



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC (OS) CASE NO. E001 OF 2021

GEOFFREY KIANIA KAMWARA PLAINTIFF

VERSUS

MWIKAMBA KAGEMBE..... DEFENDANT

RULING

1. This application states that it has been brought to court under Section 68(1) Land Registration Act No. 3 of 2012 Laws of Kenya and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling laws. The application seeks the following orders:

(a) The Honourable Court do certify this application as extremely urgent and the same be heard ex-parte in the first instance, service of the same to be dispensed with in the first instance.

(b) The Honourable Court do issue an order of inhibition restraining any dealings whatsoever with Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** until this application is heard and determined or until further orders of this court.

(c) the Honourable Court be pleased to issue a temporary order of **injunction** restraining the Defendant/Respondent whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/Applicant's houses, burning charcoal, selling, leasing, charging or otherwise howsoever interfering with the Plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** pending the hearing and determination of this Application *inter partes*.

(d) the Honourable Court be pleased to issue a temporary order of **injunction** restraining the Defendant/Respondent whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/Applicant's houses, burning charcoal, selling, leasing, charging or otherwise howsoever interfering with the Plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** pending the hearing and determination of this suit.

(e) The Honourable Court do issue an order of inhibition restraining any dealings whatsoever with Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** until this suit is heard and determined.

(f) Cost be borne by the Respondent.

2. The application has the following grounds:-

i) THAT the Respondent has served the Applicant with an eviction notice to which the Applicant has been given notice to vacate the suit land by **28th February 2021**.

ii) That the Respondent has for the past 3 days been sending goons to the Applicant's suit land with an aim of evicting the Applicant.

iii) That Land Parcel Number **THARAKA/CHIAKARIGA 'A'/1485** is the only source of the Applicant's livelihood and if he is evicted he will be rendered a destitute.

iv) **THAT** the Plaintiff/Applicant has been in **open, exclusive, continuous and uninterrupted occupation** of the suit land since the year **1992** and the same was fraudulently recorded in the name of the Defendant/Respondent hence the Applicant has developed a beneficial interest thereto under the doctrine of adverse possession.

v) **THAT** the Plaintiff/Applicant has known no other land than the suit land since the year **1992** and any interference will occasion

him irreparable loss and damage unless this court intervenes urgently.

vi) **4.THAT** the Plaintiff/Applicant has made developments on the suit land to wit, built semi-permanent houses, planted trees, does subsistence farming and generally developed the parcel of land.

vii) That the Applicant will suffer irreparable loss and damage if the Respondent is allowed to sell the suit land and/ or evict the Applicant.

viii) That the Applicant suit is for adverse possession and if he is evicted from the suit land, the suit herein will be rendered a nugatory and he will suffer irreparable damages that cannot be compensated.

ix) That the Respondent does not live on the suit land nor does he use it for any purposes and he will therefore not be prejudiced if the orders are granted as prayed.

x) It is important to preserve the status quo of the suit land herein pending the hearing and determination of this suit

xi) It is fair and just that the orders be granted.

3. The application is supported by the affidavit of Geoffrey Kiania Kamwara, the applicant which states as follows:-

I, **GEOFFREY KIANIA KAMWARA** of P O Box 95 Ishiara in the Republic of Kenya make oath and say as follows:-

1. That I am the Applicant/Plaintiff herein and competent to swear this Affidavit.
2. That the suit land herein, Land Parcel No. **THARAKA/CHIAKARIGA 'A'/1485** is registered in the names of the Defendant/Respondent herein. **Attached herein is a copy of the official search marked GKK1.**
3. **THAT** my family and I occupied the suit land sometimes in the **1992** and I have since been in **open, exclusive, continuous and uninterrupted occupation.**
4. **THAT** I have made developments on the suit land which include building semi-permanent houses, planted trees, reared livestock, planted trees and food crops and I have connected NIWASCO water. **Attached hereto are copies of photographs marked GKK2.**
5. That over a couple of days the Respondent has been visiting the suit land and has been threatening that he would evict me.
6. The Respondent also informed me that he had got someone who would buy the suit land and if I don't leave voluntarily he would forcefully remove me from the suit land.
7. That on **11th February, 2021**, the Respondent herein came to the suit land with the area assistant chief where they served me with a letter to vacate the land. **Attached herein is a copy of the letter dated GKK3.**
8. That upon receiving the said letter I contacted my advocate on record who advised me to file the instant application for inhibition of the suit land.
9. That on **14th February, 2021**, when my family were coming home from church they found a tree and been felled and charcoal burnt by someone believed to be working for the Respondent herein.
10. That I am apprehensive that if the land is not inhibited, it will be disposed off and my suit will be rendered a nugatory and I will also be rendered a destitute.
11. That I am making this affidavit to support my application for inhibition of the suit land in order to conserve it pending the hearing and determination of this suit.
12. That I also pray that there be an order of injunction against the Respondent and or agents restraining them from entering the suit land to do any act until the suit I have filed is heard and determined.
13. That the Respondent will not be prejudiced in any way if the orders are granted as I am the one who is using the suit land and the degree of convenience tilt in my favour.
14. That what is deposed herein above is true to the best of my knowledge, belief and understanding.

