



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 128 OF 2008**

**FRANCIS MUREGI KIRAGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH GACHIE KIRAGU.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**JOSEPH KINYUA KIMURI.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

This ruling is in respect of two applications i.e. The Summons dated 19<sup>th</sup> August 2009 and The Chamber Summons dated 28<sup>th</sup> October 2009.

In the Chamber summons dated 19<sup>th</sup> August 2009, **Francis Muregi Kiragu**, the plaintiff/Applicant herein, seeks for the following orders:

1. ***That this application be certified urgent and be heard ex parte at the first instance.***
2. ***That pending the interpartes hearing and determination of this application, a temporary injunction do issue restraining the respondents by themselves, their agents, servants, assign and or any person claiming through them from interfering, transferring, alienating the property known as Title No. IRIAINI/KAIRIA/518.***
3. ***That the Respondents be condemned to pay costs of the application.***

The Applicant filed a supporting affidavit he swore to buttress the Summons. Joseph Kinyua Kimuri, the 2<sup>nd</sup> respondent herein, filed a replying affidavit and grounds of opposition to oppose the Summons. When the Summons came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to file written submissions to dispose of the same.

I have considered the grounds set out on the face of the Summons plus the facts deponed in the affidavits filed for and against the Summons. It is the Plaintiff's submission that he has acquired the parcel of land known as **L.R. NO. IRINI/KAIRIA/518** by adverse possession from Joseph Gachie Kiragu, the 1<sup>st</sup> respondent herein. In fact he has filed a caveat against the aforesaid property and has even obtained an injunction registered against the property. He claimed the 2<sup>nd</sup> respondent was illegally and without any colour of right registered as the proprietor of the aforesaid parcel of land. It is alleged that the 2<sup>nd</sup> respondent had full knowledge that the 1<sup>st</sup> respondent's title had been extinguished by affluxion of time. The Applicant argued that a caveat had been registered against the property upto the time of the sale of the land. The Applicant further stated that it is questionable how the 2<sup>nd</sup> respondent managed to have the caveat removed and how he managed to have himself registered yet there was an injunction registered against the title. The applicant urged this court to grant him the orders to prevent the 2<sup>nd</sup> Respondent disposing the property to innocent third parties.

In the replying affidavit filed by the 2<sup>nd</sup> respondent, it is alleged that the application is *resjudicata*. As expected, the Applicant vehemently denied this allegation. The 2<sup>nd</sup> Respondent further alleged that there was a conspiracy between the Applicant and the 1<sup>st</sup> Respondent.

I have carefully considered the rival submissions over this summons. The substantive matter is the Amended originating summons dated 19<sup>th</sup> August 2009 in which the Applicant seeks to be declared to have acquired **L.R. NO. IRIAINI/KAIRIA/518** by adverse possession. It is clear from the averments of the 2<sup>nd</sup> Respondent that the 2<sup>nd</sup> Respondent had registered a prohibitory order against the aforesaid property on 17<sup>th</sup> November 2006. The Applicant does not deny that he was aware of the existence of Nairobi Resident Magistrate's Milimani Commercial Court Civil Suit No. **7457 of 1988**. In the aforesaid suit, Samuel Muriithi was the Plaintiff/deed holder and the 1<sup>st</sup> respondent herein was the Defendant/judgment debtor. The Applicant herein was the Objector. In fact he obtained a stay of execution in **C.M.C.C. 7457 of 1988** in **Civil Appeal No. 445 of 2009**. After considering all the material placed before the Principal Magistrate, the learned Magistrate ordered the sale to proceed in accordance with the law. A vesting order was made. The judgment debtor i.e. the 1<sup>st</sup> Respondent has spent a considerable number of years fighting a decree issued against him on 16<sup>th</sup> May 1990 and since he did not satisfy the decree his property i.e. **L.R. NO. IRIAINI/KAIRIA/518** was sold in execution of the decree. It would appear from the way this originating summons is framed that the 1<sup>st</sup> Respondent wouldn't mind the Applicant succeeding in this suit. He has not deemed it fit to answer the allegations contained in the Amended Originating Summons. This lends credence to the assertion that the 1<sup>st</sup> Respondent could be litigating through the Applicant to frustrate the decree holder in **C.M.C.C. 7457 of 1988**. I am convinced that the 2<sup>nd</sup> respondent was registered as proprietor of the suit premises having bought the same in a public auction sanctioned by a court of law in proceedings where the Applicant fully participated but was unsuccessful. In the end, I have come to the conclusion that the Applicant has not established a prima facie case with any hopes of success. The summons dated 19<sup>th</sup> August 2009 therefore lacks merit. It is dismissed with costs to the 2<sup>nd</sup> Respondent.

The second Application is the Summons dated 28<sup>th</sup> October 2009 in which the 2<sup>nd</sup> Respondent has prayed for his name to be struck off the Amended Originating Summons. It is said that the Summons does not disclose any cause of action against the 2<sup>nd</sup> respondent. I have carefully considered this issue and it is clear that the complaint against the 1<sup>st</sup> Respondent was heard and determined by way of Objection Proceedings within **C.M.C.C. NO. 7457 of 1988**. There is an appeal which is yet to be heard, but that does not concern the 2<sup>nd</sup> Respondent. I think it is appropriate at this stage to strike out the 2<sup>nd</sup> respondent's name from these proceedings despite the pendency of **Nairobi H.C.C.A. No. 445 of 2009**. The reason is that there is no triable issue which has arisen in the applicant's complaint against the 2<sup>nd</sup> Respondent. The applicant has argued that the question as to how the 2<sup>nd</sup> Respondent got himself registered as proprietor of the suit land is a triable issue. With respect, it is no longer clear that the 2<sup>nd</sup> Respondent has satisfactorily explained how he acquired the land. For this reason I grant the 2<sup>nd</sup> Respondent the order sought in the Summons dated 28<sup>th</sup> October 2009.

In the end, the summons dated 19<sup>th</sup> August 2009 is dismissed with costs to the 2<sup>nd</sup> respondent. The Summons dated 28<sup>th</sup> October 2009 is allowed as prayed with costs to the 2<sup>nd</sup> Respondent.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of July 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Miss Keli h/b for Mr. Lompo for the Respondent.

**J. K. SERGON**

**JUDGE**