



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 12 OF 2015**

**FORMERLY KERUGOYA E.L.C. 40 OF 2012**

**MICHAEL MUGO IRERI.....PLAINTIFF**

**VERSUS**

**NELSON NTHIGA IKOU.....1<sup>st</sup> DEFENDANT**

**GILBERT IRERI NAMU.....2<sup>nd</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

Mr Gilbert Ileri Name, the second defendant/applicant seeks a temporary order to restrain the plaintiff/respondent from harvesting his mango fruits without his authority. He says that the mango fruits are on the suit land reference number Evurore/Nguthi/1625. In support of his application, he has annexed a supporting affidavit, a title deed and the grounds in support thereof, which are clear from the notice of motion dated 19<sup>th</sup> January, 2015. According to him, the plaintiff/respondent had illegally entered on the suit land without his authority.

The plaintiff/respondent has opposed his application. According to him, he has filed a suit seeking to be registered as the owner of the suit land reference number Evurore/Nguthi/1624 and 1625 which he claims he has acquired ownership by adverse possession. He says that he has been in occupation the suit land for a period exceeding 12 years.

**The Case for the Second Defendant/Applicant**

The second defendant/applicant has sought a temporary injunction under Order 40 of the 2010 Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The temporary injunction that he seeks is to restrain the plaintiff/respondent, his entire family, agents and/or servants from entering or interfering with the suit land reference number Evurore/Nguthi/1625, pending the hearing and determination of this suit. Additionally, he seeks an order to direct the OCS Ishiara Police Station to be mandated to enforce the issues of this order. Finally, he seeks that he be awarded the costs of this application.

According to him, he has suffered and continues to suffer great loss estimated at Kenya shillings 50,000/= in terms of the farm produce arising from the acts of the plaintiff/respondent, whom he says is trespassing on his land. The temporary injunction sought is intended to stop what he says is irreparable damage to his property.

In his submissions in court, he had urged the court to allow him to enter the suit land and harvest the mangoes. He also adopted the contents of the supporting affidavit.

### **The Case for the Plaintiff/Respondent:**

The respondent filed a replying affidavit and opposed the application. He claims ownership of the suit land on the basis of adverse possession, which he has occupied for a period exceeding 12 years.

Furthermore, he has stated that he has extensively developed the suit land, on which he has built four houses. He has also stated that he has planted avocado trees, grafted mango trees, grevillia trees, eucalyptus, bananas and an assorted food crops. According to him, the orders sought are incapable of being granted because he is already in occupation of the suit land. If they were to be granted, they will amount to the court issuing eviction orders against him. This he says will defeat the purpose of the pending suit that has been filed in court through the originating summons procedure.

### **The Applicable Law:**

The law that governs the grant of a temporary injunction is found in Order 40 of the 2010 Civil Procedure Rules. It has been interpreted and judicially approved in the case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358***. According to that case, an applicant for a temporary injunction must satisfy the following conditions:

***“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”***

### **Issues for Determination:**

In the light of the affidavit evidence, the submissions of the parties and the law, the following are the issues for determination:

1. Whether or not the second defendant/respondent has met the criteria for the grant of a temporary injunction.
2. Who should pay for the costs of this application.

### **Evaluation of the Evidence, the Findings and the Law**

I have considered the affidavit evidence of the parties their submissions and the applicable law. It is common cause that the plaintiff/respondent is in occupation of the suit land reference number Evurore/Nguthi/1625 in addition to land parcel number Evurore/Nguthi/1624. I find that the plaintiff/respondent has done extensive developments on the suit land on which he has constructed houses and planted many food crops. I also find that the orders sought by the second defendant/applicant cannot be granted because they will amount to evicting the plaintiff/respondent from the suit land.

Finally, if the orders sought are granted, they will defeat the purpose of the pending suits which is yet to be tried and determined.

I therefore find that the 2<sup>nd</sup> defendant/applicant has not met out a case for the grant of an order for temporary injunction. Is is requesting the court to issue eviction orders and to determine the case without a proper trial. I therefore reject his application.

### **Verdict and Disposal Order**

In the light of the foregoing, I hereby make the following orders:

1. An application for a temporary injunction is hereby refused.
2. The costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this...**30<sup>th</sup>** .... day of **JANUARY,..2015**

In the presence of M/S Gitari for plaintiff and defendant in person

Court clerk Mr Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**