



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 6 OF 2011

DAVID MUNGA MACHARIA C/O HARI GAKINYA & CO.

ADV.....PLAINTIFF

VERSUS

CHRISTOPHER M.

MWAI.....DEFENDANT

RULING

This suit was filed by David Munga Macharia against Christopher Mwangi. In the plaint, the plaintiff seeks an order of declaration that the suit property, BAHATI/BAHATI/BLOCK 1/1432 belongs to him and a permanent injunction to issue against the defendant/his servants or agents from interfering with the plaintiff's ownership and quiet and peaceful enjoyment of the suit property.

The defendant filed an amended defence and counter claim on 5/5/2011 in which he claims to be the owner of the suit land and seeks an order of permanent injunction to restrain the plaintiff from entering or interfering with the defendant's peaceful and quiet possession of the suit land. The defendant then filed the Notice of Motion dated 5/5/2011, seeking an order that pending the hearing and determination of this suit, the plaintiff/respondent be restrained by way of injunction from entering, remaining or interfering in any way with the defendant's peaceful and quiet enjoyment of the suit land. The defendant/applicant deponed that he is the registered proprietor of the suit land BAHATI/BAHATI BLOCK 1/1432. He exhibited a title deed CMM1(a) and (b) issued to him in 1987. He claims to have been in occupation of the suit land since 1984. Three further affidavits were sworn in support of the application on 5/5/2011. Lilian Waruguru Mwangi the mother of the defendant/applicant deponed that the land belongs to the son and she has been farming it for the last 30 years with his consent. At one time she leased it out to Sera Wambui Kamanja for 4 years in the 1990s. The said Sera Wambui also swore an affidavit in support of the application. Veronica Wanjiru Mwangi, a neighbour of the applicant also deponed that the applicant's mother has been cultivating the land and the plaintiff has never been in possession and only invaded the land on 12/4/2011, re-ploughed it and purported to put up a semi permanent structure.

In opposing the application, the plaintiff/respondent filed a replying affidavit on 12/5/2011. It is his case that he was a member of Makongeni Farmers Company Ltd, an affiliation of Mutukanio Farmers, to which he paid and acquired shares. He exhibited a copy of the share certificate (DMM IV). The land was

issued to him after he proved that he was a fully paid up member. After he had been in possession for a long time, the defendant/applicant came claiming the land to be his and the plaintiff approached the Bahati Land Disputes Tribunal for redress and it ruled in his favour but this court quashed the decision (DMM V). He ploughed the land early this year but the defendant tried to forcefully take possession from him. He claims to have a prima facie case with high chances of success.

From the pleadings, it is clear that both the defendant and plaintiff do lay claim to the suit land, Bahati/Bahati Block 1/1432. The plaintiff/respondent exhibited a title deed in his name dated 16/7/87. The defendant also exhibited his title which is dated 30/12/1987 (CMM 6) and a copy of the register. There is indeed a real dispute over the suit land.

The next question is who is in possession of the suit land? Both of them claim to be in possession. However, I am convinced that it is the defendant who is in possession. A part from the affidavits sworn in support of the application, the ruling of this court in **JR 95/2009 REP. V BAHATI DISTRICT LAND DISPUTES TRIBUNAL & CHIEF MAGISTRATE NAKURU & DAVID MAGARA (IP)** does show that the defendant/applicant has been in possession. This is because the plaintiff/respondent had moved the Bahati District Land Disputes Tribunal seeking to have the defendant/applicant ordered to vacate the suit land and the Tribunal made an award that the defendant/applicant should vacate the land in dispute. On application by the defendant, this court quashed the decision of the Land District Tribunal for want of jurisdiction. It is therefore clear from the said ruling that in 2009, the defendant/applicant had been in possession of the suit land and the plaintiff/respondent's averment that he had been in occupation for long before the defendant/applicant started to interfere is not true. Infact the plaintiff does not disclose exactly when the defendant/applicant started to interfere.

I do agree with Mr. Gakinya's submissions that since both parties claim the suit land, the court can only consider where the balance of convenience tilts. In my view, the balance of convenience tilts in favour of the party who is already in occupation who will suffer if he were asked to move out. The persons to answer the question as to whose land this is, is the Land Buying Companies from whom the parties bought shares which were translated to land and the Commissioner of Lands who is responsible for issuance of the two titles in dispute. It is then the parties will adduce evidence on how they acquired ownership.

In the end, I find that the defendant's application is well founded. I hereby grant prayer (c) of the Notice of Motion dated 5/11/2011 pending hearing of the suit. Costs to be in the cause.

DATED and DELIVERED this 23rd day of September, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Plaintiff - in person.

N/A for defendant.

Kennedy - Court Clerk.