

IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 185 OF 2003 (OS)

JOHN MACHARIA GITHAIGA.....PLAINTIFF

V E R S U S

KAMAU PETER NGUGI.....DEFENDANT

R U L I N G

Application by way of Chamber Summons dated 26.2.2003 made under Order 39 Rule 1(a)(b), 2; Order 36 Rule 3F and 12; Section 3 of Cap 21; Section 128 of Cap 300 asking for order of inhibition order to stop 2nd Defendant from registering, transferring, dealing or alienating or disposing of any interest in LR No. CHANIA/KANYONI/1160 Secondly, restraining 1st Defendant from transferring the same plot and (b) from evicting the Plaintiff or interfering with his quiet possession.

In supporting affidavit of 26.2.2003, the Plaintiff says the suit land is now registered in the name of one PETER NGUGI MATANDA, deceased, that Plaintiff bought same land in 1970 from the deceased and that he has acquired adverse possession but that the 1st Defendant's agents are attempting to trespass on it hence this application for injunction.

The Defendant opposes the application and by his affidavit of 18.3.2003, he denies that the Applicant ever stayed in the suit land but that the Defendant and his late father have always stayed there and he still stays there with his mother. That there is a suit filed by the Plaintiff being High Court of Kenya at Nairobi Civil Case No. 4943 of 1997 between JOHN MACHARIA GITHAIGA vs. PETER NGUGI MATANDA in which he claims ownership as a result of agreement for sale.

With regards to prayer 2 for prohibitory injunction, it is noted that the Applicant did not disclose that in fact there was agreement for sale between himself and the Defendant for the purchase of the same plot. This was a material fact and even if he had stayed on the land for the years claimed, still this would not have aided his claim to adverse possession. Possession as a matter of fact, there must be conduct on the part of the claimant which indicates possession like building a house on it, cultivating, enclosing and others. The Plaintiff here merely says he has been in occupation without more. So how would he prove adverse possession? Where is his prima-facie case with probability of success? But by omitting to disclose purchase agreement the Plaintiff is trying to circumvent the effects of the legal position that is that as between vendor and purchaser a good title cannot be shown merely by proving adverse possession of land for however long a period. See **JACOBS V REVELL 1900 2 CH 858** hence if he showed it he knew he would not get injunction.

Whether damages can compensate this does not come in because that would have been possible only if indeed the Plaintiff had disclosed the purchase agreement. Here he is claiming adverse possession and evidence that he is not even in occupation, where would damages be claimed on? None. For balance of convenience, the Defendant would loss more if I grant injunction than the Plaintiff if I refuse to grant. The Plaintiff has come to equity with dirty hands. Injunction cannot issue.

There is no basis on which prohibition can be registered under Section 128 of Cap 300.

Application refused with costs.

DATED at Nairobi this 23rd day of May 2003

A. I. HAYANGA

JUDGE

Read to Mr. Wahome and Mr. Muli