



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 120 OF 2017 (O.S.)

REHEMA KAZUNGU BAYA.PLAINTIFF

VERSUS

TULIP DEVELOPMENT LIMITED.....DEFENDANT

RULING

1. The Application under consideration is the Notice of Motion date 6th April 2017 in which the Plaintiff is seeking for orders:

1) That this court be pleased to certify this matter as urgent, dispense with its service and hear it ex-parte in the first instance.

2) That pending the hearing of this Application inter-parties this Honourable Court be pleased to issue a Temporary Injunction restraining the Respondents by themselves, their representatives, agents, goons, employees, servants from evicting, demolishing all the structures currently on plot No.MN/1/3220 Nyali Mombasa.

3) That pending the hearing and determination of this Suit this Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves, their representatives, agents, goons, employees, servants from disposing, selling or transferring Plot No.MN/1/3220 Nyali Mombasa.

4) That costs of this Application be provided for.

2. The Application is based on the grounds that the Respondents have colluded with goons with an intent of disposing and selling the Suit Property; that the sole intention of the intended disposition and sale is to defeat the due course of justice; that it is in the best interest of justice and all fairness that this Application be allowed to protect the interest of the applicant who has nowhere to go since the Suit Property is her home left to her deceased husband and that the applicant has a good case with high probability of success and the balance of convenience tilts in her favour. The Application is supported by the Affidavit sworn by the Plaintiff on 6th April 2017. The Plaintiff depones that despite having lived peacefully and undisturbed for over 25 five years in the Suit Property together with her husband and children, she was shocked when the police summoned her and five children over the issue of ownership and irregular transfer of title to the Suit Property. It is the Plaintiff's contention that the Respondent has colluded with individuals unknown to them to sell and/or transfer the Suit Property to unsuspecting members of the public with the sole aim of defeating the due process of law and divert the course of justice and that they are currently living in fear as their homes may be demolished at any time unless appropriate conservatory orders are granted.

3. The Application is opposed by the Defendant who filed a Replying Affidavit sworn by Iqbal Valli Hussein on 21st April 2017. It is the Defendant's contention that the Plaintiff's sub judice, the Plaintiff having previously filed another Suit against the Defendants being **ELC No.82 of 2017** seeking similar reliefs as those sought in this Suit. The Defendant denies that the Plaintiff has been living on the Suit land since 1994 or for over 25 years or that Mzee Karisa Charo has been living on the land since 1980. Mr. Iqbal Valli Hussein depones that the Property was registered in his name and his wife on 28th January 1998 and subsequently transferred the same on 16th February 2007 to the Defendant where both of them are directors and that on both occasions the land was vacant and free of any squatters or encumbrances. He depones further that he is aware that Mzee Karisa Charo was in occupation of the adjoining land **Parcel Number MN/1/3219** and that in 2011 he was evicted by the registered owner of the said parcel of land and that upon being evicted, Mzee Karisa Charo requested him to allow him stay temporarily on the Defendant's land as he sought for an alternative place to stay. That he allowed Mzee Karisa Charo to stay temporarily until such time the Defendant was ready to develop the land. That it was with that permission and authorization that the said Mzee Karisa Charo was on the land since 2011 and put up temporary structures. He depones that in January 2016, he applied for a search of the land to enable him commence the process of getting approvals to develop the land but was informed that no search certificate would be issued and instead he received a letter dated 8th January 2016 from the Chief Land Registration Officer indicating that there were several other people claiming the same parcel of land, including one Khalid Omar Ahmed who purportedly purchased the Property from the Defendant. He states that he lodged a complaint with the Directorate of Criminal Investigations and after investigations it was confirmed that the said Khalid Omar Ahmed had been fraudulently registered as owner of the land and is being looked for by the police, and that on 17th February 2017, the Plaintiff recorded a statement with the police confirming that she was on the land with the permission of the owner. The Defendant therefore terms as false the Plaintiff's allegations that she has been in Adverse Possession of the land for over 12 years and believes that the perpetrators of the fraud alluded to have resorted to using the Plaintiff to file this Suit and manipulated entries at the lands registry in order to try their luck to get the Defendant's land.

4. The Plaintiff filed a Further Affidavit dated 10th May 2017 in which she denies the Defendants averments and she admits that she had filed **ELC No.82 of 2017** but had given instructions for that Suit to be withdrawn as there were material happenings that needed to be captured and a Notice of Withdrawal was filed on 6th April 2017 and served on the Defendant's counsel on 7th April 2017. She denies that her deceased husband was living on the Suit Property with the permission of the Defendant and states that they have lived and continue to live as owners and with no permission from the Defendant. She denies the statement allegedly made by her to the police.

5. Both parties agreed to canvass the Application by way Of Written Submissions which they filed and were highlighted by their respective counsel. In her Submissions, the Plaintiff submitted that the withdrawal of **Suit ELC NO.82 of 2017** was procedural and that this court is not barred by Section 6 of the Civil Procedure Act from proceeding with this Suit. Mr. Mwaniki submitted that the Plaintiff has met the conditions in **GIELLA – V – CASSMAN BROWN** case as she is in Possession of the Suit land. Mr. Mwakireti who appeared for the Defendant submitted that the Plaintiff is not entitled to the prayers sought as she has come to court with unclean hands. He cited the concealment of some entries in the Certificate of Title and the failure to disclose that there was another Suit being **ELC No.82 of 2017** filed by the Plaintiff against the Defendant. He further submitted that the Plaintiff has not established a prima facie case.

