



REPUBLIC OF KENYA



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**Makanga v Githui (Environment & Land Case 546 of 2014)
[2015] KEELC 845 (KLR) (23 March 2015) (Ruling)**

Danson Mwangi Makanga v Mary Muthoni Githui [2015] eKLR

Neutral citation: [2015] KEELC 845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 546 OF 2014**

L WAITHAKA, J

MARCH 23, 2015

BETWEEN

DANSON MWANGI MAKANGA PLAINTIFF

AND

MARY MUTHONI GITHUI DEFENDANT

RULING

Introduction

1. On 2nd December, 2011 the plaintiff filed the suit herein seeking to, inter alia, evict the defendant (Mary Muthoni Githui) from the parcel of land known as L.R No. Nyeri/Island farm/223 (hereinafter “the suit property”).
2. After being served with summons to enter appearance the defendant filed a statement of defence and a counter-claim. Subsequently, the defendant filed the notice of motion dated 9th September, 2014 seeking to, inter alia, restrain the plaintiff from interfering with the portion of the suit property which she occupies pending the hearing and determination of the suit.
3. During the pendency of the suit and the application by the defendant, the plaintiff filed the chamber summons dated 29th September, 2014 seeking to restrain the plaintiff from building on the suit property, cutting or felling trees therein or in any way interfering with his occupation and possession of the suit property pending the hearing and determination of the suit.
4. This ruling relates to the two applications herein.



Summary of the pleadings

5. In the plaint filed in the suit herein (paragraph 4) the plaintiff (who is the registered proprietor of the suit property) contends that the defendant without any colour of right unlawfully and wrongfully entered the suit property and has refused to vacate the same. It is for that reason that he brought the current suit against her.
6. Through the affidavit sworn in further support of the plaintiff's application herein, the plaintiff has deposed that the defendant has since left the suit property and that her application for injunction was a desperate attempt to get back into the suit property.
7. In the statement of defence and counter-claim filed by the defendant, the defendant contends that she is and has been in exclusive possession of a portion of the suit property measuring 7.14 acres for a period exceeding the period of time provided for recovery of an interest in land under the Limitation of Actions Act. In the counter-claim, the defendant contends that she has been in adverse possession of the portion of the suit property she claims. For that reason, she prays that she be declared entitled to that portion of the suit property.
8. In the supplementary affidavit which the defendant swore in opposition to the plaintiff's application herein, on 26th January, 2015, the defendant has admitted that she no longer lives on the suit property but explained that the plaintiff used unlawful means to evict her from the suit property. In that regard, she contends that the plaintiff and/or his agents burnt down her dwelling house. Despite the fact that she is currently not living in the suit property, she deposes that she is actively in possession of the suit property, as she has planted maize on the portion of the suit property she claims to have acquired rights over. The defendant accuses the plaintiff of having interfered with her activities on the portion of the suit property she occupies by, inter alia, spraying her crops with an unknown chemical.
9. Pointing out that the current state of affairs is different from the one which obtained when the suit was filed; the defendant argues that the court should not allow the plaintiff to benefit from the current state of affairs which he unlawfully caused. For those reasons, she urges the court to be guided by the status which obtained before the suit was filed.

Submissions

10. When the matter came up for hearing on 17th February, 2015 counsel for the defendant, Mr. Macharia, informed the court that through her application herein, the defendant had obtained an order for maintenance of the status quo which obtained at the time the suit was filed and explained that after the defendant's house was burnt down by arsonists, the plaintiff obtained an injunction to restrain the defendant from rebuilding her house. Explaining that the defendant is currently being housed by her relatives, he urged the court to allow the defendant rebuild her house pending the hearing and determination of the suit.
11. On his part, counsel for the plaintiff, Mr. Wahome opposed the defendant's plea arguing that there is evidence that she is no longer in possession of the suit property. Counsel submitted that allowing the defendant to rebuild the destroyed house would be prejudicial to the pending criminal case as it may imply that the plaintiff was responsible for the destruction of her house.
12. Concerning the defendant's claim that she has become entitled to the suit property by adverse possession, Mr. Wahome submitted that the defendant has not used the right procedure to prosecute the claim for adverse possession (she has counter-claimed through the statement of defence as opposed to filing an originating summons as required by law).



13. In a rejoinder, counsel for the defendant, Mr. Macharia submitted that the plaintiff is taking advantage of the situation that befell the defendant and urged the court to allow the defendant's application by reinstating the status which obtained before the defendant's house was burnt down.

