Atiang' v Ogol (Environment and Land Case Civil Suit E009 of 2024)
[2024] KEELC 6313 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6313 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND CASE CIVIL SUIT E009 OF 2024

SO OKONG'O, J

SEPTEMBER 25, 2024

BETWEEN

REBECCA ARWA ATIANG' ..... APPLICANT

AND

CAREN AUMA OGOL ..... RESPONDENT

RULING

1. The Applicant brought this suit by way of an Originating Summons dated 3rd April 2024 in which she claimed to have acquired all that parcel of land known as Kisumu/Chiga/7103 (hereinafter referred to as "the suit property") by adverse possession. The Applicant filed the Originating Summons together with a Notice of Motion application dated 3rd April 2024 which was later amended on 4th April 2024. In the amended Notice of Motion application, the Applicant sought a temporary injunction restraining the Respondent by herself, her servants, agents, employees or anybody acting on her behalf from evicting her and her tenants, carrying out demolition of structures, carrying out any development, alienating, selling, transferring, charging and/or in any way interfering with the Applicant's possession/ occupation of the suit property or any part thereof pending the hearing and determination of the suit. The Applicant also sought costs of the application.

2. The Applicant's application was based on the grounds set out on the face thereof and on the affidavit of the Applicant sworn on 4th April 2024. The Applicant averred that the Respondent was the daughter in law of one, Lusi Mareko Obaje, deceased (hereinafter referred to only as "the deceased"). The Applicant averred that the suit property was a portion/subdivision of all that parcel of land known as Kisumu/Chiga/6117 (hereinafter referred to as "the original parcel"). The Applicant averred that she purchased a portion of the original parcel measuring 0.5 of an acre from the deceased in 1988 and had continuously and overtly occupied the same from 1988 without any interference. The Applicant averred that the Respondent who was the daughter in law of the deceased subdivided the original parcel which subdivision gave rise to among others, Kisumu/Chiga/7103 (the suit property). The

Applicant averred that the suit property is the portion of the original parcel which she purchased from the deceased and that the same was registered in the name of the Respondent.

3. The Applicant averred that she constructed rental premises on the suit property in 1988 and had been in possession of the same since then. The Applicant averred that she had occupied the suit property for over 12 years and as such had acquired prescriptive rights over the same by virtue of the doctrine of adverse possession. The Applicant averred that the Respondent had directly caused the suit property to be transferred to her name while aware of the Applicant's interest and rights over the same.

4. The Applicant averred that the Respondent intended to evict the Applicant and her tenants from the suit property and had commenced demolition of the Applicant's structures on the suit property. The Applicant averred that the Respondent's claim over the suit property was barred by section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The Applicant averred that she had an overriding interest over the suit property consistent with the provisions of section 28 (h) of the *Land Registration Act*, 2012. The Applicant averred that she was bound to suffer irreparable loss should the Respondent proceed with her eviction plans.

5. The Respondent opposed the Application through grounds of opposition dated 11th April 2024. The Respondent contended that the application was based on a suit for adverse possession brought against the Respondent barely a year after acquiring the suit property on 22nd November 2023 was an abuse of the court process. The Respondent averred that there was no way the Applicant could have entered the suit property in 1988 while the property came into existence in 2023. The Respondent averred that in any event, no evidence was placed before the court by the Applicant in support of her claim that she purchased the suit property in 1988. The Respondent averred that a case had not been made for the orders sought.

6. The Applicant's application was argued by way of written submissions. In her submissions, the Applicant reiterated the contents of her affidavit in support of the application. The Applicant submitted that she purchased the suit property from the deceased on 27th November 1988 and paid the full purchase price. The Applicant submitted that she took possession of the suit property immediately thereby dispossessing the true owner thereof of possession. The Applicant submitted that she fenced the property and built thereon rental premises. The Applicant submitted that she had occupied the suit property openly and continuously without interruption since 1988 which was 37 years. The Applicant submitted that the original parcel was subdivided without her knowledge.

