copy of the title to their originating summons. To this extent, I find the preliminary objection is defeated because a copy of the title contains details of the land in dispute is annexed to the affidavit in support of the originating summons. Consequently, the preliminary objection is also dismissed for lack of merit. Each party to bear their respective costs of the preliminary objection and the application.

Dated, signed & delivered at Mombasa this 13th June 2018

A. OMOLLO

JUDGE