



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Civil Suit 409 of 2003 (OS)**

**RUGA GITUKU alias NDONGA WAMBUGU...PLAINTIFF/PPLICANT**

**-VERSUS**

**TARASICIO THUMBI.....1ST DEFENDANT/RESPONDENT**

**MUCIKU KARIUKI.....2ND DEFENDANT/RESPONDENT**

**NGANJI THUMBI.....3RD DEFENDANT/RESPONDENT**

**RIWEL KIIRU.....4TH DEFENDANT/RESPONDENT**

**MURIITHI MAINA.....5TH DEFENDANT/RESPONDENT**

**FRANCIS KIHARA.....6TH DEFENDANT/RESPONDENT**

**GITHUKU GATIHA.....7TH DEFENDANT/RESPONDENT**

**KIHU KIRUMA.....8TH DEFENDANT/RESPONDENT**

**CHEGE KABIRO.....9TH DEFENDANT/RESPONDENT**

**SIMON GICHUKI.....10TH DEFENDANT/RESPONDENT**

**MUCIRI GAKURU.....11TH DEFENDANT/RESPONDENT**

**RULING**

The plaintiff took out a Chamber Summons dated 2nd May, 2003 under Order XXXIX, rules 1, 2, 2A of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap.21). The prayers brought before the Court are as follows:

(a) that, the defendants, their agents and/or servants be restrained from evicting the plaintiff or entering, remaining in or otherwise taking possession of the parcel of land known as L.R. No. 39/111/1113, Eastleigh, Nairobi pending the determination of the Originating Summons;

(b) that, the defendants, their agents and/or servants be restrained from alienating, charging, selling or otherwise disposing of or in any other manner encumbering the title to the suit land, pending the determination of the Originating Summons;

(c) that, all other matters relating to the suit land in any way whatsoever, be stayed pending the hearing and determination of this suit.

The application is premised on the following grounds:

- (i) that, the plaintiff claims to be entitled to be registered as owner of the suit land by virtue of adverse possession;
- (ii) that, interruption of the plaintiff's peaceful and exclusive possession of the suit land might defeat the plaintiff's claim to ownership of the suit land by way of adverse possession, and prejudice his suit herein;
- (iii) that, land, the subject matter of the suit, entails that the plaintiff's loss if evicted therefrom, is unlikely to be adequately compensated by way of damages.

Evidence in support of the application is found in the plaintiff's affidavit dated 30th April, 2003. He avers that he has lived on L.R. No. 36/111/1113, Eastleigh in Nairobi openly, peacefully and as of right for an uninterrupted period of more than 12 years; and that at all material times the suit land has been registered in the names of the plaintiff jointly with all the defendants who were partners in the firm known as Gikondi Katiba Bus Service. The suit land was acquired by the defendants in 1968. In 1986 all the other part-owners of the suit land offered the same to the plaintiff for sale; and they then entered into an agreement for sale of the land. Since about 27th February, 1989 the plaintiff has been in possession of the suit land openly, peacefully, exclusively and continuously as the owner of the same. The deponent avers that the defendants, for no apparent reason, refused or neglected to sell the suit land to him even though he remained in possession of the same. Subsequently the defendants gave a notice to terminate the tenancy, even though the deponent avers that he has never entered into any tenancy relationship with the defendants. The plaintiff pleads that if he is evicted from the suit property he will suffer irreparable loss, as he will be deprived of his claim to ownership of the said property by adverse possession — and the suit herein might be rendered nugatory. Such loss, the deponent avers, is unlikely to be adequately compensated by way of damages.

A replying affidavit was, on 15th May, 2003 sworn on behalf of the defendants by Muciku Kariuki, the 2nd defendant. He avers that the plaintiff has been a monthly tenant of the defendants since 27th November, 1989 when the negotiations for sale of the suit land to him collapsed. He averred further that the defendants had served the plaintiff with a statutory notice under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) on 20th February, 2003 to pay arrears of rent amounting to Kshs.1,071,450/=, representing Kshs.6,000/= per month up to and including January, 2003. It is deponed that the said notice expired on 1st May, 2003. The deponent avers that on 28th September, 1995 the defendants and the plaintiff held a meeting to discuss the sale of the suit property, L.R. No. 36/111/1113, Eastleigh, Nairobi by the defendants to the plaintiff. The plaintiff offered to purchase the property for Kshs.600,000/= but some of the defendants wanted this figure increased, and some others were unwilling to sell their shares. It is deponed that at the said partners' meeting of 28th September, 1995 the plaintiff paid to the participants Kshs.10,600/= as sitting allowance, and this was marked as part of the rent payable by him in respect of plot No. L.R. 36/111/1113 aforesaid. It is further deponed that all the partners except the plaintiff met on 23rd February, 1999 and fixed the sale price for the suit plot at Kshs.3,500,000/=. This determination was later, on 6th October, 1999 confirmed at a meeting of all the partners including the plaintiff, on which occasion the plaintiff paid the participants a sitting allowance of Kshs.5,500/=, this being treated as part of outstanding rent payment. The deponent avers that in three meetings held by the plaintiff and the defendants, the defendants asserted their ownership of the suit premises, and considered the issue of its sale and pricing; but the plaintiff failed to raise the named price.

