



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC ORIGINATING SUMMONS E009 OF 2021**

**REUBEN KIBURI KUBAI..... PLAINTIFF**

**VERSUS**

**TIMOTHY MWINGIRWA MUTIGA.....1<sup>ST</sup> DEFENDANT**

**STEPHEN KITHURE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 18.1.2021 seeks temporary orders of injunction and inhibition restraining the defendants from interfering with the plaintiff's use and possession of **L.R No. Uringu II/2142 and 1873** pending hearing and determination of this suit. The application is supported by the affidavit of Reuben Kiburi Kubai sworn on 18.1.2021.
2. The grounds of the application are that the applicant has been in occupation of the land for over 50 years, where his family lives, though allegedly illegally adjudicated in favour of the respondents; the applicant has a claim as an adverse possessor; there has been no disturbance by the respondents and that he has developed the land including a permanent homestead. The applicant has attached photographs and a copy of the records showing the property is registered in favour of the 2<sup>nd</sup> respondent.
3. The application is opposed through a replying affidavit sworn by the 1<sup>st</sup> defendant/respondent on 12.2.202. The basis is that applicant has never occupied the land since his correct homestead was 30 kilometers at a place known as Kiburiine; there exists **Meru ELC No. 203 of 2012** where an injunction has been issued in which the applicant and his clan mates were claiming the same land and was dismissed but not appealed against and lastly there is also a pending suit **No. 65 of 2011 in Tigania Law Courts**.
4. Further, the respondent contends that, he was gifted the land by his late father in 1980 subsequent to which he was demarcated the land with no objection by either the applicant or his late father.
5. Lastly, the respondent avers the applicant has filed the case as a proxy of his clan-mates and does not possess any letters of administration to claim the land for and on behalf of his deceased's parent.
6. Parties were directed to file written submissions.
7. The 1<sup>st</sup> defendant relies on the replying affidavit sworn on 12.2.2021. He submits that being a registered owner of **Parcel No. 2142** and given the previous suits brought by clan mates of the applicant, the applicant does not deserve any injunctive orders. Reliance was placed on ***Giella –vs- Cassman Brown [1973] E.A 358, Thomas Mumo Maingey –vs- Sarah Nyiva Hillman & 3 Others [2018] eKLR, Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR, Geoffrey Kiania Kamwara –vs- Mwikamba Kagembe [2021] eKLR, John Mugambi M'Mwambi –vs- Joseph Karuti Mikwa & Stephen Kithure Murimi, Meru ELC No. 24 of 2012.***
8. The applicant approached this court by way of an originating summons claiming he and his family members have been in occupation of **Parcel No's 2142 and 1873** continuously, openly, notoriously and openly since 1956 before the area was declared an adjudication section with the knowledge of the respondents and that they have built dwelling houses.
9. The applicant therefore seeks to be declared a bonafide owner by virtue of adverse possession.
10. In the supporting affidavit to the originating summons, the applicant claims his late father M'Ibuku M'Limberia gathered the land in 1956 subsequent to which he was buried there upon his death.

11. The applicant avers his late father was issued with serial No. 983, folio No. 618 but the defendants superimposed their **Parcel No's Uringu II/2142 and 1873** on their land without their knowledge and registered it. It is claimed title deeds over the land were issued recently.

12. A party seeking injunctive orders must establish a prima facie case with a probability of success, that there will be irreparable damages if the application is not allowed and that the balance of convenience tilts in favour of granting the orders sought.

13. The applicant has attached a copy of record for **L.R No. Uringu II/1873** which indicates the land was registered in the name of the 2<sup>nd</sup> defendant on 24.8.2015 and a title deed issued on 29.2.2017. The applicant has not attached a copy of records for **L.N No. Uringu II/2142**.

14. It is not in dispute that the applicant did not file a supplementary affidavit to the replying affidavit by the 1<sup>st</sup> defendant sworn on 12.2.2021 in which several documents, pleadings and an order issued by the court regarding **L.R No's 2373 and 2143** have been attached.

15. The claim by the plaintiff/applicant, **Parcel No. 2142** is disputed. It is also subject to pending law suits. My finding therefore is that the applicant has failed to establish a prima facie case with a probability of success at this juncture.

16. Further, as concerns **Parcel No. 1873**, it is evident that the suit became registered in favour of the 2<sup>nd</sup> respondent in 2015. The suit here was filed on 21.1.2021, this is less than 12 years as envisaged by law in a claim on adverse possession. Consequently, I find the alleged right by the applicant if any as held in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* has not yet crystallized and hence no prima facie case has been established with a probability of success. The balance of convenience also tilts in favour of the respondents who are bonafide owners with registration numbers in their favour.

17. In the premises, I find no merits in the application. The same is dismissed with costs.

18. Parties to comply with **Order 11** and set down the suit for hearing.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**