



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
Environmental & Land Case 527 of 2011

**MOSES MTHENGE NDIVO.....PLAINTIFF**

**VERSUS**

**MARIA KIVINYA NDIVO..... DEFENDANT**

**RULING**

The Plaintiff's application is by way of a Notice of Motion dated 30<sup>th</sup> September 2011 and filed on the same date. The Plaintiff is seeking a temporary order of injunction from this Court restraining the Defendant from interfering with the Plaintiff's ownership and possession of Title Numbers DAGORETTI/UTHIRU/ 1901 to 1913 (hereinafter referred to as the suit properties) both inclusive together with all developments thereon, pending the hearing and determination of this application.

The gist of the Plaintiff's application is that he is the owner of the suit properties having inherited the same from his deceased mother Zipporah Mweru Ndivo. He has produced copies of the title deeds to the suit properties in his name, as well as a copy of his deceased mother's will. The detailed averments are in his supporting affidavit sworn on 30<sup>th</sup> September 2011, a supplementary affidavit sworn on 16<sup>th</sup> December 2011, and written submissions filed on 19<sup>th</sup> December 2011. He also produced in evidence the grant of probate of will and certificate of confirmation of grant issued to the executor of his deceased mother's will by this Court in Nairobi Succession Cause No. 2549 of 1999.

The Plaintiff further states that the Defendant who is his elder sister also inherited her own property from their deceased mother, and has wrongfully and illegally detained and remained in possession and occupation of a house standing on LR. No. Darogetti/Uthiru 1905, despite several requests to vacate the premises. It also alleged that the Defendant has wrongfully caused to be registered cautions against the suit properties without any claim of right or reasonable cause, thereby denying the Plaintiff the right of absolute ownership and enjoyment of the said titles. The Plaintiff is also apprehensive that his property is in danger of being wasted, damaged or alienated.

The Defendant responded in a replying affidavit sworn on 24<sup>th</sup> November 2011 and in submissions dated 29<sup>th</sup> February 2012. The Defendant states that the Plaintiff who has committed fraud by invoking a non-existent will purporting to be the administrator of the estate of her late father, and by subdividing, demarcating and selling part of the suit properties using fraudulent documents without her knowledge. The Defendant also averred that she has occupied, used and lived in the suit properties peacefully since 1970. and it is the only means of livelihood that she has with her two dependants hence the cautions she placed on the same.

The parties reiterated the above arguments at the hearing of the application on 26<sup>th</sup> April 2012 with the Defendant in addition submitting that she has filed a counterclaim for adverse possession.

I have carefully considered the arguments made by the parties and find that the Plaintiff has established a *prima facie* case as required by the decision in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** for an injunction to issue. This is primarily for the reason that the Plaintiff has produced in evidence copies of his title to the suit properties, while the Defendant has not produced any evidence of ownership. The issues raised by the Defendant of fraud and the counterclaim for adverse possession can only be decided upon after full trial and not at this stage. The only question remaining to be determined is whether damages would be an adequate remedy to the Plaintiff. The Defendant has not pleaded that she is able to compensate the Plaintiff in monetary terms, and I am therefore not able to make any finding in this regard.

For these reasons the Plaintiff's application dated 30<sup>th</sup> September 2011 is allowed, and the Defendant from interfering with the Plaintiff's ownership and possession of the land parcels comprised in Title Numbers Dagoretti/Uthiru/1901 to 1913 both inclusive together with all developments and buildings thereon, pending the hearing and determination of this application or until further orders of this court.

The costs of the application shall be in the cause.

**Dated, signed and delivered in open court at Nairobi this 26<sup>th</sup> day of July 2012.**

**P. NYAMWEYA**

**JUDGE**