



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 27 OF 2019 (O.S)

DANSON WANJOHI MITHAMO.....PLAINTIFF

VERSUS

PETER KAMAU KIMANI.....DEFENDANT

RULING

BACKGROUND

What is before me is the Notice of Motion dated 24th October 2019 brought under **Order 40 Rules 1 and 2, Order 51 Rule 1 CPR, Section 1, 1A, 1B and 3A CPA** and all enabling provisions of the law. The applicant is seeking the following orders:

1. Spent.
2. That the Honourable Court be pleased to issue a temporary injunction against the defendant by himself, his agents and/or servants from entering, encroaching, trespassing, evicting, sub-dividing and/or interfering with the plaintiff's rights on title Number MUTIRA/KIRIMUNGE/1981 until the hearing and determination of this application.
3. That the Honourable Court be pleased to issue a temporary injunction against the defendant by himself, his agents and/or servants from entering, encroaching, trespassing, evicting, sub-dividing and/or interfering with the plaintiff's rights on title number MUTIRA/KIRIMUNGE/1981 until the hearing and determination of the main suit.
4. That the Officer-in-Charge Kerugoya Police Station do ensure compliance.
5. That the costs of this application be provided for.

The application is supported by the affidavit of Danson Wanjohi Mithamo, the Applicant herein and grounds apparent on the face of the said application. The application is opposed with a replying affidavit sworn by the Respondent on 9th December 2019.

APPLICANT'S CASE

The applicant in his supporting affidavit stated that despite the respondent being the registered proprietor of the suit land parcel No. MUTIRA/KIRIMUNGE/295, he has been in open exclusive, continuous and/or uninterrupted possession and occupation of the same for over 12 years and that he has asked this Honourable Court to find that he has acquired the same by way of adverse possession. The applicant further deponed that he has been in open exclusive, continuous and/or un-interrupted possession and occupation of the suit property particularly the portion described as L.R. No. MUTIRA/KIRIMUNGE/295 and that he has fully developed buildings, structures and other developments which have been standing for a period of over 12 years.

The applicant further stated that the defendant/respondent has at all material times been aware that he has been in possession and/or occupation of the land for a long period prior to his registration as proprietor of land title No. MUTIRA/KIRIMUNGE/1981. The applicant also deponed that the defendant's agent Jackson Gacia Njega has been chasing away his wife Faith Wairimu Wanjohi and workers from the farm on the suit land. The applicant further deponed that as a result of the aforementioned, his wife has been charged in the Chief Magistrate's Court Criminal Case No. 610 of 2019 (Kerugoya). He stated that unless the orders sought are issued, he will suffer irreparable loss.

RESPONDENT'S CASE

The respondent on his part deponed that he purchased the suit land from the applicant's son one Anthony Muthii Wanjohi who had been given the suit land by the plaintiff's father Mithambo Muchiri as a gift. The respondent deponed that upon purchasing the suit land, he took possession thereof and began cultivating assorted crops including paddy rice and avocado through his agent. The respondent also stated that the plaintiff/applicant was only left occupying the portion where he had put up his house since he had made arrangements with his said father and son that he was to be allowed a grace period to move to the share of land which his father intended to give him being land parcel No. MWEA/MARURUMO/620. The respondent deponed that the plaintiff together with his family members have on several occasions attempted to dispossess him of the suit land unsuccessfully by uprooting his crops planted thereon whereby his agent on the ground reported the said damages and the plaintiff's wife was charged in CM Criminal Case No. 610 of 2019. He stated that the plaintiff is engaged in a forum shopping exercise since a similar application is pending in CMCC No. 79 of 2017.

