



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO.9 OF 2016

NYERI CHEMISTS LIMITED PLAINTIFF/APPLICANT

-VERSUS-

JANE WANJIKU MURIITHI..... 1ST DEFENDANT/RESPONDENT

NYALI BEACH CYCADS LIMITED.....2ND DEFENDANT/RESPONDENT

THE DIRECTOR OF LANDS, HOUSING & PHYSICAL PLANNING,

THE COUNTY GOVERNMENT OF NYERI.....3RD DEFENDANT/RESPONDENT

RULING

1. On **3rd February, 2016** Nyeri Chemists Limited (hereinafter referred to as the applicant) moved this court, vide the notice of motion dated **2nd February, 2016** for the following orders:-

1. **Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;**
2. **A temporary injunction to restrain the respondents from constructing on, disposing off, demolishing or otherwise interfering with its occupation/possession of the premises comprising title number Nyeri Municipality Block 1/728 pending the hearing and determination of the application and the suit herein.**
3. **An order of inhibition to inhibit dealings with title number Nyeri Municipality Block 1/728;**
4. **Costs of the application.**

2. The application is premised on the grounds that the applicant is the *bona fide* owner of the suit property (title number Nyeri Municipality Block 1/728); that the applicant has developed the suit property and that the respondents are interfering with the applicants rights to the suit property. The applicant contends that the 1st respondent unlawfully obtained title to the suit property and purported to transfer it to the 2nd respondent. The 2nd respondent is said to have submitted development plans to the 3rd respondent, which has approved them.

3. Pointing out that it has already developed the suit property by erecting a permanent structure thereon, the applicant maintains that the respondents activities are unlawful and prejudicial to its interest in the suit property.
4. The applicant is apprehensive that unless the orders sought are granted, it will suffer irreparable damage.
5. The application is supported by the affidavit of one of the directors of the applicant, **Patrick Gitia Wanjohi**, sworn on **2nd February, 2016**. In that affidavit, the deponent has, in addition to reiterating the grounds on the face of the application, deposed that the applicant applied to be allocated the property after the developments it had effected on the adjacent parcels of land which had been allocated to it spilled to the suit property; that after completing the developments initiated in the suit property, it let out the premises to Kenya Power and Lighting Company (KPLC) among other tenants; that the said tenant (KPLC) has been in possession of the suit property since 1983; that there have been attempts by the respondents to interfere with the tenancy between the applicant and KPLC on the guise that the applicant is not the owner of the suit property and that the 1st respondent has never addressed the issue of ownership of the suit property to it.
6. The deponent explains that she had lodged a caution to restrict dealings with the suit property and wonders how the suit property was registered in favour of the 1st respondent.
7. The applicant laments that the 3rd respondent has approved development plans by the 2nd respondent in respect of the suit property.
8. Maintaining that the 1st and the 2nd respondent have never addressed the issue of ownership of the suit property to it, the applicant contends that the 1st and 2nd respondent have no valid title to the suit property.
9. In support of the averments contained in the affidavit, the following documents are annexed:-
 1. Letter of allotment in respect of suit property marked **PGW-1**;
 2. Copies of title in respect of title numbers Nyeri Municipality Block 1/455 and 542 that had earlier on been allocated to it marked **PGW-2** and **3**;
 3. Letter from Commissioner of lands dated 11th March, 1983 informing the applicant about allotment of the suit property to it marked **PGW-4**;
 4. Copy of approved land development plan marked **PGW-5**;
 5. Photographs showing developments the applicant effected on the suit property marked **PGW-6**;
 6. Correspondences concerning the lease executed between the applicant and KPLC marked **PGW-7**;
 7. Copies of correspondences between 1st respondent and KPLC marked **PGW-8**;
 8. Copy of a letter from 1st respondent's advocate requiring the applicant's tenant (KPLC) to vacate the suit property marked **PGW-9**;
 9. Copy of a letter allegedly drawn by one of the applicant's director (the deponent of the supporting affidavit herein) advising the applicant's tenant (KPLC) to vacate the suit premises marked **PGW-10(a)**;
 10. O.B extract showing that the applicant reported to the police that the letter allegedly written by it advising its tenant (KPLC) to vacate the suit premises was a forgery marked **PGW-10(b)**;
 11. Letter by 1st defendant to KPLC dated 24th February, 1997 through which 1st defendant attempted to renegotiate the lease the applicant had with KPLC marked **PGW-11**;
 12. Copy of a letter by the 2nd defendant to the applicant's tenant requiring the tenant to vacate the suit premises marked **PGW-12**;
 13. Copy of the caution that the applicant had filed to restrict dealings with the suit property marked **PGW-13**; and
 14. A copy of a letter from the 3rd defendant to the applicant showing that the 3rd respondent has approved development plans by the 2nd respondent in respect of the suit property marked **PGW-14**.

