



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 1 OF 2013 (O.S)

PETER MUCHOKI NJUGUNA.....PLAINTIFF/APPLICANT

VERSUS

ELIAS MWORORO KAMAU.....DEFENDANT/RESPONDENT

RULING

By an Originating Summons dated 6th December 2012 and filed in Court on 2nd January 2013 the applicant, citing the provisions of **Order 37 of the Civil Procedure Rules** is seeking the main prayer that the respondent's title to that parcel of land known as No. LOC 16/MBUGITI/2102 (the suit land) has been extinguished by the applicant's open, peaceful and exclusive possession and occupation of the same and he be registered as proprietor thereof. The Originating Summons was supported by the applicant's affidavit in which it is deponed, inter alia, that the suit land was a resultant sub-division of land parcel No. LOC 16/MBUGITI/147 originally registered in the names of KAMAU MWORORO (deceased) and that during the land consolidation in the early 60's, the said KAMAU MWORORO was registered as owner of parcel No. LOC 16/MBUGITI/143 to hold half of it as trustee for the applicant's late father NJUGUNA MWORORO and sometime in 1986, the applicant entered and took possession of two (2) acres out of land parcel No. LOC 16/MBUGITI/143 on which he has been living since and has planted about 2,500 tea bushes, nappier grass and other food crops but on or about 11th April 2005, the respondent and one TERESIA WANJIRU KAMAU had the land parcel No. LOC 16/MBUGITI/143 sub-divided into two portions creating the suit land measuring 2.0 acres which he occupies and which the respondent had registered in his names on 29th November 2011 by which time the respondent's title had infact been extinguished by the applicant's adverse possession since 1998. It was only on 17th September 2012 that the respondent gave him notice to vacate the suit land hence this suit.

The Originating Summons was resisted both by grounds of objection and the respondent's replying affidavit dated 12th February 2013 in which the respondent deponed, inter alia, that his late father KAMAU MWORORO was never registered as trustee of the applicant's father the late NJUGUNA MWORORO in respect to land parcel No. LOC 16/MBUGITI/143 and that although the applicant has been in occupation of the suit land, that has only been as a licensee having been accommodated by the respondent's family purely on humanitarian grounds. That the applicant has no claim in adverse possession to the suit land as his occupation has been with the consent of the respondent and the suit land was a result of the respondent's successful petitioning of a grant of letters of administration in respect of his late father's Estate.

To the parties' credit, they moved expeditiously in complying with the provisions of **Order 11 Civil Procedure Rules** (which is not common with such litigation in this area) and by August 2013 this Court confirmed that the trial would be by viva voce evidence on 8th October 2013. However, the trial could not commence as Mr. Kirubi counsel for the applicant was held up in the Court of Appeal in Nyeri and

thereafter was indisposed.

On 22nd January 2015, the applicant moved this Court by a Notice of Motion premised under the provisions of **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules** seeking the following orders:-

- a. *Spent.*
- b. *Spent.*
- c. *That this Honourable Court be pleased to issue an order for injunction restraining the respondent, his agents, servants and/or employees from interfering with the applicant's occupation and use of all that parcel of the suit land measuring 2.0 acres pending the hearing and determination of this suit.*
- d. *That the costs of this application be provided for.*

The application was supported by the applicant's affidavit and based on the grounds stated therein which were basically a rehash of what was deposed in his affidavit in support of the main Originating Summons. The same was also resisted by the respondent raising the same averments as raised in his earlier affidavit.

It was agreed that the application be canvassed by way of written submissions which both parties have now filed. This ruling is therefore in respect to that application.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions.

An application for temporary injunction has to be determined in line with the now well settled principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A 358** being:-

1. *An applicant must show a prima facie case with a probability of success.*
2. *Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages.*
3. *Thirdly, if the Court is in doubt, it will decide such an application on the balance of convenience.*

What is a prima facie case? This was defined by the Court of Appeal in **MBAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO. 39 OF 2002 (2003 e K.L.R)** in the following terms:-

“A prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Being an equitable remedy, this Court will not grant it where it is shown that the applicant has not approached the Court with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATIONAL 1980 3 ALL ER 772**, the Court will take the course that appears to carry the lower risk of injustice.

This application will therefore be considered in light of the broad principles set out above.

It is not in doubt that the suit land is registered in the names of the respondent under the now repealed **Registered Land Act** since 29th November 2011. **Under Sections 27 and 28** of the said Act, such registration confers upon the respondent all the right and privileges belonging or appurtenant thereto. However, such registration does not relieve the proprietor from any duty or obligations to which he is subject as a trustee and is also subject to the overriding interests set out in **Section 30** of the said Act which include rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or prescription. The applicant herein claims that he is entitled to the suit land

by virtue of the Law of Limitations of Actions or prescription. Whether or not that will be up-held by the Court is a matter to be determined on the evidence during trial. For now, all that the applicant needs to satisfy the Court is that he has a prima facie case with a probability of success. In the circumstances of this case, I am satisfied that the applicant has established such a case. This is because, it is admitted by the respondent that the applicant is indeed in occupation of the suit land and has put up a homestead. Photograph of the home were annexed to the applicant's supporting affidavit. Of course, as stated earlier, whether that occupation is adverse to the respondent's title will be determined during the trial. For now, that occupation is, in my view, sufficient basis on which a prima facie case can be hinged.

With regard to the adequacy of damages as compensation which is the second limb of the GIELLA case (supra), this Court do no more than quote the Court of Appeal in the case of MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R 183 as follows:-

“Besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

And if this Court considers the balance of convenience and the principle in the FILMS ROVER INTERNATIONAL case (supra) that I take the course which appears to carry the lower risk of injustice, it is common ground that the applicant has set up a home on the suit land since the 1980's. The lower risk of injustice and the balance of convenience would dictate that an injunction be issued restraining the respondent, his agents, servants and/or employees from interfering with the applicant's occupation and usage of the suit land, pending the hearing of this suit.

Ultimately therefore, and after considering all the evidence herein, I find that the applicant's Notice of Motion dated 23rd January 2015 is well merited. I grant the order sought therein with costs being in the cause.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Ruling delivered in open Court this 26th February, 2016

Mr. Mwai for Mr. Kirubi for Plaintiff/Applicant present

Mr. Mwangi for Defendant/Respondent present.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016