



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 59 of 2012**

**JOHN KILEI NDIEMA & 26 OTHERS ::::::::::::::::::::::::::::::::::: PETITIONER.**

**AND**

**MATISI CO-OP. SOCIETY LTD. ::::::::::::::::::::::::::::::::::: RESPONDENT.**

**R U L I N G.**

This suit is brought by way of originating summons dated 17th April, 2012 seeking a declaratory order to the effect that the twenty seven (27) plaintiffs herein have acquired ownership of Land Title No. **Kiminini/Kinyoro Block 3/Matisi/735** (herein suit property) by way of adverse possession. The plaintiffs also seek an order to have the defendant's title over with the suit property cancelled and they be registered as proprietors of their respective portion.

The suit is based on facts contained in supporting affidavits deponed by the plaintiffs respectively and was filed contemporaneously with a notice of motion on the 19th April, 2012.

The Notice of motion is dated 19th April, 2012 and is brought under Order 40 rule 1, 2 & 4 of the Civil Procedure Rules seeking a temporary injunction order against the defendant restraining them from evicting the plaintiffs and/or their families, servants/agents from the suit property pending the hearing and determination of this suit.

The application is largely based on the ground that the plaintiffs are in possession of the suit property and there is a threat of having them evicted. This is fortified by the facts contained in a supporting affidavit dated 19th April, 2012 deponed by the fifteenth (15th) plaintiff on behalf of the rest of the plaintiffs.

It is the plaintiff's contention that they have all been in occupation of the suit property prior to the year, 1997 and that they live there with members of their families and extended families and have so lived without any person making a claim of ownership thereof.

The defendants oppose the application on the basis of the averments contained in a replying affidavits deponed by their secretary dated 22nd May, 2012. It is the defendant's contention that this case has been initiated by the defendants in Kitale HCCC No. 45 of 2000 in which an eviction order was made against them but upon an application dated 19th April, 2012 being made by them the court extended the time within which the said defendants were to move out of the suit property. It is further contended by the defendants herein that no notice of eviction has been issued against the plaintiffs and that the people due for eviction are the defendants in the aforementioned Kitale HCCC No. 45 of 2000.

it is also contended by the defendants herein that the plaintiff are not in occupation of the suit property and if anything, they have rented premises from the defendants in Case No. 45 of 2000 and are therefore mere trespassers against whom a case of eviction has been filed.

In response to the foregoing and all that is contained in the defendant's replying affidavit, the plaintiffs filed a supplementary affidavit dated 28th June, 2012 in which they state that they were not parties in case No. 45 of 2000 neither are they related in any way to the parties therein. Further, their occupation of the suit property has been open to all and sundry including the defendants.

The plaintiffs deny that this suit was initiated by the defendants in case No. 45 of 2000 and contend that they have been threatened with eviction by the defendants herein.

The plaintiffs also contend that the defendants are taking advantage of a decree in a suit alien to them (plaintiffs) in order to defeat their statutory rights.

The plaintiffs maintain that threats of eviction have verbally been made to them since the month of April, 2012.

Both the plaintiffs and the defendants presented their respective arguments by way of written submissions filed herein on 9th October, 2012. The same have carefully been considered by this court in the light of the facts contained in the supporting and replying affidavits.

Apparently, the basic issue for determination is whether the plaintiffs have established sufficient cause for the grant of a temporary injunction against the defendant. In that regard, the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**, comes to the fore.

At this stage all that the plaintiffs were required to do is to show a "prima-facie" case with probability of success or to show that they stand to suffer irreparable damage if an injunction is not granted against the defendants pending hearing and determination of this suit. If the court is in doubt, it may be required to determine the matter on a balance of convenience. However, these principles are not cast in stone such that each case has to be viewed on its own peculiar circumstances with utmost regard being given to promotion of constitutional rights and values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

It is not herein contested that the defendants are the registered proprietors of the suit property. They are entitled to protection of law with regard to that proprietorship. However, there is no substantial contest with regard to the alleged occupation of the suit property by the plaintiffs. They may be in occupation of the property as squatters or tenants of existing squatters. The defendant alleges that the plaintiffs are tenants of squatters or trespassers against whom the defendants instituted Kitale HCCC No. 45 of 2000 and obtained an eviction order which remains valid to date.

The order does not however affect any of the plaintiffs as none of them was a party in case No. 45 of 2000 even though it is alleged by the defendants that the aggrieved parties in the said case investigated the filing of this suit. The allegation was however not supported or proved by any cogent evidence.

Be that as it may, the fact that the plaintiffs may be in occupation of the suit property in whatever capacity entitles them to protection of the law until such time that their present dispute with the defendants will finally be determined by the court. This is fortified by the fact that there is allegation that the plaintiffs' occupation of the suit property was effected at different times mostly prior to the year 1997 when the property was registered in the name of the defendants. The credibility or otherwise of the allegation will only become clearer at the hearing of the suit. But, if indeed the plaintiffs have been in occupation of the suit property for such long periods of time, the possibility that they may have respectively acquired rights over the property may not be farfetched notwithstanding the defendant's legal ownership thereof. It may therefore be safely stated that the plaintiffs have shown a "prima-facie" case with a probability of success. On that ground alone, they are entitled to an order of injunction against the defendants.

Consequently, the application is granted in terms of prayer (c) of the Notice of Motion dated 19th April, 2012. The plaintiffs shall have the costs of the application.

Ordered accordingly.

**[Read and signed this 16th day of October, 2012.]**

**[In the presence of Mr. Ngeiywa for applicant and M/s. Munialo for respondent.]**

**J.R. KARANJA.**

**JUDGE.**