



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE NO. 314 OF 2015

CHARLES LUCHIVYA CHANJALIA.....1ST PLAINTIFF

AGGREY ANDATI MUSA.....2ND PLAINTIFF

VERSUS

RITA ANDEYO ENANE.....1ST DEFENDANT

GRIFFIN ABUYEKA ENANE.....2ND DEFENDANT

RULING

BACKGROUND

1. The Applicants **Charles Luchivya Chanjalia** and **Aggrey Andati Musa** are sons of **Musa Chanjalia** who died on 13/5/2014. The late **Musa Chanjalia** was the owner of **LR No. S/Kabras/Bushu/1147** which was later sold in a public auction. The Respondents **Rita Andeyo Enane** and **Griffin Abuyeka Enane** are children of the late **Zadok Enane** who died on 27/3/2010. The late **Zadock Enane** is the one who bought **LR No S/Kabras/Bushu/1147** which was registered in his name on 25/1/1977. The little No. **LR S/ Kabras/Bushu/1147** has since been closed on sub division and a new title being **S/ Kabras/Bushu/4140** is now in place and the Respondents are now the registered owners of the same.

2. The Applicants filed an Originating summons against the Respondents in which they are seeking orders that they have acquired **S/Kabras/Bushu/1147** and **S/Kabras/Bushu/4140** by adverse possession. They contemporaneously filed an application for injunction orders and restriction in respect of **S/Kabras/Bushu/4140**.

APPLICANTS' SUBMISSION

3. The Applicants contend that they have lived on **LR No S/Kabras/Bushu/1147** which later was sub divided and became **S/Kabras/Bushu/4140** for a period of over 12 years and that they have therefore acquired the same by adverse possession. That the Respondents have been to the property and have lately threatened them with eviction and that the Respondents are intent on selling the property. They contend that if the injunction is not granted , they will suffer irreparable loss as they have no any other place to go to.

RESPONDENTS SUBMISSION

4. The Respondents have opposed the Applicants' application based on a replying affidavit sworn on 12/1/2016 as well as a further affidavit sworn on 15/1/2016. The Respondents contend that the Applicants have not demonstrated that they have a prima facie case with probability of success and that they have concealed material facts in this case. That the Applicants and their late father were on the property as licencees and as such, they cannot seek to have themselves registered as owners of the suit property by way of adverse possession.

5. The Respondents further contend that there can be no order of injunction given in respect of **LR No S/Kabras/Bushu/1147** as that title is non-existent the same having been closed upon subdivision of the same. That the Applicants' possession of the suit property has not been peaceful and that they are intent on benefitting from land which the Respondents salvaged upon paying the loan owed to the Bank which had a charge over the property.

ANALYSIS

6. I have considered the Applicants' application as well as the opposition to the same by the Respondents. I have also considered the submissions by the counsel for the parties herein. This is an application for injunction. For one to succeed in such an application, he must demonstrate that he has a prima facie case with probability of success. Secondly he has to demonstrate that he will suffer irreparable loss which will not be compensated in damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. These are principles for grant of temporary injunctions which were set out in the celebrated case of **Giella -Vs- Cassman Brown Ltd [1973] EA 358**.

7. I now have to decide whether the Applicants have satisfied the conditions set in the Giella case. The first principle is that an Applicant must demonstrate that he has a prima facie case with probability of success. A prima facie case in a civil application was defined in the case of **Mrao Ltd -vs – First American Bank of Kenya Ltd & 2 others** 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 on 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.”

In the instant case it is not disputed that the Applicants have been and are still in occupation of what was known as **LR No S/Kabras/Bushu/1147 which is now S/Kabras/Bushu/4140**. This property belonged to the father of the Applicants who is now deceased. The same was sold in a public auction and was bought by the Respondents' father who had it registered in his name in 1977.

8. There is no evidence that the Respondents' father took possession of the suit property. There is also no evidence that the Respondents themselves took possession of the suit property. The only attempt by the Respondents to show that they had control of the suitland was through copies of cane delivery documents by the first Respondent which were made to West Kenya Sugar Company in 2014 and 2015. The documents show that the cane was from **Plot No. 1147**. Apart from this, there is no any other evidence to show that the Respondents took possession of the property.

9. It is the Applicants who have been in possession and are still in possession. There is no evidence yet to show that the Respondents or their late father took any effective steps to assert their right to the suit property. Without this evidence, it would appear prima facie that the Applicants have acquired prescriptive rights over the property. It is not for the court to determine at this stage whether the Applicants have met all the conditions for one to be declared to have acquired title by way of adverse possession. The concern of the court at the moment is to see if there is a prima facie case with a probability of success.

10. The Applicants are bringing this case in their own right and not as administrators or legal

representatives of the estate of their late father. I find that they have demonstrated that they have a prima facie case as to warrant grant of injunction. A prima facie case does not mean one which will succeed as was stated in the **Mrao Ltd** (supra).

11. On whether the Applicants will suffer irreparable loss which will not be compensable in damages, a look at paragraph 20 of the replying affidavit shows that the intention of the Respondents is to sell the suit property. If the suit property is sold before the matter is heard and determined, it might subject the Applicants to possible eviction by the purchaser. The Applicants say that they buried their father on the suit property. If they are removed, no amount of damages will adequately compensate them in the circumstances. The fact that the Applicants have alternative land where they can move to is not a ground for denying them the orders sought. The important consideration in this application is whether they have satisfied the conditions for grant of an injunction.

12. On the material placed before the court, there is no doubt in the court's mind as to call for decision of this application on a balance of convenience. Even if the court was to entertain any doubt in this matter, the balance of convenience would have tilted in favour of the Applicants who are in possession. According to the Applicants' own affidavit in reply, they state that they first came into the suit property in 2013. The Respondents father never took possession or any active steps to remove the Applicants from the suit property. Time therefore ran against him uninterrupted. The fact that there was change of ownership of the property in 2015 does not affect the Applicants' prescriptive rights.

CONCLUSION

13. I find that this is a proper case where an injunction ought to issue. I grant an injunction restraining the Respondents, their agents and assigns from selling, alienating or in any manner interfering with the Applicants ownership of parcel **No. S/Kabras/Bushu/4140** until the hearing and determination of this suit. I also give an order that there be a restriction registered against the interests of the Respondents in respect of **LR No.**

S/ Kabras/Bushu/4140. The Applicants shall have the costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this 20th day of April 2016.

E. OBAGA

JUDGE

In the presence of Mr Onganda for Respondents.

Court Assistant: Isabellah.

E. OBAGA

JUDGE

20/4/16