

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE 936 OF 2007

JAMES MACHARIA GACHUGU.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH KARANJA GITAU.....DEFENDANT/RESPONDENT

R U L I N G

This is an application by way of Chamber Summons dated 3rd August 2007 brought by the Plaintiff under Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act seeking orders:-

(1) That the Defendant by himself, his servants, agents, and/or employees be restrained by a temporary injunction from entering into, trespassing on and/or in any other way interfering with the Plaintiff's property known as **LR No GATAMAIYU/GACHOIRE/924** pending the hearing and determination of this suit.

(2) That the Honourable Court be pleased to issue eviction orders against the Defendant pending the hearing and determination of this suit.

(3) That the Defendant by himself, his servants agents and/or employees be compelled by a mandatory injunction not to cultivate the Plaintiff's land known as

LR No. GATAMAIYU/GACHOIRE/924 pending the hearing and determination of this suit.

The Plaintiff also prays for costs of this application. The application is abased on the grounds as stated on the body of the Chamber Summons and supported by an affidavit sworn by the Applicant on 3rd August 2007 in which he avers that he brought the suit land in 1975 being **LR No GATAMAIYU/GACHOIRE/650** measuring 5 Acres with his brother one John Nairangi; that in 1988 the suit land was subdivided into 2 equal parcels resulting into **LR No GATAMAIYU/GACHOIRE/924** and **925**; that he was registered as proprietor of **LR No GATAMAIYU/GACHOIRE/924**; that thereafter he started cultivating his said parcel of land as he was not living on the plot; that the Respondent has since trespassed into the land destroying the fences therein and started cultivating the suit land and also grazing his animals on the suit land; that the matter was reported to the police and the District Officer; that the Respondent was later arrested and charged with a criminal offence of forceful detainer contrary to Section 91 of the Penal Code in Criminal Case No 3243 of 2003 at the Chief Magistrate's Court Nairobi and was convicted and that despite the conviction, the Respondent has continued staying on the suit land without any colour of right and has continued cultivating potatoes and other crops on the suit and continues to graze his animals on the same.

In paragraph 4 of the Plaint the Plaintiff/Applicant states that the Respondent had trespassed on to the suit land between 2003 and 2007 and built some structures thereon. The Defendant on being served with the pleadings filed a defence in which he stated that he has been on the suit land for the last 35 years and has developed the same and that the Plaintiff is fully aware of this fact and the same is admitted in paragraph 4 of the Plaint.

That being the position prayer 1 of the Chamber Summons dated 3rd August is not tenable as an order of injunction cannot issue against a party who is already on the suit land before the suit was filed.

Further prayers 2 and 3 of the Chamber Summons are not also tenable before the suit is heard and determined.

For the reasons stated above the Plaintiff's Chamber Summons dated 3rd August 2007 fails and the same is dismissed with no order as to costs.

Delivered and dated at Nairobi this 11th day of June 2009.

J. L. A. OSIEMO

JUDGE