



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 266 OF 2013

**SAMUEL NJENGA KIMANI1ST
PLAINTIFF**

**COSMOS NJOROGE KIBUE.....2ND
PLAINTIFF**

**ANN WARURIE NJENGA.....3ND
PLAINTIFF**

(Suing as Officials and on behalf of Members of Juja Nurseries Self Help Group)

VERSUS

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY
(JKUAT)..DEFENDANT**

RULING

Coming up before me for determination is the Plaintiff’s Notice of Motion dated 12/2/13 brought under the provisions of Order 40 Rule 1,2 and 3 of the Civil Procedure Rules, 2010 and Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law. It seeks the following orders:

- 1. Spent

2. That this honourable court be pleased to issue an interim order of injunction restraining the Respondents by themselves, their servants, agents and/or employees from evicting or interfering, in any manner whatsoever with the Applicant's peaceful and quiet possession, occupation and use of Land Reference No. 9461/12 (Shamba 2) in Juja (hereinafter referred to as the "Suit Property") including but not limited to removing the applicants assets from the Suit property pending hearing and determination of this Application Interpartes.

3. That this Honourable Court be pleased to issue a permanent order of injunction restraining the Defendants by themselves, their Servants, agents and/or employees from evicting or interfering in any manner whatsoever with the Plaintiff's peaceful and quiet possession, occupation and use of the Suit Property including but not limited to removing the Plaintiff's assets from the Suit Property pending hearing and determination of this suit.

4. That costs of this Application be provided for.

The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of Samuel Njenga Kimani sworn on 12/2/12 in which he stated that he was the Chairman of Juja Nursery Self Help Group which was formed in 1993 before it was registered with the Ministry of Social Services. He stated that they were planting trees seedlings and flowers for sale along the Kia-ora road which is along the Defendant's fence before they were reallocated by the local administration in conjunction with the Defendant to a Power Line and Thiririka River Reserve which is part of the Suit Property in 1995. He further stated that the new site was barren, rocky and formless and no plants could grow there save for desert vegetation and wild plants as it was a dumping site for waste rocks and debris from the Nairobi-Thika Highway Construction in 1978. He further stated that the Group undertook the heavy task of bringing in red soil, manure, leveling and digging out barren soil to replace with new and productive soil so that plants can grow and they managed to make the place safe for trees and flower growing. He further disclosed that on 1st January 2007, the Defendant acknowledged the good work they were doing and took the initiative to invite them as a stakeholder to Juja Community Development Committee meeting which was established in May 2006 to comprehensively plan Juja Location into a University City. He further swore that the group has partnered with the local Community, local and international non governmental organizations, students from nearby primary schools and colleges by promoting the initiative of planting trees and donating some for planting, allowing students to visit the center for learning. He further swore that ever since 1995, the group has enjoyed peaceful uninterrupted occupation, use and open possession of the Suit Property with 22 members and 25 permanent workers whereon they have established an elaborate tree and flower seedling nursery, a car wash center and environment conservation center. He stated further that the Defendant had issued the Plaintiff with seven (7) days eviction notice to vacate the Suit Property failure of which they will be forcefully evicted. He further, stated that the intended interference with their occupation of the Suit Property is meant to frustrate their effort to prosecute the present case to its logical conclusion. He further swore that he had been advised by his advocates that the group had acquired possessory title to the Suit Property by adverse possession and he had rightly brought the present proceedings to enforce his rights.

