

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HCCC 38 OF 2006

JAMES KARIUKI MURETE.....APPLICANT

VERSUS

NICHOLAS NGUTHI KIVINDA.....RESPONDENT

JUDGMENT

The plaintiff sought by Originating Summons for orders that the plaintiff be declared to have acquired by adverse possession property parcel **No. Nthawa/Gitiburi/2444** and that the Defendant is holding title as trustee for the Applicant/Plaintiff. Secondly that the Defendant be ordered to execute all documents failing which the same be executed by the Executive Officer of this court be ordered to do so. The Plaintiff also claims costs. The grounds upon which the suit is based is set out on the Originating Summons mainly that the plaintiff's father purchased and was registered as a first proprietor on 28/5/1984 and that plaintiff has lived on this land for over 12 years in adverse possession exclusively openly continuously without interruption. The plaintiff has fraudulently got de-registered and the Defendant is now the registered owner

By an interlocutory application dated 27/7/2006 the plaintiff seeks orders and orders 1 & 2 have already granted prayers 3, 4, and 5 were argued by all parties before this court. It was shown by the Applicant that plot No. 2444 in dispute was a partition of plot No. **Nthawa/Gitubiri/886** as shown in the exhibit "**AN 1**" exhibited by 2nd defendant. It is also shown that in **HCC (Embu) No. 37/2004** the first Defendant sued the plaintiff here for eviction but the order was stayed on 16/11/2005. That suit was in respect of same land. While that suit was pending on 15/5/2005 the land was sold to 2nd Defendant. Plaintiff argues that the first Defendant did not inform the second defendant that there was a suit pending. Furthermore that if the 2nd Defendant had inspected the land he should have seen that there were persons with overriding interests protected under section 30 Registered land Act. The applicant was in possession in this case and will suffer irreparable loss. To the contrary none of the Defendants reside on the land and they will suffer no loss at all. The Plaintiff cited the following cases:-

1. Aikman – Vs – Muchoki 1984 KLR 153.
2. Issa Leshan & 5 others –Vs- Kipoki Oreu Tasire & 11 others, Court of Appeal Civil Application No. 216 of 2003 and
3. Njuguna Ndatho –Vs- Masai Itumo & others, Court of Appeal Judgment.
4. Kolongai Farmers Co. Society Ltd –Vs- Tom Kevolwe Arizingale & others.

Mr. Okwaro argued on behalf of first and second Defendant. He submitted that the plaintiff has not demonstrated a prima facie case though he is claiming by adverse possession.

I have considered the arguments on both sides. It is not disputed that the Applicant has resided over the land for over the prescriptive period of 12 years. He is still in possession. The situation is volatile to get

him evicted before evidence has been taken at a trial. He says his father was the first registered proprietor. He alleges fraud evidence to support these allegations can only be tested at the hearing of suit. I agree with the advocate for the plaintiff that the irreparable loss would be suffered by the plaintiff by the failure of this court to protect him having been on the land for 40 years. He is entitled to continue on the land until the suit is finalized. For the above reasons I find that the balance of convenience tilts on the plaintiff's side.

I grant the orders sought under prayer 3 and prayer 4 pending the full hearing and determination of this suit. The costs of this application shall be in the cause.

It is so ordered.

Dated this 26th September, 2007.

J. N. KHAMINWA

JUDGE