REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 27 of 2010

STEPHEN MWITHIA M'RUUTI .... PLAINTIFF

VERSUS

JOSHUA MUTHUKU .... 1ST DEFENDANT
ISABELLA NKINA M'IRERA .... 2ND DEFENDANT
LAWRENCE KIRIINYA IBURI .... 3RD DEFENDANT

RULING

The application under consideration in this ruling is a Chamber Summons dated 4th March 2010. It is brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules. The plaintiff seeks by that application an order to restrain the defendants from trespassing or in any way entering land title number *Nyaki/Thuura/2465* pending the hearing and determination of this suit. He also seeks that the court may order the *status quo* which persisted prior to the filing of this case to be maintained until the final determination of this suit. The plaintiff's claim in this case is for the order that he has acquired the suit property by way of adverse possession. In the affidavit in support, the plaintiff discloses that he had unsuccessfully sought the revocation of a grant in High Court Succession Cause No. 52 of 2001 which related to the estate of M'Irera M'Ruuti, deceased. He had sought by his application in that succession cause for a declaration that the grant that had been issued to Joshua Muthuku and Isabella M'Irera had been obtained fraudulently. The court in the ruling in that succession dated 5th November 2009 dismissed the plaintiff's application mainly because it found that there was no consent of the Land Control Board to the alleged transaction between the plaintiff and the M'Irera M'Ruuti deceased. On that application being dismissed, the plaintiff filed this present case. By the present suit, the plaintiff states that he has been in possession of the suit property for over 30 years. However, on 3rd March 2010, the 3rd defendant entered into the suit property and allegedly destroyed the fence which the plaintiff had erected. The application was opposed by the defendants. A replying affidavit was sworn by the 3rd defendant. The 3rd defendant deponed that the suit property was a subdivision of parcel number *Nyaki/Thuura/1735.* After a grant was confirmed in High Court Succession No. 52 of 2001, the administrators sold to him parcel number 2465. A title was issued in his name in respect of that property on 29th April 2002. On obtaining the title, he entered into possession and has remained thereon continuously. He denied that the plaintiff has been in possession of the same. He stated that the *status quo* on the ground was that he is in possession of the suit property.

It is clear that the plaintiff first sought the revocation of the grant in High Court Succession 52 of 2001. The application for revocation was heard by way of *viva voce* evidence. By the judgment of this court in that succession cause dated 5th November 2009, the application for revocation was dismissed. It is on failing to have the grant revoked that the plaintiff has now filed this present suit. It should be noted that the estate of M'Irera M'Ruuti only comprised of the parcel No. 2465, the suit property. I do not wish to dwell very much on the competence or otherwise of this present suit but on a *prima facie* basis, I am of the view that the present suit is an abuse of court process. The principles of granting an injunction were clearly stated in the case of **Giella Vs. Cassman Brown & Co. Ltd** [1973] EA. They are:-

1. ***An applicant must show a prima facie case with a probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
3. ***When the court is in doubt, it will decide the application on the balance of convenience."***

As stated before, the plaintiff's claim in this action is that he has acquired the suit property by way of adverse possession. That claim is on the basis that the plaintiff has been in possession of that land for more than 30 years. As stated, the court in High Court Succession 52 of 2001, received *viva voce* evidence in respect of the plaintiff's application to revoke the grant. The plaintiff gave evidence in the succession cause and stated that M'Irera M'Ruuti sold to him parcel number *1735* which it has become evident in this action, was subdivided and one of the parcels of that sub division was parcel number 2465. The plaintiff on being cross examined in the succession cause had this to say:-

"I did not cultivate number 1735 (now the suit property) ***until Irera allowed me to do so. He did so after I paid him some money. His wife harvested bananas with my consent thereafter because I was purchaser (sic)."***

For a party to succeed in a claim for adverse possession, he has to establish that his possession of the land was adverse to the defendant title. From that evidence on a *prima facie* basis, it becomes clear that the plaintiff if indeed he did enter the suit property with the consent of M'Irera M'Ruuti he is a licensee. That being so, the plaintiff cannot claim to have been in adverse possession of the deceased property. See civil Appeal No. 24 of 2004 **Samuel Nyakenogo and Samwel Orucho Onyaru** where the Court of Appeal stated:-

"Time can run in favour of a tenant at will by virutue of Section 12 of the Limitation of Actions aCt but it cannot run in favour of a licensee, therefore a licencensee has no possession (Hughes Vs. Griffin [1969] 1 WLR 23)."

In the case decided by the House of Lords in the **J.A. Pye (Oxford) Ltd Vs. Graham** [2002] UKHL 30 stated thus:-

"The question is simply whether the defendant squatter had dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner." (Underlining mine.)

In the case of **Kimeu Vs. Syina** Civil Suit No. 1402 of 1986 the court had this to say:-

"As for the claim based on adverse possession, the plaintiff was duty bound to adduce inter alia that he had been in possession of the suit land, that his occupation was exclusive, was adverse to the defendant's rights as owner and that his occupation had been continuous and uninterrupted or unchallenged for a period in excess of twelve years since the possession commenced."

In view of the evidence that the plaintiff adduced in the succession cause as quoted above, I find that the plaintiff does not satisfy the first principle of granting an injunction. He has not shown a *prima* facie case with probability of success. On the second principle, I would state that the plaintiff can indeed, because the subject matter is land, be compensated if at the hearing of the case the court is of the view that he was entitled to the orders as prayed. I am therefore of the view that the plaintiff will not suffer irreparable injury if this injunction is not granted. Since I am clear on the first and 2nd principles of granting an injunction and I entertain no doubt, I will not proceed to consider the 3rd principle. It should also be noted that the 3rd defendant deponed that on purchasing the suit property in the year 2002 he has been in occupation of the suit property. It is conceded even in the succession cause that the plaintiff when he first took possession of the suit property was cultivating it but not residing in it. That would mean if the court was to give the orders that are sought by the plaintiff by his application for injunction, what the court would essentially be doing is issuing mandatory injunction. Halsbury's Laws of England, 4th Edition Paragraph 948 has this to say in respect of mandatory injunction.

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted However, if the case is clear and one which the court thinks it ought to be decided at oce, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ....a mandatory injunction will be granted on an interlocutory application."

That position was also considered in the case **Locabail International Finance Ltd. Vs. Agroexport and others** [1986] 1 ALL 901 where the court stated:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high degree of assurance that at the trial would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

There are no special circumstances presented before me to justify issuing the orders that are sought. The application therefore which is sought by the plaintiff dated 4th March 2010 is found to have no merit and the same is hereby dismissed with costs being awarded to the defendants. The orders issued by this court on 18th March 2010 are hereby vacated.

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE