



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 11 OF 2015 (O.S)**

**IN THE MATTER OF L.R. NO. MWEA/MUTITHI/SCHEME/513**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA**

**ORDER 37 RULE 7 AND 14 OF THE CIVIL PROCEDURE RULES**

BETWEEN

PURITY WANGECHI MITHAMO.....PLAINTIFF

VERSUS

BERNARD MAINA NYAGA.....DEFENDANT

**RULING**

The plaintiff filed this suit by way of Originating Summons on 13<sup>th</sup> February 2015 seeking a determination of the following:-

- 1. That the plaintiff be declared to have become entitled to one (1) acre of land parcel No. MWEA/MUTITHI/SCHEME/2841 (formerly part of the land parcel No. MWEA/MUTITHI/SCHEME/513) registered under the provisions of the Registered Land Act Cap 300 Laws of Kenya by virtue of adverse possession thereof by the plaintiff who has been in open, exclusive and continuous and/or un-interrupted possession or occupation for a period of over 12 years.***
- 2. That the title rights and interest of the defendant over the aforesaid land parcel No. MWEA/MUTITHI/SCHEME/2841 are extinguished so that the defendant's title should be recalled and cancelled.***
- 3. That the Land Registrar Kirinyaga do register the plaintiff as the proprietor of land parcel No. MWEA/MUTITHI/SCHEME/2841 from all encumbrances.***
- 4. That the costs of this summon be borne by the defendant.***

In her supporting affidavit, the plaintiff deponed, inter alia, that she has been in open, exclusive, continuous and/or un-interrupted possession of one acre out of land parcel No. MWEA/MUTITHI/2841

(the suit land) for over 12 years and has therefore acquired the same by way of adverse possession.

The defendant resisted the application and in his replying affidavit dated 10<sup>th</sup> March 2015 he deponed as follows:-

- That the original land parcel No. MWEA/MUTITHI/SCHEME/513 belonged to his late father **NYAGA THIGITI** who died in 1977 and he acquired it following Succession proceeding in Kerugoya Resident Magistrate's Court Succession Cause No. 137 of 2002 and was registered as owner thereof in 2009 but in the same year, the plaintiff placed a restriction on the land having entered it in 2008 and so she has only been in occupation for six (6) years. That in 2009, he filed a case seeking removal of the restriction which was removed and so he terminated the case. He added therefore that the plaintiff's occupation of the suit land has not been open and without interruption.

On 20<sup>th</sup> July 2015, the plaintiff filed a Motion of Motion citing **Order 40 Rules 1 and 2 of the Civil Procedure Rules** seeking the following orders:-

**1. Spent**

**2. Spent**

**3. That the Honourable Court be pleased to issue a temporary injunction against the defendant restraining himself, his agents, and/or servants from evicting, transferring, selling, alienating and/or otherwise interfering with the plaintiff's right in any way on land parcel No. MWEA/MUTITHI/SCHEME/2841 or any part thereof until the hearing and determination of the main suit.**

**4. That an inhibition be placed on land parcel No. MWEA/MUTITHI/SCHEME/2841.**

**5. That the Land Registrar Kirinyaga and Officer in charge Wanguru Police Station do ensure compliance with that order.**

**6. That the costs of this application be provided for.**

The application is based on the grounds set out therein and supported by the plaintiff's affidavit dated 20<sup>th</sup> July 2015 in which she has deponed, inter alia, that she has been in possession of one (1) acre out of land parcel No. MWEA/MUTITHI/SCHEME/513 pursuant to orders issued on 18<sup>th</sup> August 2009 in Senior Resident Magistrate's Court Arbitration Case No. 20 of 2009 and lodged a restriction which the defendant unlawfully removed on 11<sup>th</sup> March 2014 and proceeded to sub-divide the said land into MWEA/MUTITHI/SCHEME/2841 to 2844 and she has been in occupation of the suit land which is parcel No. 2841 which the defendant has threatened to sell and/or alienate.

In his replying affidavit dated 2<sup>nd</sup> October 2015, the defendant confirmed that he was registered as the proprietor of land parcel No. MWEA/MUTITHI/513 in 2009 but the plaintiff placed a restriction which was removed after the defendant had filed Kerugoya Case No. 201 of 2009 seeking its removal. He added that he sub-divided the said land parcel into MWEA/MUTITHI/2841 to 2844 which he is in occupation growing rice on all the four portions and the applicant has not met the principles for the grant of an interlocutory injunction as set out in the case of **GIELLA VS CASSMAN BROWN**.

Submissions have been filed by counsel for the parties with Mr. Ngigi advocate appearing for the plaintiff and Mr. R.K. Kimani advocate for the defendant.

I have considered the application, the rival affidavits and annexures and the submissions by counsel.

An application for a temporary injunction has to be considered in light of the principles set out in the case

of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

- 1. The applicant must establish a prima facie case with a likelihood of success.**
- 2. The applicant must also show that if the order is not granted, he will suffer irreparable injury that will not adequately be compensated by an award of damages, and**
- 3. If in doubt, the Court will determine the application on a balance of convenience.**

A prima facie case, on the other hand, was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** as a case in which, on the material presented to the Court, a tribunal properly directing itself will consider that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal by the latter.

Being a discretionary remedy, an interlocutory injunction will not be granted where a party has approached the Court with un-clean hands nor will it be granted as a matter of course. Finally, the Court will consider the course that bears the least risk of injustice if in doubt about the applicant's case.