Analysis and determination

14. It is not in dispute that the defendant was living on the suit property when the suit herein was filed.
15. That fact is imminent in the plaint filed herein. From the documents filed in this suit and in particular the proceedings in the Nyeri CM's Criminal case No.909 of 2011 (Republic v. Mary Muthoni Githui), it is clear that the defendant had lived and was still living on a portion of the suit property when the current suit was filed (2nd December, 2011). In this regard see the plaintiff's own testimony at the lower court where he stated as follows:-

“...the accused and her brother's cultivate on my part of the land. I do not go to that part of my land since we have a dispute.....I have not brought a civil suit about it.....I had kept quiet for 40 years.”

16. The testimony of the plaintiff above was given on 26th October, 2011 barely two months before the current suit was filed on 2nd December, 2011.
17. When filing the current suit, the plaintiff acknowledged that fact. See paragraph 4 of the plaint where he avers as follows:-

“4. The defendant has without any colour of right unlawfully and wrongfully entered the said parcel and has refused to vacate the same.”

18. From the affidavits sworn in support or opposition to the applications herein, it appears that during the pendency of the suit the status which obtained when the suit was filed changed in that the defendant's dwelling home was destroyed. Following the destruction of the defendant's home, she moved out of the suit property but continued carrying other activities thereon, for instance farming (growing maize therein).
19. Under the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed) which by dint of the provisions of Section 107 of the *Land Registration Act*, 2012 applies to the suit property and the title that the plaintiff has, the plaintiff is prima facie the indefeasible owner of the suit property. However, under Section 28 of that Act his registration as such is subject to the overriding interests listed under Section 30 of the Act. Those overriding interests include:-

“the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed,”(Section 30 (g)).

20. Whereas the plaintiff is prima facie the owner of the suit property, in the criminal case referred to herein, it emerged that the defendant's claim in the suit property was not heard and determined by court or any other body with jurisdiction to hear and determine the claim. For that reason the defendant's occupation of the suit property, was by the time the suit was filed, in accordance with the provisions of Section 28 as read with Section 30(g) of the Registered *Land Act* an overriding interest on the plaintiff's land.



21. Having determined that the defendant's possession/occupation of the suit land was an overriding interest on the plaintiff's land, the question to answer is whether the plaintiff, who has not demonstrated that the process used to terminate or purportedly terminate the defendant's interest in the suit property was proper or lawful, can be allowed to benefit from the intervening circumstances that saw the defendant unwillingly move out of the suit property?
22. Although there is no evidence that the plaintiff was responsible for the changed circumstances, upon applying the principles which a court considers in determining an application for temporary injunction, enunciated in the celebrated case of *Giella v. Cassman Brown Ltd* (1973) E.A 358, I find and hold that the plaintiff has failed to prove that the circumstances currently obtaining as concerns the suit property were lawfully caused. That being the case, the only circumstances that the plaintiff can rely on to defeat the defendant's interest in the suit property are those which obtained when the suit was filed.
23. Having found that at the time the current suit was filed the defendant's possession and occupation constituted an overriding interest on the plaintiff's suit, and that the said status was not lawfully brought to an end, I agree with the defendant's counsel that the status that ought to be maintained is that which obtained at the time the current suit was filed.
24. Being cognizant of the fact that the defendant's homestead was destroyed through criminal activities whose perpetrators are unknown, I hold the view that for the defendant's own security, it may not be prudent to allow her to rebuild her house in the suit property. She may, however, continue using the portion of the suit property she has been previously using for the activities she is currently carrying thereon pending the hearing and determination of the suit.
25. Concerning the contention by plaintiff's counsel that the defendant's claim for adverse possession is unmaintainable, since the plaintiff's application is not a preliminary objection and being of the view that nothing stops the defendant from amending her pleadings in accordance with the law, if need be, I find that contention to be unreliable in challenging the defendant's claim to the suit property.
26. For the foregoing reasons, I decline to allow the plaintiff's application and allow that of the defendant to the extent contemplated in this ruling.
27. As the defendant has succeeded in her application, I award her costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 23RD DAY OF MARCH, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Ms Odipo holding brief for Mr. Wahome Gikonyo for the plaintiff/applicant

Ms Thuo holding brief for Mr. Waweru Macharia for the defendant/respondent

Lydia – Court Assistant

