



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

AT NYERI

Civil Case 7 of 2010

CHARLES GITONGA MURIITHI

CECILIA GATHONI MURIITHI.....PLAINTIFFS

Versus

HELLEN MURINGI MUCHOKI

NANCY WANGUNGI MUCHOKI (*As personal representatives of the estate of*

***EPHRAIM MUCHOKI MARANGA (DCD)*DEFENDANTS**

RULING

By the summons dated 27th January 2010 taken out pursuant to order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, Charles Gitonga Muriithi and Cecilia Gathoni Muriithi, the plaintiffs herein, applied for an order of injunction to restrain Hellen Muringi Muchoki and Nancy Wangungi Muchoki, the legal representatives of the estate of Ephraim Muchoki Maranga, deceased by themselves, their agents and or servants from cutting, building, selling or felling trees or interfering in any way with their occupation and possession of three (3) acres in L.R.No. Nyeri/Island Farm/414 pending the hearing and determination of this suit. The summons is supported by the affidavit sworn by Charles Gitonga Muriithi. The defendants filed a notice of preliminary objection and the replying affidavit of Hellen Muringi Muchoki to oppose the summons.

The substantive suit in this matter is the originating summons dated 27th January 2010 in which the plaintiffs are seeking for interalia to be declared to have acquired 3 acres to be excised from the parcel of land known as L.R. No. Nyeri/Island Farm/414 by adverse possession under section 38 of the Limitation of Actions Act and under order XXXVI rule 3D of the Civil Procedure Rules. The duo state that they purchased the aforesaid parcel of land on 11th March 1994 from the late Ephraim Muchoki Maranga. They also alleged that they have been in exclusive and quiet occupation and possession of the portion since 1994. The plaintiffs have averred in the affidavit of Charles Gitonga Muriithi sworn and filed in support of the application for injunction that the defendants have started encroaching on their portion by digging and damaging their fence without their consent. The defendants have stated that the agreement annexed to the supporting affidavits cannot be relied on because the same does not have the stamp duty under S. 19 of the Stamp Duty Act.

I have considered the material placed before me and the oral arguments tendered by learned advocates from both sides. The principles for granting injunctions were settled. First, an applicant must show that he has a prima facie case with high chances of success. In this case the plaintiffs have alleged that they bought three acres of the suit land after which they went into occupation in 1994. The defendants have denied the existence of the agreement. In fact they have alleged that the agreement relied by the plaintiffs is a forgery and that the same cannot be relied upon in evidence because it did not have the Stamp Duty. As to whether or not the agreement is

a forgery, that is a matter which will be determined at the hearing of the suit. The fact that the agreement does not have the Stamp duty is not fatal because the court reserves the right to call upon the infringing party to have the stamp affixed within a given time. The defendants do not deny the allegation that they have encroached on the portion occupied by the plaintiffs. If indeed the plaintiffs have been in occupation of the suit land since 1994 then it is possible that their claim may fall under s. 38 of the Limitation of Actions Act. In sum I am satisfied that the plaintiff have shown that they have a prima facie case with high chances of success. The second principle required to be satisfied before granting an order of injunction is that an applicant must show that unless the order is given he would suffer irreparable loss. The complaint raised is that the defendants have encroached on the plaintiffs' portion. It is alleged that the defendants are digging and damaging fences. It would appear things like the destructions of a fence are injuries which can easily be compensated in monetary terms. However in the circumstances of this case, a fence is a very crucial piece of evidence showing the plaintiffs extent of occupation. If the fences are destroyed then the most important piece of evidence will be gone for ever hence the suit may not be proved in the end. This in my view is a damage that cannot be compensated in monetary terms. Again, I am satisfied that the plaintiffs have proved that the damage they are likely to suffer if the order of injunction is denied is irreparable. The last principle is the balance of convenience where the court is in doubt. I will not belabour to take into account this principle because I am not in doubt.

In the end the summons dated 27th January 2010 is allowed as prayed with costs to the plaintiffs.

Dated and delivered this 31st day of March 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Mugo h/b Waithima for Respondent and Miss Keli h/b Wahome for applicant.

J.K. SERGON

JUDGE