



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 50 OF 2011**

**JOHN GITHITHO NGARI.....PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN KAHARA NGURE.....DEFENDANT/RESPONDENT**

**RULING**

**John Githitho Ngari**, the Plaintiff herein, took out the Chamber summons dated 11<sup>th</sup> May 2011 in which he sought for an order of injunction to restrain **Stephen Kahara Ngure**, the Defendant herein, from evicting, harassing or interfering with the Plaintiffs right of occupation and use of the parcel of land known as **L.R. NO. KONYU/ICHUGA/1108** pending the hearing and the determination of this suit. The Plaintiff swore two affidavits in support of the summons. The Defendant opposed the Summons by filing the replying affidavit he swore on 30<sup>th</sup> May 2011. When the Summons came up for interpartes hearing, learned counsels from both sides made brief oral submissions in support of the positions they held.

I have taken into account the grounds set out on the face of the Summons plus the facts deponed in the rival affidavits. I have further considered the oral submissions made by learned counsels. The substantive suit is expressed in the Originating summons dated 11<sup>th</sup> May 2011 taken out by the Plaintiff. In the Originating summons, the Plaintiff seeks to be declared to have acquired **L.R. NO. KONYU/ICHUGA/1108** by adverse possession under *Section 38* of the Limitation of Actions Act and under *Order 37* of the Civil Procedure Rules. The Plaintiff avers that he and his family have been in occupation of the aforesaid parcel for over twelve (12) years. It is alleged that during this period the Plaintiff did the following developments of the land:

- (i) Built 4 dwelling houses.
- (ii) Planted over 100 mature coffee trees.
- (iii) Planted over 150 bananas.

It is also alleged that the Plaintiff has buried on the suit land four of his relatives. The Plaintiff is now before this Court seeking for temporary orders of injunction to restrain the Defendant from evicting him before the suit is heard and determined. The principles to be considered before granting or reusing an order for injunction are well settled. First, an applicant must show a prima facie case with high chances of success. Secondly, an applicant must show that if he is denied the order he will suffer irreparable loss and thirdly, that where the Court is in doubt the application will be determined on a balance of convenience [see **Giella =Vs= Cassman Brown**]. I have carefully looked at the two affidavits sworn by the Plaintiff in support of the Summons and it is apparent that the Plaintiff's action raises serious grounds which can only be determined through a trial. In essence, a prima facie case with a probability of success has been shown. Having satisfied the first principle, the Plaintiff was further required to show the irreparable damage he would suffer if he is denied the interim order. To begin with, the Plaintiff has not shown that the Defendant has taken an unlawful adverse action to have him evicted nor harassed from the suit land. It is clear from the Plaintiff's averments that the Defendant has always taken legal steps to establish his claim and to have the Plaintiff evicted from the suit land. The Plaintiff has averred that in 1998 he went to do a search at the Lands Registry Nyeri when he overheard people claim that the suit land had been registered in the name of the Defendants and that is when he learnt that indeed, the Defendant was the registered proprietor of the land. In 1999, the Defendant filed **Nyeri H.C.C.C. No. 243 of 1999** in which

he sought for the eviction of the Plaintiff from the land. It is alleged the case was referred to the Mathira Land Disputes tribunal to arbitrate. The Land Disputes Tribunal gave judgment in favour of the Defendant. The Plaintiff appealed to the Central Provincial Land Disputes appeals Committee. The appeals committee set aside the award of the Mathira Land disputes Tribunal on the basis that the Land disputes Tribunal had no jurisdiction to hear and determine the dispute. It is not clear what other steps the Defendant has taken thereafter so that this Court can say that there is not to give temporary orders of injunction. The Defendant has denied the Plaintiff's allegation. The Defendant pointed out that the Plaintiff is in occupation of **L.R. NO. KONYU/ICHUGA/188** which is in the name of Ngari s/o Kahonoki and not **L.R. NO. KONYU/ICHUGA/1108**. The Defendant has averred that the developments enumerated by the Plaintiff on the suit land happened for the last 13 years when the Plaintiff was in occupation with full knowledge that the suit land belongs to the Defendant. It is the Defendant's submission that he moved to Court to have the Plaintiff evicted when he learnt of the Plaintiff's illegal occupation of the suit land. In the affidavit of the Defendant, he does not deny the allegation that he has intentions to evict the Plaintiff from the suit land. The issue is whether the Plaintiff has shown he is under the threat of eviction by the Defendant? The answer to the question is in the negative. The Plaintiff has failed to explain in detail the irreparable loss he would suffer. He has not alleged that the Defendant has taken steps to have him evicted from the land. Having failed to discharge that burden, then this Court is entitled to deny him the order.

In the end I dismiss the Summons dated 11<sup>th</sup> May 2011 with costs to the Defendant.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.***

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

In open court in the presence of Mr. Kingori holding brief Kimunya for the Defendant and Kahiga holding brief Muthigani for the Plaintiff.