



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 334 OF 2004

CHIROIRO NDEREBA NJIRIPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI1ST DEFENDANT

PETER KYALUNGU.....2ND DEFENDANT

GEDION NZIOKA3RD DEFENDANT

ABDIRAHIMAN MUHUMED ABDI.....4TH DEFENDANT

R U L I N G

Chiriro Ndereba Njiri (hereinafter referred to as "**the plaintiff**")

Claims to be the owner of the piece or parcel of land situate in Nairobi (Eastleigh) known as L. R. No. 36/11/126 (hereinafter referred to as "**the suit land**"). Although he is not registered as proprietor of the suit land pursuant to the provisions of the Government Lands Act [Cap], he says he has been in continues and uninterrupted occupation thereof since 1955. He built 280 temporary Structures on the suit land for residential purposes for himself and his family and for occupation by tenants.

On the 30th March 2004 Peter Kyalungu (the Second Defendant) and Gedion Nzioka (the Third Defendant) who are both employees of the City Council of Nairobi (hereinafter referred to as "**the First defendant**") attached to the Inspectorate Department, invaded the suit land, destroyed the structures and evicted the Plaintiff and his family, The Plaintiff claims that the invasion and eviction were instigated by Abdirahiman Muhumed Abdi (hereinafter referred to as "**the fourth Defendant**").

Consequently upon his eviction, the Plaintiff filed a suit against the Defendants on the 6th April 2004 seeking a permanent injunction restraining the Defendants from dealing with the suit land or interfering with his possession; a declaration that he is the legal owner of the suit land; and general damages. On the same day, the Plaintiff applied for a temporary injunction under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules for the same reliefs in a Chamber Summons application dated the 6th April 2004. As the matter was urgent, the Plaintiff was granted an interim injunction, pending the hearing of his application *inter partes*. Being dissatisfied with that *ex-parte* order, the Fourth Defendant moved the court in a Chamber Summons application dated and filed on the 9th July 2004 seeking to set such order aside and by consent of the parties, both such applications were consolidated and heard together and are the subject

of this ruling.

In his supporting, replying and supplementary affidavits respectively made on the 6th April 2004 and the 27th July 2004. the Plaintiff repeated the averments in the Plaintiff. He deponed that in 1979, one Samuel Mugo Karanja filed a suit (being HCCC No.2262/79) and was declared to be the rightful owner of the suit land and was registered accordingly. The Plaintiff claims to have been unaware of those proceedings. In July 1999, the Plaintiff heard that Karanja was in the process of selling the suit land and he immediately filed a suit against him (being HCCC No, 1405 (OS)) claiming title by adverse possession, In the meanwhile, Karanja had also filed a suit against the Plaintiff (being HCCC No. 1344 of 1999) seeing an injunction to restrain the Plaintiff from interfering with the suit land. These two suits (Nos. 1405 and 1344) were consolidated and heard together by Ransley, C.A. (as His Lordship then was) who on the 10th May 2000 dismissed Karanja's case (No. 1344) and gave judgment for the Plaintiff in case No. 1405 and declared the Plaintiff the legal owner of the suit land. The learned Commissioner of Assize found that the Plaintiff had lived on the Suit land for over fifty years and had acquired title thereto by adverse possession.

In their replying affidavit made and filed on the 28th April 2004 by the Third Defendant, the First, Second and Third defendants denied the Plaintiff's claim. In opposition to the plaintiffs application, the Fourth Defendant relied on his replying and supporting affidavits sworn on the 28th April 2004 and the 9th July 2004 respectively putting forward the defence of a *bona fide* purchaser for value without notice having been registered as owner of the suit land on the 22nd July 1999 at the price or sum of K. Shs. 3,500,000/= which he paid in full. He further deponed that he was not a party to the suit between the Plaintiff and Karanja and that at the time he became registered, there was no caveat on the title to the suit land forbidding the registration of the deed of conveyance in his favour.

Mr. Gikonyo, learned counsel for the Plaintiff, submitted that the Plaintiff had acquired title by adverse possession having occupied the suit land continuously and without interruption since 1955 right up to 30th March 2004 when he was illegally evicted by the Defendants acting in concert. He pointed out that the plaintiff's title has been confirmed by a judgment and decree of a court of competent jurisdiction. He attributed the Plaintiff's failure to perfect his title (*inter alia*) to the lawful acts of the First and Fourth Defendants, amongst other persons.

