REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 96 OF 2019 (O.S)

PETER GITHONGORA MIGWI.....PLAINTIFF

VERSUS

KAMAU MUNENE WAKABA.....1ST DEFENDANT

GRISHON KITHEKA NZUKI.....2ND DEFENDANT

MUKA MUKUU CO-OPERATIVE SOCIETY LTD.....3RD DEFENDANT

RULING

1. Vide the Notice of Motion dated 14th August, 2019, the Plaintiff moved the Court seeking the following orders:

> ***a) That pending the hearing and determination of the suit Interim Conservatory orders, maintenance of status quo, and or interim injunction be issued restraining the Defendants by themselves, agents or servant from alienating, erecting any structures, entering and or in any other manner interfering with Land parcels titles described as MITC 91, MITC 98, MITC 179, MITC 186 and MITC 198 Mithini Donyo Sabuk within Machakos County.***
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> ***b) Costs be in the cause.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that in the year 1995, he was allocated after purchase land parcels plot numbers MITC 91, MITC 98, MITC 179, MITC 186 and MITC 198 Mithini Donyo Sabuk within Machakos County under Muka Mukuu Farmers' Cooperative Society Limited *(the suit properties).*

3. The Plaintiff deponed that he was issued with a beacon certificate for the suit properties after the 3rd Defendant issued him with a letter of authorization and that he took possession of the suit properties. According to the Plaintiff, it was not only until the year 2013 that the Defendants started laying claim to the suit property.

4. The Plaintiff deponed that between the period 1995 to 2013, he has been in open, continuous and notorious possession of the suit property and that he had initially taken proceedings before the Co-operative Tribunal number 498/13 and Kangundo Principal Magistrate's Court ELC. No. 4 of 2019 which are pending withdrawal.

5. It was deponed that the Defendants continued interference with the suit property may interfere with the pending suit, thus affecting the substratum of the case and that conservatory orders should issue.

6. In response, the 1st Defendant deponed that suit is incompetent and an abuse of the court process for there cannot be a claim for adverse possession on properties which are not registered and that there is no evidence of copies of title or searches exhibited by the Plaintiff to confirm that the properties herein are registered in the name of the 1st Defendant.

7. The 1st Defendant deponed that he is the legal and absolute owner of properties known as Plot No. 186 under share member 156; Plot No. 179 under share number 1811 and Plot No. 196 under share 2479; that the Applicant's claim for ownership of the suit properties is baseless for the documents annexed, to wit, the beacon certificates and the letter thereof are not ownership documents and that the properties he is referring to are in Mithini Mithogo and while his properties are in Mithini Central hence they are two different properties.

8. The 1st Defendant deponed that he bought the properties known as Plot No. 186, 179 and 196 from the original owners; that the transfer was effected to him by the original owners; that he has been in occupation of the said properties since 2010 to date; that he has since developed the properties extensively with permanent buildings and crops and that he lives on the land with his family.

9. According to the 1st Defendant, the annextures by the Plaintiff marked as exhibit No. 4 are false and meant to mislead the Court for the developments in the first picture by the Plaintiff is erected on Plot No. 22 which is still a disputed property in a different case in Kangundo which the Plaintiff claims to be the owner and that the other two photographs are developments by him *(the 1st Defendant)* on Plot No. 179, 186 and 196 which were done long time ago.

10. The 1st Defendant deponed that the Plaintiff is a member of Muka Mukuu through membership number 2182 and is the legal owner of property known as Plot No. 12 /044; that the Plaintiff instituted claim number 498 of 2013 in the Co-operative Tribunal over the same issues raised herein and the said claim is still pending in court; that the subject in this case and the entire suit is similar to the subject in the suit filed by the Plaintiff in the Co-operative Tribunal Case No. 498 of 2013 being Plot Nos. 186, 179 and 196, which claim is still pending before the Tribunal and that the instant suit and the Application are *sub- judice*.

11. The Vice Chairman of the 3rd Defendant deponed that as per the Society's records, the suit properties belong to the Defendants as follows: David Wambua, Plot No. MITC 98; Muya Mutisya and Peter Mutisya Plot No. MITC 196 *(sold to Titus Musembi Makau);* Beth Munee King'oo, Plot No. MITC 186; Shadrack Mutua Muiu, Plot No. MITC 91 and David Wambua Komu, Plot No. 179 and that the suit properties do not belong to the Applicant.