The application is contested. The Defendant filed its Replying Affidavit dated 27/2/13 sworn by Vivian N. Waithaka in which she swore that the Defendant is a government institution university and as a result, proceedings of adverse possession cannot be brought against a government institution. She further swore that the Defendant is the registered owner of the Suit Property measuring 1.405 Hectares and produced a copy of the valid Certificate of Title issued on 20th September 2005. She further indicated that the Suit Property was ear marked by the Defendant for the development of an industrial park being a vision 2030 project jointly implemented by the Defendant and the Ministry of Industrialization. She further indicated that the Defendant had also issued a tender for the fencing off of the Suit Property to facilitate the development of the aforementioned Industrial Park. She further swore that it is without doubt that 12 years of uninterrupted occupation have not preceded the making of the instant application from the date when the Defendant became the registered owner of the Suit Property. She further stated that the Plaintiff's annexed Certificate of Registration controverts their position that they have occupied the Suit Property since 1995 as the Group was registered in 2012. She also indicated that the photos produced by the Plaintiff were taken in 2009 which further supports the position that at no point did the

Plaintiffs enjoy the use of the Suit Property in excess of 12 years. She further indicated that from the foregoing, the Plaintiffs could not have dispossessed the Defendant of title to the Suit Property. She further stated that all along, the Defendant is the one which had consented and given permission to the Plaintiffs to occupy the Suit Property for use in activities of tree nursery and as such the possession was not *nec vi, nec claim, nec precario*. She further stated that the reason why the Defendant issued an eviction notice to the Plaintiffs was because without the consent of the Defendant, they had decided to sublet the Suit Property to other parties who were running a car wash service and a bar without the requisite development approval from Thika Municipal Council and/or Liquor License. She further swore that in view of the foregoing it is in order for the eviction order to issue to ensure the Defendant enjoys the benefit of their soil.

The Applicant filed a Further Affidavit sworn by Samuel Njenga Kimani sworn on 21/3/13 in which he stated that their Group has been in possession of the Suit Property since 1995 to date with the consent and permission of the Defendant and that the Plaintiff has acquired possessory title to the Suit Property by adverse possession and have rightly brought the present suit to enforce their rights.

Both the Plaintiffs and the Defendants filed their written submissions which have been read and taken into consideration by this court.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of ***Giella v. Cassman Brown [1973] EA 358*** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs made out a prima facie case with a probability of success? In the case of ***Mrao v First American Bank of Kenya and Two Others [2003] KLR 125***, a prima facie case was described as:-

“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 “.

Turning to the present case, the first question which the court needs to answer is whether the Plaintiffs have satisfied the three conditions for awarding a temporary injunction enumerated in the ***Giella*** case. To begin with, have the Plaintiffs established a *prima facie* case with a probability of success? Looking at the facts revealed in this case and the evidence adduced by way of affidavit, it emerges to the extent possible at this interlocutory stage that the Defendant is indeed the legal registered proprietor of the Suit Property. This is proved by the copy of Certificate of Title produced in evidence. The Plaintiffs do not dispute this position but contend that this position notwithstanding, their claim on the Suit Property is superior as it is based on the doctrine of adverse possession. The Plaintiffs claim that they occupied the Suit Property in 1995 to date and have as a result extinguished the Defendants title to the Suit Property. However, this court observes that the Defendant being a government institution, whether the doctrine of adverse possession applies to it. The Defendant contends it does not. However, even more fundamental is the claimed possession by the Plaintiffs of the Suit Property for over 12 years. According to their Certificate of Registration, they were only registered as a group in 2012. Photos produced date only as far back as 2009. No evidence has been produced to show that their occupation dates back to 1995. It is with this in mind that this court makes the finding that the Plaintiffs have not established a *prima facie* case with a probability of success. The first condition of ***Giella*** case having not been satisfied, this court sees no need to delve into the remaining two conditions.

The Plaintiffs also sought for a permanent injunction against the Defendant. In response to that, this

court states that it would not issue such an order unless in very special circumstances. Refer to the case of *Locabail International v. Agro Export [1986] 1 ALLER 901* in which it was stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

This case is not obviously a clear case with the rival claims which have been made in respect of the Suit Property and which have, at this stage not been clearly determined. Accordingly, this court finds that this case is not suited for the award of a permanent injunction.

In conclusion, this court finds that the Plaintiffs have not succeeded in satisfying the requirements for the grant of their prayers. Accordingly, their application is hereby dismissed. No order as to costs.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 31ST DAY OF MAY 2013

MARY M. GITUMBI

JUDGE