REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCCC NO 16 OF 2011 (O/S)

DAVID MWANGI GITAU…….....…….....……

PLAINTIFF

VERSUS

DOMIIC NJENGA KARUTHI…….....…….……

DEFENDANT

R U L I N G

The applicant has brought an originating summons for a declaration that by adverse possession he has acquired title to **KIJABE/KIJABE BLOCK1/2787,**and therefore ought to be registered as the owner.

Subsequently he has brought the instant motion for a temporary order of injunction to restrain the respondent from entering, ploughing,erecting structures or in any way interfering with the his (applicant's) peaceful and quiet possession of the suit property until the originating summons is determined.

It is the applicant's contention that as a member of Maai Mahiu Kijabe Longonot Co Ltd, now dissolved, he was allocate the suit property on 8th February 1984; that he has since been in occupation until the 2007/2008 post election violence when his house was destroyed. In August 2010 the applicant visited the Land Registry at Naivasha and was surprised to find that the suit property was registered in the name of the respondent. After he filed the originating summons he applied to effect service of pleadings on the respondent by way of a newspaper advertisement. Thereafter on 20th December, 2011 the respondent through the firm of Creswell , Mann & Dod Advocates entered appearance and at the same time, the respondent invaded the suit property, erected structures and began to plough it. The applicant had deposed that having been on the suit property since 1984 he was entitled to be registered the owner by operation of the law of adverse possession. He further argued that the respondent has never been on the suit property.

In response the respondent had maintained that he purchased the property in March 1994, was issued with a title deed and thereafter took possession by planting a hedge around it; that when he took possession the property was vacant and further that the applicant has never lived on the property. After purchasing the property and planting a hedge the respondent allowed Alphaxad Ngugi Wanjagi to cultivate it between 1999 and 2007. The applicant took over the property and himself cultivated it between 2008 and 2009.

Alphaxad Ngugi Wanjagi has sworn an affidavit confirming that indeed he cultivated the property with the respondent's permission upto 2007 as explained by the respondent in his affidavit. He asserted that the property was vacant during this period. Another neighbour of the respondent, one Kimani Kiburo has also deposed in another affidavit that he has been in occupation of

the neighbouring property, **No.KIJABE/KIJABE BLOCK1/2786** since 1991 and only moved out during the 2007/2008 post election violence period but left his son behind; that he had settled on his property when the respondent purchased his in 1994.

A temporary injunction will be granted at the discretion of the court where it is proved by affidavit or otherwise, *interalia* , that a property the subject of a suit is in danger of being wasted, damaged or alienated by any of the parties to a dispute, or is about to be wrongfully sold in execution of a decree.

The applicant must show on a *prima facie* basis that he is entitled to the property in question; that the damage he stands to suffer is substantial and cannot be compensated by an award of damages. But should the court be in doubt , it must decide the dispute on a balance of convenience .***See Guella Vrs Cassman Brown.***

There are two opposing positions with regard to the ownership or possession of the suit property. The applicant contends that the property was allocated to him in 1984 by a company in which he was a member; that from that period to date, save for 2007/2008 post election violence, he has been in occupation of the suit property.

The respondent , whose evidence is that he purchased the property in 1994, has maintained that when he purchased it nobody was in occupation. He has either been cultivating to himself or leased it to a third party. What is critical at this stage is not the merit or demerit of either party's case. Strength or weakness of a party's case can only be tested at the trial. But before that stage is reached the court must ascertain from the evidence presented in affidavit evidence whether the applicant has a prima facie case as defined in the ***Mrao Limited** V. **First American Bank of Kenya Limited*** *(*2003) KLR 125 so as to preserve the property before the determination the dispute on merit. The applicant has filed a claim by way of an originating summons to the effect that having been in possession of the property since 1984 he is entitled to it; that the subsequent purchase by the respondent in 1994 did not interrupt that possession; that even after purchasing the property the respondent has taken over 17 years to assert his proprietary right, and only upon being prompted by this suit . the applicant has annexed copies of a receipt and voting card issued to him in 1984 by Maai Mahiu Kijabe Longonot Co. Ltd in respect of plot No.2787, the same number as the suit property.

At the trial the court will have opportunity to test this evidence, but at this stage, it remains a *prima facie* evidence that the applicant is presently using the property and will suffer great prejudice and substantial loss should this application be dismissed.

Before his claim in the originating summons is determined the balance of convenience is to maintain the status quo. For these reasons the application is allowed in terms of paragraph 3 of the notice of motion dated 28th December 2011. Costs to be in the cause .

Dated and delivered at Nakuru this 21st Day of May 2012.

W OUKO
JUDGE
Miss Mpaka for Applicant
Mr Githua for respondent
Court Clerk :Patricia