



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ELECTION PETITION 243 OF 2009**

**MAUREEN WATHIRA MWENJE ..... 1<sup>ST</sup> PLAINTIFF**

**ERIC KAMAU MWENJE ..... 2<sup>ND</sup> PLAINTIFF**

**VS.**

**DAVID KINYANJUI NJENGA ..... 1<sup>ST</sup> DEFENDANT**

**MONICA WANGUI NJENGA ..... 2<sup>ND</sup> DEFENDANT**

**GRACE NJERI NJENGA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiffs/applicants in this suit have moved the court by way of originating summons claiming to be entitled to be owners of land parcels Nos. LR.10060/6, 10060/9 and 10060/12 and also that the defendants be restrained from evicting them from the said parcels of land.

Following the filing of the said originating summons they brought an application by way of chamber summons for restraining orders against the defendants. By a sale agreement dated 20<sup>th</sup> March 1992, the then owner of the said parcels of land one, Njenga Mathu agreed to sale to one David S. K. Mwenje (now deceased), the said properties at an agreed price. According to the said sale agreement, pending completion of the sale, the vendor would allow the purchaser to occupy the three buildings situate on the property as a tenant at a monthly rent of Kshs.7,500/= payable every 1<sup>st</sup> day of the month in advance.

The sale did not go through and therefore, the advocate for the vendor asked the then purchaser to give vacant possession. This he did not do. It is now the claim of the applicants herein that having held onto the said premises after the sale aborted they are entitled to be registered as proprietors based on adverse possession.

There is evidence that when the original owner failed to sell the property to the original purchaser, it was sold to the defendants herein. There is also evidence that two cases have been field previously in relation to the said premises. These are **High Court Civil case No.3193 of 1993** and **High Court Civil Case No.1110 of 2000**.

The application for injunction is opposed by the defendants and both learned counsel have addressed the

court on the same.

I agree that for the applicants herein to succeed, they must establish first that they have a *prima facie* case with a probability of success. Secondly, such an order will not be granted unless the applicants might suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide the application on a balance of convenience (see **Giella vs. Cassman Brown & co. Ltd. [1973] EA 358**).

It is now trite law that where an owner of a property takes legal proceedings against the respondent and in this case the occupier of the property, then time ceases to run in favour of the party claiming advantage of that time, and therefore, the applicants must show that there are no proceedings that have been instituted by the defendants who are now the legal owners of the property to claim that their time in occupying the said premises has been continuous. In the event that is not shown, then they will have failed to establish a *prima facie* case against the defendant.

If it is true that the defendants herein filed a suit against the applicants in the year 2000, then that was a material interruption of the time in favour of the applicants. The filing of **HCCC No.1110 of 2000** has not been disputed. Distress for rent has been alleged in this case. However, if that be the case, the applicants cannot claim adverse possession if at the same time they claim to be tenants with the same breath. The applicants have not shown with profound respect that they are likely to suffer irreparable injury which cannot be compensated by an award of damages.

Having failed to establish a *prima facie* case and having failed to establish that the injury cannot be compensated by an award of damages, then the application by the applicants must fail. I am not in doubt about the said findings, but even if I were, I would still find that the applicants cannot have the orders sought otherwise, I would be acting against the interest of the defendants who have displayed ownership of the said properties.

I must therefore find as I hereby do, that the application by the plaintiffs must fail and it is so ordered.

The applicants must now pay the costs of this application to the defendants.

Orders accordingly.

Dated, signed and delivered at Nairobi this **21<sup>st</sup> day of July, 2009.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

*Mr. Mutinda for Kaburu for the Plaintiff/Respondent*

*Miss Gitau for M/s Kirugumi for the Applicants*