



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT NO. 27 OF 2004 (O.S.)**

**JOSEPH KAMWETI NGUGI.....PLAINTIFF**

**VERSUS**

**REFRACTORS LIMITED.....1ST DEFENDANT**

**MR. NGARUIYA )**

**DUNCAN NJAGI )**

**NDUNGU NGARUIYA (sued as officials )**

**of Munyu Tree Nursery Self Help Group) .....2ND DEFENDANTS**

**RULING**

The Plaintiff filed an application by way of a Chamber Summons dated 30th January, 2004 praying for an order of injunction to restrain the defendants, their servants and/or agents or any other person claiming authority from them from selling, alienating, wasting, damaging or dealing with, in any other manner whatsoever or evicting or in any other manner howsoever interfering with his use, enjoyment and occupation of all that parcel of land known and referred to as L.R. NO. 7935/1 EBURU measuring 7 acres or thereabouts, or any part thereof pending the hearing and determination of a suit which he had filed against the defendants.

In the suit itself, brought by way of an Originating Summons, the plaintiff prayed for orders that he be registered as the proprietor of all that piece of land known as L.R. NO. 7935/1 measuring 7 acres or thereabouts having acquired title thereto by virtue of adverse possession after being in quiet, peaceful exclusive and continuous occupation of the same for a period exceeding 12 years.

In his application, he stated that he had together with his family occupied seven (7) acres of the aforesaid land for a period exceeding 24 years and had carried out substantial developments thereon. He also stated that title to the said property was in the first defendant's name and there was a danger that he was going to dispose of the land to the second Defendant or any other person and there was a likelihood that he would be evicted therefrom.

In his affidavit in support of the application, he deponed that he entered into the said parcel of land in 1970 and he had carried out substantial developments thereon including constructing a house, planting trees, fruit trees and was also rearing livestock in the property. He further deponed that he had raised his family on the said land and he had no other home. His occupation had all along been known to the first Defendant. He stated that on 27th January, 2004 he received a letter from M/S Miriti & Company

Advocates, acting on behalf of the second Defendant asking him to vacate the premises failing which he would be evicted.

He said that he would suffer irreparable loss if he was evicted from his home. He deponed that he had a prima facie case with overwhelming chances of success, contending that the second Defendant had no legal basis of threatening to evict him from the property as the same was still registered in the name of the first Defendant. The said letter from M/S Miriti & Company Advocates informed him that the first defendants had since December 2003 commenced sale of the entire portion of land to the second Defendant.

All the defendants were served with the Plaintiff's application but the first Defendant did not enter any appearance but the second Defendant instructed M/S Otieno Okeyo & Co. Advocates and filed two replying affidavits, one sworn by Mr. John Njenga, a member of the second Defendant and another one by Mr. Duncan Njagi, the secretary. Mr. Karanja, the learned counsel for the Plaintiff clarified that the property known as L.R. 7935/1 EBURU measured 278 acres and the plaintiff was occupying only 7 acres thereof and his claim was limited to that part which he occupied.

In the replying affidavit sworn by Mr. John Njenga, he deponed that he had know the Plaintiff for more than 30 years as having been employed by the first defendant as a quarry man for more than 23 years and he had been authorised by his employer to construct a dwelling house in one section of the property. He further deponed that about three years ago, the first Defendant folded its operations and the Directors informed the plaintiff and other workers of its desire to dispose of its property and gave them licence to continue in occupation pending the sale of the property and the machinery. He further deponed that the first Defendant offered to purchase two acres of land for each of its former employees from the second Defendant but the plaintiff and one other person were not agreeable to that arrangement.

Mr. Duncan Njenga deponed that the 1st Defendant and the second Defendant had entered into a memorandum of understanding dated 11th August, 2003 which defined the terms of an impending sale of the property and one of the terms therein was that the licence of the Plaintiff to occupy a part of the said property was to terminate with the signing of the Agreement for Sale. He further deponed that on 16/12/2003 the second Defendant entered into a sale agreement with the first Defendant for the purchase of the aforesaid property. The copy of the sale agreement annexed to the said affidavit showed that the completion date for the transaction was 30th June, 2006.

Mr. Karanja submitted that the plaintiff was not a licensee but was in adverse possession of the said property. He further submitted that the second Defendant was not competent to testify about the status of the Plaintiff, only the first Defendant could do so. He urged the court to grant the order of injunction as sought, arguing that since the completion date of the said transaction was 30th June, 2006, by that time the Plaintiff's case would have been finalised and the second defendant would not be prejudiced in any way.

