



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 98 OF 2012

BETWEEN

RAYLEIGH WANYAMA APPELLANT

VERSUS

KHISA MUYUNDO alias ZABLON KASISI MUYUNDO..... RESPONDENT

(An appeal from the Ruling and Order of the High court of Kenya at Bungoma (Muchelule, J.) dated 14/03/2012

in

CIVIL CASE NO. 66 OF 2012 (O.S)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court given on 14th March 2012 dismissing the appellant's application for interim relief pending the hearing and determination of his claim for adverse possession. During the hearing of the appeal before us the appellant was represented by Ms. A. Mumalasi. Mr. J. K. Korir held brief for Mr. Onyancha for the respondent and sought an adjournment, which we declined. Thereafter Mr. Korir did not attend to argue the appeal on behalf of the respondent.
2. The background to the appeal is this: By an Originating Summons dated 24th June 2010, the appellant claimed entitlement, by adverse possession, to the property known as Ndivisi/Muchi/636(the property) registered in the name of the respondent. He pleaded that he had been in open and continuous possession of that property for a period of over twelve years and had thereby acquired title by operation of law.
3. In answer to the Originating Summons, the respondent deposed in his replying affidavit that he is the registered owner of the property that measures 7.6 hectares; that in 1968 he sold a portion of the property measuring 7 acres to the appellant's parents; that as he was staying in Eldoret he allowed the appellant's parents to farm the property as licensees'; that he did not sell the entire property to the appellant's parents; that after the death of the appellant's father, the appellant's mother sued him in Bungoma Chief Magistrate's Court in Civil Case No. 460 of 2009

claiming ownership of the 7 acres; and that he is willing to transfer the 7 acres of land that the appellant's family purchased from him.

4. On 27th July 2011 the appellant presented an application by a notice of motion to the High Court seeking restrictions on title numbers Ndivisi/Muchi/7285 and 7286 that were apparently curved out of the property. He also sought a restraining order to prevent dealings, disposal, alienation or interference with those properties pending the hearing and determination of his claim over the property. He deposed in his affidavit in support of that application that he had moved the court to restrain dealings in the property and had obtained orders restraining dealings in the property; that he had then established from the lands office that two titles, namely title numbers Ndivisi/Muchi/7285 and 7286, had been issued in place of the title to the property; and that he was apprehensive that further subdivisions would be undertaken and disposed before he could get a chance to have his claim for adverse possession over the property determined.
5. In his replying affidavit in opposition to that application, the respondent reiterated that he had sold 7 acres of the property to the appellant's parents; that the suit by the appellant's mother, demanding the 7 acres, namely Bungoma Chief Magistrate's Court in Civil Case No.460 of 2009, had been determined in favour of the appellant's mother and that the magistrate's court had ordered the subdivision of the property and the transfer of the portion due to the appellant's mother to her, which was done; that the appellant had unsuccessfully sought to be joined in that suit; and that the respondent should not be stopped from dealing with his land without justification.
6. In the impugned ruling delivered on 14th March 2012, Muchelule, J. dismissed the appellant's application, primarily on the ground that the suit in Bungoma Chief Magistrate's Court in Civil Case No. 460 of 2009, had in his view "*finally brought to a close any claim that the family of the deceased had against the defendant in regard to parcel 636.*" The Judge went on to say that "*under section 7 of the Civil Procedure Act, it would appear, the present suit and application are res judicata.*"
7. In this appeal, the complaint by the appellant urged before us by learned counsel for the appellant Ms. A. Mumalasi is that the Judge was wrong in holding, particularly at an interlocutory stage, that the appellant's suit and application was res judicata has merit. It appears to us, (and we say this without making any determination) that the appellant was in his originating summons pursuing, in his own right, a claim for adverse possession over the entire property. In Bungoma Chief Magistrate's Court in Civil Case No. 460 of 2009 in which the appellant's mother was the plaintiff, the cause of action appears to have been a claim for only 7 acres of the property. The cause of action in that suit was founded on an agreement for sale. The appellant was not privy to that suit. It was not a representative suit and no wonder the appellant had attempted to be joined in it.
8. The learned Judge was dealing with an application that required the appellant to demonstrate a prima facie case with a probability of success, amongst other requirements articulated in the celebrated **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. He was not called upon to pronounce himself finally on matters that required further interrogation during the hearing of the Originating Summons. We think the learned Judge fell into error in doing so.
9. On our part, and having regard to the principles in **Giella v Cassman Brown & Co. Ltd** (Supra), we are satisfied that the appellant deserved the interim protection that he sought pending the hearing and determination of the Originating Summons. We accordingly set aside the ruling and order of the High Court given on 14th March 2012 and substitute it with an order allowing prayers 4 and 5 of the application dated 27th July 2011. We accordingly order;
 - a. *That a restriction order be placed and maintained on Title No. NDIVISI/MUCHI/7285, 7286 and to any other resultant numbers thereto till the suit is heard and determined by the High Court.*

b. *That an interlocutory injunction do and is hereby issued restraining the respondent whether by himself, his servants, agents, nominees or whomsoever claiming through or under him from subdividing, alienating, disposing of or in any other way interfering with the appellant's use and occupation of parcel numbers NDIVISI/MUCHI/7285,7286 and any other resultant parcels until this suit in the High Court is heard and determined.*

10. The appellant shall have the costs of the appeal. The costs of the application in the High Court shall abide the outcome of the Origination Summons. We direct the Deputy Registrar of the High Court at Bungoma to facilitate the hearing of the appellant's Originating Summons on a priority basis.

Dated at Eldoret this 5th Day of February, 2016.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR