



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

**AT NAKURU**

**CIVIL SUIT 16 OF 2009**

**MUTITU RURAYA .....APPLICANT**

**VERSUS**

**WILSON MUGWE WERU .....RESPONDENT/DEFENDANT**

**RULING**

The plaintiff filed this suit on 20<sup>th</sup> January 2009, he claims that in or around 1967 the defendant offered to sell to him a parcel of land known as Nyahururu/Kanyagia/13 for Ksh.13,500/-. The plaintiff paid the agreed consideration, but sometimes in 1974, the defendant reneged on the sale agreement. This culminated in a civil suit between the plaintiff and the defendant. The suit was determined in favour of the plaintiff and the settlement fund trustee confirmed the suit land was owned by the plaintiff. However the defendant moved behind the plaintiffs back and had the land registered in his favour. When the plaintiff became aware of the defendants attempt to have the land registered in his favor, he filed a prohibition to restrain the land registrar from registering the defendants interest.

On 16<sup>th</sup> January 2009, the plaintiff alleged that the defendant attempted to take possession of the suit premises with the help hooligans who were armed with crude weapons. They attempted to cut down the trees and partially demolished the plaintiff's residential house while claiming the suit premises. This is what snow bowed into the present application by way of chamber summons which was filed by the defendants simultaneously with the suit. This application is brought under the provisions of order XXXIX of the Civil Procedure Rules. The plaintiff is seeking for orders that the defendant be restrained from cutting trees, destroying the plaintiff's house or dealing in any way with the land parcel no. Nyandarua/Kanyagia/13.

This application is premised on the grounds that the plaintiff purchased the land from the defendant for valuable consideration. The plaintiff settled on the suit premises with his family. He was confirmed by the settlement fund trustee and the District Land Registrar as the owner of the suit premises. This application is supported by the affidavit of Mutitu Muraya. He has elaborated further the above grounds in greater details.

According to the plaintiffs counsel Mr. Githui, the plaintiff purchased the land between 1965 and 1966. He took possession of the premises therefore he had a valid claim of adverse possession, in the alternative, a claim based on equitable estoppel. The plaintiff demonstrated with evidence that he purchased the suit premises. There was a dispute between the plaintiff and the defendant which gave rise to Hccc No.188/1974 in Nakuru which was dismissed for want of prosecution. Counsel explained that there was a mistake when they filed the application and indicated the suit was decided in favour of the

plaintiff. He acknowledged that the suit was dismissed for want of prosecution which means that the plaintiff can bring another suit under order XVI rule 6 of the Civil Procedure Rules. If a suit has been dismissed for want of prosecution another suit can be filed subject to the Limitation of Actions Act.

According to counsel for the plaintiff, the cause of action accrued from January 2009 and they are entitled to bring a fresh cause of action. Counsel further submitted that they had fulfilled the conditions for granting an interim injunction by demonstrating a prima facie case with a probability of success. The defendants allowed the plaintiff to construct his dwellings on the suit premises for the last forty years. Therefore damages will not be sufficient compensation. On the balance of convenience, counsel urged the court to find that it tilts on the side of the plaintiff.

Formidable opposition was put forth by the defendants who relied on his replying affidavit sworn on 29<sup>th</sup> January 2009. He denied that the plaintiff purchased the suit premises as alleged. He contends that the plaintiff had paid Ksh.6000/- only towards the purchase price and failed to pay the balance. On that account, the defendants refused to transfer the land to the plaintiff. This prompted the plaintiff to file **Hccc Nakuru No.188 of 1974** which suit raised similar issues as the present suit. The defendant contends that the suit proceeded ex parte because the plaintiff failed to serve him with the court summonses. Judgment was entered against the defendant and when he became aware of the ex parte judgment, he successfully applied to set it aside as per the decree annexed to his affidavit. However, prior to setting aside the ex parte judgment, the plaintiff had extracted a decree purportedly allowing the transfer of the land and authorizing the executive officer to execute the necessary transfer instruments in the plaintiffs favour.

