



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 381 of 2009

IN THE MATTER OF LR NO. LIMURU/KAMIRITHU/T 565
AND
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
MARY WAITHERERO GITAU.....PLAINTIFF/APPLICANT
VERSUS
MARGARET NJOKI NJUKIRA.....DEFENDANT/RESPONDENT
R U L I N G

1. The dispute herein relates to a parcel of land known as LIMURU/KAMIRITHU/T 565 (the suit property). By her application dated 30/07/2009 brought under Section 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 39 Rules 1 and 9 of the Civil Procedure Rules. The Plaintiff/Applicant is seeking ORDERS:-

(1) *THAT temporary injunction does issue restraining the defendant by herself, her agents, employees, servants or anyone acting upon their instructions and behest from selling, alienating, disposing of, transferring or in any way howsoever interfering with the plaintiff (sic) right of ownership, use and possession of half portion of all that parcel of land particularly known as L.R. No. LIMURU/KAMIRITHU/T 565 pending the hearing and determination of this application.*

(2) *THAT temporary injunction does issue restraining the Defendant by herself, their agents, employees, servants or anyone acting upon their instructions and behest from selling, alienating, disposing of, transferring or in any way howsoever interfere (sic) with the plaintiffs right of ownership, use and possession of half portion of all that parcel of land particularly known as L.R. No. LIMURU/KAMIRITHU/T 565 pending the hearing and determination of this suit.*

(3) *THAT the costs of this application be provided for.*

2. The application is supported by the grounds on the face thereof and the affidavit sworn by the Plaintiff/Applicant, Mary Waitherero Gitau. The Applicant avers that she has lived on the suit property for upwards of 50 years and that she would suffer irreparable damage if she were to be evicted therefrom. The Applicant believes that she has a prima facie case with a high probability of success.

3. The application is opposed. The Replying Affidavit which is dated 6/08/2009 is sworn by the Respondent, Margaret Njoki Njukira. The Respondent admits that she shares a boundary with the Plaintiff/Applicant, but denies that she and the Plaintiff/Applicant live on the same plot. She also says that there is a tribunal case between herself and the Applicant, which case the Respondent says went up to the Provincial Appeals Committee. The Respondent says the Applicants claim was dismissed, after which she says she (the Respondent) was issued with a title deed on the 2/11/1994 (see annexure marked "MNN III" to Respondent's Replying Affidavit). One of the other annexures to the Respondent's Replying Affidavit is the Award of the Provincial Appeals Committee dated 13/05/2009. The Appellant therein was the Respondent herein. The dispute concerning Title No. Limuru/Kamurithu/T565 had been heard by the Kiambu West Land Disputes Tribunal. The Applicant herein as claimant in the Tribunal case had claimed a share of the suit land on the ground that she had lived on the suit land for more than 50 years; and she sought revocation of the title of the suit land so that she could be given a half of it. The tribunal had proceeded to revoke the title. That award was set aside by the Appeals Committee. The Applicant herein had 60 days within which to appeal to the High Court against the Committee's decision. Apparently, the Applicant did not prefer any appeal, but instead filed the present suit.

4. In the Originating Summons dated 30/07/2009 and filed in court on 31/07/2009 the Plaintiff/Applicant prays for orders:-

1. *THAT the Plaintiff be declared to have become entitled by adverse possession over twelve (12) years to a portion of all that land known as LR No. Limuru/Kamirithu/T 565 and the title, rights and interest of the defendant be extinguished.*

2. *THAT the plaintiff be registered as the proprietor of the said portion of all that land known as LR No. Limuru/Kamirithu/T 565.*

IN THE ALTERNATIVE

3. *THAT the Plaintiff's over-riding interests over a portion of all that parcel of land known as LR No. Limuru/Kamirithu/T565 by virtue of possession and actual occupation of the said land before, at and after the time of the first registration to date. (sic)*

4. *THAT the costs of this summons be borne by the Defendant.*

5. At the hearing of the application, M/s Wairimu Mugo and Mr. Karuga Wandai appeared for the Applicant and Respondent respectively. Basing her arguments on the grounds on the face of the application and the supporting affidavit, Miss Mugo contended that if the Applicant were to be evicted from the suit land, she will suffer irreparable loss and damage. Miss Mugo further submitted that the Plaintiff/Applicant has met all the three conditions established by the **Giella case** for the granting of injunctions, namely that:-

- *The Plaintiff/Applicant has shown that she has a prima facie case with a probability of success*
- *That if the orders sought are not granted, the Plaintiff/Applicant will suffer irreparable loss and*
- *That the balance of convenience tilts in favour of the Plaintiff/Applicant.*

6. Counsel for the Defendant/Respondent thinks otherwise. It was submitted on behalf of the Defendant/Respondent that the litigation between the Plaintiff and the Defendant was brought to an end when the award of the Ruiru District Lands Tribunal was adopted as a judgment of the court at Limuru in land case number 22 of 2008. It was further submitted that no appeal was preferred against the said judgment and that no Judicial Review Proceedings or other proceedings have been taken out by the Plaintiff herein since the decision of the Appeals Committee at Nyeri on 13/04/2009.

7. I have now carefully considered the application as filed. I have also considered the law and the facts surrounding the Plaintiff's application. On the basis of the above, I find and hold that the Plaintiff has not met any of the three conditions enunciated in the **Giella case**. I do find and hold that the Plaintiff has not established that she has a prima facie case with the probability of success. Nor has she shown that if the orders sought are not granted, she will suffer irreparable loss. It is already on record that there is a valid order requiring the Plaintiff to move out from the Defendant's land in default of which she is to be evicted. That order has not been challenged by the Plaintiff. Accordingly and for the above reasons, even if I were to consider the balance of convenience, the same would tilt in favour of the Defendant.

8. I have also considered the orders sought in the Chamber Summons application dated 30/7/2009 vis-à-vis the reliefs sought in the plaint. My view is that there is great variance between the reliefs sought in the two pleadings. In the persuasive authorities in **Winstone –vs- Winstone [1959]3 AII ER 580**, a case that was with approval by Emukule J in **Meru HCCC No. 55 of 2009 – John Kubai Meringa –vs- Frederick Ntongai Meringa**, it was held that where the prayers in the application are inconsistent or at variance with the reliefs sought in the plaint, then such an application is fatally defective. On this ground, I find the Plaintiff's application dated 30/07/2009 to be fatally defective.

9. In the premises, the Plaintiff's Chamber Summons application dated 30/07/2009 lacks merit. The same is hereby dismissed in its entirety with costs to the Defendant. The interim order issued by this Honourable Court on 31/07/2009 be and is hereby discharged.

Orders accordingly.

Dated and Delivered at Nairobi this 19th day of March, 2010

**R. SITATI
JUDGE**

Delivered in the presence of:

Mr. Mugallo for Mugo (present) for the Plaintiff/Defendant

Miss Gichohi for the Attorney General

Mr. Karuga Wandai (absent) for Respondent

Weche – court clerk

