



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC 323 OF 2016

IRENE THADDE AVERMANN.....PLAINTIFF

=VERSUS=

COQUERO LIMITEDDEFENDANT

R U L I N G

1. I have before me an application dated 25th November, 2016. The applicant Irene Thadde Averman prays for Orders: -

a) SPENT

b) THAT pending the hearing and determination of this application this Honourable Court be pleased to restrain the defendant, its servants, agents or anyone else claiming under or instructed by the defendant, from evicting, selling, transferring, disposing, charging, leasing, sub-dividing or in any way interfering with the plaintiff/applicant's quiet possession and enjoyment of parcel of land of subdivision Number 491 of Section Number IV Mainland North (Certificate of Title Number CR. 30489) where her house stands on.

c) Pending hearing and determination of the suit this Honourable Court be pleased to restrain the defendant, its servants, agents or anyone else claiming under or instructed by the defendant, from evicting, selling, transferring, disposing, charging, leasing, sub-dividing or in any way interfering with the plaintiff/applicant's quiet possession and enjoyment of parcel of land of subdivision Number 491 of Section Number IV Mainland North (Certificate of Title Number CR. 30489) where her house stands on.

d) Costs of this Application be provided for.

2. The Application is supported by the Plaintiff/Applicant's affidavit sworn at Mombasa on 25th November 2016 and is premised on several grounds. The application is based on an Originating Summons filed herein by the plaintiff on 28th November 2016 seeking adverse possession of a portion of the mentioned parcel of land in which she states her house stands.

3. By way of background, the plaintiff indicates that the entire parcel of land previously belonged to her mother, one **TIMA JOSEPH BOCKLE**. In 1992, the plaintiff left Kenya and took up residence in Germany. Upon her return in 1998, she found the land had been sub-divided into 2 parcels – being subdivision No. 491(which is the suit property) and sub-division No. 492 which was transferred to her

mother. On her return, she commenced construction of a house on the suit property which measures 20 Acres and which was registered in the name of the Defendant herein.

4. The plaintiff avers that she has since then dispossessed the Defendant of the land having built a house and lived thereon without any contestation by the Defendant. It is the plaintiff 's case that while the Defendant has been embroiled in a number of cases with her brother one **BRUCE JOSEPH BOCKLE**, the defendant has never taken action to repossess the portion on which her house stands from her despite her occupation thereof being open and lacking the Defendant's consent. She states that recently, the Defendant has served her with an Order of eviction from the suit land which order only relates to the dispute between the defendant and her said brother. She is now apprehensive that the Defendant might use the pretext of the order to either evict her and/or alienate the suit land and hence her quest for an order of injunction herein.

5. The Defendants, Coquero Limited are however opposed to the grant of the orders sought. In a Replying Affidavit sworn by a director thereof, one Franklyn Pereira on 23rd February 2017, the Defendants contend that this application is an abuse of the Court process, bad in law and that it ought to be dismissed with costs.

6. According to the Defendants this matter has a long history in which the Plaintiff herein and her brother **BRUCE JOSEPH BOCKLE** have continued to use all manner of tricks in the book to stop the Defendant from accessing the suit property. They have annexed to the Replying Affidavit a judgement and decree requiring the said **BRUCE JOSEPH BOCKLE** to vacate the suit premises. It is the Defendant's case that the plaintiff herein is merely acting as an agent of her said brother after her brother as it were "exhausted all tricks in the books" to perpetuate his now illegal stay in the suit premises.

7. Ultimately the Defendant avers that the application is made in bad faith. It is their case that the plaintiff's occupation of the suit land if at all has never been open as it was always her brother who was keeping the defendant's away from the land. Her claim for adverse possession is therefore only meant to defeat the other orders of the court and should be dismissed with costs.

8. I have perused the application before me together with the Affidavit in Reply. I have also carefully considered the Oral submissions made by the rival counsels for the parties herein. The applicable principles to the grant of an interlocutory injunction have been well settled in the **Giella -vs- Cassman Brown & Company Ltd (1973) EA 358**, case that:-

"first an 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

9. On whether or not the plaintiff has shown a prima facie case with a probability of success, I must turn to the facts of the case as laid before me. In **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, the court of Appeal in defining a prima facie case stated as follows:

"a prima facie case is more than an arguable case. It is not sufficient to (merely) raise issues. The evidence must show an infringement of a right, and the probability of the Applicant's case (being upheld) upon a trial. That is clearly a standard which is higher than an arguable case."

10. It is the Plaintiff's case that she has constructed a house and lived on the suit land uninterrupted since 1998 by virtue of which she has now acquired rights to the land by way of adverse possession. As I understand it, adverse possession may be said to be a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his/her title for a prescribed period of at least 12 years. The essential prerequisites for this situation to apply is that the possession of the adverse possessor is acquired neither by force or stealth or under the license or permission of the owner as normally expressed in the Latin maxim **nec vi, nec clam, nec precario**. Such possession must be adequate in continuity, in publicity and in extent.