By an order issued on 25<sup>th</sup> July 1980, the defendant managed to obtain an order restraining the transfer of the suit land to the plaintiff. Eventually the plaintiff's suit was dismissed on 15<sup>th</sup> November 1980 after he failed to attend court. According to the defendant, the plaintiff forcefully took part of the suit premises in 1973 and continued to interfere with the defendant's peaceful occupation of the suit land until 1990 when he vacated the land but some portions were invaded by squatters. Subsequently, the plaintiff filed another suit being **Nakuru SRMCC No.563 of 1983** and as usual, did not serve the court summonses on the defendant. Ex parte judgment was entered against the defendant. In that suit the plaintiff was claiming the purchase price of the suit premises. A decree and a warrant of attachment was issued against the defendant and his tractor registration No. KSC 855 was attached and sold by Samburu Auctioneers in liquidation of the plaintiffs claim.

According to the defendant, the plaintiff received the purchase price and therefore has no claim over the suit premises. According to counsel for the defendant the present suit is *res judicata*. The plaintiff ceased to have any claim on the defendant's parcel of land. This is confirmed by the affidavit sworn by Simon Mwangi Kariuki the senior assistant chief Muruai sub location who confirmed that the plaintiff has been residing in Muruai sub location with his family since 1983. A further affidavit by David Gachoya Ndungu the assistant chief Kanyagia sub location confirmed that the plaintiff resides in Muruai sub location with his family until January 2009 when he moved into some structures erected in the defendants plot no. Nyandarua/Kanyagia/13. He also confirmed that prior to January 2009; the plaintiff was not farming on the suit land and was not residing therein.

Counsel further submitted that the plaintiff's suit has no chances of success. He did not attach a copy of the sale agreement to demonstrate that there was any intention of sale. It is trite that sale of land should be executed in writing even if there was a sale agreement; the same would be null and void for want of land control board consent. The two affidavits by the area chief and searches annexed to the affidavit by the defendants clearly show the plaintiff owns two parcels of land. That is Nyandarua/Muruai/427 and Nyandarua/Muruai/426. Therefore he cannot claim that he will suffer irreparable damages.

Further the prayers sought by the plaintiff are equitable in nature. The plaintiff is supposed to demonstrate good faith and should approach the courts with clean hands. However the plaintiff misrepresented facts that Hccc No.188 of 1974 was decided in his favour. There is also a copy of the judgment which is deliberately altered to mislead the court.

Having set out the summary and the background of this matter including the rival submissions by the counsel for the plaintiff and the defendant, the following issues are for determination. Whether the plaintiff has established a prima facie case with a probability of success. The principles of granting an interim order of injunction are settled in the oft cited case of **Giella v Cassman Brown Company Limited**. The conditions are that the applicants must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise. And if in doubt, then the court would determine the matter on a balance of convenience. Applying the above conditions to the present case, it is determinable from the facts and it is indeed not disputed that the plaintiff herein filed **Hccc 188 of 1974** which was dismissed for want of prosecution.

As can be seen by the proceedings of **J.W. Meand J.** dated 22<sup>nd</sup> November 1980. The plaintiff has also not denied that he instituted before the subordinate court SRMC No. 563 of 1983 in which judgment was entered against the defendants to recover the purchase price and the defendant's property was attached. Moreover, the plaintiff did not approach this court with clean hands when the application for the interim orders was filed. This material information was not brought to the attention of the court. This is compounded by deliberate misrepresentation of the outcome of Hccc No.188 of 1974 through falsified court documents.

During the hearing of this application, counsel for the plaintiff admitted that the suit was dismissed for want of prosecution but tried to explain that his client was an old man who does not understand the court processes. This is indeed no excuse because the plaintiff was represented by the counsel. In any case ignorant of the law has never been a defence. An issue was raised that the plaintiff has no cause of action since Hccc No.188 of 1974 raised similar issues and was dismissed for want of prosecution.

Under order XVI rule 6, if a matter is dismissed for want of prosecution the plaintiff can, subject to the law of limitation, bring a fresh suit. The plaintiff's suit was dismissed in 1980. This suit is being brought after about 28 years. This is obviously outside the parameters of Limitations of Actions Act. The other issue which I took into consideration is the fact that the defendant is the registered proprietor of the suit premises and for those reasons the plaintiff has not established a prima facie case with a probability of success. This application for injunction cannot be granted in the circumstances. The plaintiff's application dated 20<sup>th</sup> January 2009 is hereby dismissed with costs to the defendant. The interim order of injunction granted on 20<sup>th</sup> January 2009 is hereby vacated.

**RULING READ AND SIGNED THIS 25<sup>th</sup> DAY, OF JUNE, 2009.**

**M.K. KOOME**

**JUDGE**