



REPUBLIC OF KENYA

Environment And Land COURT AT KISII

CASE NO. 96 OF 2015

DANIEL MUNGA MBORI PLAINTIFF

VERSUS

JULIUS OMITI OKACH 1ST DEFENDANT

WALTER OMITI OKACH 2ND DEFENDANT

RULING

1. The plaintiff by a plaint dated 7th March 2015 filed in court on 10th March 2015 avers that he is the registered owner of land parcel **West Kasipul/Kotieno Kokechi/1102** (hereinafter referred to as “the suit land”). The plaintiff claims that the defendants on or about June 2014 entered onto and commenced cultivation on a portion of approximately one (1) acre of the suit land without the permission and/or consent of the plaintiff. The plaintiff by the plaint seeks inter alia a declaration that he is the lawful owner of the suit land, permanent injunction against the defendants and general damages for trespass.
2. The plaintiff by a Notice of Motion application dated 24th March, 2016 expressed to be brought under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules and Sections 1A, B, 3A and 63 (e) of the Civil Procedure Act prays for orders that:-

1. **The honourable court be pleased to grant an order of temporary injunction restraining the defendants/respondents either by himself, agents, servants and/or anyone claiming under the defendant /respondent, from entering into, trespassing onto, cultivating, building structures, continuing to build further structures, interfering with and/or in any other manner, whatsoever, dealing with the suit property, that is LR No. WEST KASIPUL/KOTIENO KOKECH/1102 and/or any portion thereof, pending the hearing and determination of this suit.**
2. **Costs of this application be borne by the defendant/respondent.**

3. The application is predicated on the grounds set out on the face of the application and the affidavit sworn in support of the application by the plaintiff dated 24th march, 2016. The plaintiff/applicant’s case is that he is the registered owner of the suit land by virtue of having inherited the same from his deceased father, one Joseph Mbori Mbuya who was previously the registered owner. The plaintiff has annexed a copy of search and title deed as **DMM1 (a) and (b)** respectively to illustrate he is presently the registered owner of the suit land.
4. The plaintiff avers that the defendant on or about June 2014 unlawfully entered into and took possession of a portion of the suit land and commenced cultivation and construction of structures which prompted the plaintiff to make a report to the area chief respecting the defendants unlawful activities but since the defendants did not stop their activities the plaintiff states he was

- constrained to bring the instant application for a temporary injunction to prevent further interference and wastage of his property by the defendants.
5. Upon being served with the application and the suit the defendants filed a defence and counterclaim. By the defence the defendants claim the plaintiff got the suit property transferred to himself fraudulently. The defendants deny that the plaintiff is entitled to exclusive and/or absolute rights over the suit land and aver that the defendants have in fact acquired a right to ownership of the suit land by way of prescription on the basis that they have been in exclusive possession of the land for a period of over 12 years and are therefore entitled to be declared as having acquired the right to be registered as owners by virtue of adverse possession. By way of counter claim the defendants seek a declaration that they are entitled to the suit land by reason of being in adverse possession.
 6. The defendants filed a replying affidavit in opposition to the plaintiff's application sworn by Julius Omiti Okach the 1st defendant herein. The defendants state that their late father, one Joshua Omiti Okach in 1978 purchased a parcel of land from the plaintiff's father one Joseph Mbori Mbuya as per Memo of agreement annexed and marked "**JOO1**" and that subsequently in 2006 the plaintiff's mother Suzana Ariko Mbori sold an additional portion of land to the defendant's father making altogether a total of 0.52 Hectares. The copy of the agreement is annexed as "**JOO2**". The defendants aver the plaintiff's original parcel was **West Kasipul/Kotieno Kokech/445** which was subsequently subdivided to parcels **864** and **865** and that the latter parcel **865** was sold to repay a loan that had been taken by the plaintiff's father from the Agricultural Finance Corporation on parcel **445**.
 7. The defendants further aver that the plaintiff subsequently caused land parcel number **West Kasipul/Kotieno Kokech/864** to be subdivided to create parcels **West Kasipul/Kotieno Kokech/1100, 1101** and **1102**. The defendants state that their parcel/portion of land is comprised in land parcel **1102** which the plaintiff caused to be registered in his name. The defendants contend that they have possessed and have cultivated land parcel **1102** for well over a period of 12 years and have therefore become entitled to be registered the owners thereof in place of the plaintiff, the plaintiff's title to the said parcel of land having been extinguished by effluxion of time on account of the defendants being in adverse possession of the portion of land.
 8. The plaintiff filed a further affidavit in response to the defendants' response and denied the averments contained in the defendants replying affidavit and specifically denied the agreement for sale alleged to have been entered into with the plaintiff's deceased father on 5th June 1978 and the plaintiff's mother respectively. The plaintiff denied that the defendants father entered into possession of the suit land as alleged stating further that it is the defendants who in 2014 attempted to make forcible entry onto the suit premises and thereafter unlawfully put up an illegal structure precipitating the filing of the instant suit by the plaintiff. The plaintiff further asserted that the alleged agreements of sale, if at all there was any, which however the plaintiff denies, were null and void for failure to comply with the provisions of the **Land Control Act**, Cap 302 Laws of Kenya.
 9. The parties argued the application by way of written submissions. The plaintiff filed his submissions on 1st October 2015 while the defendants submissions dated 4th November 2015 were filed on 8th January 2016. I have reviewed the pleadings, the application by the plaintiff together with the affidavits in support and in opposition thereof and the submissions by the parties and the issue for determination at this stage is whether the plaintiff has satisfied the conditions for the grant of an interlocutory application as established in the case of **Giella -vs- Cassman Brown & Co. [1973] E. A 358**. I have to ask myself whether the plaintiff has established a prima facie case with a probability of success and further whether he has demonstrated that he stands to suffer irreparable damage which cannot be compensated in damages unless the injunction is granted. In case I entertain a doubt in regard to either of the two antecedent conditions, I would consider in whose favour the balance of convenience tilts in determining the application.
 10. The plaintiff has tendered evidence by way of copy of search certificate and copy of title to show that he is the registered owner of land parcel **West Kasipul/Kotieno Kokech/1102**. The plaintiff is thus prima facie the registered absolute proprietor of the suit land and in terms of Sections 24, 25 and 26 of the **Land Registration Act, 2012** he is entitled to exclusive possession and rights of usage. The defendants premise their opposition to the plaintiff's application on the ground that they have been in occupation of the suit land since 1978 when allegedly their late father purchased