12. The 3rd Defendant's Vice Chairman deponed that the subject matter in this case, the instant Application and the entire suit is similar to the claim filed by the Plaintiff in the Co-operative Tribunal Case No. 498 of 2013 touching on the same properties namely; MITC 186, MITC 98 and MITC 91 MITC 179 and MITC 196 and Kangundo SPM Suit No. 11 of 2019, which suits are still pending in court and that this Application is *sub judice* and *res judicata*.

13. According to the 3rd Defendant, the Application for injunction came up for hearing before the Tribunal and a Ruling was delivered on 23rd February, 2015 dismissing the said Application with costs on the grounds that the same did not raise proper grounds to warrant the orders sought and that the claimant had not shown any evidence to prove ownership of the suit properties.

14. It was deponed that the last time the Tribunal case was in court was on the 3rd of April, 2018 where parties were directed to fix the matter for hearing; that the Plaintiff has never taken any steps to prosecute the said matter to its logical conclusion; that the Applicant herein filed a similar Application and suit seeking similar reliefs in the Kangundo court and that the Kangundo court dismissed the Application for injunction while the main suit is still pending in the said court.

15. The 3rd Defendant's Vice Chairman finally deponed that the instant Application and suit are *res judicata* and/or *sub judice;* that the Applicant has no legal as well as proprietary rights, claim or interest over the suit properties at all; that the Applicant has never been in possession of the suit properties and that the Applicant has not constructed on the suit properties and has never cultivated the said land.

16. In his submissions, the Plaintiff's advocate submitted that it is the Plaintiff who is in possession of the suit property; that the Defendants have encroached on the suit properties and that this court should not hold a mini trial or examine the merits of the case closely. Counsel relied on the case of ***John Musyoki Musembi vs. Henry Muli (2015) eKLR*** where the Court of Appeal held as follows:

> "A *'prima facie case'* as was stated in ***Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR (Civil Appeal No 39 of 2002)** includes:
>
> *"but is not confined to a "genuine and arguable case." It is a case 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 as 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. 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."*

In ***Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)***, the Court further proclaimed that:

> *"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

17. Counsel submitted that the rights of a person in occupation and possession of land is an overriding interest protected under the law even where the other person holds a title and that the Plaintiff is likely to suffer irreparably if his possession of the suit property is interfered with.

18. The 1st Defendant's advocate submitted that the Application and the entire suit is an abuse of the court process and a waste of the precious judicial time; that there cannot be a claim for adverse possession on properties which are not registered and that the Plaintiff has not

adduced any evidence before the Honourable Court to confirm that indeed the properties herein are registered in the name of the 1st Defendant. It was submitted that this position renders the Plaintiff's case frivolous and untenable.

19. Counsel relied on the case of ***Mtana Lewa vs. Kahindi Ngala Mwangandi (2005) eKLR*** where it was held that *"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years."*

20. It was submitted that the 1st Defendant is the beneficial and legal owner of the properties known as Plot No. 179, 186 and Plot No. 196 having bought them from the original owners in the year 2010 and has extensively developed the properties with permanent buildings, dams and crops and that the Plaintiff has never been in occupation of the suit properties.

21. On his part, the 3rd Defendant's advocate submitted that the subject matter in the instant Application and the entire suit is similar to the suit/claim filed by the Applicant in the Co-operative Tribunal Case No. 498 of 2013 and Kangundo SPM Suit No. 11 of 2019 between the same parties, with similar issues and touching on the same properties being MITC 186, MITC 98, MITC 179, MITC 91, MITC196, Mithini in Donyo Sabuk.

22. It was submitted that before the Co-operative Tribunal, the Applicant's claim is that he is the legal owner of the aforementioned plots by virtue of them having being allotted to him by the 3rd Respondent herein and that his Application for injunction before the Tribunal dated 17th October, 2013 was dismissed with costs.

23. It was submitted that the Applicant having failed to secure favourable orders before the Tribunal, he filed another suit through an Originating Summons claiming adverse possession vide Kangundo SPM Suit No. 11 of 2019, and an Application seeking for similar orders of injunction over the same properties and that vide a Ruling delivered on 15th May, 2019, the trial Magistrate again declined to grant injunctive orders and dismissed the Plaintiff's Application with costs.