11. The doctrine of adverse possession is embodied in section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

“Any action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”

12. Section 13 of the Limitations of Actions Act aforesaid further provides that:

“ A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitations can run(which possession is in his Act referred to as adverse possession) and, where under Section 9,10,11, and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

13. Arising from the provisions of sections 7 and 13 of the Limitations of Actions Act, I think it is pertinent that the person against whom the order of adverse possession is sought should be in possession of or able to exercise some form of control over the land in question. The general impression of the doctrine of adverse possession has been equated with the actions of an aggressive squatter whose wrongful possession is eventually validated with the passage of time. While the rationale for the law of limitation for and against the recovery of land has been varied, one common theme that emerges is the neglect or default of the land owner to assert his rights and/ or make full use of the land. Neuberger J., in **Pye (Oxford) Holdings Ltd -vs- Graham (2000) Ch 676** observes as follows:

“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely. However, if as in the present case the owner of the land has no immediate use of it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing. I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.”

14. Similarly in **Adnam -vs- Earl of Sandwich (1877) QBD 485**, the Court observed as follows:

“ The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part want to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

15. I cite the above provisions because at paragraph 7 of her supporting Affidavit, the Plaintiff avers that when she came back to Kenya in 1998, the defendant was in possession of the 20 acres comprised in the sub-division No. 491 which was transferred to them following protracted legal battles which the plaintiff's mother fought with one Abdallah Zubedi who sold the Suitland to the defendants.

16. The assertion that the Defendants were in possession of the land in 1998 does not however ring true as per the record placed before me. While the defendant concedes that they bought the parcel of land from the said Abdalla Zubedi on or about 15th March 1998, it is their case that since the year 2001 when they tried to take possession of the Suitland, the Plaintiff's brother Bruce Joseph Bockle acting as the administrator of the estate of their Mother TIMA THADDLE BOCKLE violently resisted their entry into the land as a result whereof the Defendants were forced to file Mombasa High Court Civil Case No. 59 of 2006; Coquero Limited -vs- Bruce Joseph Bockle(which is now Malindi ELC case 20 of 2016).

17. It is not in dispute that the Mombasa High Court delivered judgement on the matter on 27th February 2013 whereby *inter alia* a mandatory injunction was issued requiring the said Bruce Joseph Bockle to

“forthwith pull down and remove from the said land any construction and all his property of whatever nature as well as his workmen, servants or agents.” From the record, it is evident that the said Bruce Joseph Bockle acting as administrator of the mother’s estate as aforesaid moved to the Court of Appeal and filed Malindi Civil Appeal No. 41 of 2013. At page 12 of the Appeal Court’s judgement delivered on 3rd April 2014, the Court upon reviewing the evidence from the High Court found as a matter of fact that:

“It is a common ground that the appellant (Plaintiff’s Brother) has to date refused to part with the possession of the suit premises to the Respondent (the Defendant herein) though two titles according to the appellant are in existence, in the name of the respondent and Tima (Plaintiff’s Mother) respectively. It is also common ground that Tima has since passed on and the appellant is now the Administrator of her Estate.”

18. Arising from the foregoing, it is clear that the Defendant herein has never taken possession nor been in control of the Suitland courtesy of the acts and/or omissions of the Plaintiff’s brother. In refusing to give possession of the land to the Defendant, the plaintiff’s brother was acting in his capacity as the legal representative of the plaintiff who is a beneficiary of the estate of the late TIMA THADDLE BOCKLE. The Plaintiff admits knowledge of the cases between her brother and the Defendant. On 9th September 2016, this Court in Malindi ELC 20 of 2016 declined to stay eviction Orders issued against the Plaintiff’s brother, his servants and/or agents. Given the plaintiff’s admission of knowledge of the said cases and as a beneficiary of the estate of TIMA THADDLE BOCKLE it is not difficult to see why the respondents conclude that she is nothing but an agent of her brother in these proceedings.

19. At any rate I find no evidence that she was in occupation of the Suitland in her personal capacity other than as a beneficiary of the estate of her mother. Her occupation if at all, cannot by any stretch of imagination be said to have been open. Her entry into the Suitland was in my view acquired by stealth under the guise of the property being part of the estate of her mother. In any event during the course of the dispute between the Defendant and the plaintiff’s brother, limitation of time could not in my view be running as to warrant or amount to adverse possession. In **Bellamy -vs- Sabina (1857) De J 566, ? Cranworth L.J** Commenting on the doctrine of lis pendens observed as follows:

“where a litigation is pending between a plaintiff and Defendant as to the right of a particular estate the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so there could be no certainty that the proceedings would ever end.”

20. In my considered view even if the Plaintiff stayed in the Suitland for the period advanced, it is certain that this is not a case where the Defendant slept upon his rights to the land. A claim for adverse possession is therefore not tenable. The upshot is that the plaintiff has failed to prove a prima facie case with a probability of success. Her application is dismissed with costs to the Defendant.

Dated, signed and delivered in Malindi this 12th day of May, 2017.

J.O. OLOLA

JUDGE