



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

LAND AND ENVIRONMENT COURT

E.L.C. NO.63 OF 2013

JOHNSON KANYINGI GITHINJI.....PLAINTIFF

VERSUS

MARGARET WANJIKU MUCHIRI.....DEFENDANT

R U L I N G

The suit herein is commenced by way of originating summons on a claim based on Customary Trust. The plaintiff alleges that **L.R. No.OTHAYA/IHURIRIO/379** was initially registered in the names of **JOHN MUCHIRI WAIRAGU** (deceased) and later subdivided and became **OTHAYA/IHURIRIO/645** and **OTHAYA/IHURIRIO 646** currently registered in the name of the defendant **MARGARET WANJIKU MUCHIRI**. He claims that the two parcels of land are subject to Customary Trust in favour of the plaintiff **JOHNSON KANYINGI GITHINJI**. Moreover, the plaintiff claims a right to the parcels of land on the basis of adverse possession.

In the affidavit supporting the Originating Summons there is no dispute that the suit properties are registered in the names of the defendant and were created after subdivision in 1998. However the first registration was done in 1958 after demarcation and consolidation. It is alleged that at first registration the defendant's husband was only 12 years old and that the beneficiaries did not know the same and therefore the registration was meant to benefit the whole family.

Moreover, it is alleged that the defendant and her late husband never settled on the land today and that they have been staying in the Rift Valley.

The plaintiff claims that he has been staying on the land with his family since the year 1958 and has exclusive possession and use of the whole land and has planted 10,000 tea bushes, mature trees, fruits, food crops, has built a home for himself and children.

Accompanying the Originating Summons is a Notice of Motion dated 18/4/2013 where he is seeking an interim order of injunction against the defendant from alienating or interfering with his possession and use of the suit land on the basis that the same are ancestral and have been in the plaintiff's possession. The plaintiff has sworn a supporting affidavit to the Notice of Motion whose import is that they have been threatened with eviction.

The Notice of Motion was served upon the defendants daughter, Jemimah Wambui of ID. No.30892853 who accepted service on behalf of her mother. Se appointed the firm of Gori, Ombongi &

Co. Advocates who filed the Notice of appointment and replying affidavit on the 14/5/2013 after the hearing of the application.

The import of the replying affidavit is that the disputed parcels of land were registered in her husband's name who died on 2007 having subdivided the land in three portions. After her husband's death she filed a succession cause and obtained a grant which was confirmed on 28/2/2012. She claims that she did not require the consent of the applicant to commence a succession cause since she has sons and her mother Jemimah Wambui Wairagu is still alive. The respondents allege that their mother was a subject to proceedings before the Nyeri South Tribunal and the verdict was that the applicant should vacate willingly. The decision is annexed. The same is not dated and appears to have been made without jurisdiction.

This court finds that the plaintiff has established a prima facie case with a probability of success based on the claim of Customary Trust or adverse possession and therefore satisfies the first limb in **Giella -VS Cassman Brown**.

Secondly, the court finds that if a temporary injunction is not issued, the plaintiff is likely to suffer irreparable loss due to the developments on the parcel of land as sworn in the supporting affidavits.

Though not necessary as I have found for the plaintiff on the two above grounds, if I were in doubt, which I'm not, I would also decide on a **balance of convenience** to the benefit of the plaintiff because he has been in occupation and actual use of the land since 1988.

The upshot of the above is that the application is allowed with costs in the cause.

Dated, signed and delivered at Nyeri this 22nd day of May 2013.

A. OMBWAYO

JUDGE