



**CIVIL PRACTICE AND PROCEDURE**

- In an application the court is likely to grant it when the land is family land.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 48 OF 2010 (OS)**

**M'RAMA MITAMBO ..... PLAINTIFF**

**VERSUS**

**NKONGE RUBARA ..... DEFENDANT**

**RULING**

M'Rama M'Mitambo (plaintiff) has filed this action seeking the court's declaration that he has acquired two acres of L.R. No. *Mwimbi/S. Mugumango/565* (suit property). That parcel of land is in total 4 acres. In his claim, the plaintiff stated that he and his family are in occupation of two acres of that land and that they have been in such occupation since 1968. The green card of the suit property attached to the plaintiff's affidavit shows that the plaintiff on 29<sup>th</sup> October 1987 registered a caution on the land claiming purchaser's interest. The plaintiff has filed a Notice of Motion dated 9<sup>th</sup> February 2011 brought under order 40 rules 1 and 2 of the Civil Procedure Rules 2010. He seeks injunction to stop the defendants Nkongge Rubara from entering or dealing with the suit property pending the hearing and determination of this suit. The application was opposed. The defendant deponed that the plaintiff has not been in possession of the suit property as alleged. That the plaintiff voluntarily vacated the suit property on 16<sup>th</sup> September 2010. The defendant referred to another case being HCC Meru No. 21 of 2004 (OS) between Ephantus Nyaga M'Itambo and Nkongge Rubara. The defendant alleged that in view of the pending suit this present suit cannot be entertained. He argued that this suit ought to be stayed as per section 6 of the Civil Procedure Act. Although the defendant alleged that the plaintiff is not on the suit property there is nothing on record to show what the defendant alleges that the plaintiff voluntarily vacated the suit property on 16<sup>th</sup> September 2010. At least what the defendant could have brought before the court is a letter either from the chief or from the village elder to confirm that the plaintiff vacated the suit property. What is deponed in the plaintiff's affidavit in support of his application is in my view supported by the entry in the green card of the suit property. The plaintiff in my view could not register a caution on a suit property in 1987 claiming purchaser's interest then vacate in 2010. The information in the green card is more consistent with the averments of the plaintiff in that regard and I find that the plaintiff has shown a prima facie case with probability of success. See the case of **Giella Vs. Cassman Brown & Co. Ltd** [1973] E.A. Moreover, the plaintiff states that he occupies the land with his family. If the plaintiff is ejected from the suit property it is clear that he and his family would suffer untold suffering. When the suit property is the family home of a party the court would more likely grant an order of injunction as is sought. This was clearly stated in the case **Mbuthia vs. Jimba Credit Finance Corporation & Ano.**

[1988] KLR1 where the Court of Appeal stated as follows:-

***“The subject matter of the suit was land, namely, the appellant’s home. In disputes concerning land, it is usual to grant an injunction. It would be right to grant an injunction on terms in this case.”***

It is for that reason that I grant the following orders:-

- 1. The court grants an injunction until final determination of this suit restraining the defendant from entering, occupying, remaining or dealing in whatsoever manner with the two acres of parcel number L.R. Mwimbi/S. Mugumango 565.***
- 2. The costs of Notice of Motion dated 9<sup>th</sup> February 2011 are awarded to the plaintiff.***

***Dated, signed and delivered at Meru this 13<sup>th</sup> day of April 2011.***

**MARY KASANGO**  
**JUDGE**