10. The application is opposed through the replying affidavit of Nderitu Wachira, a director of the 2nd defendant, sworn on **17th February, 2016**. In that affidavit, the deponent has given an account of how the 2nd respondent obtained title to the suit property and contended that the applicant cannot sustain his claim against the 2nd defendant. In this regard, the deponent explains that the 2nd defendant bought the suit property from the 1st defendant at a time when the 1st defendant was the registered proprietor thereof. The deponent points out that at the time the 2nd defendant bought the suit property, the property was not encumbered.

11. Pointing out that the applicant who all along was aware of the 1st defendant's claim to the suit property did not lodge any claim against the 1st defendant, the deponent deposes that the applicant slept on its rights, if any.

12. Concerning failure by the 2nd defendant to consult or address the applicant as the person in possession of the suit property, the deponent contends that they had no reason to deal with the applicant because it was not the registered proprietor of the suit property.

13. Arguing that a letter of allotment is not proof of ownership to land, the deponent pokes holes to the letter of allotment held by the applicant and contends that, if even if it is legitimate, it cannot override the interest of a registered proprietor over the same parcel of land, unless the registered proprietor is accused of obtaining title to the land by fraud.

14. Terming the 2nd respondent an innocent purchaser for value without notice, the deponent maintains that the applicant has no claim against the 2nd respondent.

15. Arguing that granting the orders sought will occasion irreparable injury to the 2nd respondent who has already taken possession of the suit property and began developments thereon, the deponent urges the court not to allow the application.

16. In support of the averments contained in the replying affidavit the deponent has annexed the following documents:-

- a) Certificate of lease issued to the 2nd respondent on 21st October, 2015, marked **NW-1**;
- b) Certificate of lease issued to the 1st respondent on 18th December, 1992, marked **NW-2(a)**;
- c) Certificate of official search dated 10th April, 2014 showing that the 1st respondent was as at that time the registered proprietor of the suit property and that the property was not encumbered, marked **NW-2(b)**;
- d) Pictures of works being undertaken by the 2nd respondent on the suit property.

17. When the matter came up for hearing, counsel for the applicant, **MS Njoroge** informed the court that the applicant is unable to prove ownership of the suit property. That being the case, it basis its claim on adverse possession. She informed the court that it is not indispute that the applicant has been in occupation of about 1/8th of the suit property (where the demolished building stood) since 1983.

18. Explaining that the applicant's possession was not interrupted until the current suit was filed, counsel for the applicant maintained that the applicant has become entitled to the suit property by adverse possession.

19. Arguing that unless the orders sought are granted, the applicant will suffer irreparable injury, counsel for the applicant urged the court to consider the principles that undergird a claim for adverse possession, set down in the cases of **Virginia Wanjiku Mwangi V. David Mwangi Jotham Kamau** (2013)e KLR and the principles governing granting an injunction set down in the case of **Giella v Cassman Brown & Company Limited** (1973) E.A. 358 (C.A. 51 OF 1972) and urged the court to grant the orders sought.

20. Counsel also took issue with the replying affidavit of the 2nd respondent in that it was commissioned by the drawer.

21. Counsel for the 2nd respondent, **Ms Muigai**, pointed out that the applicant has not addressed the issue of adverse possession in the application. She, however, acknowledged that the issue is addressed in the main pleading (plaint).

22. Based on the decision in the case of **Haro Yonda Juage v. Sadaka Dzenzo Mbauro & another (2014) eKLR**, Ms Muigai submitted that the suit, having been commenced by way of plaint as opposed to an originating summons, is fatally defective.

23. Terming the contract that existed between the applicant and KPLC illegal, Ms Muigai submitted that the applicant cannot hinge its claim on an illegality.

24. Because the tenants have since moved out of the suit property, it is submitted that the applicant will not suffer any loss that is incapable of being compensated by way of damages.

25. Concerning the defect in the replying affidavit of the 2nd respondent, Ms Muigai submitted that the defect is excusable under **Article 159** of the Constitution.

26. In a rejoinder, counsel for the applicant pointed out that the claim for adverse possession is just but an alternative claim in the plaint.

27. Explaining that the 2nd respondent went to the suit property without eviction orders, she maintained that if orders of status quo are not maintained the applicant stands to suffer irreparable injury.

