



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 06 OF 2020

CHARLES NJAGI MIRITI.....APPLICANT

VERSUS

LEONARD MUTEMBEI GIRISHON.....1ST RESPONDENT

JOSECK NYAGA M'RUCHA.....2ND RESPONDENT

PHILIS MPII M'RUCHA.....3RD RESPONDENT

KENNETH KIMATHI M'RUCHA.....4TH RESPONDENT

RULING

1. This application states that it has been brought to court under sections 1A, 1B, 3 and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provisions of the law.

2. The application seeks the following orders:

1. That this application be certified urgent and the court be pleased to hear the application ex-parte in the first instance.

2. That the honourable court be pleased to grant an order of temporary injunction restraining the respondents whether by themselves, their servants, agents and/or employees or anyone acting on their behalf from trespassing, evicting, occupying or in any way interfering with the applicant's quiet possession, use, development and/or occupation of land parcels No. Muthambi/Gatua/2294, 2295 and 2296 (Originally LR. No. Muthambi/Gatua/429 pending the inter partes hearing and determination of this application.

3. That the honourable court be pleased to grant an order of temporary injunction restraining the respondents whether by themselves, their servants, agents and/or employees or anyone acting on their behalf from trespassing, evicting, occupying or in any way interfering with the applicant's quiet possession, use, development and/or occupation of land parcels No. Muthambi/Gatua/2294, 2295 and 2296 (originally L.R. No. Muthambi/Gatua/429) pending the hearing and determination of this suit.

4. That an order of inhibition do issue inhibiting all dealings in land parcels No. Muthambi/Gatua/2294, 2295 and 2296 (originally L.R.No. Muthambi/Gatua/429 pending the inter partes hearing of this application and thereafter as the honourable court shall order.

5. That an order of inhibition do issue inhibiting all dealings in land parcels No. Muthambi/Gatua/2294, 2295 and 2296 (originally L.R. No. Muthambi/Gatua/429) pending the hearing and determination of this suit herein.

6. That costs of this application be provided for.

3. The application is supported by the applicant's affidavit which states as follows:-

SUPPORTING AFFIDAVIT

I, **CHARLES NJAGI MIRITI**, of P.O. Box 198 CHUKA and a resident of Chuka County within the Republic of Kenya do hereby make oath and state as follows:

1. **THAT** I am the Applicant herein well versed with the facts in this issue hence competent to swear this affidavit.
2. **THAT** I have been living continuously on the three land parcels known as LR Nos. **MUTHAMBI/GATUA/2294,2295 & 2296(originally L.R NO. MUTHAMBI/GATUA/ 429)** measuring 3.1 acres since 1991 to date.
3. **THAT** the land (MUTHAMBI/GATUA/429) was gifted to me by my grandfather M'RUCHA M'MBWIRIA (deceased) who invited me into the said land.
4. **THAT** upon the demise of my grandfather the Respondents without my knowledge obtained the registration of the suit lands in their names after subdividing the parent parcel. Attached hereto and marked "**CNM1a, b & c**" are the green cards for the Suitland.
5. **THAT** I have built a permanent house thereon and developed the same extensively by planting over 200 coffee trees, over 300 trees and subsistence crops thereon.
6. **THAT** I have further connected the suit land to water and electricity and planted over 300 banana plants thereon.
7. **THAT** I have enjoyed uninterrupted continual possession of the said land since August 1991 and have effected the developments thereon with the full knowledge of the Respondents.
8. **THAT** I have lived on the suit land openly, continuously and without any interruption by any of the Respondents since the year August 1991.
9. **THAT** I am advised by my advocates, which advice I verily believe to be true that I have a right of ownership by adverse possession in respect of the suit lands which right has accrued to me by virtue of my uninterrupted, continuous, exclusive possession of the suit land for more than twelve years from August 1991.
10. **THAT** what is deposed to herein above is true to the best of my knowledge, belief and information.

4. The application was canvassed by way of written submissions.

5. I opine that, where possible, there is no better way of ensuring that all the issues canvassed by the parties are taken into account than to reproduce in full their submissions in matters which are not canvassed orally.

6. The applicant's written submissions are reproduced in full herebelow:

APPLICANT'S WRITTEN SUBMISSIONS ON HIS APPLICATION DATED 6TH JULY 2020

May it please Your Lordship.