The case put forward by Mr. Koech, learned counsel for the First, Second and Third Defendants, is that they demolished the plaintiffs structures erected on the suit land because they were entitled to do so under the relevant by-laws of the First Defendant upon giving notice, which they claim they did, These Defendants denied acting in collusion with the Fourth Defendant or having been instigated by him.

As I have already observed, the submissions by Mr. Wachira, learned counsel for the Fourth Defendant, was that the Fourth Defendant was a *bona fide* purchaser for value without notice and that he stands to suffer irreparable loss if the court grants the injunction sought by the Plaintiff who in any event is not entitled to this equitable remedy for failure to disclose material facts to the court when the *ex-parte* order was granted. Mr. Wachira emphasized that the Fourth Defendant has already embarked on the construction of an elaborate commercial building on the suit land.

The agreement for sale between Samuel Mugo Karanja and the Fourth Defendant made on the 5th June 1999 and the Fourth Defendant became the registers owner of the suit land on the 22nd July 1999. It is significant that by the time the Fourth Defendant was being registered as proprietor on the 22nd July 1999, the Plaintiff had already filed case No. 1405 (OS) on the 15th July 1999 challenging Samuel Karanja's title. As from the 22nd July 1999 when the Fourth Defendant was registered as owner, he became entitled to enjoy the benefits that go with ownership. From that date, Samuel Karanja had absolutely no further legal or beneficial or equitable Interest in the suit land. Yet that notwithstanding, and for some strange reason, Karanja did on the 23rd September 1999 institute case No.1344 of 1999 against the Plaintiff and asked for an injunction to restrain the Plaintiff from interfering with what he termed as proprietary rights. I am completely at a loss to comprehend what "**proprietary rights**" Karanja retained in or over

the suit land after selling and conveying his title to the Fourth Defendant.

So I have to ask myself the question why Samuel Karanja filed suit No. 1344 of 1999 against the Plaintiff. A little common sense suggests that he could only have done so at the request and for the benefit of the Fourth Defendant, the registered proprietor. The Fourth Defendant could not take the risk of adopting that course of action himself because if he did so, then his defence of a *bona fide* purchaser for value without notice would collapse.

I have already noted that Karanja's suit was dismissed by Ransley, C. A., There is no evidence of any appeal being preferred by either Karanja or even by the Fourth Defendant who could have appealed as a person directly affected by that decision, The Fourth Defendant must have been made aware of the institution of the two cases (Nos. 1405 and 1344) but he chose not to apply to be joined as an interested party in either or both. He has also not explained why he has not taken any steps to evict the Plaintiff from the suit land since the 22nd July 1999 when the Fourth Defendant became the registered owner thereof. In those circumstances, his claim to be a *bona fide* purchaser for value without notice may well not be true. But that is a defence upon which only the trial court can arrive at a concluded view after hearing all the evidence - a role I certainly do not wish to usurp at this stage.

The Plaintiff has lived on the suit land with his family for over half a century and he has a decree granting him title by adverse possession against which no appeal has been lodged. The Fourth Defendant's claim is based solely on being registered as proprietor having purchased the suit land from Samuel Karanja, In my judgment, it would be grossly wrong to allow the Fourth Defendant to continue with construction on the suit land and to allow the other Defendants to evict the Plaintiff from the suit land which has been his home without investigating the circumstances in which the Fourth Defendant became registered as the owner. As between the Plaintiff and the Fourth Defendant, the Plaintiff is likely to suffer far greater loss and damage if an injunction is not granted. As for the Fourth Defendant, he will suffer only delaying the progress of his project. The right to a home a fundamental human right and am not prepared to sign away the Plaintiff's home without first giving him the opportunity to prosecute his case, I these circumstances, and even if I were in doubt, the balance of convenience appears to me to favour the Plaintiff.

Accordingly, the Fourth Defendant's Chamber Summons application dated and filed on the 9th July 2004 fails and is hereby dismissed with costs. The plaintiff's Chamber Summons application dated and filed on the 6th April 2004 succeeds and it is ordered that an injunction be and is hereby granted in terms of prayer No,2 thereof restraining the Defendants and each of them jointly and severally, their servants and agents or otherwise howsoever from evicting the Plaintiff from the suit land or interfering with his enjoyment or otherwise dealing therewith and in the case of the Fourth Defendant he is further restrained from alienating or charging or Offering as collateral the suit land until the hearing and final determination of his suit or further order. The Plaintiff will have the costs of the application and it is also so ordered.

Dated and delivered at Nairobi this 4th day of March 2005.

P. Kihara Kariuki

Judge