



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 22 OF 2011

WILSON NJOROGE

KAMAU.....PLAINTIFF/APPLICANT

VERSUS

NGANGA MUCERU

KAMAU.....DEFENDANT/RESPONDENT

RULING

WILSON NJOROGE KAMAU, the Plaintiff/Applicant herein, took out the Notice of Motion dated 8th March 2011 in which he applied for the following orders *inter alia*:

- 1. That this application be certified as urgent and in the first instance the same be heard ex-parte and interim orders be granted;**
- 2. That the honourable court be pleased to issue a temporary order of injunction restraining the defendant/respondent by himself, his servants and/or agents from evicting, destroying, disposing or in any way entering and/or interfering with the properties especially tea bushes and trees growing thereon land parcel number LOC. 2/KANGARI/506 IN Kangari Location within Murang'a County pending the hearing and determination of this application.**
- 3. That the honourable court be pleased to issue an order of injunction restraining the defendant/respondent by himself, his servants and/or agents evicting, destroying, disposing or in any way entering and/or interfering with the properties especially tea bushes and trees growing thereon land parcel number LOC. 2/Kangari/506 in Kangari Location within Murang'a County until this suit is heard and determined.**

The Applicant swore an affidavit he filed in support of the Motion. The affidavit of service of Julius Thiong'o Muchoki sworn on 21st March 2011 indicates that the Motion was personally served upon Ng'ang'a Muceru Kamau, the Defendant/Respondent herein on 10th March 2011. the Defendant did not deem it fit to file any response hence the Plaintiff was permitted to prosecute the Motion ex-parte.

The substantive matter before this court is the Originating Summons dated 8th March 2011 taken out by the Plaintiff in which he prays for interalia:

1. ***A declaration that the title of NG'ANG'A MUCERU KAMAU to the land parcel number LOC. 2/KANGARI/506 has been extinguished by the Plaintiff adverse possession thereof for a period of more than Twelve (12) years in terms of the Limitation of Actions Act.***
2. ***That the plaintiff has become entitled by adverse possession to that land parcel of land comprised in title Number LOC. 2/Kangari/506 in Kigumo District and registered under the land Act in the name of the defendant.***
3. ***An order that the land registrar Murang'a to register the plaintiff as absolute proprietor of land parcel number LOC. 2/KANGARI/506 in place of the defendant.***
4. ***That the land registrar Murang'a be directed that the order herein shall be an instrument of transfer of ownership of the whole land reference Number LOC. 2/Kangari/506 from the defendant to the plaintiff.***

The Plaintiff avers that he went into occupation together with his father in 1971 of **L.R. NO. LOC. 2/KANGARI/506**. The plaintiff claimed that he has been in open, peaceful continuous and uninterrupted use and occupation of the land for 30 years hence the defendant's title remains extinguished. The Originating Summons is yet to be responded to by the Defendant. The Plaintiff avers that the Defendant had never attempted to interfere with his occupation since 1971 until the year 2005 when he filed a complaint before Kigumo land Disputes Tribunal vide Tribunal case No. 11 of 2005. The Land Disputes Tribunal declined to determine the dispute by directing the parties to pursue the same before courts of law. It would appear the Defendant filed a suit seeking injunctive orders vide **Kigumo R.M.C.C.C. NO. 35 of 2005** which suit was later dismissed for want of prosecution. The Plaintiff thereafter filed Nairobi H.C.C.C. No. 350 of 2005 claiming for interalia: A declaration that he was the rightful owner of the aforesaid land. He also sought for the cancellation of title and for injunctive orders to restrain the Defendant from interfering with his occupation. The Plaintiff's aforesaid suit was dismissed for want of prosecution on 2nd March 2011. The Plaintiff proceeded to file the current Originating Summons. He is now before this court alleging that unless the orders are given he would be evicted by the Defendant.

In deciding whether or not to grant orders of injunction, the following principles will be taken into account (see *Giella =VS= CASSMAN BROWN*): First, an applicant must show that he has a *prima facie* case with a probability of success. Secondly that an applicant must show the irreparable loss he would suffer if the order is denied. Thirdly, that if the court is in doubt the application be decided on the principle of convenience. Let me apply those principles in this case. It is clear from the pleadings filed by the Plaintiff that his claim is based on adverse possession. It is alleged that the Plaintiff has been in continuous peaceful occupation of the suit land since 1971 until 2005, when the Defendant purported to cause an interruption. In my humble view, I am convinced that the Plaintiff has shown a *prima facie* case with high chances of success. The second principle which must be established is the irreparable loss which an applicant may suffer if the order is denied. In this case, I have already stated that the claim is that based on adverse possession. If the Applicant is denied the order the Defendant may cause him to be evicted from the land. He may in the process destroy certain vital evidence necessary to establish such a claim. The anticipated loss in my view may not be measured in monetary terms. Since I am not in doubt, I do not intend to apply the third principle of convenience.

In the end I allow prayer 3 of the Motion dated 8th March 2011 as prayed save that costs shall abide the outcome of the suit.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mrs. Kinyanjui holding brief Kinuthia for the Applicants. No appearance for Respondent.