

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 391 OF 2011

**PERIS MUTHONI MBURU (SUING AS THE
ADMINISTRATOR OF THE ESTATE OF MBURU
KANGATHI (DECEASED)).....PLAINTIFF**

VERSUS

DAUDI MUTISYA.....DEFENDANT

RULING

The Plaintiff filed an application by way of a Notice of Motion dated 2nd August 2011 which is supported by an affidavit she swore on 28th July 2011, and is seeking an order that pending the hearing and determination of this suit a permanent injunction be issued restraining the Defendant whether by himself or through his servants, agents, employees or others claiming through or under him, from constructing, alienating in any manner whatsoever with all that property known as LR 336/62 situated at Ruaraka within Nairobi (hereinafter referred to as the suit property).

The grounds for the application are that the Plaintiff is the widow to the late Mburu Kangathi and is the Administrator of the Deceased's estate having obtained the Certificate of Confirmation of Grant on the 13th May 2009, a copy of which certificate is annexed as evidence. Further, that before his death the said Mburu Kangathi was a shareholder at Ruaraka Sabuni Development Company Limited and had paid all dues to the said Company entitling him to be allocated plot No. 9. The Plaintiff claims that the shares constituting the plot are represented by LR. No. 336/62 situated at Ruaraka area in Nairobi.

The Plaintiff further alleges that the Defendant has illegally entered into the suit property and erected thereon structures which he has rented to several tenants, and has exposed the Plaintiff and the Deceased's estate to substantial loss and damage since they are desirous of utilizing the property. The Plaintiff also states that upon inquiry from Ruaraka Sabuni Development Company Ltd as to the ownership of the suit property, she discovered that a certificate of ownership to the suit property had been issued to one Monica Kabuu Nthengi (deceased) who was the Defendant's mother. The Plaintiff attached a copy of the said certificate of ownership.

The Defendant in his replying affidavit sworn on 20th September 2011 stated that to his knowledge the suit property was acquired by his mother Monica Kavuu, now deceased, after paying all the monies due to Ruaraka Sabuni Development Company Limited where she was a member. Further, that his late mother was issued with a certificate No. 0837 for a plot known as L.R. 336/62 site No. 9 on 10th May 1987, a copy of which certificate was attached.

Counsel for the parties relied on the submissions filed during the hearing of the application on 24th July 2012. The Plaintiff's Counsel in submissions dated 30th March 2012 argued that the Plaintiff had demonstrated a *prima facie* case by showing that her deceased husband was at all material times entitled

to be allocated the suit property having paid all monies due. The Plaintiff also submitted relying on the authority of **Rashid Amana vs Charles Mukiri & 2 Others, HCCC No. 2937 of 1996** that she cannot be adequately compensated by an award of damages owing to the fact that there can be no adequate substitute for an interest in a parcel of land.

Arguments were also made by the Plaintiff that the Defendant was precluded from pleading acquisition of the title to the suit property by way of adverse possession, as this ought to have been specifically pleaded in his Defence, pursuant to the provisions of Order 2 Rule 4 of the Civil Procedure Rules. Further, that the Defendant was illegally in possession as he had not shown any grant of letters of administration with respect to his deceased mother's estate.

The Defendant's Counsel in reply submissions dated 2nd May 2012 argued that the Defendant and his family have been in continuous possession of the suit property since 1987, and the balance of convenience therefore tilts in his favour. He also submitted that he had not been served with summons to enter appearance and the Plaintiff, and the provisions of Order 2 Rule 4 were therefore inapplicable.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. What I am required to do is to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's claim in the Plaintiff filed herein dated 3rd August 2011 is for her deceased's husband shares in Ruaraka Sabuni Development Company Limited as represented in the said plot no 9. The Plaintiff has provided evidence of payments by her deceased husband with respect to the said plot 9 issued by Ruaraka Sabuni Development Company Limited. The Plaintiff has not produced any evidence of title, share certificate or other document showing her beneficial interest with respect to the suit property as described in the application and Plaintiff, namely LR No. 336/62. In addition both the Plaintiff and Defendant have produced evidence of a certificate of ownership issued by Ruaraka Sabuni Development Company Limited with respect to the suit property issued to one Monica Kavuu Nthenge on 10th May 1987. To this extent I find that the Plaintiff has not established a *prima facie* case, and the application dated 2nd August 2011 is hereby disallowed.

The Plaintiff shall meet the costs of the application.

Dated, signed and delivered in open court at Nairobi this 27th day of September, 2013.

P. NYAMWEYA

JUDGE