



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Civil Suit 24 of 2011**

**JOSECK MWANGI GACHAGA .....PLAINTIFF/APPLICANT**

**VERSUS**

**NAOMI WAMBUI.....DEFENDANT/RESPONDENT**

**RULING**

There are two applications before me, to which this ruling relates. The plaintiff brought this action against the defendant for a declaration that the defendant's entry into the plaintiff's land known as NYANDARUA/KIPIPIRI/LERESHTWA BLOCK 1 (MALEWA RANCH) 834 (the suit property) is unlawful and irregular and for an order of injunction to restrain the defendant from interfering with the plaintiff's suit property.

The defendant in her defence denied that the suit property belongs to the plaintiff and together with her mother in-law counter claimed against the plaintiff, asserting that they are entitled to the suit property by adverse possession or in the alternative that the 1<sup>st</sup> defendant in the counter claim who is the plaintiff herein, Joseck Mwangi, holds the suit property in trust for the 1<sup>st</sup> plaintiff in the counter claim.

In his reply to the defence and defence to counter claim, the plaintiff maintains that the defendants cannot be entitled to the suit property by adverse possession as they have not been in occupation for more than twelve (12) years.

The plaintiff instituted this suit simultaneously with an application for a temporary order of injunction to restrain the defendant from interfering with the suit property until the suit is heard and determined

The defendants (plaintiffs in the counter-claim) have also applied to restrain the plaintiff (the defendant in the counter claim) from interfering with their quiet possession of parcel Nos.318 and 834 until the suit is heard.

The plaintiff, Joseck Mwangi Gachaga is the registered proprietor of the suit property having been so registered and a title deed issued in his name on 10<sup>th</sup> August, 2010. The 1<sup>st</sup> plaintiff in the counter-claim, Mwihaki Mwangi is the beneficial owner of plot No.827.

The plaintiff in the main suit has averred that the defendant in the main suit entered the suit

property on diverse dates in the month of January, 2011. The defendant and the 1<sup>st</sup> plaintiff in the counter-claim have insisted that they have been on the suit property since 1980, having been allocated the same by the 2<sup>nd</sup> defendant in the counter-claim, Malewa Ranching Company Limited.

The 2<sup>nd</sup> defendant in the counter claim has not filed a defence. But in their grounds of opposition to the application by the plaintiffs in the counter-claim, they have averred that the 1<sup>st</sup> plaintiff in the counter-claim was not allocated the suit property but was only allowed to use it pending planning and survey. They have denied being trustees of the 1<sup>st</sup> plaintiff in the counter-claim.

In a letter annexed to the plaintiff's supplementary affidavit filed on 29<sup>th</sup> April, 2011, the 2<sup>nd</sup> defendant in the counter claim has reiterated that the 1<sup>st</sup> plaintiff in the counter-claim has been illegally occupying two parcels of land instead of one which is lawfully hers.

Since both applications are seeking orders of injunction pending trial, the strictures enunciated in the **Giella V. Cassman Brown Limited**, (1973) EA 348, case must be met.

The applicant in each application must demonstrate *prima facie* case with a probability of success at the trial. They must also show that unless an order of injunction is granted, they will suffer such loss that is not capable of compensation by an award of damages. However, in case the court is in doubt, then it must decide the application on a balance of convenience.

In considering whether the applicants have a *prima facie* case, the court is not at this stage expected to delve into the merit of each of the party's case. The court is only required to inquire whether there is an apparent violation of the applicant's rights which would necessitate the calling upon the respondent to offer a rebuttal. **Mrao Limited V. First American Bank of Kenya Limited** (2003) KLR 125

From the pleadings, there is no dispute that the plaintiffs in the counter-claim are on the suit property. According to them, they have been in occupation, in the case of the 1<sup>st</sup> plaintiff since 1980 and in the case of the 2<sup>nd</sup> plaintiff since 1989. But the plaintiff in the main suit has insisted that the 2<sup>nd</sup> plaintiff in the counter-claim only invaded the suit land in 2011 and is therefore a trespasser.

This is a difficult question which cannot be decided on affidavit evidence. Oral evidence has to be presented by each party to prove respective claim as regarding the date of entry. It follows that while the plaintiff in the main suit has a title issued in 2010, the plaintiffs in the counter-claim claim the suit property by reason of adverse possession which pre-dates the plaintiff's title. Because each party has a legitimate claim to the suit property, it is just and reasonable that no orders should be made that may affect the *status quo*.

On a balance of convenience, I order that the *status quo* as of the date of this order be maintained pending the hearing and determination of this suit.

One technical issue has been raised in the written submissions of the plaintiff in the main suit which I find necessary to deal with at this stage. It has been submitted that a claim based on adverse possession cannot be brought by way of a counter-claim. To that proposition, counsel sought the support of the following decisions, **Violet Omuse V. Vincent Kamari**, Kitale HCCC No.78 of 2005 and **Patrick Odako & Another V. William N. Kirew**, Civil Appeal No.202 of 1998.

Under **Order 37 rule 7** of the **Civil Procedure Rule**, 2010, a claim based on adverse possession must be made by Originating Summons. The courts have for a long time moved away from insisting that a claim to property by adverse possession can only be made by an Originating Summons. Indeed the courts have held that in view of the fact that Originating Summons procedure is resorted to in simple and uncomplicated suits, Originating Summons may not be suitable in claim to land by adverse possession.

There are therefore numerous cases where the courts have allowed parties to raise adverse possession in their defence (**Wabala & Another V. Okumu**) (1997) LLR 608 (CAK) or by a plaintiff (**Lusenaka V.**

**Omocha** (1994) LLR 578 or even by a counter claim.

That disposes that ground. Costs will be in the cause.

**Dated, Signed and Delivered at Nakuru this 18<sup>h</sup> day of June, 2012.**

**W. OUKO  
JUDGE**