**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC CIVIL SUIT NO.623 OF 2009 (O.S)**

IN THE MATTER OF LAND PARCEL NO.L.R.NO.3811/6 (ORIGINAL NUMBER 3811/1/2 NAIROBI

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22, LAWS OF KENYA

MOSES KINGATI WANGARI, MICHAEL MWENDA MANYARA, JOSEPH MUSYOKA WAMBUA (Suing as the Secretary, Organizing Secretary and member on their own behalf and on behalf of Githurai Mwihoti Settlement Society)……PLAINTIFF

***VERSUS***

JOSEPH THUGO MWAURA……..1ST DEFENDANT

DAVID KIARIE WAIYA……..2ND DEFENDANT

SILAS KINYANJUI KIMEMIA……3RD DEFENDANT

DINAH MUTHONI MBUTHIA……4TH DEFENDANT/APPLICANT

DAVID GITAU MBUTHIA ……5TH DEFENDANT/APPLICANT

RULING

The plaintiffs herein brought this suit against the 1st, 2nd and 3rd defendants by way of Originating Summons claiming to be declared as proprietors of the parcel of land known as LR.No.3811/6 (Original LR.No.3811/2) because they had occupied and or lived on the said land for a period in excess of twelve (12) years and therefore claim title by way of adverse possession.

After the said declaration they sought an order they should be registered as the sole proprietors of the said parcel of land in place of the three defendants, and that the Registrar of this court executes all the necessary instruments and documents, to effect the transfer of the suit property from the defendant to the plaintiffs name.

The Originating Summons is supported by an affidavit sworn by Moses Kingati Wangari who depones that, the members of the plaintiff which is the society known as Githurai Mwihoti Settlement Society, have been in occupation of the whole suit property and exercised on it acts of ownership openly and conspicuously since 1995.

In the said occupation they have constructed semi permanent and permanent structures, and have been farming on the said suit property. It is also their case that, the defendants have never occupied or taken possession of any part of the suit property since 1995. As a result, it is their case that the title of the three defendants was extinguished on or about 2007 by the plaintiffs' act of continuous and exclusive adverse possession.

In the course of the subsistence of this suit, the 4th and 5th defendants herein applied to be joined as parties and also moved the court for injunction orders to restrain the plaintiffs from trespassing, alienating, subdividing, building any structures and from interfering in any manner whatsoever with their possession of their suit property situate in the City of Nairobi until the determination of this suit.

The 4th and 5th defendants were joined as parties herein and this ruling is confined to their application for injunction orders under Order XXXIX Rules 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

This application is opposed by the plaintiffs who have filed an affidavit in reply and both learned counsel have addressed the court on the issues relating to this application. The 1st, 2nd and 3rd defendants were served with all the relevant documents but have not appeared in respect of this particular application. From the material before me it has transpired that there are two pending cases relating to the same suit property which are yet to be determined. These are High Court Misc Civil Application No.1264 of 1994 and Misc Civil Application No.938 of 1995.

There is also evidence that on 27th October, 1994 this court granted leave to the 4th and 5th applicants to apply for orders of certiorari and prohibition in respect of the suit premises, which leave was also directed to operate as a stay of proceedings in respect of the sale of the suit premises, until the determination of the two suits aforesaid. That order was duly registered in the Lands Office, Central Registry against the title of the suit property so that no further dealings or alienation of the same could take place.

That notwithstanding, it is the applicants' case that in the month of July 1995 the property was transferred to 1st, 2nd and 3rd defendants herein. This the applicants say, was in total contempt and defiance of the court order registered against the title. The foregoing transfer gave rise to High Court Misc Civil Application No.938 of 1995 against the Principal Registrar of Titles. The said suit was premised on the belief that the Principal Registrar of Titles had conspired with the three defendants to defeat the court order.

It is the applicants' case that, the claim by the plaintiffs' in this case cannot be sustained because the suit property has been subject to two suits, that is, High Court Misc Civil Application No.1264 of 1994 and High Court Misc Application No.938 of 1995 since way back in the year 1994 and the decision of the court in respect of the two suits is yet to be made. It is also the applicants' case that the plaintiffs have not been in possession of the suit premises as they invaded the same very recently this year. If anything, they are agents or servants of the 1st, 2nd and 3rd defendants who have devised ways and means of defeating the court orders issued in this matter.

The 4th defendant Dinah Muthoni Mbuthia is said to have been in possession and occupation of the suit property since way back in 1966 with her husband one Dr. Arthur Samuel Mbuthia who passed away in 1971. It is feared that the plaintiffs may alienate and interfere with the suit property to the prejudice of the 4th and 5th defendants.

I have considered the material before me. A claim for adverse possession may be sustained if the occupation of the suit premises is against the registered proprietor without his consent but, which must be open without any force or interference. A party in the name of Twiga Limited has been introduced by the plaintiffs as having been the previous owners of the land but there is no evidence that they were ever registered as such. The plaintiffs must make up their minds whether or not they are litigating against Twiga Limited or the 1st, 2nd and 3rd defendants. That notwithstanding, the transfer of the land to the 1st, 2nd and 3rd defendants was made in total disregard of the court order which was registered against the

said title. This appears as entry No.14 in the title that has been annexed.

At the same time, no claim for adverse possession may be advanced when there are pending suits in respect of the suit premises and therefore, on the question of whether or not the 4th and 5th defendants have established a *prima facie* case with a probability of success, the answer is that they have. There are clear suspicious transactions in respect of this suit property which call for orders of injunction to issue against the plaintiffs. Most of the issues are likely to come out during the hearing of the main suit and therefore I do not deem it appropriate to delve any deeper into the issues to avoid prejudice to the parties. I can only emphasise that the 4th and 5th defendants have made a good case for the grant of injunction orders against the plaintiffs or any other parties claiming under them in terms of prayers No.3 of the Chamber Summons dated 4th February, 2010.

This order shall be served upon the plaintiffs by the Court Bailiff, and the Officer Commanding Police Station Kasarani Division, shall ensure compliance therewith until this suit is heard and finalized. The 4th and 5th defendants' shall have the costs of this application.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 4th day of November, 2010.***

**A. MBOGHOLI MSAGHA**

**JUDGE**