In determining this application, I have considered the plaintiff's claim to the suit land which is by adverse possession. This is important in finding out if in fact she has a prima facie case with a probability of success as set out in the **GIELLA** case (supra). In doing so however, I have paused to remind myself that at this stage of the proceedings, I am not at liberty to make any conclusive finding of fact or even law. These have to await the trial. Nonetheless, I must come to some provisional conclusions based on the affidavit evidence before me to determine if the injunctive relief sought is appropriate in the circumstances of this case.

As indicated above, the plaintiff's case as per her Originating Summons, is based on a claim to the suit land by adverse possession. **Section 38 of the Limitation of Actions Act** allows a person to apply to have become entitled to registered land in place of the registered proprietor. To establish a claim for adverse possession, the plaintiff will have to prove that she has been in exclusive possession of the suit land openly and as of right and without interruption for a period of twelve years either after disposing the defendant or on discontinuation of possession by the defendant or his own volition – see **KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184**. It must be remembered that the mere occupation of another's land will not be sufficient to entitle the occupier to an order of interlocutory injunction or indeed to an order of adverse possession. It must be occupation that is recognized in law. To establish her claim to the suit land by adverse possession therefore, the plaintiff will, among other things, have to prove that she has been in occupation of the suit land for a period of twelve (12) years.

I have looked at the plaintiff's affidavits both in support of her Originating Summons and also in support of her Notice of Motion seeking injunctive reliefs. In paragraph 3 of her supporting affidavit in support of the Originating Summons, she has deposed as follows:-

**3: “That we have been in open, exclusive, continuous and/or un-interrupted possession and occupation of 1 acre out of land parcel number MWEA/MUTITHI/SCHEME/2841 for over 12 years and ask this Honourable Court to find that we have acquired the same by way of adverse possession (Annexed hereto and marked PWM 2 is a copy of the register)”**

However, in paragraph 4 of her supporting affidavit in respect to the application for injunctive relief and which is the subject of this ruling, the plaintiff has deposed as follows:-

**4: “That I have been in possession of 1 acre out of land parcel number MWEA/MUTITHI/SCHEME/513 pursuant to orders granted on 6<sup>th</sup> August 2009 and issued on 18<sup>th</sup> August 2009 in Senior Resident Magistrate's Court Arbitration Case number 20 of 2009 (Annexed hereto and marked PWM 2 is a copy of the decree)”**

In resisting the plaintiff's claim to the suit land, the defendant deponed in paragraphs 7, 8 and 9 of his replying affidavit as:-

7: ***“That I got registered in the land as the owner in the year 2009”***

8: ***“That in the same year – 2009, the plaintiff imposed a restriction on the said land”***

9: ***“That the plaintiff has therefore been in occupation of the land for some 6 years”***

Prima facie therefore, the plaintiff, by her own admission and as confirmed by the defendant, has only been in occupation and/or possession of the suit land since 2008 or 2009. This suit having been filed in 2015, the twelve (12) years period that would entitle her to an order that she has acquired the suit land by way of adverse possession has not elapsed. From those undisputed facts, it is clear to me that the plaintiff has not established a prima facie case with a probability of success at the trial. The plaintiff has therefore failed to surmount the first principle set out in the GIELLA case (supra) that she needed to do to be entitled to a grant of interlocutory injunction.

The plaintiff having failed to establish a prima facie case which is the first principle in the GIELLA case (supra), it follows that her application for injunction must collapse and this Court need not consider the other two principles. In NGURUMAN LTD VS JAN BONDE & TWO OTHERS C.A CIVIL APPEAL NO. 21 OF 2014, the Court of Appeal discussed the application of the three principles in the GIELLA case (supra) and stated as follows:-

***“It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATION SOCIETY (2001) 1 E.A 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction. The Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”*** emphasis added

In view of the above, I need not examine the two other principles in the GIELLA case (supra) and the application for injunction can only be for dismissal.

Among the documents that the plaintiff has relied on in her application for interlocutory injunction is a decree in the Senior Resident Magistrate's Court Wanguru in Arbitration Case No. 20 of 2009 issued on 18<sup>th</sup> August 2009. That decree reads as follows:-

***“IT IS HEREBY ORDERED AND DECREED***

***1. That Purity Wangeci Mithamo do receive 1 acre of land to be curved out of parcel No. MWEA/MUTITHI/SCHEME/513***

***2. That Plaintiff do continue to be the owner and be in possession of MWEA/MUTITHI/SCHEME/1615 which she has been in possession of since 1999”***

That order reinforces my finding above that any occupation by the plaintiff has not met the statutory period of twelve (12) years to warrant the grant of any orders in her favour on the basis of adverse possession. Most significantly, that order shows that the only parcel of land to which the plaintiff can properly claim to be entitled to by adverse possession is parcel No. MWEA/MUTITHI/SCHEME/1615 which she has been in possession of since 1999. That parcel is however not subject of this suit.

Ultimately therefore and upon consideration of all the material placed before me on the Notice of Motion

dated 20<sup>th</sup> July 2015, I find that the said application lacks merit. The same is dismissed. Costs in the cause.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> April, 2016 in open Court

Mr. Macharia for Mr. Ngigi for Applicant present

No appearance for Respondent.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**