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

5. The Plaintiff/applicant's written submissions are reproduced in full herebelow.

May it please Your Lordship;

The Applicant filed the Application under Certificate of Urgency seeking for the following orders:-

- a) Spent.
- b) Spent.
- c) Spent.
- d) *the Honourable Court be pleased to issue a temporary order of **injunction** restraining the Defendant/Respondent whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/Applicant's houses, burning charcoal, selling, leasing, charging or otherwise howsoever interfering with the Plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** pending the hearing and determination of this suit.*
- e) *The Honourable Court do issue an order of inhibition restraining any dealings whatsoever with Land Parcel NO. **THARAKA/CHIAKARIGA 'A'/1485** until this suit is heard and determined.*
- f) *Cost be borne by the Respondent.*

Your Lordship, the Respondent filed their Replying Affidavit in opposition to the Application and in a nutshell claimed that the Applicant is not entitled to the relief sought as he is a mere trespasser who enjoys no rights of an adverse possessor.

Your Lordship, we wish to rely on the grounds on the face of the Application, the supporting Affidavit dated 16th February, 2021, all the annexures attached thereto and the Supplementary Affidavit dated the 18th March 2021.

Law Applicable

Your Lordship, the Applicant brought the Application under Section 68 of the Land Registration Act, Section 3A of the Civil Procedure Act and all other enabling Laws,

Section 68 of the Land Registration Act empowers this Court to make an inhibition order inhibiting for a particular time or until the occurrence of a particular event or generally until a further order, the registration of any dealing with any land, lease or charge. Such an order just is meant to preserve the suit property until an occurrence of a particular event.

In granting such an order the Court will consider if the land in dispute is

1. likely to be alienated or transferred thus making it un-available by the time the trial is concluded,
2. whether the applicant has an arguable case
3. And whether the refusal to grant the order it will render the suit nugatory.
4. The prejudice that may be occasioned to any party to the suit

The above principles are similar to the principles set With regard to the prayer for a **temporary injunction** pending trial which are now well settled in the celebrated case of **GIELLA .V. CASSMAN BROWN AND COMPANY LTD** where it was stated that a party seeking such a remedy(temporary injunction) should satisfy the following: -

- 1: Establish a prima facie case with a probability of success.**
- 2: Such an injunction will not normally be granted unless the Applicant demonstrates that he will suffer irreparable injury that cannot be adequately compensated by an award of damages.**
- 3: If in doubt, the Court will determine the application on the balance of convenience.**

Order 40 rule 1 of the Civil Procedure Rules provides that:

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

a) Whether the Applicant has established a prima facie case with a probability of success

Your Lordship the Applicant claim adverse possession on the suit land, L.R NO. **THARAKA/CHIAKARIGA 'A'/1485** , having been in occupation of the suit land for a period exceeding 12 years. The Applicant has attached photographs to prove that he has been residing on the suit land having built his homestead on the suit land, carrying farming activities and also grazing his cattle on the suit land as per copies of photographs **marked GKK2 on his supporting Affidavit.**

Your Lordship, It is not in dispute that the Applicant has been on the suit land as the same has also been admitted by the Respondent. It is also not in dispute that the land is registered in the names of the Respondent herein. The Applicant is only interested with 7acres out of the suit land which he has been utilizing since 1992 to date.

Your Lordship, the Applicant does not deny that the Respondent has built a semi-permanent house on the far head of the suit land. It is also not in dispute that there is a person by the names of Nyaga Kiome who is utilizing a portion out of the suit land. The Respondent has never resided on the suit land and he only want to evict the Applicant from the suit land with an aim of selling it.

b) Whether the suit will be rendered nugatory if orders sought are not granted

The Applicant claim is for adverse possession in regards to *Land Parcel NO. THARAKA/CHIAKARIGA 'A'/1485.* The Applicant has been on the suit land for a period exceeding 12 years.