24. It was submitted that the Applicant cannot claim adverse possession while on the other hand he is claiming a purchaser's interest and that the suit properties are not registered and therefore a claim for adverse possession over the same cannot stand. Counsel relied on the case of ***Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR.***

25. It was submitted that the Applicant has not met the conditions precedent for the grant of an injunction and that the Application should be dismissed with costs.

26. This suit was commenced by way of an Originating Summons filed pursuant to the provisions of Order 37 of the Civil Procedure Rules dated 14th August, 2019. In the said suit, the Plaintiff has sought for a declaration that he is the rightful owner of the suit properties by adverse possession and should be issued with title documents by the Registrar of Titles.

27. Contemporaneously with the Originating Summons, the Plaintiff filed the current Application in which he is seeking for a temporary order of injunction pending the hearing and determination of the suit. The Application is premised on the grounds that the Defendants have encroached on the suit property notwithstanding that he has been on the same land for more than twelve (12) years.

28. The conditions for grant of an injunction were well settled in the celebrated case of ***Giella vs. Cassman Brown & Co. Ltd (1973) EA 358*** in which it was held as follows:

> *"... the conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."*

29. In ***Mrao Ltd vs. First American Bank Ltd & 2 others [2003] KLR 125,*** the Court of Appeal defined a *prima facie case* as follows:

> *"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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 as to call for an explanation or rebuttal from the latter."*

30. A *'prima facie case'* as was stated in ***Mrao case*** *(Supra)* is not confined to a *"genuine and arguable case"*. The court defined it further as follows:

> *"It is a case 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 as 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. 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."*

31. In ***Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR***, the Court of Appeal proclaimed as follows:

> *"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We*

reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

32. As already stated above, the Plaintiff is seeking for an order of this court to be registered as the proprietor of the suit property by way of adverse possession. The said registration is pursuant to the provisions of Section 38 (1) and (2) of the Limitation of Actions Act which provides as follows:

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

33. From the above provision, which should be read alongside Section 37 of the Act, one can only move the court to be declared the proprietor of land by adverse possession where the land in question has been registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300), which have all been repealed, or the Land Registration Act.

34. In the case of ***Benson Mukuwa Wachira vs. Assumption Sisters of Nairobi Registered Trustees (2016), eKLR,*** the Court of Appeal held as follows:

"But can time in adverse possession run or start to run against an owner of land who is not registered as proprietor of the suit land but otherwise holds a letter of allotment? It is not difficult to discern that if the suit land is not registered, then compliance with Section 38(1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1). Unless such suit land is registered at the time of institution of the suit under any of the statutes referred to Section 37 of the Limitation of Actions Act, a claim for the title by a trespassing claimant would be misplaced and, a court order would be incapable of being effected."

35. Indeed, the requirement that a claim for adverse possession in Kenya is only applicable to registered land is fortified by the provision of Order 37 Rule 7 of the Civil Procedure Rules which provides as follows:

"(1) An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served."

36. The Plaintiff was required to annex on his Affidavit a certified extract of the title to the suit properties. In this case, the said titles could not be annexed because the suit properties have neither been surveyed nor registered. The suit properties having not been registered under and statute, it is my finding that the Plaintiff has not established a *prima facie* case with chances of success for a claim of adverse possession.

37. Furthermore, the evidence before this court shows that the Plaintiff has filed a similar suit in Kangundo PMCC No. 11 of 2019 (OS). In the said suit, the Plaintiff has sought to be declared the owner of the suit property by way of adverse possession. Indeed, the Plaintiff also sought for an order of injunction in the lower court based on the same grounds as in the present Application. The said Application was dismissed by the court on 15th May, 2019.

38. The filing of the present suit before withdrawing the Kangundo PMCC No. 11 of 2019 (OS) is an abuse of the court process. Indeed, if the Plaintiff was dissatisfied with the decision of the lower court, he should have appealed against the said decision to this court instead of filing a fresh suit.

39. If the Ruling of the lower court did not delve in the merits of the Application for want of jurisdiction, then the Plaintiff should have withdrawn the said suit first. Instead, he filed the current suit during the pendency of a similar suit in the lower court, which is an unlawful act.

40. For those reasons, I find the Application dated 14th August, 2019 to be unmeritorious. The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE