



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 829 OF 2013 (O.S)**

**ZACHARY NDUNGU KANGETHE.....PLAINTIFF**

**VERSUS**

**JOYCE MUTHONI NGUGI.....1<sup>ST</sup> DEFENDANT**

**NDUNGU NGUGI.....2<sup>ND</sup> DEFENDANT**

**JOHN NGUGI.....3<sup>RD</sup> DEFENDANT**

**NJOROGE NGUGI.....4<sup>TH</sup> DEFENDANT**

**JAMES NGUGI.....5<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

The application before the court is a Notice of Motion dated 3<sup>rd</sup> July 2013 filed by the Plaintiff, seeking orders of a temporary injunction against the Defendants to restrain them from disposing, alienating or in any other manner interfering with his occupation of, and/or tilling, planting, or harvesting any of the crops planted by the Plaintiff in the ½ acre portion of land parcel LOC5/KAGUNDUINI/2476 (hereinafter referred to as "the suit property"). Further, that the O.C.S Kabati Police Station or the area head of police administration unit be ordered and/or authorised to ensure compliance of the order given by the Court.

The grounds for the application are that the Plaintiff bought ½ of an acre of the suit property in 1999 from one Elizabeth Wambui Kamau (deceased). Further, that the deceased's daughter who is the 1<sup>st</sup> Defendant is now registered as the owner of the suit property, and that she and the other Defendants who are her children, are now harassing the Plaintiff and trying to evict him from his occupied portion. The Plaintiff further averred that the Defendants have denied him the right of ingress and egress from the said portion, and have without any justifiable cause started cutting down trees, harvesting napier grass and other crops he planted thereon to his detriment.

The Plaintiff in his supporting affidavit sworn on 3<sup>rd</sup> July 2013 attached the sale agreement he entered into with the deceased for the ½ acre portion of the suit property, and stated that the purchase price was Kshs.50,000/= which he paid in installments and completed in 2003. Further, that he immediately took possession of the land, planted trees, napier grass, plants and various crops of the land since 1999 to date, and has always been in occupation thereof.

The Plaintiff stated that the registered owner of the suit property later on died, and that the 1<sup>st</sup> Defendant had the entire land secretly transferred into her names, and that her children, the 2<sup>nd</sup> to 5<sup>th</sup> Defendants, encroached on the land and have now claimed that he is a trespasser thereon. The Plaintiff further stated that he has been greatly prejudiced by the Defendants' illegal and fraudulent behavior and/or actions.

### **The Response**

The Defendants opposed the Plaintiff's application in a replying affidavit sworn by the 1<sup>st</sup> Defendant on 28<sup>th</sup> October 2014, wherein she stated that she is the absolute proprietor of the suit property having inherited the same from her late mother Elizabeth Wambui Kamau as her only child. She annexed a copy of her title to the suit property. Further, that when her mother died in the year 2003, she filed a succession case in Thika (CMC Succession Cause No. 281 of 2006) and a certificate of confirmation of grant was issued in respect to the Estate of her deceased mother which she annexed.

The 1<sup>st</sup> Defendant averred that her late mother had never disposed of the suit property during her lifetime, and had only leased out portions of the land to lessees who have since moved out of the land. Further, that she has been in occupation of the suit property since the demise of her mother, and that she and her sons and have been cultivating the suit land without interference until the Plaintiff started claiming interest in the land.

### **The Issues and Determination.**

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 19<sup>th</sup> December 2014 while the Defendants' counsel filed submissions dated 26<sup>th</sup> February 2015. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the temporary orders of injunction sought.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

**“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.”**

The Plaintiff submitted in this regard that the sale agreement produced in evidence was clear that he was buying the suit property and not leasing it, and had therefore shown a *prima facie* case. Further, that the Defendants had not brought any evidence of the rent they had received for leasing the suit property.

The Defendants on their part submitted that the Plaintiff had not shown why he had not transferred the suit property to his name from the date of purchase, and that the sale agreement he was relying upon was fatally defective as it did not indicate or identify the suit property and was not signed or thumb printed as indicated by the translation thereof. Further, that the Plaintiff had not developed the suit property which had remained vacant save for the crops planted thereon and fence constructed by the Defendants, and cannot claim adverse possession thereof. Lastly, the Defendants relied on section 26 of the Land Registration Act to submit that the 1<sup>st</sup> Defendant followed due process and acquired a valid title to the suit property, and that the Plaintiff having no documents to the suit property had not shown a *prima facie*

case.

The Court notes that the Plaintiff in the Originating Summons dated 3<sup>rd</sup> July 2013 and filed herein on 10<sup>th</sup> July 2013, is seeking orders that he is entitled to be registered as the proprietor of the suit property in place of the 1<sup>st</sup> Defendant, on the ground that he has been in open and uninterrupted occupation of the same for over 12 years. Further, that the title of the 1<sup>st</sup> Defendant be extinguished under the Limitation of Action Act. His action is therefore essentially one of adverse possession. He claims to have taken possession of the suit property after purchasing a portion thereof from the Defendants' deceased mother in 1999, and that he has planted napier grass, plants and various crops on the same. He however did not produce any evidence of the said plants planted on the property or of any other occupation thereof.

In addition the 1<sup>st</sup> Defendant also dispute the Plaintiff's possession and stated that she has been in possession of the suit property since the death of her mother and has been cultivating the same. It is also noted by the Court in this respect that the 1<sup>st</sup> Defendant's mother died in 2003; a certificate of confirmation of grant with respect to the suit property was issue to the 1<sup>st</sup> Defendant on 22<sup>nd</sup> November 2010 in Thika CMC Succession Cause No. 281 of 2006; and a title to the suit property also issued to her on 26<sup>th</sup> November 2012, copies of which she attached.

This Court cannot therefore make a finding that the Plaintiff has shown a *prima facie* case, in light of the foregoing circumstances, and his Notice of Motion dated 3<sup>rd</sup> July 2013 accordingly fails. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_15<sup>th</sup>\_\_\_\_ day of \_\_\_\_April\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**