6. I have carefully read and considered the pleadings, the Affidavits and Annexures on record as well as the rival Submissions and authorities. The principles to be applied when considering an Application such as this one before me are now well settled in the case of **Giella –Vs- Cassman Brown (1973) EA 358** in which it was held:

a) The applicant must establish a prima facie case with a probability of success.

b) The applicant must establish that he might otherwise suffer irreparable damage which would not adequately be compensated by an award of damages.

c) When the court is in doubt it will decide the Application on a balance of convenience.

7. I hasten to add that an Interlocutory Injunction is an equitable as well as discretionary remedy and therefore it behoves an applicant to come to court with clean hands and his conduct must be beyond reproach. He must make full disclosure of all material facts whether they are in his favour or not to enable the court make an informed decision, and any material non-disclosure of facts will automatically disentitle the applicant to the said equitable and discretionary remedy.

8. The Plaintiff's claim is for Adverse Possession. According to the Plaintiff's Affidavit in support of the Originating Summons, her late husband Mzee Karisa Charo informed her that he had been living in the Suit land since 1980 and the Plaintiff got married to him in 1994 and has also lived thereon since then. The Plaintiff states that she got to know that the Defendant was the registered owner when in 2017 her advocate went to the lands office to investigate the history of the land. The Plaintiff further states that in February 2017 she was summoned by the police and when she went to see them on 6th February 2017, she was informed that the land was the subject of a fraud investigation as it had been transferred irregularly. On its part, the Defendant in the Replying Affidavit states that the Plaintiff's deceased husband was given permission to occupy the Suit land in 2011 after he had been evicted from an adjacent plot.

9. The first element that a claimant must prove on a balance of probability in a claim for Adverse Possession is that he has made physical entry on the land and is in actual Possession or occupancy of the land for the statutory period of 12 years or more. Adverse Possession rests on the use and occupation by the claimant and it has been held in numerous decisions that Possession must be actual. Secondly, the occupation of the land by the claimant must be non-permissive. If one is in possession as a result of permission given to him by the owner, or if he is in possession as a licensee, he cannot claim to be in Adverse Possession. The occupation by the claimant must be with the clear intention of excluding the owner from the Property. In the case of Wambugu –V- Njuguna (1983) KLR 173, the Court of Appeal held that:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it”

From the foregoing, the issue is not whether or not the claimant has proved that he has proved that he has been in Possession for the requisite number of years but whether he had the *animus possidendi* to acquire the land by way of Adverse Possession. The claimant can only prove that he had the requisite *animus possidendi* by showing the circumstance under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his Possession.

10. In this case the Plaintiff disposition shows that she entered and lived on the Suit land upon getting married to the late Mzee Karisa Charo. She seems to base her claim on the deceased's occupation of the land and has even attached a burial permit and letters in support of her marriage to the deceased. In my view, such a claim can only succeed if the Plaintiff is the legal representative of the estate of the deceased. On its part, the Defendant has deponed that the late Mzee Karisa Charo moved into the land with their permission in the year 2011. The Defendant has also exhibited a statement allegedly written by the Plaintiff confirming that she was on the land with the permission of the owner. Although the Plaintiff admitted that she went to see the police, she has disowned the statement allegedly made by her at the police station. However the Plaintiff does not state whether she recorded a different statement from the one exhibited by the Defendant or none at all.

11. Having considered the pleadings herein as well as the Plaintiff's Application and the Affidavits on record, I am not satisfied on the material before me that the Plaintiff has established a prima facie case with a probability of success. The Plaintiff's claim is hinged on the estate of a deceased person but without the requisite capacity to file the Suit. Moreover there is a dispute as to whether or not the deceased lived on the Suit land with the permission of the Defendant. There is an Affidavit by the Defendant that there was permission while the Plaintiff states otherwise. In the circumstances, I take cue

from **Royal Media Services Ltd -v- Telkom Kenya Ltd and others (Nairobi Milimani HCCC No.13 of 2000)** where the court citing the English case of **R –v- Fulham Tribunal ex-parte Zerek (1951) 2 KBI** said that where a dispute turns on a question of fact about which there is a conflict of evidence the courts will genuinely decline to interfere by issuing an injunction and thus leave the matter to be determined through a hearing by evidence.

12. As earlier stated, an Interlocutory Injunction is an equitable as well as a discretionary remedy and it behoves an applicant to come to court with clean hands. The Plaintiff filed the Originating Summons and the present Application on 6th April 2017. The Plaintiff in her pleadings failed to disclose that she had filed **Mombasa ELC case No.82 of 2017** in which she was seeking similar reliefs as those in this Suit. Although the Plaintiff has deponed in her further Affidavit that the said Suit was withdrawn, this fact only came out when it was raised by the Defendant in the Replying Affidavit. In my view, the Plaintiff was not candid and failed to disclose all material facts to the court and only alluded to the alleged withdrawal when the issue was raised by the Defendant in its Replying Affidavit. This material non-disclosure of material facts automatically disentitles the Plaintiff the discretionary power of this Court.

13. The upshot of the foregoing it that the Plaintiff has failed to satisfy the conditions for granting the orders sought. In the circumstances, I find no merit in the Notice of Motion dated 6th April 2017 and the same is hereby dismissed with costs to the Respondent.

Ruling delivered, dated and signed at Mombasa this 18th day of September 2017

C. YANO

JUDGE