1.0. Introduction

1. The Applicant has moved this Honourable Court seeking for temporary injunctive and prohibitory orders as outlined under prayers numbers 3, 4 & 5 of the Notice of Motion Application dated 6th July 2020.
2. The Applicant seeks for orders prohibiting all dealings and restraining the Respondents whether by themselves or their agents from trespassing, evicting, occupying or in any way interfering with the Applicant's quiet possession, use, development and/or occupation of Land parcels No. **MUTHAMBI/GATUA/2294, 2295 & 2296 (ORIGINALLY L.R NO. MUTHAMBI/GATUA/429)** pending the hearing and determination of the main suit.
3. The application is supported by the Affidavit of the sworn and signed by the Applicant and filed in Court on 7th July 2020.
4. The gist of the application is that the Applicant is in lawful possession and occupation of Land parcels No. **MUTHAMBI/GATUA/2294, 2295 & 2296 (ORIGINALLY L.R NO. MUTHAMBI/GATUA/429)**, which he has lived therein since the year 1991 to date.
5. To protect his interests and rights on the suit property, the Applicant approached this Court via an Originating Summons (OS) which forms the basis of the main suit and which raises substantive questions that ought to be determined by this Honourable Court on the Applicant's rights to the suit land.
6. The Respondents have responded to the application via the Replying Affidavits sworn by the 1st and 2nd Respondents, both dated 18th September 2020.
7. In further reply thereto, the Applicant swore a Further Affidavit dated 23rd November 2020 which outlines the actual position on the ground unlike the issues purported by the Respondents in the two Replying Affidavits. The Applicant has clearly set out in his Further Affidavit that, most of the issues raised by the Respondents in the two Replying Affidavits are issues that ought to be heard and determined in the main Originating Summons.

8. Unless the Orders sought under the Notice of Motion Application dated 6th July 2020 are granted, the status quo is likely to be upset thereby defeating the substratum of the main suit.

2.0. Grounds for issuing injunctive orders

9. It is our humble submissions that the Applicant has adduced sufficient grounds for issuing the injunctive and prohibitive orders sought.

10. The law governing the issuance of injunctive orders is primarily contained in the often cited case of **Giella v. Cassman Brown [1973] E.A. 358** at p. 360 where it was stated that:-

*“**First**, an applicant must show a prima facie case with a probability of success.*

***Secondly**, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.*

***Thirdly**, if the Court is in doubt, it will decide an application on the balance of convenience.”*

11. In restating the principles for granting injunctive Orders, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC NO. 1234 of 2002** (as cited in **Michael Gitere & another vs Kenya Commercial Bank Limited [2018] eKLR** at **Paragraph 43**) set them out as follows:

a. a prima facie case with a probability of success at the trial;

b. if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;

c. the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;

d. the conduct of the applicant meets the approval of the Court of equity.

2.1. Prima Facie Case

12. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** defined a prima facie case as follows:

“It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

13. The Applicant’s cause of action is therefore predicated on adverse possession. The Applicant has been enjoying occupation, possession and usage of the suit land. His enjoyment of the suit land is now under threat due to the unlawful actions by the Respondents.

14. The Applicant has built a permanent house and conducted extensive development on the land by planting over 200 coffee trees, over 300 trees and other subsistence crops. Additionally, the Applicant has also connected the suit land to electricity and planted over 300 banana plants.

15. Unbeknown to the Applicant, the Respondents procured an illegal subdivision of the original land and thereby acquired fraudulent registration of the new title deeds for the three parcels arising out of the purported subdivision.

16. In challenging the unlawful acts by the Respondents, the Applicant has brought an Originating Summons (OS) before the Court seeking the recognition and protection of his proprietary rights to the suit land.

17. We urge the Honourable Court to find that the Applicant has established a prima case which has chances of success hence his application should be allowed.

2.2. Whether the Applicant will suffer irreparable damages?

18. The second test of granting an interlocutory injunction is that the Applicant must show that he will suffer irreparable damages in case orders for temporal injunctions are not granted.

19. The Court in the case of **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** relied on the **Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352**, which provides that:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

20. The Court proceeded to state that, *“In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."*

21. The Respondents have threatened the Applicant with an unlawful forceful eviction from the suit land. The Respondents have also threatened to damage the Applicants property and destroy his developments in the suit land.

22. It is our humble submissions that the Applicant has illustrated and/or demonstrated that he will suffer irreparable loss in the event that the injunctive orders are denied.

23. The Applicant has been in occupation of the suit land and has been enjoying the uninterrupted occupation and usage of the suit land.

