



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 151 OF 2010

SAMUEL GAKIRIA KIMANI1ST PLAINTIFF
MARK WACHIRA KIMANI2ND PLAINTIFF

VERSUS

JOHN MAINGI KARIUKIDEFENDANT

RULING

Samuel Gakiria Kimani and Mark Wachira Kimani, the 1st and 2nd Plaintiffs herein, took out the summons dated 2nd November 2010 in which they sought for the following orders:

1. *That this application be certified urgent and be heard ex parte in first instance.*
2. *that the defendant by himself or through his agent, servant and or persons claiming under him be restrained by way of temporary injunction from collecting rent, or erecting any building or in any other way interfering with land parcel No. NYERI/MUNICIPALITY BLOCK 2/1911 pending the hearing and determination of this application.*
3. *that the defendant by himself or through his agent, servant and or persons claiming under him be restrained by way of temporary injunction from collecting rent, or erecting any building or in any other way interfering with land parcel no. NYERI/MUNICIPALITY BLOCK 2.911 pending the hearing and determination of the suite herein*
4. *That the costs of this application be provided for.*

The summons is supported by the affidavit of Samuel Gakiria Kimani sworn on 2nd November 2010. John Maingi Kariuki filed the replying affidavit he swore on 21st February 2011 to oppose the summons.

I have considered the oral submissions of learned counsels from both sides together with the material placed before me. The substantive suit in this matter is the plaint dated 2nd November 2010 in which the plaintiffs are praying judgment in the following terms:

- a) *A declaration that the defendant is a trespasser and thus be evicted from the said parcel of land.*
- b) *Mesne profit of Kshs. 19,400 per month from 3rd December 2009.*
- c) *Cost of the suit.*

d) Interest of (a), (b), and (c)

e) Any other relief this Honourable court may deem just and fit to grant.

The defendant has denied the plaintiffs' claim by filing a defence plus a counter-claim in which he has sought for judgment against the plaintiffs in the following terms:

(i) That the plaintiffs' suit be dismissed with costs.

(ii) An order of declaration that the defendant is the rightful and legal owner of Nyeri Municipality Block 2/911.

(iii) Costs of this suit and counter –claim.

(iv) Any other or further relief this honourable court may deem fit to grant.

The Plaintiffs alleged that the defendant has been collecting mesne profits from the land in dispute and has continued to do so at the rate of Kshs. 19,400/= from 3rd December 2009. It is the plaintiffs' assertion that the defendant's acts are illegal hence the orders sought should be granted to prevent the defendant from suffering prejudice since the suit land belong to them. The plaintiffs attached to the affidavit of Samuel Gakiria Kimani, a copy of the certificate of lease showing the plaintiffs jointly owned L.R. no. Nyeri/ Municipality Block 2/911. The plaintiffs aver that the defendant has put up a structure on the suit land prior to them taking up possession. They claimed that the defendant is a mere trespasser who should give way to the registered proprietors.

The Defendant on his part denied the plaintiffs' claim and alleged that he has been in physical possession of the suit land since 1976. He attached to the replying affidavit a copy of a letter allocating him a kiosk dated 22nd January 1976, by the Nyeri Municipal Clerk. The Defendant further averred that the plot was originally owned by his firm known as Mutathi-ini Building Contractors. He also claimed that he put up structures which he receives rent per month from tenants. The defendant alleged that one of his partners caused his name to be removed from the Nyeri Municipal council records as the owner of the aforesaid plot and as a result he sued him plus the council vide Nyeri C.M.C.C.C. no. 33 of 2001 later Nyeri C.M.C.C.C. no. 876 of 2003 and Nyeri C.M.C.C.C. no. 116 of 2007.

In determining an application for an injunction the applicable principles are well settled. An applicant must show that he has a prima facie case with a probability of success. In the case before this court it obvious that the plaintiffs are in possession of the certificate of lease issued on 9th June 2010. the defendant claims the plaintiffs obtained title by fraud. It is not in dispute that the defendant was in possession of the land in dispute even before the plaintiffs were issued with a certificate of lease. It is also not in dispute that the defendant has litigated over the suit land in more than two suits. There is also evidence to show that the defendant has been collecting a monthly rent of Kshs. 19,400/= the structures he put up on the suit land. I am unable to believe the plaintiffs' assertion that the defendant moved to the suit plot on 3rd December 2009. from the pleadings and the submissions tendered, it is obvious that it cannot be said that the plaintiffs have shown a prima facie case with high chances of success. Even if one can aver that the plaintiffs have shown a prima facie case, I doubt whether the plaintiffs can be able to show that if they are denied the order they would suffer irreparable damage. It is apparent that the plaintiffs have stated that they will suffer a monthly loss of revenue in form of rent at a rate of Kshs. 19,400/=. In short, the anticipated loss is quantifiable in monetary terms. The third principle to be considered is that of convenience. The court has to balance the inconvenience which may arise between the litigants. In my view, if I grant the plaintiffs the order, the defendant will be more inconvenient than if the same is refused. I say so because the affidavit evidence shows that the defendant has been utilizing the plot for a very long time before the plaintiffs acquired proprietary rights.

A fair order in the end is for the dismissal of the summons which I hereby direct. Costs of the summons to abide the outcome of the suit.

Dated and delivered this 29th day of July 2011.

J.K. SERGON
JUDGE

In open court in the presence of R.M. Kimani h/b for Muchiri for the Applicant and Mr Kimunyu h/b for Ng'ang'a for Respondent.

J.K. SERGON
JUDGE