



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE 155 OF 2008

JOSEPH MUIA KIVUVO PLAINTIFF

VERSUS

BERNARD KIMILU AND 2 OTHERS DEFENDANTS

RULING

1. On 2.10.2008 The Plaintiff/Applicant filed Plaint seeking possession of UKIA/NZUUNI/1225 and damages for trespass inter alia. Contemporaneously he also filed an application dated 2.10.08 seeking injunctive relief against the 1st Defendant. The motion is anchored on the old provisions of Order XXXIX Rule 1, 2 and 3 Civil Procedure Rules and based on grounds on the chamber summons and supported by the affidavit of Joseph Muia Kivuva attached. The 1st Respondent has filed replying affidavit sworn by Bernard Kimilu Kivuva on 8.6.2010.
2. The Applicant's case is that he is the registered owner of the suit land and the matter went through the Tribunal hearing in which he was the victor against the 1st Defendant. He avers that he issued 1st Defendant notice to move out of the suit land and stop trespass as he intends to enjoy quiet possession of the suit land. In his reply, the 1st Respondent contend that he purchased the suit land in 1980 from Musani Kieleko before it was registered in Applicant's name and took possession and he is still in continuous occupation to date. The alleged decision issued by the minister according to him was done without jurisdiction. He claims to have acquired suit land by way of adverse possession and thus has filed OS in the HCC.290/09 for acquisition of suit land and thus he cannot be enjoined in the circumstances.
3. The Applicant submits that he has established conditions for grant of injunction in line with the case of **GIELLA VS. CASSMAN BROWN 1973 EA 358**. He claims to have proved via material before court – prima facie case with probability of success,
 - that if orders are not granted he will suffer irreparable damages and in any case the balance of convenience tilts in his favour.

The Respondent No.1 submits that the Applicant has not shown the irreparable damage he may suffer if orders are not granted. In any event since 2008 what injury has he suffered? The Respondent No.1 asks.

4. The 1st Respondent submits that it is him who would suffer irreparably if orders are granted as he would be evicted before the suit is determined. He claims that he has filed an Originating Summons for adverse possession claim and thus court ought to hear the matter before making orders which may render his Originating Summons nugatory. He submits that he has established

- that the balance of convenience favours him as he is in actual possession since 1980.
5. After going through the averments and the submissions by the parties, I find the following issues emerging:-
 1. Whether the Applicant has met the threshold of **GIELLA CASE *supra***, for grant of temporary injunctions?
 2. What is the order as to costs?

The Court observes that the Plaintiff is brother to the 1st Defendant. It is not denied that the 1st Defendant is in occupation of the suit land for over 12 years and has even lodged an adverse possession claim.

6. The Applicant is seeking via a 2008 application to conclude the whole suit as both suit and the application seek principally the possession for suit land to be vested in the Applicant. The situation on the ground demonstrates that the Applicant has not demonstrated the irreparable damage he is likely to suffer.
7. The court therefore finds no merit in the application and makes the following orders.
 1. The application dated 2.10.2008 is dismissed.
 2. Costs in the cause.

Dated and Delivered at Machakos this 13th day of February, 2015.

CHARLES KARIUKI

JUDGE