



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

ELC CASE NO. 179 OF 2015 (OS)

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT AND ORDER
37 RULES 7 AND 19 OF THE CIVIL PROCEDURE RULES AND SECTION 3A OF THE CIVIL
PROCEDURE ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

MILLIAM RUGURU NJERU.....PLAINTIFF/APPLICANT

VERSUS

ZEPHANIA SIMON MUTURI.....DEFENDANT/RESPONDENT

RULING

By an Originating Summons filed herein on 3rd March 2015, the applicant (**MILLIAM RUGURU NJERU**) sought the main order that she be declared to have become entitled to ownership of the land parcel No. KAGAARI/GITARE/T.168 by virtue of **Section 7 of the Limitation of Actions Act** having had open, peaceful occupation of the said land since 1964.

Simultaneously with that Originating Summons, the applicant filed a Notice of Motion under Order **40 Rule 1 of the Civil Procedure Rules** seeking the following orders:-

1. Spent.

2. That pending the hearing and determination of the suit herein and/or further orders of the Court, the respondent ZEPHANIA SIMON MUTURI by himself, his agents and/or servants, employees and all those persons claiming under him be restrained from interfering, disposing, selling, alienating, sub-dividing, leasing, charging, transferring, threatening and/or in any manner whatsoever interfering in whichever manner with the applicant's quiet enjoyment occupation and use of all that parcel of land known as KAGAARI/GITARE/T.168.

3. That costs be in the cause.

The application is grounded on the facts pleaded therein and supported by the applicant's affidavit. The brief summary of the applicant's case is that on or around 1963, she purchased for value the land parcel No. KAGAARI/GITARE/T.168 (the suit land) from one **KORU GATUOROVO** (now deceased) and has had open, quiet, peaceful and un-interrupted possession of the same since 1964. However, upon carrying out a search at the Embu Lands office, the applicant discovered that the deceased registered the suit land in the name of his son **MURIITHI KORU** on 14th July 1978 who obtained a title thereto on 6th October 1979 and on 17th December 2013, the said **MURIITHI KORU** transferred the suit land to the respondent who obtained title on 5th August 2014 and is now threatening the applicant with eviction and yet the applicant has developed the suit land and has buried her son and grandson thereon. Annexed to the affidavit are a copy of her Identity card, photographs of a lady (presumably herself) and a home and

part of a shamba – annexure **MNR 1 – MNR 2.**

The respondent filed a replying affidavit in response in which he deponed, inter alia, that he is the registered owner of the suit land having purchased it from **MURIITHI KORU** and has been in possession of the same having extensively developed it. That he only started seeing the applicant, who lives with her daughter at Kigumo in Runyenjes, after he had developed the suit land. Annexed to the replying affidavit is the title deed to the suit land – Annexure **ZSM 1.**

Submissions have been filed by Ms Njeru advocate for the applicant and Ms Ndorongo advocate for the respondent.

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

This is an application for an interlocutory injunction and the conditions for the grant of such remedy are settled. First, the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on a balance of convenience – **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.**

A prima facie case was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD 2003 K.L.R 125** as one in 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 by the latter.

The remedy of an interlocutory injunction is discretionary and will be denied where the applicant has not approached the Court with clean hands. The purpose of an injunction is to conserve or preserve the property subject of a dispute pending the determination of a suit and as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 3 ALL E.R 772,** a fundamental principle that a Court considering such an application keeps in mind is that it must take whichever course appears to carry the lower risk of injustice should it turn out to have been “*wrong*”.

This application will therefore be considered in light of the above principles. It is not in dispute that the respondent is the registered proprietor of the suit land which is registered under the now **repealed Registered Land Act.** Under **Sections 27 and 28 of the repealed Act,** such registration confers upon the registered proprietor the absolute ownership of such land. However, such registration is subject to other overriding rights and interests recognized in law. **Sections 25 and 26 of the new Land Registration Act** has similar provisions and under **Section 28 (h) of the new Land Registration Act** such other overriding rights and interests include:-

“Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”

Counsel for the respondent has submitted that the applicant has not annexed any sale agreement. The applicant’s case, as can be discerned from her Originating Summons is that she has acquired the suit land by virtue of having been in possession of the same since 1964. She is not basing her claim on any agreement of sale. Both the applicant and the respondent claim to be in possession of the suit land. The applicant has however annexed to her affidavit in support of the application photographs of a home and a crop of trees and coffee – annexure **MRN 2.** This has not been rebutted and the respondent has not adduced any evidence that he has a home or crop on the suit land. I am satisfied that the applicant is in possession of the suit land and on that basis, I am persuaded that she has a prima facie case with a probability of success at the trial.

On the issue of irreparable damage or injury that cannot be compensated by an award of damages, the applicant says she is over 85 years of age and has lived on the suit land since 1964 having bought it in

1963 after she separated from her husband. She buried her son and grandson on the suit land in 1987 and 2004 respectively. Her daughter **ALICE GICUKU NJERU** also swore an affidavit in support of the application and has deponed, inter alia, that she was born on the suit land and that is the only home known to her and the applicant. In my view, having lived on the suit land all this time and having also buried her son and grandson thereon, the damage that the applicant would suffer is not such that can adequately be compensated by an award of damages. The applicant has therefore met the second principle of the **GIELLA** case (supra) and I need not consider the application on the balance of convenience. Even if I were to do so, the balance would tilt in favour of the applicant who is in possession and the course that appears to carry the lower risk of injustice is to be achieved by granting the injunction rather than by refusing to do so.

In the circumstances therefore and upon considering all the matters herein, I find that the applicant has satisfied this Court that she is entitled to the orders sought in her Notice of Motion filed on 3rd March 2015 which I allow in the following terms:-

1. That pending the hearing and determination of this suit, the respondent by himself, his agents, and/or servants or employees and all such persons claiming under him are restrained from interfering, disposing, selling, alienating, sub-dividing, threatening or in any manner whatsoever interfering with the applicant's quiet enjoyment occupation and use of the land parcel No. KAGAARI/GITARE/T.168.

2. Costs shall be in the cause.

The parties are directed to expedite compliance with the pre-trial directions and have this suit heard and finalized in the next twelve months.

It is so ordered.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Ruling dated, delivered and signed in open Court this 9th day of June 2016.

Ms Ndorongo for Respondent present

Ms Njeru for Applicant absent.

B.N. OLAO

JUDGE

9TH JUNE, 2016