



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

E L C NO. 470 OF 2012

MOSES MUSAU WAMBUA.....APPLICANT

VERSUS

FRANSIC KIBAKI NJOROGE.....RESPONDENT

RULING :

1. The Applicant herein **Moses Musau Wambua** has brought this Notice of Motion dated 1st August 2012, under **Order 40 Rule 1 & 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Laws of Kenya** and all enabling provisions of Law for Orders that;- The Court do restrain the Defendant herein **Francis Kibaki Njoroge**, his agent, and or servant by a temporary injunction from in any manner dealing or entering into, remaining into or interfering with the applicant's quiet occupation of **Land Parcel No. KAKUZI KIRIMIRI BLOCK 1/23** , till the suit is heard and finalized.

2. The Applicant relied on his annexed affidavit and by the grounds on the face of the application.

The applicant stated that, his family of six is in danger of being arbitrarily evicted and their structure demolished from the land they have occupied for a period of 58 years, un interrupted and that they have no other land to go to. Applicant prayed that pending the hearing and determination of his Originating Summons, the Court do restrain the Respondent and/or his agents or servants from interfering with applicant quiet occupation of the suit property.

3. The Respondent opposed the application. He filed his Replying Affidavit on 16/11/2013 and averred that, he is the registered proprietor of all that parcel of Land known as **KAKUZI/KIRIMIRI/BLOCK 1/23** as per the Certificate of official search (FK N) attached to his Replying Affidavit. He also alleged that he has been in possession and occupation of the suit land and he acquired it by virtue of being a member of **Kirimiri Farmers Co-operative Society** which society had purchased the land in **1960's** and **1970's**. That Plaintiff did not raise his claim with **Kirimiri Farmers Co-operative Society** which sub divided the land among its shareholders and Plaintiff acquired the suit land. That Plaintiff is a trespasser on Respondent's land and he should be evicted. That the issue has been deliberated upon at the Provincial Administration and Respondent has always indicated that Plaintiff should vacate the suit land.

4. The application was canvassed by way of Oral submissions. The Applicant relied entirely on his supporting affidavit. He further contended that, there was no evidence that **Kirimiri Farmers Co-operative Society** was registered and that Respondent bought the land through the said company. The Respondent relied entirely on his Replying Affidavit and submitted that **Status Quo** should be maintained.

5. The applicant has sought for an order of injunction. He must satisfy the three principles laid down in

the case of **Giella Vs Cassman Brown Co.Ltd 1973 EA 358.**

Applicant should satisfy the Court that he has a prima facie case with high probability of success. Secondly that, he will suffer irreparable loss and injury which cannot be compensated by way of damage if orders not granted, and thirdly, if the Court is in doubt to decide the case on a balance of convenience.

6. The applicant alleges that he has been staying on the suit land for more than **58 years**. That the Respondent is the registered owner of the suit land and has threatened to evict him. The Respondent on the other hand averred that he is a member of ***Kirimiri Farmers Society Ltd*** which was a land buying Company and Respondent acquired the suit land when the society subdivided its land among the share holders. From the annexures **MMW1**, it is not clear when the Respondent got registered as the proprietor of the suit land. The Court cannot at this time state when time started running. It is also not clear the suit land is of what acreage. Applicant in his further affidavit averred that his family has been occupying 7 acres out of the entire suit land of the 14 acres. So is the Defendant suit land 14 acres?. That is not clear from '**MMW1**'.

7. The applicant main claim is for adverse possession. From the scant annexures attached to the Plaintiff's notice of motion, I would find it difficult to hold that the Plaintiff has a prima facie case with high probability of success.

Plaintiff also alleged that if evicted, he will suffer loss which cannot be compensated by way of damages. The fact that it is not clear what acreage the suit land stands on, and the fact that he uses 7 acres of the former white man's land, then there it is probability that the suit land would be less than what the Plaintiff is using. No evidence that Respondent's Title covers the whole of the 7 acres used by the applicant. There is therefore no evidence that applicant will suffer loss which cannot be compensated by way of damages. Respondent has also averred that he took possession of the suit land after the land was registered in his name. That allegation is contested by the applicant. Such conflict can only be resolved after evidence is tendered. The Court cannot find that the balance of convenience tilts in favour of the applicant.

8. However, considering the circumstances of the case and the fact that the Respondent conceded that, **Status Quo** should be maintained, I find that the Court has a duty to preserve the property and safeguard the interest of each party pending the hearing and determination of the suit. It would not augur well for the applicant if the suit property is alienated before the main suit is determined. The Court is therefore guided by the case of **OUGO & ANOTHER VS OTIENO 1987 KLR1**, where the Court of Appeal stated that:-

"The general principle where there are serious conflicts of facts that the court should maintain **Status Quo** until the dispute has been decided in trial".

9. The Court will therefore issue **Status Quo Order** in the following terms:-

(a) Pending the hearing and determination of the main suit, the **Status Quo** obtaining to be maintained.

(b) The Plaintiff to set down the main suit for hearing within a period of 12 months this from the date of this ruling failure to do so, the **Status Quo Order** will stand discharged automatically unless further orders are issued by the Court.

- The costs of this application shall be in the cause.
- It is so ordered.

Dated, Signed and delivered this 21ST day of June, 2013.

L.N. GACHERU

In the Presence of:-

..... **For the Plaintiff**

.....**For the Defendant**

Anne : Court Clerk

L.N. GACHERU