Your Lordship, the Respondent has threatened to evict the Applicant from the suit land as per the Applicant's annexure marked **GKK3.** The Respondent had threatened to evict the Applicant from the suit land by 28th February, 2021.

Your Lordship, if the Applicant is evicted from the suit land or if the suit land is disposed off, the Applicant will suffer irreparable damages and his suit shall be rendered a nugatory because the substratum of the dispute would be lost.

c) If the applicant can be compensated by damages.

In Panari Enterprises Limited v Lijoodi & 2 others [2014] eKLR the learned judge stated **that "...Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right..."**

Your Lordship, the Applicant has proved that he has been on the suit land for over a period exceeding 12 years. He has built his home there, done farming activities and connected county water. The suit land has been his source of livelihood. He has all attachment with the suit land which attachments cannot be compensated by award of damages.

All the Applicant's livelihood is derived from the suit land. His suit has a high likelihood of success.

d) Whether the balance of convenience tilts in favour of the Applicant.

Your Lordship, the Applicant has been in the occupation of 7acres out of the suit land. He does not dispute that the land is currently registered in the names of the Respondent herein.

The Applicant has annexed various annexures which clearly points out that he is the one who is on the suit land.

The Applicant has been on occupation of the suit land openly, without secrecy, without violence and without the Respondent's permission. The Respondent has unequivocally admitted that the Applicant entered the suit land without his permission as per annexure **GKK3** of the Applicant's supporting Affidavit to the Application herein.

Your Lordship, the doctrine of adverse possession is one of the overriding interests on a title to land. The purpose of the inhibition and injunction orders sought is to preserve the suit land from being wasted and to protect the occupancy of the Applicant until the suit is finally determined. No prejudice will be caused to the Defendant/Respondent if the order sought is granted as they are not in use nor in occupation of the suit land.

The balance of convenience tilts in favour of the Applicant as he is the one in occupation of the suit land. The Applicant resides on the suit land and that is where he derives his livelihood from.

Whether or not the Applicant has a valid claim to the suit land is a matter for the trial Court which court should decide in the substantive suit.

We pray that this court grant the prayers as prayed for in the Application.

We so pray Your Lordship,

Dated at Embu this 18TH day of MARCH 2021.

MUTEGI, KITHAKA & CO.

ADVOCATES FOR THE PLAINTIFF/APPLICANT

6. The Defendant/Respondent's submissions are reproduced in full herebelow:

DEFENDANT/RESPONDENT'S SUBMISSIONS

A. BACKGROUND:

1. My Lord, the application before you is the notice of motion dated **16th February 2021** seeking injunctive orders:-

B. APPLICABLE LAW:

2. The notice of motion is brought under S. 68(1) of the Land Registration Act and S. 1A, 1B and 3A of the Civil Procedure Act;

3. *It is further noted my Lord, that this application ought to have been brought under Orders 40 and 51 of the Civil Procedure Rules 2010, which unfortunately is not the case;*

C. SUBMISSIONS:

4. The Defendant/Respondent is the absolute registered owner of all that parcel of land title number THARAKA/CHIAKARIGA "A"/1485 measuring 3.57 HA and this is a fact that has been admitted by the Plaintiff/Applicant and supporting evidence adduced.

(see Annexure marked "MK-1" in the Replying affidavit).

5. The Plaintiff/Applicant filing of application for adverse possession is a way of oppressing and obstructing the Defendant'/Respondent's right to ownership of land as provided for in the Constitution and an attempt at defrauding the elements of justice.

6. The application for injunction itself has been presented in bad faith and its intended to diminish or stifle the Defendant/Respondent from enjoying his inalienable right to property and as a means for the Plaintiff/Applicant to unjustly enrich himself at the expense of the Defendant/Respondent.

7. The doctrine of Adverse Possession envisions a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title. However, the Plaintiff/Applicant has failed to inform this honourable court that the parties are actually neighbours who have been engaged in continuous boundary disputes over the property THARAKA/CHIAKARIGA "A"/1485 which escalated to the then district officer having the parties enter into an agreement that would allow the Plaintiff/Applicant to remain in the property pending the determination of the boundary dispute between the parties.

(see Annexure marked "MK-2" in the Replying Affidavit).

8. Since the time of that agreement, that parties have had continuous conflict over the boundaries between the Plaintiff/Applicant and the Defendant/Respondent's property and on several occasions the Defendant/Respondent has instructed the Plaintiff/Applicant to vacate the area falling within the Defendant/Respondent's boundary. Further, the Plaintiff/Applicant has alluded to a complaint made to the Land Adjudication officer over the parcel of land and further alludes to the continuous dispute over the same with the Defendant/Respondent this does not meet the threshold of open, exclusive, continuous and uninterrupted occupation to warrant the Plaintiff/Applicant adverse possession.