Analysis and determination

28. This being an application for an interlocutory injunction, the principles that guide the court in considering the application were set down in the case of **Giella v. Cassman Brown** (supra) thus:-

“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 (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”

29. The conditions outlined in the **Giella** case (supra) are sequential **“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”** See **Kenya Commercial Finance Company Ltd Vs Afraha Education Society** [2001] 1 E.A. 86 and **Karen Bypass Estate Ltd v. Print Avenue & Company Ltd; Nairobi HCCC No. 284 of 2013 [2014] eKLR**.

30. An injunction being a discretionary remedy, there is ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See **Kenya Hotels Limited Vs Kenya Commercial Bank and another** [2004] 1 KLR 80, **Public Trustee Vs Nicholas Kabucho Murimi** HCCC ELC 610 of 2011 [2012] e KLR and **George Munge Vs Sanjeev Sharma & 3 others** HCCC ELC 677 of 2011 [2012] eKLR.

31. Have the applicant's established a *prima facie* case?

In answering this question, I begin by pointing out that despite having been given time to produce documents capable of proving its entitlement to the suit property, the applicant was unable to do so. As a result, the applicant changed tact and sought to rely on the claim for adverse possession which is only canvassed in the plaint and not in the application under consideration.

32. The 2nd respondent, on the other hand, has annexed to its replying affidavit a certificate of lease issued to it on 21st October, 2015. Whereas the applicant vide paragraph 8 of the plaint has cast aspersions on the title held by the 1st and 2nd respondents, no evidence whatsoever was led capable of showing that the title held by the 2nd respondent was acquired unprocedurally, irregularly or unlawfully. That being the case, by dint of the provisions of **Section 26** of the Land Registration Act, 2012 this court is obligated to treat the 2nd respondent as the prima facie owner of the suit property.

33. In that regard, see the said provision of the law which provides that a certificate of title shall be taken by all courts as *prima facie* evidence; that the person named as proprietor of the land is the absolute and indefeasible owner and further, that such a title is not subject to challenge, except:-

a. on the ground of fraud or misrepresentation to which the proprietor is proved to be a party; or

b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

34. In the affidavit sworn in support of the application herein, the applicant has neither challenged the title held by the respondents on either of the above stated grounds or provided any evidence capable of showing that it is entitled to challenge the title held by the respondents on any one of the said grounds.

35. With regard to the claim for adverse possession, it is not in dispute that the same is only raised in the plaint. That being the case, the applicant has not provided any evidence capable of forming a basis for that claim. Besides, the claim for adverse possession appears to offend the provisions of **Order 36** of the Civil Procedure Rules which require a claim for adverse possession to be brought by way of originating summons. See the said order and the case of **John Kamunya & another v. John Nginyi Muchiri & 3 others (2015)e KLR**, where the Court of Appeal observed:-

“...From the above observation, it is our finding that the learned trial Judge gave the right approach to the issue raised of adverse possession but failed to make a finding as to whether the claim in the manner framed was severable or not. Bearing in mind the provisions of order 36 Civil Procedure Rules as it was then and Order 37 as it is now as well as principles of case law sampled above, we wish to reiterate that the correct position in law in so far as pleading of a claim for adverse possession is concerned is that, a claim for adverse possession can only be presented to court by way of an originating summons. Such a procedure is designed to deal with less complex and uncontentious matters. Where issues turn out to be complex and highly contentious the court has jurisdiction to covert an originating summons into a suit and allow parties to adduce “viva voce” evidence.

Applying the above observations as well as principles of case law to the rival arguments herein on this issue, we are satisfied that indeed the two subject claims, one for entitlement by way of sale and another by way of adverse possession though laid in one pleading, are severable. One had to give way to the other and the learned trial Judge should have ruled so. This is because the issues in controversy in the litigation culminating in this appeal were complex as they involved ownership of land, production of documents, issues as to whether the various sales were valid or not. They were therefore not ideal for disposal by way of an originating summons. They were properly laid by way of a plaint. As for the alternative claim of adverse possession, we find that this was just an appendage as it had not supportable averments in the body of the plaint and it had not been laid in a counter claim. It was therefore severable. We so find it and hereby sever it. Its severance will have no effect on the main claim which still has feet to stand on.”

36. Concerning the apparent defect in the affidavit sworn in support of the replying affidavit of the 2nd respondent, I hold the view that the same does not render the affidavit fatally defective.

37. Being of the view that the applicant has not established a prima facie case with probability of

success, I find the application herein to be lacking in merit and dismiss it with costs to the 2nd respondents who defended it.

Dated, signed and delivered at Nyeri this 21st day of June, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Ombongi h/b for Ms Njoroge for the plaintiff/applicant

Mr. Echichu h/b for Mr. Ngunjiri for the 3rd defendant

N/A for the 1st & 2nd defendants

Court assistant - Lydia