



No. 151/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

E.L.C NO. 339 OF 2012

MUSETO WOMEN GROUP (suing through its officials....**1ST PLAINTIFF**

SARAH NJERI MWANGI**2ND PLAINTIFF**

MARY WAIRIMU NJOROGE.....**3RD PLAINTIFF**

BENEDETA MBELENGWA WATHOME.....**4TH PLAINTIFF**

VERSUS

JOSEPH KARIUKI NGUGI.....**DEFENDANT**

RULING

1. By an application dated **5th September 2012**, the applicants seek a temporary injunction to issue restraining the defendant from evicting the plaintiffs from land parcel **No. Title Ngong Township Block 2/29 (suit-land)** or demolishing or fencing in the plaintiff's building or interfering with the plaintiffs' possession of the same or alienating, transferring, disposing off or dealing with the suit land in any manner whatsoever pending hearing and determination of the main suit.
2. The application is supported by an affidavit sworn by **Sarah Njeri Mwangi**, the **2nd** applicant where she stated that the applicants have occupied the suit land since 1989 and have constructed business premises thereon; the respondent has threatened to forcefully evict the applicants and has issued a verbal notice to them to vacate the suit premises by **10th August, 2012** and unless he is restrained from effecting the eviction the applicants will suffer irreparable damages and that they have a *prima facie* case having had continuous open uninterrupted occupation of the suit land.
3. In a response thereto the respondent claimed ownership of the land in issue having purchased it from **John Kasale Mutungu** in **2002** and stated that the applicants had not sued **Olekejuado County Council** which initially allocated the land to the said **John Kasele Mutungu** in **1992**.
4. Further, he stated that having put a caution on the land they could not claim adverse possession. The suit filed by the applicants, **Nairobi HCC No. 877 of 2002** had been dismissed by the court on **27th November, 2003** and he had continued to pay rates to **Olekejuado County Council** which entitles him to claim *mesne profits* from the applicants and rent arrears.

5. The principle applicable in granting interlocutory injunction was laid down in the case of ***Giella versus Cassman Brown & Co. Ltd & another [1973] E.A. 358***. The applicant must establish a *prima facie* case with a probability of success. Secondly, the applicant must show that if the order sought is not granted he will suffer an irreparable injury that cannot be compensated in damages. Thirdly, if the court is in doubt it must decide on a balance of convenience.
6. The applicants herein claim adverse possession of the suit land. On the **26th July, 2002** the 2nd applicant on behalf of the 1st applicant, a self-help group lodged a caution to Title Numbers **Ngong Township/Block 2/29**. In paragraph 5 of the supplementary affidavit the 2nd applicant states that they have been in occupation of the suit property since **1989** and the purported allocation to **John Kasele** in **1992** is illegal as the property had already been occupied. She however, does not state how they came to take possession of the said property.
7. **John Kasele Mutungu** swore a replying affidavit to the application whereby he deponed that he rented the main shop on **Plot Ngong Block 2/29** to the 1st applicant having been allocated the land. Annexure "JKMI" is a letter of allotment dated **29th November 1992**. The allottee of **Commercial Plot Block 2/29 – Ngong** is **John Kasele Mutungu**. Subsequently a certificate of lease was issued to him on **26th November, 2001**.
8. In the case of **Mrao versus First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, the Court considered what a *prima facie* case with a probability of success is. It described it thus :-

“Prima facie case in a civil application includes but is not confined to a genuine and arguable case, it is a case 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 from the latter.”

9. Although the applicants have claimed adverse possession. They have fallen short of establishing the claim.
10. **Section 24(a)** of the **Land Registration Act** provides as follows:-

“Subject to this Act, the registration of a person as the proprietor of and shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 26(1) of the **Land Registration Act** stipulates thus:-

“The certificate of title issued by the Registrar upon registration... shall be taken by all courts as prima facie”.

11. The Respondent adduced affidavit evidence that established how he acquired the suit property. There is a certificate of lease in his name dated 3rd April, 2002. This is evidence of proprietary interest in the suit property. This would require the applicants to present considerable, formidable evidence to present an arguable material to court to establish a *prima facie* case.
12. It has been established that the applicants rented a shop at the suit property. They have stated that they developed the property. In case the case turns out to be favourable to them, damages can compensate them.
13. In the premises, I find the applicants having not presented a case for issuance of injunctive orders sought. The application is dismissed with no orders as to costs.

DATED, DELIVERED and SIGNED this 15th day of JANUARY, 2014.

L.N. Mutende

Judge