7. The Applicant submitted that since she was in actual occupation of the suit property, the balance of convenience tilted in her favour. The Applicant submitted that the Respondent would not be inconvenienced if the orders sought were granted. The Applicant prayed that the application be allowed with costs.

8. The Respondent filed submissions dated 11th June 2024. The Respondent submitted that the Applicant had not established a prima facie case against the Respondent since the Applicant had not demonstrated that the Respondent had infringed any of her rights. The Respondent submitted that the suit property was registered in the name of the Respondent and that if any right had been infringed concerning the property, it was the Respondent's right as the owner of the property. The Respondent submitted that the Applicant could not claim the suit property by adverse possession since the Respondent had owned the suit property for less than 2 years. The Respondent submitted further that there was no evidence that the Respondent had demolished the Applicant's structures on the suit property as alleged. The Respondent submitted that the photographs that had been submitted in evidence were not admissible in law since they were electronic evidence and no Certificate of Electronic Evidence had accompanied them. The Respondent submitted further that there was no evidence that

the Applicant had been in possession of the suit property since 1988 as alleged. The Respondent submitted that the Applicant had also failed to demonstrate that she was likely to suffer irreparable harm if the orders sought were not granted. The Respondent submitted that the Applicant had failed to satisfy the conditions for the grant of a temporary injunction. The Respondent urged the court to dismiss the application with costs.

Analysis and determination

9. Order 40 Rule 1 of the *Civil Procedure Rules* provides that:

> " Where in any suit it is proved by affidavit or otherwise—
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

10. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

11. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which an award of damages would not adequately compensate. It was further held that if the court is in doubt, the application is to be determined on a balance of convenience. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*[2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others*[2003]eKLR and went further to state as follows:

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

12. I am satisfied that the Applicant has met the threshold for granting a temporary injunction. The Respondent did not file a replying affidavit in response to the Applicant's application. The effect of that is that all the factual averments in the Applicant's affidavit in support of her application were not rebutted. The fact that the Applicant in 1988 purchased a portion of the land parcel Kisumu/ Chiga/6117 (the original parcel) measuring 0.5 of an acre which upon subdivision of the said parcel

was given land parcel reference Kisumu/Chiga/7103(suit property) was not controverted. The fact that the Applicant had put up rental houses on the said parcel of land and had been in possession of the same since 1988 was also not controverted. The averment that the Respondent had commenced the demolition of the rental houses that had been put up by the Applicant on the suit property with the intention of evicting the Applicant from the suit property was similarly not controverted. The Applicant has established on a prima facie basis that she had occupied the suit property for over 35 years at the time the same was registered in the name of the Respondent. In *Githu v. Ndeete* [1984] KLR 776 it was held that:

a. "The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.

b. Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping g the running of time under the *Limitation of Actions Act*.

c. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title."

13. In *Kairu v. Gacheru* [1988]KLR 297, the court stated that:

> "That the law relating to prescription affects not only present holders of title but their predecessors in title is shown by S 7 of the *Limitation of Actions Act*."

14. I am satisfied that the Applicant has established a prima facie case with a probability of success against the Respondent. It is common ground that the buildings that had been put up on the suit property by the Applicant have been brought down by the Respondent. Since the suit property is registered in the name of the Respondent, nothing stops her from disposing of the same while this suit is pending unless stopped by the court. The Applicant has therefore demonstrated that she stands to suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted.

15. In conclusion, I find merit in the amended Notice of Motion dated 4th April 2024. The Application is allowed in terms of prayers 3 and 4 thereof.

DATED AND DELIVERED AT KISUMU ON THIS 25TH DAY OF SEPTEMBER 2024

S. OKONG'O

JUDGE

Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Ojwang h/b for Ms. Okumu for the Applicant/Plaintiff

Mr. Orego for the Respondent/Defendant

Ms. J. Omondi-Court Assistant