



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 708 OF 2013 (ORIGINATING SUMMONS)**

**IN THE MATTER OF LAND PARCEL NO. MUTIRA/KANYEI/172 MEASURING 1.49 HECTARES**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

**BETWEEN**

FRANCIS MURIUKI GIKIGI .....1<sup>ST</sup> APPLICANT

DAVID MUGO GIKIGI ..... 2<sup>ND</sup> APPLICANT

MISHECK MURIUKI MUTHIKE .....3<sup>RD</sup> APPLICANT

**VERSUS**

RICHARD MURIITHI TIRI ..... 1<sup>ST</sup> RESPONDENT

TIMOTHY MURIITHI TIRI ..... 1<sup>ST</sup> RESPONDENT

**RULING**

By an Originating Summons filed herein on 12<sup>th</sup> September 2013, the plaintiffs/applicants sought to be declared to be entitled by adverse possession of over 12 years to 1.5 acres out of land comprised in land parcel No. MUTIRA/KANYEI/172. Simultaneously with that Originating Summons, the plaintiffs/applicants filed a Notice of Motion under **Sections 1A, 1B, 3A, and 63 (c) and (e) of the Civil Procedure Act, Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 68 (1) of the Land Registration Act** seeking injunctive reliefs restraining the defendants/respondents, their servants or anyone else claiming under them from evicting, selling transferring, disposing, charging, leasing, subdividing or in anyway interfering with the plaintiff/applicants' quiet possession and enjoyment of the said 1.5 acres out of L.R No. MUTIRA/KANYEI/172. The plaintiffs/applicants also sought orders of inhibition and/or prohibition against the said defendants/respondents with respect to the said land.

That application is the subject of this ruling and in his supporting affidavit, the 1<sup>st</sup> plaintiff/applicant has deponed, inter alia, that though the land in dispute is registered in the names of the defendants/respondents, the applicants have lived on the suit land and know of no other home and even their parents were buried on part of the land which they claim and further, they have extensively developed the land where they have grown crops including coffee trees and bananas since 1950's.

The application is opposed and in his replying affidavit, the 1<sup>st</sup> defendant/respondent has deponed, inter alia, that the land was originally registered in the names of the respondent's father TIRI MUREU but was later registered in the defendants/respondents' names after he died. He adds that as the land is theirs, they are entitled to sub-divide it and in any event, the 3<sup>rd</sup> plaintiff/applicant does not live on it and as for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/applicants, their father has a rice farm in Mwea and so they do not solely rely on the land in dispute.

I have considered the application, the rival affidavits and the submissions of counsels.

The plaintiffs/applicants' claim to this suit is based on the pleading that they have lived continuously on the land for over 12 years and are therefore entitled to be declared owners by adverse possession. Indeed the plaintiffs/applicants say they were born in 1961, 1962 and 1971 respectively and have known no other home. They claim to have lived on 1.5 acres of the land and even their parents were buried there. On the other hand, it is not in dispute that the defendants/respondents are the registered proprietors of the land. Being the registered proprietors of the land in dispute, their rights cannot be defeated except as provided for in law and more specifically **Section 28 of the Land Registration Act**. One such manner in which the rights of a registered proprietor can be defeated is provided for under **Section 28 (h) of the Land Registration Act** as follows:-

***28(h) "rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription"***

**Section 38 (1) of the Limitation of Actions Act** allows a person who has been in exclusive possession of land openly, of right and without interruption for a period of 12 years to apply to the High Court for an order that he be registered as the proprietor of the said land in place of the person registered as the proprietor.

The plaintiffs/applicants' claim to the land is that they have lived on the 1.5 acres portion of the land in dispute since they were born in 1961, 1962 and 1971 respectively and have therefore qualified to be registered owners therefore as provided by the Limitation of Actions Act. Whether they are indeed so qualified will be a matter to be determined at the trial after hearing the evidence by both parties to this dispute. What the plaintiffs/applicants need to satisfy me at this stage is that they are entitled to the injunctive relief and have met the standards laid down in the case of **GIELLA VS CASSMAN BROWN & ANOTHER 1973 E.A. 358**. They first have to establish a prima facie case with a probability of success. On that first test, the applicant's contention that they have known no other home other than the suit property has not really been rebutted. Indeed in paragraph 11 of the replying affidavit of RICHARD MURIITHI TIRI, he depones as follows:-

***"That the 1<sup>st</sup> and 2<sup>nd</sup> applicant father has a rice farm in Mwea and therefore they do not depend solely of (sic) L.R NO. MUTIRA/KANYEI/172 since they have alternative residence infact the 2<sup>nd</sup> applicant lives in the sad (sic) farm in Mwea and only his wife resides in the suit land.***

Further, the plaintiffs/applicants' claim that they have lived on the suit land or indeed a portion of it since they were born has not been rebutted. Neither is their claim that their parents were infact buried on that portion. On the basis of that evidence, I am persuaded that the plaintiffs/applicants have established a prima facie case to entitle them to the injunctive relief sought therein. As stated earlier in this ruling, the issue of whether or not their occupation of 1.5 acres of the suit land entitles them to orders sought in their Originating Summons will be determined on the evidence. What is clear for now is not only that they are in occupation but that they have been in occupation for over 12 years.

The second principle in the **GIELLA** Case (supra) is that for one to qualify for an injunction, he must establish that if the remedy is not granted, he might suffer irreparable injury. The plaintiffs/applicants claim that their parents were buried on the suit land. If that portion on which their parents are buried was to be sold as they fear, it will, their parents graves would go with it. That, in my view, is irreparable injury as they would be denied their right to take care of their parent's graves. The

applicants have met that second principle.

And if I were to determine this application on a balance of convenience, it is not in dispute that the plaintiffs/applicants are in occupation of 1.5 acres of the suit land. Indeed what the 1<sup>st</sup> plaintiff/applicant depones in paragraph 11 of his supporting affidavit is that the prevailing “*status quo*” be preserved until this suit is heard and determined. I find that plea to be a reasonable one in the circumstances of this case. It must further be noted that even as the Courts apply the principles set out in the GIELLA case (supra), an important guide in the grant of injunctive relief was described by Justice Hoffmann in the English Case of FILMS ROVER INTERNATIONAL (1986) 3 ALL E.R 722 at Page 780 – 781 as follows:-

***“A fundamental principle---- is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”***

In the circumstances of this case, I am persuaded that the lower risk of injustice dictates that I grant the injunctive relief sought herein which I hereby do as it would be a greater risk of injustice should the plaintiffs/applicants be up-rooted from the only home they have known together with their parents graves should it turn out that indeed they are entitled to the orders sought in their Originating Summons. I therefore grant the injunctive relief sought.

The plaintiffs/applicants also seek orders of inhibition. Section 68 of the Land Registration Act empowers the Court to inhibit dealings in registered land until further orders. Looking at the circumstances of this case, I am satisfied that the plaintiffs/applicants are entitled to the order of inhibition.

Ultimately therefore, upon considering the plaintiffs/applicants’ application dated 11<sup>th</sup> September 2013, I find that it is well merited. I accordingly grant the orders sought therein with costs being in the cause.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> FEBRUARY, 2014**

19/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. Kahiga for Applicant – absent

Mr. Mwai for Chomba for Respondent – present

COURT: Ruling delivered this 19<sup>th</sup> day of February, 2014.

Mr. Kahiga for applicant absent

Mr. Mwai for Mr. Chomba for respondent present.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> FEBRUARY, 2014**