

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 14 OF 2010 (O.S.)

**JAMES GITAU GACHAIYA (*Suing as the
Administrator*)**

***of the Estate of ELIZABETH NJERI GITAU*).....APPLICANT**

VERSUS

PRISCA NAROTSO ETYANG'A

***alias* PRISCA NAROTSO ETYANGI.....RESPONDENT**

R U L I N G

The Applicant filed suit by way of originating summons and sought to be declared to have acquired, by adverse possession, a portion of land measuring 0.02 hectares which was exercised and demarcated from the parcel of land registered as LR. No.North Teso/Kocholia/789. The Respondent has filed a defence to the suit denying the assertion by the Applicant to the effect that he was the owner of the particular portion of land by adverse possession. Contemporaneous with filing suit, the Applicant filed an application under **Order 40 Rules 1, 2 and 3** of the **Civil Procedure Rules** seeking orders of this court to restrain the Respondent, by means of a temporary injunction, from interfering with his possession of the said portion of land especially by entering, locking, demolishing, renovating or leasing, letting out or collecting rent from the suit premises pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Applicant. The application is opposed. The Respondent filed a replying affidavit in opposition to the application. She denied the assertion that the Applicant, or for that matter his late mother, had purchased the said portion of land that comprises the suit premises from her. She averred that the deceased mother of the Applicant was a month to month tenant and not the owner of the suit premises.

At the hearing of the application, this court heard the oral rival oral submission made by Mr. Wanyama for the Applicant and Mr. Ipapu for the Respondent. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of the respective opposing positions. The issue for determination by this court is whether the Applicant established a case for this court to grant him the order of temporary injunction that he craves for. The principle to be considered by this court in determining whether or not to grant the order of injunction is settled. The Applicant must satisfy the court that he has a prima facie case that has a likelihood of success. He must persuade the court that if the order of injunction is not granted he is likely suffer an irreparable injury that will not otherwise be compensated by an award of damages. Finally, if the court shall be in doubt, it shall determine the case on a balance of convenience (see **Giella –Vs- Cassman Brown [1973] EA 358**).

In the present case, the Applicant annexed to the affidavit in support of the application a copy of the application for consent of the Land Control Board which was signed by the Applicant's deceased mother and the Respondent. Pursuant to the application, a letter of consent was issued by the Amagoro Land Control Board on 21st December 1977. The consent allowed the Respondent, as the registered owner of the suit parcel of land, to sub-divide and transfer a portion thereof measuring 0.02 hectares to the Applicant's deceased mother. According to the Applicant, his deceased mother occupied the suit premises until her death in 1992. Subsequently thereafter, he rented out the suit premises to tenants until the Respondent attempted to disrupt their tenancies. On her part, the Respondent denied selling the said portion of land to the Applicant's deceased mother. The Respondent however contradicts herself in her affidavit when she concedes at some point that the Applicant occupied the suit premises.

Having carefully evaluated the facts of this case, it was clear to this court that the Applicant made a prima facie case that the estate of the deceased is entitled to lay claim on the suit premises. This is because the letter of consent issued by Amagoro Land Control Board is sufficient proof that the Respondent sold the suit parcel of land to the deceased. The Applicant also prima facie established that the Respondent had made attempts to wrest ownership of the suit premises from him. The Respondent has taken advantage of the fact that the Applicant no longer resides in the suit premises but resides in Nairobi. It is clear that if the Applicant is deprived rent that he receives from the suit premises, he will suffer irreparable injury that cannot otherwise be compensated by an award of damages.

This court therefore holds that the Applicant establishes a suitable case for this court to grant him temporary injunction in terms of prayer (c) of the application dated 24th July 2012. The interim injunction is issued pending the hearing and determination of the suit. The applicant shall have the costs of the application. It is so ordered.

L. KIMARU

JUDGE

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF
AUGUST, 2013.**

F. TUIYOT

JUDGE