Senior counsel, Mr. Wamae, for the plaintiff/applicant submitted that the plaintiff had a well-based claim, to be registered as the owner of the suit land, on account of adverse possession which has been running since 1989. Although counsel stated that the defendants had offered the land for sale to the plaintiff, and that they indeed went ahead and sold the same to him, this is denied in the relying affidavit, and it will not at this interlocutory stage, be possible to establish the true position. It will be an important question for determination at the hearing of the plaintiff's Originating Summons of 2nd May, 2003. The applicant has

already attempted by the instant application to lay a foundation for an adverse possession claim. He says that it was on 27th November, 1989 that the negotiations towards a purchase of the suit premises, by the plaintiff, collapsed: and therefore his continuing thenceforth to retain possession, by occupying the premises openly, exclusively, peacefully and continuously, was an assertion of adverse title which should now be honoured and validated with the necessary change to title registration. The collapse of negotiations is said to have been marked by a demand for rent by the defendants, in an attempt to make the plaintiff a tenant-at-will.

Mr. Wamae sought to reinforce his argument with the Court of Appeal's decision in *Wambugu v. Njuguna* [1983] KLR 172. The relevant part of the judgement appears in the headnote (p.73):

**“Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the Limitation of Actions Act but time cannot run in favour of a licensee ...**

**“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated. In this instance, time began to run once the appellants sent a letter to the respondent terminating the agreement.”**

Mr. Wamae submitted that it was at least 12 years since negotiations for the purchase of the suit premises ended in failure; and therefore he has been holding the property and occupying it adversely to the title-rights of the defendants. Counsel urged that pending the hearing of the adverse possession claim being made by Originating Summons, nobody should purport to be a landlord, and on that basis levy distress for rents. It was submitted on the basis of *Wambugu v. Njuguna*, that the plaintiff had not been a licensee, and was in the circumstances entitled to have time running in his favour, in relation to the operation of the doctrine of adverse possession.

On those foundations, Mr. Wamae prayed for the grant of injunctions in the interim period, pending the hearing and determination of the main suit, which was based on the cause of action of recovery of land.

Learned counsel for the respondent, Mr. Kiriba, contended that the application was based on falsehood and should be dismissed.

That is an intriguing proposition. Both sides in the dispute had given their evidence in the form of depositions. It is difficult to tell which one of these contrasting affidavits has given the correct and the truthful account of the facts. Indeed, the questions involved in the sphere covered by the conflicting evidence, are so broad in nature as to eminently call for determination only after a full hearing.

It is difficult, therefore, to concede to the contention that the statements of fact placed before the Court are, at this stage, so misguided that the prayers for an interlocutory injunction ought not to be entertained. At this stage the Court can only be guided by prima facie merits. I have considered the fact that the plaintiff has been in occupation for a long time — a fact not disputed by the defendants. He remains in occupation, and is seeking an opportunity to prove that he should be confirmed as the lawful owner of the suit premises. If he has no basis for making such a far-reaching claim, the defendants will be in Court to demonstrate this — and he runs the risk of losing out and paying costs. In the meantime, the plaintiff is in possession and is, without doubt, the party destined to lose the most, in the event of any disturbance to the status quo. This, I think, is a fit situation for the preservation of the status quo pending trial on the merits.

Being guided by these considerations, I will grant the plaintiff's prayers, and order as follows:

**1. The defendants, their agents and/or servants shall hereby, be restrained from evicting the plaintiff, or entering, remaining in, or otherwise taking possession of the parcel of land known as**

**L.R. No. 39/111/1113, Eastleigh, Nairobi pending the determination of the plaintiff's Originating Summons of 2nd May, 2003.**

**2. The defendants, their agents and/or servants shall hereby be restrained from alienating, charging, selling or otherwise disposing of, or in any manner encumbering the title to the suit property, pending the determination of the Originating Summons.**

**3. All other matter related to the suit land in any way whatsoever, shall hereby be stayed, pending the hearing and determination of the instant suit.**

**4. The costs of this application shall be in the cause.**

*Orders accordingly.*

DATED and DELIVERED at Nairobi this 10th day of June, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff/Applicant: Mr. Wamae, instructed by M/s. P.M. Wamae & Co. Advocates**

**For the Defendants/Respondents: Mr. Kiriba, instructed by M/s. V.E. Muguku Muriu & Co. Advocates.**