9. The doctrine of adverse possession "*nec vi, nec clam, nec precario,*" requires that possession is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. However, the Plaintiff/Applicant's possession has been subject to continuous boundary disputes and has only continued to occupy part of the Defendant/Respondent's property subject to the boundary dispute agreement. He fails to meet the requirements of the principle and as such this suit must fail.

10. The doctrine of adverse possession is one that is premised on the notion of mercy, where a party claiming adverse possession has no other means or source of livelihood and would be greatly burdened and inconvenienced should they be vacated from the property. This doctrine cannot be used to satisfy greed. The Plaintiff/Applicant has failed to reveal to this honourable court that he is actually a neighbour to the Defendant/Respondent who owned Title THARAKA/CHIAKARIGA /1529.

(see Annexure marked "MK-3" in the Replying Affidavit).

11. The Plaintiff/Applicant is not destitute but a person of means "a land owner" and a neighbour to the Defendant/Respondent who intentionally transferred his property THARAKA/CHIAKARIGA /1529 to **Nathan Mugambi Kiania** on the 22nd of January 2021

immediately prior to filing this suit. This was a clear act of mischief and well-coordinated plot by the Plaintiff/Applicant aimed at deceiving this honourable court and misusing the doctrine of adverse possession to deprive the Plaintiff/Applicant of his right to property.

(see Annexure marked "MK-4" in the Replying affidavit).

12. It is trite law that **he who seeks equity must do equity**, and **he who goes to equity must go with clean hands**. The Plaintiff/Applicant is not entitled to injunction as he has clearly contravened these principles and his hands are unforgivably soiled.

13. The Defendant/Respondent has built a semi-permanent structure on the parcel of land where he does seasonal subsistence farming throughout the years to make a living for his family and such injunction would deprive him and his family a livelihood.

(see Annexure marked "MK-5" in the Replying affidavit).

14. It is trite law, as enunciated in **GIELLA vs. CASSMAN BROWN & CO. LTD**, that for the Plaintiff/Applicant to be granted injunction, he must demonstrate a prima facie case with a high probability of success, he must demonstrate irreparable damage if the injunction is not granted, and where the court is in doubt, it must decide on a balance of convenience. Clearly, the Plaintiff/Applicant is not entitled to injunction as he has no chance of success and a being land owner with audacity to sell or transfer, cannot claim that he will suffer irreparable damage because he is the author of his misfortunes.

D. CONCLUSION:

15. In conclusion I urge court to dismiss the application with costs as it is evidently an abuse of the court process and cannot lie in law;

That is all your Honour.

DATED at NAIROBI this 16th day April of 2021

KIMAKIA MAGARA & PARTNERS

ADVOCATES FOR THE DEFENDANT

7. I have carefully considered the pleadings, the submissions and the authorities the parties proffered to buttress their diametrically divergent assertions. The applicant has asserted that the case of *Giella versus Cassman Brown & Co. Ltd, [eklr]* supports his case. The respondent asserts otherwise. The applicant has also proffered the case of **Panari Enterprises Limited versus Lijoodi & 2 Others [2014] eklr** to press the issue that he would suffer irreparable damage if the orders he seeks are not granted.

8. Both parties seem to be in agreement that the respondent occupied part of the suit land, the size of the portion of land he occupies notwithstanding. It is also not disputed that he is the registered owner of the suit land. Granting prayer 2 would amount to, among other things, denying the registered owner of the land any access to the land. I am not inclined to do so. I will, however, order that the applicant be not evicted from the portion of land he is occupying and that his houses be not demolished pending the hearing and determination of this suit. The main suit being a claim for ownership under the doctrine of adverse possession, there is need to preserve the suit land pending the hearing and determination of the main suit.

9. Many of the issues raised by the parties are issues that should be raised at the hearing of the main suit.

10. Prayer b in the application, for inhibition, is merited as its effect is to preserve the present ownership of the suit land.

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

- a) The respondent or any other person acting at his behest is restrained from evicting the applicant from the suit land or demolishing his houses pending hearing and determination of this suit.
- b) Prayer b, for inhibition, is granted pending hearing and determination of this suit.
- c) Costs shall be in the cause.

Delivered in open court at Chuka this **18th day of May, 2021** in the presence of:

CA: Ndegwa

Kiongo h/b Mutegi for Plaintiff/Applicant

M/s Kijaru h/b Kimakea for the Defendant

P. M. NJOROGE,

JUDGE.