24. Unless the injunctive orders are granted by this Honourable Court, the Applicant's rights will be trampled upon by the Respondents and he will suffer substantial and irreparable damages.

25. We urge the Honourable Court to find that the Applicant will suffer irreparable loss and damages in case the Injunctive Orders sought are not granted.

2.3. The Balance of Convenience

26. The Applicant has established a prima facie case and demonstrated that he will suffer irreparable loss. Additionally, the balance of convenience in this matter shifts in favour of the Applicant.

27. In this matter, the Applicant has proved the inconvenience he is likely to suffer if the injunction is refused; he has showed to Court that he will be rendered landless, his property destroyed and that the substratum of the main suit shall be defeated if the injunctive orders are denied.

28. We urge the Honourable Court to make a determination that the balance of convenience in this matter tilts in favor of the Applicant and therefore the temporal injunctive and prohibitory orders should be granted.

2.4. Injunctive orders to preserve suit land and maintain status quo

29. The injunction orders sought are merited to **preserve** the suit land and **maintain status quo** on the suit land pending the full hearing and determination of the main suit.

30. As it was observed in the Court of Appeal case of **Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & 2 others [2006] eKLR** that:-

“We have considered carefully the rival arguments and the principle we have stated hereinabove. In our view injunctive orders are meant to preserve property and maintain the status quo.”

31. The injunctive and prohibitory orders sought by the Plaintiff are crucial in this matter in order to preserve the suit land, maintain the status quo and thereby preserve the substratum of the main suit.

3.0. Conclusion

46. We urge the Honourable Court to find that the Application dated 6th July 2020 is merited and should be allowed as prayed.

47. We pray that Your Lordship be persuaded by the Applicant's submissions and authorities and thereby allow the application by granting the Orders sought.

48. And for this, we do humbly pray.

DATED at **MERU** this **23RD** Day of **NOVEMBER** 2020.

.....**MKK**.....

FOR MITHEGA & KARIUKI,

ADVOCATE FOR THE APPLICANT

7. The respondents' written submissions are reproduced in full herebelow:

RESPONDENTS SUBMISSIONS

My Lord, this Honourable Court directed that the application dated 6th day of July,2020 be disposed by way of written submission thus we so do herein;

BACKGROUND INFORMATION

The Applicant brought this suit by way of an application seeking for various orders;

- a) That the Honourable Court be pleased to grant an order of Temporary injunction restraining the Respondents whether by themselves, their servants, agents, and or employees or anyone acting on their behalf from trespassing, evicting, occupying or in any way interfering with the applicant's quiet possession use, development and or occupation of land parcels No. MUTHAMBI/GATUA/2294, 2295 &2296 pending the hearing and determination of their application.

- b) That the Honourable Court be pleased to grant an order of temporary injunction restraining the respondents whether by themselves, their servants, agents and or employees or anyone acting on their behalf from trespassing, evicting, occupying or in any way interfering with the applicant's quiet possession use, development on land parcels Nos. MUTHAMBI/GATUA/2294, 2295 & 2296.

There are various issues to be delved into My Lord;-

- a) Whether or not the applicant has acquired the suit property by way of adverse possession?

- b) Whether or not the applicant is entitled to the temporary injunctive orders being sought?

My Lord, Land Parcel MUTHAMBI/GATUA/2294, 2295&2296 which are as a result of a sub-division of Land Parcel No. MUTHAMBI/ GATUA/ 429 was registered in the name of the Respondents father M'RuchaMbwiria on first registration in the year 1997. A copy of the green card was produced before this Honourable Court to ascertain the same. The Respondents averred that they lived on the said parcel of land prior to its sub-division since time immemorial and that they had extensively developed the parcel by planting permanent trees, constructed permanent buildings on the same.

The Respondents further averred that a succession cause was filed at Meru High Court vide No. 15 of 2000 after their father passed on. That a confirmed grant was issued by the Honourable court on the 18th day of October,2001 which grant was also annexed to their Replying Affidavit. At no time did the Applicant object, revoke the succession cause for the reason that he had no interest over the parcel of land MUTHAMBI /GATUA/429.