a portion of the land from the plaintiff's father and mother respectively. The defendants point to two separate memo of agreements dated 5th June 1978 and 9th March 2006 to support their allegations of purchase of the suit land by their father. The memorandum of agreement of 5th June 1978 refers to sale of a portion of 1 acre out of parcel 445 while the memorandum of agreement of 9th March 2006 does not make any reference to any specific parcel of land and/or the portion the subject of the suit. Although the defendants aver that their father, Joshua Omiti Okach, took possession of the portion he purchased in 1978 after paying kshs. 1,000/= the evidence of possession is scanty if not nonexistent. The defendants allege the plaintiff's father took a loan with parcel 445 and thereafter disappeared into Tanzania without trace and that the plaintiff obtained grant of letters of administration by having his father declared to be dead.

11. The defendants allege their father who died in 2014 has remained in uninterrupted possession of the suit land since 1978 but where is the evidence? If indeed the defendants have remained in continuous and uninterrupted possession for over 35 years as they allege it would have been expected that they would have been able to point out at any development they may have effected on the suit land. Photographs of any such developments would have gone some way to illustrate the aspect of possession. The defendants do not claim to be residing on the suit land but claim they have been cultivating the same and that the suit land is their only source of livelihood.
12. The plaintiff for his part denies the defendants have been in occupation and/or have been cultivating the suit land. The plaintiff states the defendants only came into the scene about June 2014 when they entered the suit land and commenced cultivation of a portion thereof. The plaintiff further states the defendants during the month of March on 22nd March 2015 which was after they had been served with the court papers in this suit, commenced to construct structures on the suit land as evidenced by the bundle of photographs exhibited and marked "DMM5". I have scrutinized the photographs and I note there is an incomplete house that certainly must have been freshly put up. The ground around the structure is bare and there is hardly any evidence of habitation and/or cultivation. There are no plants growing or any trees that could show any prolonged occupation and/or possession. Quite evidently the "makeshift" house structure was being hurriedly put up to mislead that there has been some form of occupation and/or possession over sometime by whoever was putting it up. The court will refuse to be hoodwinked. I see no evidence of persistent, continuous or uninterrupted possession. The plaintiff has further annexed a letter from the senior chief Kokech location dated 22nd March 2015 marked "DMM6" where the chief states that although the Assistant County Commissioner had directed that for security reasons nobody should carry out any activities on the land parcel the defendants did not heed the directive but rather decided to build a house at the plot in defiance of advise from the chief not to do so.
13. Taking the totality of the material placed before the court, I am persuaded the plaintiff has established a prima facie case within the meaning of what constitutes a prima facie case has defined in the case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** where the court held that:-

“A prima facie case in a civil application includes but is not confirmed 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. The plaintiff in my view has met that threshold. The defendants' activities were intended to steal a match on the plaintiff by establishing themselves as occupants of the suit land. Possession in adverse possession cases has to be peaceful, continuous and uninterrupted for a period of not less than 12 years. Whether or not possession is adverse is a matter of evidence and the burden to prove adverse possession rests on the party placing reliance on the doctrine. While the defendants' father may at some point have been cultivating the suit land before he died the issue is whether his occupation and/or possession in the circumstances may have constituted adverse possession. That will be for the trial court to determine. As I have observed, the defendants' belated efforts to forcibly occupy the suit land by constructing a house were but an effort in trying to establish occupation and in the process steal a match against the plaintiff. **Madan J.** in the case of **Alkman –va- Muchoki [1984] KLR 353** stated thus:

“The court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful titles of others, and brazenly admit it ought to be restrained by injunction...equity will not assist law breakers...”.

15. Until the plaintiff’s title is impugned and/or otherwise challenged and annulled, the defendants would have no right to forcibly enter onto his land and construct thereon a house, more so when the plaintiff has come to court to assert his right of ownership. In the present case the defendants are doing exactly that and they ought to be restrained.
16. I have held that the plaintiff has established a prima facie case to warrant the grant of a temporary injunction. I find no need to address the other conditions for grant of temporary injunction as I am of the view that the plaintiff as the registered owner of the suit property stands to suffer irreparable damage if the suit land is put to waste by the defendants.
17. For all the foregoing reasons, I find merit in the plaintiff’s application and I accordingly grant an injunction in favour of the plaintiff in terms of prayer (3) of the Notice of Motion dated 24th March 2015. The costs of the application are awarded to the plaintiff.

Ruling dated, signed and delivered at Kisii this 23rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff
..... for the 1st and 2nd defendants
..... for the Court Assistant

J. M MUTUNGI

JUDGE