



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE (OS) NO. 18 OF 2020**

**MOFFAT MURITHI KIAMBI.....PLAINTIFF**

**VERSUS**

**ALICE MIRITI .....DEFENDANT**

**RULING**

1. By originating summons brought under **Section 38 of the Limitations of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules Moffat Murithi Kiambi** hereafter the plaintiff seeks to be declared suited to adverse possession of  $\frac{1}{2}$  a share over **Parcel No. Abogeta/L. Kithangari/1277** against **Alice M. Miriti** hereinafter the defendant.
2. Alongside the originating summons the plaintiff brought a notice of motion **dated 22.6.2020** seeking for inhibition orders against the suit land; temporary injunction restraining the defendant, her agents, servants or employees from evicting selling, leasing, charging or in any other way interfering with the suit property till determination of this suit. The application is based on the grounds that there is imminent danger, eviction; she purchased the share in May 2008, has been living there; the respondent has declined to transfer the share; there are intentions to dispose of the land to third parties and hence there is need to preserve the property pending hearing hereof.
3. The application is supported by an affidavit sworn on 22.6.2020 in which the applicant has attached **annexture MMK 01” a copy of green card, MMK 02 (a), (b)** being a sale agreement and acknowledge receipts by the respondent of purchase amount for the share. Similarly the applicant has attached **MMK 03**, land control board consent and lastly **MMK 04** being photos of developments over the Suitland.
4. In a nutshell the applicant avers since he bought the land in 2008, it is now over 12 years and hence has accrued rights worthy protecting. Interim ex parte orders were issued on 30.6.2020 to which the respondent made a replying affidavit sworn on 21<sup>st</sup> August 2020. In the said replying affidavit it is admitted there was a sale agreement for only 0.012 hectares and not the whole land, that the respondent has no objection to the applicant getting his share and that the only contention is the claim over a house which the respondent maintain does not belong to the applicant and should not use the court process to get more than what was in the sale agreement as the sold portion was vacant at the time of sale.
5. Following issuance and service of temporary orders the respondent rushed to court by an application dated 21.8.2020 brought under **Section 33A, 63E of the Civil Procedure Act, Article 159 (2) (d)** of the Constitution and any other enabling provision of law seeking for review of the orders issued on **30.6.2020** and in particular seeking to have the plaintiff/applicant restricted to **0.012 ha** being the portion purchased of **Parcel No. Abogeta/Kithangari/1277** and to allow the defendant return to and occupy the remaining portion.
6. The said application is based on the grounds that there was a purchase of 0.012 ha, the house was not part of the purchased portion; applicant had used the orders granted to evict the respondent from the larger unsold portion; the respondent had no objection to the order restraining her from the sold portion and she had not interfered with the sold portion.
7. In support of the motion the respondent swore an affidavit on **21.8.2020** where she reiterated she sold a portion to the plaintiff/applicant, that she had been staying on the remaining portion; that the temporary orders should not restrain her from the whole parcel as she owns it and upon service of the order she was removed from her land and is now living with her sister for she cannot access the land anymore.
8. The court directed both applications be heard together through written submissions. By written submissions dated **13.11.2020** the plaintiff urges the court to find his application to have met the conditions for grant of injunctions set out in **Giella vs Cassman Brown (1969) E.A 380, relied on order 40 rule 1 (a) of the Civil Procedure Rules; urges the court to be guided by the case law of Mrao Ltd vs first American Bank of Kenya Ltd and 2 others (2003) eKLR, Central Bank of Kenya and another vs Uhuru Highway Development Ltd and 4 others (2000) eKLR, Hutchings Biemers Ltd vs Barclays Bank of Kenya Ltd and 2 others (2006) eKLR, Tritex industries Ltd & 30 others vs National Housing corporation and another (2014) eKLR and lastly Thomas Mungiria and 9 others vs Joseph Mutuma and 4 others (2012) eKLR.**

9. On the other hand defendant through written submissions dated **18.2.2021** submitted the he is a nephew to the respondent and urged the court to find the application as full of lies.
10. It is not in dispute that the applicant is in possession of a portion of the suit land where he has carried out extensive developments. Further it is not contested that he lives on 0.012 acres of land and has fenced off the portion.
11. The defendant however submits that what was sold cannot be half share of the whole land and hence the contention is that the applicant herein is seeking to have more than was sold to him.
12. It is also submitted the plaintiff/applicant has used the temporary orders to take up 4 rental houses on the piece of land inclusive of the living house where the defendant/respondent resides and hence the court should not aid him gain more than he deserves especially by denying the defendant access to her rental houses that are in the same line as the disputed house.
13. Similarly the respondent urges the court not to give ambiguous orders which may be incapable of being complied with. Lastly the defendant urges the court to grant orders of status quo instead of any other order which the plaintiff seeks and whose likelihood is to bring unfairness and lead to eviction or restrain her from enjoying the unsold portion.
14. It is quite apparent that parties herein are in agreement that there was a sale agreement which both executed in 2008 and thereafter the plaintiff took vacant possession and has been living on the sold portion. The agreement is clear the sold portion is the one neighboring Obed Gitonga measuring 0.012 ha or thereabout. It is also clear that the replying affidavit and the supporting affidavit to the application for review lacks certain details as now stated in her written submissions. This being a preliminary application presumably such details shall become clear during the main hearing.
15. Suffice it to say that the defendant does not dispute the proprietary rights of the plaintiff particularly over the sold but yet to the transferred portion measuring 0.012 ha.
16. That being the case and in absence of any objection from the defendant, and given that the respondent has given assurance that she has no intention of interfering with the sold portion, this court finds the applicant has met the threshold for grant of temporary injunction regarding the portion sold measuring 0.012 ha and whose dimensions, measurements and location is as per the agreement dated 26.5.2008. With regard to the defendant's application and for purposes of preservation of the rights of both parties pending hearing of this matter, status quo as at 25.6.2020 shall continue subsisting meaning the defendant shall have unlimited access to the rest of the unsold portion of **Parcel No. Abogeta L. Kithangari 1217**.
17. Meantime the interim orders of inhibition are hereby confirmed. Parties to file and exchange documents and set the originating summons for hearing within 60 days from the date hereof.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13<sup>TH</sup> DAY OF OCTOBER, 2021 IN PRESENCE OF:**

Mwirigi holding brief for Elijah ogoti for applicant

Muthomi for plaintiff/applicant

Court Assistant: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**