APPLICANT'S SUBMISSIONS

The applicant through the firm of Ngigi Gichoya & Co. Advocates submitted that the defendant is the registered owner of title number MUTIRA/KIRIMUNGE/1981 and that the plaintiff/applicant and his family have been in open and exclusive, continuous and/or uninterrupted possession and occupation of the suit property which he has fully developed buildings, structures and other developments which have been standing for a period of over 12 years. The plaintiff/applicant also submitted that the defendant has been aware that the plaintiff has been in possession and/or occupation of the land for a long period prior to his registration as the proprietor of L.R. No. MUTIRA/KIRIMUNGE/1981. The applicant further submitted that it is clear from the plaintiff's affidavit that the defendant's agent, Jackson Gacia Njega has been harassing the plaintiff's wife, Faith Wairimu Wanjohi and the workers from the suit land. It is further submitted by the applicant that he is on record having admitted that the defendant herein had sued him and his wife Faith Wairimu Wanjohi in the Chief Magistrate's Court CMCC No. 79 of 2017 (Kerugoya) where he had sought an order of eviction from the suit property parcel No. MUTIRA/KIRIMUNGE/1981. The applicant contends that the judgment was entered in favour of the defendant as against the plaintiff and his wife and the Court granted the plaintiff 90 days to give vacant possession failing which an eviction order shall issue. He submitted that there has been no eviction proceedings taken out as against him as ordered by the lower Court on 11/4/2020. The plaintiff/applicant subsequent to the judgment of the Lower Court filed this suit claiming title No. MUTIRAKIRIMUNGE/1981 under the doctrine of adverse possession and also filed the Notice of Motion dated 24/10/2019 which is the subject of this ruling. The applicant submitted that him together with his wife Faith Wairimu Wanjohi could not have filed a counter-claim in the lower Court as that Court lacked the jurisdiction to entertain a claim on adverse possession under **Section 38 of the Limitation of Actions Act** which provides as follows:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 38 of this Act or land compromised 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 the proprietor of the land”.

The applicant cited the case of **GIELLA VS CASSMAN BROWN CO. LTD 91973) E.A. 358** and stated that the application meets all the three principles for the equitable relief sought.

RESPONDENT'S SUBMISSIONS

The respondent did not file any submissions by the time this Court withdrew to write this ruling.

ANALYSIS AND DETERMINATION

The applicant in this interlocutory application is seeking an equitable relief of an injunction. The principles for the grant of an equitable relief of an injunction were succinctly set out in the celebrated case of **GIELLA VS CASSMAN BROWN CO. LTD (1973) E.A. 358** as follows:

- 1. An applicant must establish a prima facie case.**
- 2. An applicant must demonstrate an irreparable injury where damages cannot be an adequate remedy and**
- 3. Where the Court is in doubt, it may decide the matter on a balance of convenience.**

Applying the three principles to this case, I find that on the first issue, the plaintiff/applicant has deponed on oath that he has lived on the suit land together with his family for a period more than twelve years where they have lived openly without the consent of the owner and has done enormous investments including cultivating assorted crops e.g. avocado trees and structures. These averments given on oath have not been controverted. The applicant also submitted that he is claiming to be registered as owner of the suit land by the operation of law under **Section 38 of the Limitation of Actions Act Cap. 22 Laws of Kenya**. On those grounds, I find that the applicant has established a prima facie case. On the second principle, the applicant has stated that he has lived in the suit land for more than twelve (12) years and that he has invested by constructing buildings and cultivated crops which includes avocado trees which he stands to suffer irreparable loss if the orders sought are not granted. I am also satisfied that the applicant has demonstrated to the satisfaction of this Honourable Court that he will suffer irreparable loss which cannot be compensated by damages unless the orders sought are granted.

Even if this Court was to decide this case on the last principle, I am still persuaded that the balance of convenience tilts in favour of the plaintiff/applicant. My findings are guided by the decision in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD (2003) K.L.R 125** where it was held as follows:

“A prima facie case in a civil application includes but not limited to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself concludes that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

I agree with the decision in that case. For the aforementioned grounds, I find the application dated 24th October 2019 merited and the same is allowed as prayed.

The plaintiff/applicant to fast track the hearing of this suit within 12 months from today failing which the injunction orders shall be vacated. The costs of this application to be costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 29th day of May, 2020.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Mwangi holding brief for Mr. Ngigi for Plaintiff/Applicant
2. Mr. C.S. Macharia for Respondent
3. Mbogo – Court clerk