



IN THE MATTER OF LIMITATION OF ACTION ACT CAP 22

AND

**IN THE MATTER OF ACCLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38
OF LIMITATION OF ACTIONS ACT**

BETWEEN

CHARLES ODONGO

NGANI.....PLAINTIFF

-VERSUS-

**MILKA AKINYI OTIENO (SUED IN HER OWN RIGHT AND AS THE SUCCESSOR
IN TITLE AND THE**

**LEGAL ADMINISTRATIX OF THE ESTATE OF THE LATE ONGOMA
OCHUKA.....DEFENDANT**

RULING

The applicant has filed the instant application dated 16th December 2011 seeking orders that:-

1. *That this application be certified urgent and the same be heard ex parte in the first instance.*
2. *That pending the hearing and determination of this application, this Honourable Court be pleased to grant an order of interim injunction restraining the defendant/respondent either by herself, servants, agents or and/or any other person acting under her instructions from alienating, transfer, interfering and/or evicting the Plaintiff from a parcel of land otherwise known as LR No. KAMAGAMBO/KOLUOCH/1000 and in particular a portion of the subject land measuring 1 Acre which has been in use and/or possession of the Plaintiff.*
3. *That pending the hearing and determination of this application, this Honourable Court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by herself, servants, agents or and/or any other person acting under her instructions from alienating, transfer, interfering and/or evicting the Plaintiff from a parcel of land otherwise known as LR No. KAMAGAMBO/KOLUOCH/1000 and in particular a portion of the subject land measuring 1 Acre which has been in use and/or possession of the Plaintiff.*
4. *That costs of this application be borne by the defendant/respondent.*
5. *That such further and or other orders be made as the court may deem fit and expedient.*

The application is premised on the grounds that the applicant has been in actual peaceful and uninterrupted occupation of the suit land for over 27 years therefore acquiring rights over the same by

adverse possession. The applicant is apprehensive that the respondent may dispose of the suit land having already commenced acts of alienation through removing a caution hitherto placed on the same parcel causing the suit land to be registered in her name and subsequently issuing a notice to the applicant to vacate the land.

In her replying affidavit, the respondent has averred that at no time did the applicant acquire the suit land and that there is no evidence of sale, consent or title to support his claim. She has further averred that the suit land was given to her by her late father-in-law and that the applicant is a trespasser on the same having not demonstrated how he came to acquire the land.

Parties have canvassed the application through written submissions. The applicant's submissions firstly address the applicant's entitlement through adverse possession and secondly, the applicable principles on the grant of injunction.

The rival submissions of the deponent deal with the issue of adverse possession summing that the applicant has neither demonstrated his rights through adverse possession nor purchase. The respondent has further submitted that the applicant has taken advantage of her vulnerable position of being physically challenged and being a widow.

The principles by which courts have for years been guided in deciding whether or not to grant a temporary injunction were firmly stated by Spry VP in ***Giella v. Cassman Brown & Co. Ltd [1973] E.A 358 at page 60*** as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420).

In the present application, the applicant claims adverse possession and has filed a chamber summons seeking to be registered owner of one acre to be exercised from the suit land. He has demonstrated in both the supporting affidavit and submissions that he has been in possession of the land.

The respondent on the other hand has displayed a title in her name.

From the rival affidavits and submissions, it is evident that there is a prima facie case capable of being argued at the hearing of the chamber summons. It is only at the trial that the rival positions on ownership can be determined. The same cannot be determined at this interlocutory stage.

On the overall, I find that the balance of convenience tilts in favour of the applicant having been demonstrated that he is currently in possession of the land.

I therefore allow the application in terms of prayer 2 and 3. Regarding the prayer for costs, I have considered the circumstances of the respondent as stated in the pleadings and order that each party bear their costs and further that the chamber summons be set down for expeditious hearing on the priority basis.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Applicants

.....Counsel for the defendants/respondents

R. LAGAT-KORIR
JUDGE