



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 271 OF 2013

TABITHA WAITHERERO KIMANI.....PLAINTIFF

VS

JOSHUA NG'ANG'A.....DEFENDANT

(Application for injunction; principles upon which the court will determine an application for injunction; plaintiff claiming a portion of the suit land by way of adverse possession; defendant having issued a notice to quit to the plaintiff; best that status quo be maintained pending hearing of the suit; application for injunction allowed)

RULING

The application before me is the motion dated 6 May 2013 filed by the plaintiff. It is an application for injunction brought under the provisions of Order 40 of the Civil Procedure Rules and Sections 63 (c) and (e) of the Civil Procedure Act, and Section 13 of the Environment and Land Court Act. The applicant seeks orders to have the respondent restrained from evicting her from the land parcel Eldoret Municipality Block 16/Kamukunji/190 pending the hearing and determination of this suit. The application is opposed by the respondent.

This suit was commenced by way of Originating Summons taken out pursuant to the provisions of Order 37 (7) of the Civil Procedure Rules and the Limitation of Actions Act, CAP 22, Laws of Kenya. The suit of the applicant (plaintiff) is for orders that she has acquired title by way of adverse possession to a portion measuring 60 feet by 55 feet out of the land parcel Eldoret Municipality Block 16/Kamukunji/190 (the suit land). It is her case that she has been in continuous, uninterrupted possession of the said portion since the year 1995, a period in excess of 12 years. The defendant is the registered owner of the suit land. The plaintiff has explained that she moved into the claimed portion after purchasing it in the year 1994 and has put up a house on it. The land was registered in the name of one Geoffrey Waweru Muchina between the years 1989 to 2000. The defendant became registered as owner on 11 September 2000. It is the plaintiff's case that the title of the defendant, to the portion of 60 by 55 feet, has been extinguished by effluxion of time.

In her application for injunction, the plaintiff has averred that the defendant has threatened to evict her from the suit land or may adversely deal with the suit land to her detriment. She has deponed that the respondent has indeed issued a quit notice and unless he is restrained, he will proceed to evict her from the suit land. It is for these reasons that the plaintiff has sought the orders of injunction.

The defendant/respondent, who is acting in person, has opposed the application for injunction. In his Replying Affidavit, the respondent has deposed that he is the registered owner of the suit land having purchased it from Geoffrey Waweru Muchina in the year 1995. He has further averred that the local administration has sought to resolve the dispute between himself and the plaintiff in vain. He has challenged the plaintiff to show an agreement for sale, if indeed she moved into the land by virtue of purchase, as claimed. He has stated that the applicant is not deserving of the orders as he has attempted to evict her but the applicant has refused to vacate.

Mr. Momanyi for the applicant urged me to allow the application for injunction and allow the status quo to prevail pending the hearing of the suit. He pointed out that it is not denied by the respondent that the applicant has been in occupation of the portion of the suit land claimed. He averred that the plaintiff has demonstrated a prima facie case with a probability of success and is deserving of the orders sought.

The respondent on the other hand urged me to disallow the application for injunction on the basis that the suit land rightfully belongs to him. He admitted having issued notice to the plaintiff to vacate.

This being an application for injunction, I need to be satisfied that the applicant has a prima facie case with a probability of success, be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy, and if in doubt, decide the matter on a balance of convenience. These principles were laid out by the court of appeal in the case of *Giella v Cassman Brown (1973) EA 358*. It should also not be forgotten that the essence of every application for injunction, is for the court to make a determination of how to preserve the subject matter of litigation, pending the hearing of the suit. It is strictly not a final determination of the rights of the parties but only a determination of how best to preserve the subject matter of the suit.

In this instance, it is the case of the applicant that she has acquired the suit land by way of adverse possession. Her case is based on the claim that she has been in possession of the suit land since the year 1995 which is now a period of about 18 years. There is an imminent threat of eviction by the defendant who is the registered proprietor.

The fact that the plaintiff is currently in possession of the suit land is not denied by the defendant. The defendant has actually admitted having issued notice to the plaintiff to vacate the suit land. I do not at this stage wish to make any statement as to whether the plaintiff has been in quiet, uninterrupted possession of the claimed portion for the said period of 18 years as she has claimed. But there is no doubt in my mind that her occupation of the claimed portion ought not to be disturbed pending the hearing of the suit.

In the premises, I allow the application for injunction. I order the defendant not to evict the plaintiff from the portion of 60 by 55 feet which she claims until this suit is heard and determined on merits. I also issue an order of inhibition, inhibiting the registration of any dispositions on the suit land pending the hearing and determination of this suit.

The costs of this application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Miss G.N. Gacau holding brief for Momanyi for the plaintiff.

Defendant present (acting in person).