



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 198 of 2012**

**AINEA W. NDOMBI .....APPLICANT/ PLAINTIFF**

**VERSUS**

**SAIMON O. LOUKERI ..... RESPONDENT/DEFENDANT**

**RULING**

On the applicant/plaintiff filing an Originating Summons for adverse possession, he also filed this Notice of Motion for temporary injunctive orders. Both the Originating Summons and the Notice of Motion application were filed on 6<sup>th</sup> August 2012. The Notice of Motion was filed under **Order 40 Rules 1 and 4** of the Civil Procedure Rules and **Section 63 (e)** and **3A** of the Civil Procedure Act (Cap.21) The prayers in the application that now require my decision are prayers 3 and 4 as follows –

1. (spent)
2. (spent)

3. That an order of temporary injunction be issued restraining the defendant/respondent, his agents, servants or assigns from evicting or threatening to evict the plaintiff/applicant and causing damage to the crops on the portion of land measuring 4 acres and being used by the applicant on the land parcel **NAMIRAMA/BUNYALA/526** pending hearing and determination of this suit.

4. The costs of this application be provided for. The application has grounds on the face of the Notice of Motion. The grounds are that the applicant occupies four (4) acres of the subject land; the respondent has issued a Notice of eviction; and that the balance of convenience tilts in favour of the applicant as he has been in actual occupation since 1983 and has no other land to go to.

The application was filed with a supporting affidavit in which it was deponed that the respondent was appointed the administrator of the estate of the late **LUKERI MUFUKI** the original registered owner in Kakamega HC/SUCC. NO. 159 of 1986. That the applicant had bought the subject 4 acres from the original owner in 1983 and had since been living with his family on the subject land; that the applicant had mutually agreed with the respondent to transfer the subject piece of land to the applicant; that the applicant had extensively developed the subject land; that the respondent had adamantly neglected to transfer the land to the applicant; that in June 2012 the respondent uprooted one acre of sugarcane on the said plot and started bringing strangers and threatening to evict the applicant and in the same month of June made the applicant receive a letter from the respondent's advocate to stop pursuing the respondent to transfer the subject portion of land; and that if the orders sought were not granted the applicant would suffer great loss with his entire family as they had occupied the portion of land since 1983.

The applicant also filed a further affidavit sworn by himself on 18<sup>th</sup> September 2012 deponing that the respondent and others had been charged in the criminal court with creating a disturbance and destroying the applicant's crops on the said land.

The applicant also through counsel M/S Onsando Getanda & Company filed written submissions. It was their contention that the applicant purchased 4 acres of the subject land at Kshs.2,700/= per acre from parcel **Namirama/Bunyala/526** and had been in occupation of the same since purchase in August 1983. That the applicant would suffer great loss and damage if he was evicted from the said land.

The application is opposed. A replying affidavit sworn by the respondent on 13<sup>th</sup> November 2012 was filed. It was deponed in the said affidavit that it was not true that the applicant had bought the 4 acres and lived therein with his family since 1983 as alleged. That in any case, if there was such an agreement for sale, the same was null and void and not enforceable in law. That the respondent became administrator of the estate of the registered owner of the land in 1986. That it was not true that the respondent had agreed to transfer the said portion of land to the applicant after the succession. That the respondent did not attempt to destroy or uproot the applicant's crops on the subject land. That the charges preferred against him and his son were a false creation of the applicant.

The respondent through counsel C. M. Mwebi & Co. filed written submissions on 18<sup>th</sup> February 2013. It was contended that the respondent was not the registered owner of the subject land and was merely a beneficiary. That it was not disputed that the applicant was in possession of the subject land but that the applicant did not purchase the said land. That there was no consent of the Land Control Board to the alleged purchase of the land by the applicant. That the applicant had not demonstrated a prima facie case with probability of success and was therefore not entitled to the remedy of temporary injunction.

On the hearing date, both Mr. Getanda for the applicant and Mr. Mukabale for the respondent relied upon the written submissions filed.

This is an application for temporary injunction. The parameters to be considered by the court in such an application were stated in the now famous case of **GIELLA -vs- CASSMAN BROWN LTD. [1973] EA 358**. Firstly, an applicant has to demonstrate a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not capable of being compensated in damages. Thirdly, if the court is in doubt, it will decide the matter or application on the balance of convenience.

Does the applicant have a prima facie case with a probability of success? The applicant has already filed an Originating Summons for title to the subject land claiming adverse possession. On the face of it, he appears to have been on the land for a long time. The respondent admits so, though he denies some of the details. In my view, the facts show that the applicant has established a prima facie case with probability of success. The success or otherwise of the case will depend on evidence to be tendered at the trial.

Will the applicant suffer irreparable loss if the injunction sought is not granted? In my view, he will. He is already on the land. He has filed an Originating Summons. The respondent appears to be bent on evicting him. In my view, if the temporary injunction is not granted, the Originating Summons will also be rendered nugatory.

The balance of convenience is also in favour of the applicant as he is on site, and is also pursuing legal redress.

In the final analysis, I find merits in the application. I allow the application and grant temporary injunction as requested in prayer 3 till determination of the suit. Costs in the cause.

***Dated and delivered at Kakamega this 18<sup>th</sup> day of April, 2013***

**George Dulu**  
**JUDGE**