



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

Environmental & Land Case 55 of 2010

**HIRUM NGUGI..... APPLICANT
VERSUS
ISAAC KIMANI NGUGI.....RESPONDENT
RULING**

The applicant herein brought this suit against the respondent in respect of a parcel of land parcel No. LR. Loc. 3 Mungaria/351 by way of Originating Summons claiming that he has acquired title on the said parcel of land by way of adverse possession and that the respondent's title thereto has been extinguished. There was a prayer also that the respondent do transfer the said parcel of land to the applicant forthwith. He also prayed for costs of the motion.

Alongside the Originating Summons he filed an application by way of Chamber Summons under Order XXXIX Rules 1 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the defendant be restrained from dumping any building materials, constructing any structures, excavating soil, selling and or transferring or in any other way interfering with the suit property pending the hearing of this suit.

The application is opposed and there is an affidavit in reply sworn by the defendant. Both learned counsel have filed submissions in respect of the said application. The applicant did not annex a certified extract of the title in respect of the suit property to his Originating Summons. Order XXXVI Rule 3D(2) is couched in mandatory terms and the absence of that extract is fatal. The only document annexed to the Originating Summons is what appears to be an extract of Certificate of Official Search which however, has not been certified to be a true copy of the said document.

That omission notwithstanding I have considered whether or not the applicant is entitled to the orders sought. For the applicant to be entitled to the said orders he must, in the first place, demonstrate that he has a *prima facie* case with a probability of success. The land is registered in the name of the respondent. The applicant must show that he was or has been in open and peaceful occupation without the permission of the respondent which occupation must be uninterrupted.

There is before me proof that this land has been subject to litigation from 1983 which litigation was alive up to sometime in July 2008. When the applicant says that he has been in occupation for the years that he has stated, this cannot be the case because, any litigation in respect of the suit property would mean that such occupation was not peaceful neither can it be said to have been uninterrupted.

There is no way this court can uphold the submission that the respondent has no right to deposit any construction material on property that belongs to him lawfully. It is instructive to note that, the applicant says that he planted some coffee trees on the property but the photographs annexed to his application show nothing to that effect.

There is not on record also, any evidence that he erected any structures on the property to show actual possession in respect of the suit premises. I am of the view that he has failed to establish a *prima facie* case with a probability of success to warrant the orders sought.

His application is therefore dismissed with costs to the respondent.
Orders accordingly.

Dated, signed and delivered at Nairobi this 1st day of October, 2010.

**A. MBOGHOLI MSAGHA
JUDGE**

