

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 177 of 2006

ESTHER WANGUI MURAYA.....PLAINTIFF

VERSUS

NAFTALI WAIGWA GITHINJI.....DEFENDANT

RULING

The plaintiff, Esther Wangui Muraya has filed an originating summons under the provision of Section 38 of the Limitation of Action Act, Cap. 22 Laws of Kenya. She seeks to be declared to have acquired title in respect of a parcel of land known as LR. No. 7071 Molo Township measuring 6.26 acres (*hereinafter referred to as the suit land*) by having been in adverse possession of the suit parcel of land for a period of more than forty two (42) years. At the time of filing the suit, the plaintiff filed an application for injunction under Order XXXIX rule 1 of the Civil Procedure Rules seeking an interlocutory order to be issued restraining the defendant from alienating, transferring, charging, disposing, entering, dealing with or interfering with the plaintiff's quiet enjoyment of LR. No. 7071 Molo Township pending the hearing and determination of the suit or further orders of the court. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The defendant Naftali Waigwa Githinji has filed a replying affidavit in opposition to the said application.

At the hearing of the application, I heard the submission made by Mr. Muhia on behalf of the plaintiff and by Mr. Mongeri on behalf of the defendant. The issue for determination by this court is whether the plaintiff has established a case as to enable this court grant her the order of interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the application for injunction sought are well settled. The Court of Appeal in the case of Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society [2001]1E.A. 86 stated at page 89;

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella -vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

In the present application certain facts are not in dispute. The defendant and the husband of the plaintiff one John Muraya Githinji, who is now deceased, entered into an agreement whereby the deceased and his family were to reside on the suit land on the understanding that the deceased would purchase the said parcel of land from the defendant. It is apparent that the deceased and the member of his family (*including the plaintiff*) took occupation of the suit land at least by the year 1974 according to an agreement which was entered between the defendant and the deceased dated the 28th May 1974 and which was annexed to the replying affidavit filed by the defendant.

It is also further apparent that the deceased did not pay a single cent to the defendant. Several correspondences were exchanged between the deceased and the defendant. The tone of all the said letters which were annexed to the affidavits filed in the application was that the deceased would only stay in occupation of the suit land after he had paid some purchase consideration to the defendant. However, it is also apparent from the said correspondences that the defendant did not make any effort to terminate the

occupation of the deceased and the members of his family from the suit land. The situation remained the same until the death of the deceased. It is only after the death of the deceased that the defendant now has made a positive move to have the plaintiff and her children vacate the suit land.

It is the plaintiff's claim that she has occupied the said parcel of land for a period of over forty two years. This has not been denied by the defendant. He however depones that the plaintiff occupied the said parcel of land with his permission and not in such circumstances as to entitle the plaintiff and the members of her family to claim that they had acquired title to the suit land by the operation of the law of adverse possession.

I have carefully considered the facts of this case and also the submissions which were made before me by the counsels for the plaintiff and the defendant. I do hold that the plaintiff has established that she has a prima facie case. She has been and continues to be in possession of the suit land. The fact that she has occupied the suit land for a long period of time is not denied by the defendant. It is my opinion that during the lifetime of the husband of the deceased, the defendant could not muster enough courage to remove the deceased and the members of his family from the said parcel of land. It is only after his death that the defendant has made moves to have the plaintiff, the widow of his late brother, and her children vacate the suit land. In my view, it is clear that the defendant had accepted that the deceased and the members of his family were in legitimate occupation of the suit land. In the circumstances of this case therefore it is imperative that this court preserves the status quo pending the hearing and determination of the main suit.

The upshot of the above reasons is that the application for injunction filed by the plaintiff is allowed. The defendant is restrained by means of a temporary injunction from interfering with the plaintiff's possession and occupation of all that parcel of land known as LR. No. 7071 Molo Township pending the hearing and determination of the suit filed by the plaintiff. The plaintiff shall have the costs of the application.

DATED at NAKURU this 20th day of December, 2006.

L. KIMARU

JUDGE