My Lord, the applicant alleges that he had been in quiet and peaceful possession since the year 1991. A grant was issued in 2001 whereby the respondents were awarded their portions of land parcel MUTHAMBI/GATUA/429. That the Respondents then sub-divided the parcel to implement the court order in 2002 and then they claimed possession of their respective parcels thereof. In adverse possession,a party claiming must have been in possession for over 12 years and that the period starts running a fresh whenever there are changes in the title. In the case of ***Kimani Ruchine& Anor Vs Swift Rutherford &Co.Ltd and Another(1980) KLR 10***,it was held that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time. My Lord, the Applicant has not proved that he dispossessed the Respondents for a period of 12 years as it is clear that time started to run from 1991 to 2002 when the Respondents became the registered proprietors and they took possession of their parcels . At that point time stopped from running effectively; which then makes it 11 years and hence premature to bringing this suit.

In addition My Lord, the Applicant has not proved how he dispossessed the title holder in 1991, or whether he discontinued his possession for the statutory period of 12 years. The Respondents aver that they have been in possession since time immemorial, that they have lived, been raised on the parcel of land in contention. That they have extensively developed on the parcel of land by building permanent houses since. That it was only in 2003 when the Applicant filed a suit at Meru No. 40 of 2003 claiming inhibition orders in respect to land parcels MUTHAMBI/ GATUA/2294, 2295 & 2296 which suit was dismissed for want of prosecution. In the case of; ***Wambugu -v- Njuguna (1983) KLR 173***,the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his Possession for the statutory period, and not whether or not the claimant has proved that he or she has been in Possession for the requisite number of years.

My Lord on the second issue of whether the Applicant is entitled to the injunctive orders as prayed in their application. As stated in the case of **Giella vs Cassman Brown** which laid out the requirements that must be fulfilled before an injunction is granted. Firstly, the applicant must show a *prima facie* case with a probability of success, Secondly, that an irreparable damage will be occasioned by the applicant which cannot be adequately compensated by an award of damages and lastly that the application be decided on a balance of probabilities.

On the first issue of a *prima facie* case, the claim of adverse possession fails to meet the fact that the applicant did not dispossess the registered proprietor of land and that he was not in open, notorious, exclusive possession for the statutory prescribed period because at that point the parcel of land has been having a dispute since 2003. This was clearly brought out in the case of: ***Mbira -v- Gachuhi (2002) IEALR 137*** in which the court held that:.....***a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....***”.

My Lord, no irreparable harm that will be occasioned by the applicant that cannot be adequately compensated if the injunction is not granted for the reason that the Applicant had brought up a suit filed at Meru in Civil Case No.40 of 2003, on claims of fraud towards the succession of the Respondents deceased father. The applicant failed to prosecute the matter and the same was dismissed in 2015. That upon the Respondents application to lift the inhibition orders that had been issued on land parcels MUTHAMBI/GATUA 2294, 2295 & 2296, the Applicant woke up again from his slumber and instituted this suit. The intention of the Applicant is to encounter the Respondents land and ensure that they do not enjoy quiet and peaceful possession and to forum shop in courts.

We therefore pray My Lord that the Application brought forth by the Applicant be dismissed for it lacks merits.

Our humble prayer.

DATED AT CHUKA 4TH THIS DAY OF DECEMBER, 2020

FOR: KIJARU,NJERU& CO.

ADVOCATES FOR THE RESPONDENTS

8. I have carefully considered the assertions made by the parties in their submissions, which assertions are diametrically incongruent. I have also considered the principles espoused by the authorities the parties have cited.

9. I find that the issues the parties are canvassing in their submissions are issues that ought to be argued during the hearing of the main suit.

10. I do note that Lady Justice Lucy Mbugua on **9.7.2020** issued orders of *status quo* and inhibition in terms of prayer 4 in the application. A judge of concurrent jurisdiction cannot purport to overrule a decision made by the other judge.

11. In the circumstances, the following orders are issued:

- a) An order of status quo as issued by Lady Justice Lucy Mbugua on **9th July, 2020**.
- b) Prayer 4 as granted by Lady Justice Lucy Mbugua is hereby confirmed.
- c) The plaintiff should fully comply with order 11, CPR, within 14 days of today and the defendants should do so within 14 days after receipt of the plaintiff's compliance documents.
- d) Costs regarding this application shall be in the cause.
- e) The parties to come for **directions** on **16th March, 2021**.

Delivered in open Court at Chuka this 17th day of February, 2021 in the presence of:

CA: Ndegwa

Gachuki for Plaintiff/Applicant

Miss Kijaru for Defendants/Respondents

HON. JUSTICE (Dr.) P. M. NJOROGE,

ELC JUDGE.