



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 65 OF 2012**

SHELMISE KABAIRE MWANGI (Suing as the legal representative of the Estate of)  
SAMUEL MWANGI GITONGA (DECEASED).....PLAINTIFF/APPLICANT

VERSUS

JANE WANGUI KIGANDA .....1<sup>ST</sup> DEFENDANT/RESPONDENT

JERIUTHI WANJIKU KIGANDA ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 27<sup>th</sup> November 2012 and filed in this Court on the same day seeking orders restraining the respondents from entering or interfering with land parcel No. KIINE/RUIRU/143 (hereinafter referred to as the suit land) pending further orders of this Court. The same is supported by the affidavit of the plaintiff/applicant in which she depones, inter alia, that she is the registered proprietor of the suit land.

The application is opposed and in her replying affidavit, the 1<sup>st</sup> defendant/respondent has deponed, inter alia, that the original proprietor of the suit land was one MACHARIA WANJAGIRA (now deceased) and that she and her co-defendant (also deceased) were the only survivors and beneficiaries of the Estate of the late MACHARIA WANJAGIRA having obtained grant in KARATINA S.R.M SUCCESSION CAUSE NO. 44 of 2002. She adds that the plaintiff/applicant filed CHUKA S.R.M SUCCESSION CAUSE NO. 5 of 2002 and included the suit land as part of the properties knowing very well about the existence of the KARATINA S.R.M SUCCESSION CAUSE NO. 44 of 2002. Arising out of that, the defendant/respondents filed EMBU HIGH COURT SUCCESSION CAUSE NO. 88 of 2007 seeking revocation of the grant issued in CHUKA S.R.M SUCCESSION CAUSE NO. 5 of 2002 which is still pending. The 1<sup>st</sup> defendant/respondent has further deponed that she and her children have lived on the suit land since 1960 and have developed it extensively and that the plaintiff/applicant has neither entered the suit land nor utilized even a portion of the same.

I have considered the application, the replying affidavit and the submissions by both Mr. Ndegwa advocate for the plaintiff/applicant and Mr. Magee advocate for the defendants/respondents.

It is clear from the record that apart from this application now before me, the plaintiff/applicant had filed a similar application on 4<sup>th</sup> June 2009 which has not been prosecuted to-date. When counsels appeared before me on 7<sup>th</sup> August 2013 following the transfer of this suit from the High Court in Embu, it was agreed that this application now before me be prosecuted. I would advise

parties against the filing of a multiplicity of applications in one case. However, that alone cannot be the basis of dismissing this application as was suggested by the defendant/respondents counsel in his written submissions.

This being an application for injunction, it has to be considered in light of the principles laid down in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358 and these are:-

1. ***The applicant must make out a prima facie case with a probability of success at the trial***
2. ***The applicant must show that he will otherwise suffer irreparable damage which cannot be compensated in damages and,***
3. ***If in doubt, the Court will determine the application on a balance of convenience***

A further fundamental principle in considering whether or not to grant an injunction was identified by Justice Hoffmen in FILMS ROVER INTERNATIONAL 1986 3 ALL E.R 772 when he said that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “**wrong**”.

Having said so, it is clear from the annexures herein that the plaintiff/applicant has a title deed to the suit land issued on 13<sup>th</sup> March 2006. It would be a rare case to deny a registered proprietor the remedy of an injunction bearing in mind that such registration is prima facie evidence that the person so registered is the indefeasible owner of the property in question. Such ownership may of course be subject for instance, to trust. However, the defendants/respondents herein in their defence do not allege any trust. They state that they are in fact the beneficiaries of the suit land by virtue of having been the sole beneficiaries of the same following confirmation of KARATINA SUCCESSION CAUSE NO. 44 of 2002 and that the said suit land was originally the property of MACHARIA WANJAGIRA. The Court has seen another copy of title to the suit land showing that the late MACHARIA WANJAGIRA was issued with the title to the property in 1980 though two cautions were placed thereon first on 17<sup>th</sup> January 1986 by one JOHN MUHINDI RUGO claiming a purchaser’s interest and a second one on 16<sup>th</sup> August 1988 by SAMUEL MWANGI GITONGA also claiming a purchaser’s interest. The said SAMUEL MWANGI GITONGA is the original plaintiff in this case before he was substituted by the current plaintiff/applicant. On the face of it, therefore, while plaintiff/applicant is the registered proprietor of the suit land, the defendant/respondents in paragraph 5 (c) of their defence plead as follows:-

***“That the defendants have all along had un-interrupted occupation and use of the suit land”***

If I understood the above pleading well, the defendants/respondents seem to be pleading that their possession of the suit land is adverse to that of the plaintiff/applicant. That occupation by the defendants/respondents is conceded by the plaintiff/applicant who in paragraph 10 of her further affidavit deposes that ***“the respondents continue to cultivate the suit land changing its form without my consent -----”***. Whether or not the defendants/respondents possession is in fact adverse to the plaintiff/applicant’s ownership of the suit land is a matter for the trial Court. It is, however, the law that a party who has been in continuous and un-interrupted possession of land can acquire title to the same adverse to that of the registered proprietor so long as he meets the requirements under the law of Limitation Act.

On the evidence before me, it is clear that whereas the plaintiff/applicant became the registered proprietor of the suit land in March 2006, the same was previously registered in the names of one MACHARIA WANJAGIRA under whom the defendants/respondents claim and they have been on the suit land since the 1960’s. There is an agreement showing that the said MACHARIA WANJAGIRA sold the suit land to SAMUEL MWANGI (deceased) the previous plaintiff in this suit. Having considered the compelling interests herein, I am unable to make a finding that a prima facie case with a probability of success has been established by the plaintiff/applicant. Similarly, there is nothing in the supporting affidavit to show what irreparable injury the plaintiff/applicant would suffer if the injunction is not granted.

In my view, this application has to be determined on the balance of convenience. The land is currently registered in the names of the plaintiff/applicant but is in occupation of the 1<sup>st</sup> defendant/respondent who has lived there with her family since the 1960's. To injunct them would amount to evicting them from the land which is the only home they have known. That would be a greater risk should it turn out at the trial that they are infact entitled to the land. My view of the matter is that the current status quo obtaining on the land should continue and neither of the parties should do anything on the land that would jeopardize the other party's right. The defendant/applicant can continue utilizing the land without degrading it in any manner whatsoever.

Having said so, it would appear from the pleadings herein that there are other suits in other Courts involving the land subject matter of this suit though not necessarily involving the same parties herein. Those matters are in the subordinate Court and as the issue of adverse possession have been raised, it is clear that this suit can only be handled by this Court. This suit was filed in 2007 some six years ago. It is not a healthy state of affairs that suits should be pending in the Court for so long. In order to expedite the determination of this suit, let all the parties and their counsels work towards having this suit expedited.

Other than the orders of status quo made above, this application is otherwise dismissed with no order as to costs.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2014**

31/3/2014

Coram

B.N. Olao – Judge

Mwangi – Court clerk

Mr. Ndegwa for Plaintiff/Applicant – absent

Mr. Abubakar for Defendant/Respondent – present

COURT: Ruling delivered this 31<sup>st</sup> day of March 2014 in open Court.

Mr. Ndegwa for plaintiff/applicant absent

Mr. Abubakar for defendant/respondent present.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2014**

