



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MACHAKOS**

**Civil Suit 26 of 2011**

**WILLY WAMBUA MWEKI.....APPLICANT**

**VERSUS**

**JACKSON MBITHI NZEKI.....RESPONDENT**

**RULING**

The Applicant took out a Notice of Motion under a certificate of urgency seeking to injunct the respondent from possessing and or evicting and or in any way interfering with the piece of land known as Title Number Movoko Town Block 3/3205, hereinafter referred to as “*the suit premises*” pending the hearing and determination of the application *interpartes* and thereafter the main suit. He also prayed for costs.

The application was premised on the grounds that the Applicant is the registered absolute proprietor of the suit premises and had a clean Title, the Respondent had encroached into the suit premises, that the occupation by the Respondent on the suit premises is adverse to the Applicant’s right over the same and that it is in the interests of justice that the Orders be granted.

The Applicant in support of his application swore that he is registered as the absolute proprietor of the suit premises measuring 8.10 Hectares. He annexed a copy of the Title Deed, where he is registered as the proprietor.

It is claimed by the Applicant that on or about December 2010, the Respondent without his consent or authority, trespassed into the suit premises and commenced developments thereon claiming ownership of the same The Respondent proceeded to farm the land, fenced and commenced development thereon.

The Respondent on the other hand, in his defence averred that he has been living on the suit premises since 1985 after purchasing the same from the deceased. He pleaded that the applicant herein obtained the title fraudulently and listed the particulars of fraud. He further filed a counterclaim where he maintained that he is the legal owner of the suit premises, on which he has lived for an interrupted period of not less than 26 years. He prayed that the Applicants Title which was obtained through collusion with **Jonathan Wambua Nzomo** officials of the Lukenya Ranching and Farming Co-operative and the Land Registry Machakos be nullified.

The Respondent through his replying affidavit dated 1<sup>st</sup> April 2011, says that he has been in occupation of the subject land referred to as Plot Number 252 since 1985 having purchased it from **Joseph Nzomo Nzeki** who was a member to Lukenya Ranching & Farming Co-operative being member 303. He further stated that **Nzomo** initially sold him 10 acres of land out of his 40 acres of land. He attached a Sale Agreement to that effect. He further stated that after the demise of the Vendor herein, the children of the deceased sold him an additional 12 acre bringing the total to 22 acres of land. He also claims that the

Applicant acquisition of the Title is fraudulent.

The Applicant filed his supplementary affidavit dated 15<sup>th</sup> April 2011 and said that he bought 20 acres of Land comprised in plot number 252, which was vacant at the time. He initially bought ten (10) acres from **Onesmus Ndonye Nzau** who had bought the same from the deceased; a sale agreement in that regard is annexed. He further on the 19<sup>th</sup> August 2001 bought another 8 acres from three of the deceased's sons bringing the total acreage to Eighteen (18) acres. He annexed another sale agreement and a letter in proof of the said transaction. He further purchased another one (1) acre from **Jonathan W. Nzomo**, the son of the deceased and another one (1) acre from **John Nzioka Ngili** who had a portion of the suit premises. The applicant says that he had his land surveyed by the Co-operative society and he was allocated no. 3205 and ultimately the suit premises number.

The applicant further claims that the exhibits marked as JMN-1 and JMN2 relied upon by the Respondent are not agreement for sale but mere letters and proceeded to state that he was given vacant possession of the suit premises and as such the respondent cannot claim to have lived in the suit premises since 1985. If anything he moved to the said land in December 2010.

When the application came before **Kihara Kariuki J.** on 30<sup>th</sup> June 2011 for *interpartes* hearing, **Mr. Muinde** and **Mr Mung'ata**, learned counsels for the applicant and the respondent respectively agreed to canvass the same by way of written submissions. I have carefully read and considered them alongside cited authorities.

Does the application satisfy the principles as set out in the classic case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** for the grant of an interlocutory injunction to wit:-

- An applicant must show a *prima facie case* with probability of success.
- An applicant shall suffer irreparable injury if the injunction is not granted, and
- If the court is in doubt, it should decide the application on balance of convenience

It is also essential to note that an Injunction is a discretionary as well as an equitable remedy so that the conduct of the parties prior and subsequent to the mounting of the application may come in focus.

The issue for determination here is whether the suit premises belongs to the Applicant or the Respondent bearing in mind also that the Respondent acknowledges that the Applicant had a portion of suit premises and he is his neighbor, whether the suit premises was in vacant possession when it was sold to the Applicant and whether all the purported vendors in this transaction had the capacity to dispose the suit premises to both the Applicant and the Respondents especially the children of the deceased who require a Grant of letters of Administration to effectively dispose off the land of the deceased . These are issues that can be best addressed if the application herewith is allowed and the suit goes for full hearing.

Everything considered, I am satisfied that the applicant have at this interlocutory stage made out a *prima facie case* with a probability of success at trial. Also, the applicant is likely to suffer irreparable injury considering he paid some consideration for the suit premises to the various vendors.

I hereby allow prayer 3 of the application with costs to the Applicant.

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> JULY 2012.**

**ASIKE- MAKHANDIA**

**JUDGE**