He also submitted that change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession and for this proposition he cited the Court of Appeal decision in **GITHU VS NDEETE [1984] K.L.R. 776.**

Mr. Murage, the learned counsel for the second Defendant opposed the Plaintiff's application and submitted that the Originating Summons as the basis of the application was bad in law because under rule 3D(2) of Order XXXVI a certified extract of the title to the land in question is supposed to be annexed to the affidavit in support of the summons and this had not been done. He relied on the Court of Appeal decision in **NDUNGU GATHIRWA VS SAMMY M. KARIUKI CIVIL APPEAL NO. 65 OF 1988.**

He further submitted that the plaintiff was a former employee of the first Defendant who had been allowed by the first Defendant to occupy the parcel of land by virtue of his work and that had not been denied by the plaintiff. The structures which the plaintiff put up in the said premises were financed by the first Defendant, he stated. He therefore insisted that the plaintiff was a licensee. He submitted that the Plaintiff had not made out a prima facie case as against the defendants.

The legal principles for granting injunctions are well settled.

The plaintiff/applicant has first to prove that he has a prima facie case with a likelihood of success before he can be granted the orders which he is seeking. The applicant claims to be an adverse possessor of a portion of the first Defendant's land. He alleges that he has been in such adverse possession for a period close to 24 years. On the other hand, the second Defendant avers that the applicant is not in adverse possession of the said land but was a mere licensee of the first Defendant. It is unfortunate that the first Defendant did not enter appearance and file any documents in response to the plaintiff's claim. The crucial issue for determination in this matter is whether the applicant is in adverse possession of the land or whether he is a licensee of the first Defendant. The rights and obligations of a licensee are very different from those of an adverse possessor who has been in occupation for a period exceeding 12 years.

It is not in dispute that the Plaintiff/applicant was employed by the first Defendant some years ago and was working in the first Defendant's suit property and that he was allowed by the first Defendant to put up a dwelling house on a portion of the land. The applicant built the house and started farming activities on a portion of land which he said was about 7 acres. This he did while he was still in the employment of the first Defendant.

According to the affidavit sworn by Mr. John Njenga who was also a former employee of the first defendant, it was only three years ago when the first Defendant closed its operations and told its employees of its intentions to dispose of its property and allowed them to continue in occupation pending the sale of the property. Thereafter, some employees left but the Plaintiff and one George Owino remained in occupation to look after the land pending its disposal.

In the aforesaid circumstances, the applicant is in my view a licensee. In land law ***“a licence is a permission to enter upon land. It makes lawful what would otherwise be a trespass, and, in the absence of special circumstances, it is revocable at the will of the licensor”***. This is as per R.H. Maudsley & E.H. Burn in ***“LAND LAW, CASES AND MATERIALS”***, 4th edition.

The applicant's entry into the first Defendant's land and the developments which he did thereon would have been a trespass if he had not expressly been granted permission to do so by the first Defendant.

In ***HUGHES VS GRIFFIN [1969] 1 W.L.R. 23*** the court held that time cannot run in favour of a licensee. It therefore does not matter that this applicant has been in occupation for over 12 years. In the case of ***WAMBUGU VS NJUGUNA [1983] K.L.R. 172*** the Court of Appeal considered the issue of adverse possession and it stated that in order to acquire by the Statute of Limitations Title to Land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

Since the applicant was occupying the land with permission of the first Defendant, the occupation was not adverse. The Court of Appeal in the above matter also stated that:-

“Occupation can only be either with permission or adverse; the two concepts cannot coexist.”

Having found that the applicant was not in occupation of the land adversely, it is my view that the first Defendant or any other person acting with the first defendant's authority can lawfully terminate the applicant's licence of occupation of the land.

It is my considered view that the applicant has not established a prima facie case with a likelihood of success. Having arrived at this conclusion, it would not serve any purpose for me to consider the other issues which were raised by counsel because an injunction cannot issue unless an applicant passes the first test. I therefore dismiss the application dated 30th January, 2004 with costs to the second Defendant.

DATED, SIGNED and DELIVERED at Nakuru this 13th day of May, 2004.

**DANIEL MUSINGA**

**AG. JUDGE**

13/5/2004

Ruling delivered in the presence of Mr. Karanja for the applicant.

**DANIEL MUSINGA**

**AG. JUDGE**

13/5/2004