



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC (OS) CASE NO. E002 OF 2021

IN THE MATTER OF SECTION 38 OF LIMITATIONS OF ACTIONS ACT, ORDER 37 RULES 7 AND 19 CIVIL PROCEDURE RULES SECTION 3 (A) OF THE CIVIL PROCEDURE ACT AND ALL THE OTHER ENABLING PROVISIONS OF THE LAW

PETER KATHARE .....PLAINTIFF/APPLICANT

VERSUS

JOSEPHAT MURIUNGI (SUED AS THE LEGAL ADMINISTRATOR/ REPRESENTATIVE

OF MUCHOKA NKARIRO - DECEASED.....DEFENDANT/RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion application for injunction dated **30<sup>th</sup> August, 2021** which was filed by the Plaintiff/Applicant. The Applicant's case is that he and his family have since **1973** been in open and exclusive occupation of **ten (10)** acres out of Land Parcel Number **N. THARAKA/MARIMANTI/1582** which is registered in the name of Muchoka Nkariro (deceased). The Applicant avers that he has extensively developed the said portion of **ten (10) acres** having cultivated various food crops. The Applicant states that after receipt of summons of the main suit, the Respondent has been interfering with the Applicant's peaceful occupation of the subject portion of land to the extent of harassing and intimidating the Applicant and threatening to forcefully evict the Applicant and his family from the said land. It is the Applicant's contention that unless the Respondent is restrained by an order of injunction, the Respondent will take possession of the same rendering the proceedings herein nugatory and subjecting the Applicant to irreparable loss. The Applicant avers that no prejudice will be occasioned to the Respondent if the orders sought herein are granted as he has never been in occupation of the said portion of land.

2. The application is supported by the affidavit of Peter Kathare the Applicant sworn on **30<sup>th</sup> August, 2021**. The Applicant avers that he entered into occupation of the said portion of land in or about the year **1973** and has since then extensively developed the same.

3. In opposing the application, the Respondent filed a Replying Affidavit sworn by Josephat Muriungi, the Respondent on **25<sup>th</sup> September, 2021**. The Respondent has deposed inter alia, that he knows the applicant herein and denied that he was a resident of Gatonga Village, Gituma Sub-Location within Tharaka Nithi County where the suit land is situated. That the Applicant is a resident of Irapani Village, Kaguuma Sub-Location also within Tharaka Nithi County. The Respondent also avers that the Applicant only owns parcel of land No. **N. THARAKA/MARIMANTI/1949** which neighbours the suit land and in which the Applicant only cultivates but does not reside in. The Respondent states that he is the first born child of Muchoka Nkariro (deceased) and the legal representative of the estate of the deceased. That he was born in the year **1968** and has lived in the suit property since then to date.

The Respondent termed as false the Applicant's allegation that he has been in occupation of **10 acres** of land parcel No. **N. THARAKA/MARIMANTI/1582** since **1973**. The Respondent reiterated that it is him, his mother and siblings who are in occupation of the entire suit land, and has given their names. The Respondent states that the Applicant was born in Kamanyaki Location which is over **10 Kilometres** away from the suit land and that he only immigrated to Irapani Village in the **1990's** together with his father and other siblings and only started cultivating land parcel No. **N. THARAKA/MARIMANTI/1949** after he got married. It is the Respondent's contention that the Applicant wants to grab their father's land which is where the Respondent and his family live in. The Respondent states that the Applicant is on a fishing expedition and cited a demand notice and a **Citation No. E003 of 2003** in which the Applicant was claiming the entire Land Parcel No. **N. THARAKA/MARIMANTI/1582**. The Respondent has annexed copies of the demand notice and citation.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for the Applicant and the advocates for the Respondent.

5. I have considered the application and the rival submissions. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but

only determining whether the applicant is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her rights have been infringed.

6. The principles upon which an interlocutory injunction may be granted are well settled in the famous case of *Giella –v- Cassman Brown & Co. Ltd (1973) EA 358*. One has to establish a prima facie case with a probability of success and 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. If in doubt, the court will decide the matter on a balance of convenience.

7. In this case, it is not in dispute that the suit property is registered in the name of Mwathi Nkariro Kirianga alias Benson Muchoka alias Muchoka Nkariro (deceased) who was father to the Respondent. While the Applicant's case is that he has occupied **10 acres** out of the suit property for a period of **over 12** years and therefore has acquired the same by way of adverse possession, on his part the Respondent contends that he is living on the entire parcel of land together with his family. In the Replying Affidavit to the originating summons sworn on **23<sup>rd</sup> June, 2021**, the Respondent has attached photographs showing some structures and crops. Whereas the Applicant states that he has been cultivating various food crops on the portion he now claims, there was no evidence shown to the court to support the said allegation.

8. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of this court that the Applicant has not established a prima facie case with a probability of success against the Respondent. As regards irreparable damage, I take the view that any damage suffered by the Applicant, if any, can be quantified in damages. Furthermore, the Applicant can still be reinstated into the suit land if found to have been forcefully evicted during the pendency of this suit.

9. Arising from the above, I find that the Notice of Motion dated **30<sup>th</sup> August, 2021** lacks merit and the same is dismissed with costs.

10. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 16<sup>TH</sup> DAY DECEMBER, 2021 IN THE PRESENCE OF:**

C/A: Martha

Ms. Wahome h/b for Muthoni Ndeke for Plaintiff/Applicant

Kirimi h/b for Defendant/Respondent

**C. K. YANO,**

**JUDGE**