



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC CASE NO. 355 OF 2015 (OS)

**IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTIONS ACT ORDER 37 RULE 7 AND
19 CIVIL PROCEDURE RULES SECTION 3A OF THE CIVIL PROCEDURE ACT AND ALL THE
OTHER ENABLING PROVISION OF THE LAW**

NJIRU NYAGA.....PLAINTIFF/APPLICANT

VERSUS

FIDESIO MUGO MATI.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant **NJIRU NYAGA** moved this Court by way of an Originating Summons dated 9th December 2015 seeking to be declared to have become entitled to the ownership of land parcel No. EVURORE/EVURORE/1666 (herein the suit land) registered in the names of the defendant/respondent **FIDESIO MUGO MATI** by virtue of having been in occupation of the same for a period of over 12 years and in the alternative, for a declaration that the defendant/respondent was registered as proprietor of the said land in trust for him. The same was supported by his affidavit to which were annexed two certificates of search in respect of the suit land one showing that it is registered in the names of **MATI NJERU** (annexture **NN 1**) while the other is showing that it is registered in the names of the defendant. Hopefully, this anomaly will be sorted out before the trial.

Simultaneously with the filing of the Originating Summons, the plaintiff/applicant filed a Notice of Motion under the provisions of **Section 3A of the Civil Procedure Rules and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** seeking the following orders:-

1. Spent.

2. That the defendant either by himself, his agents and/or servants be restrained from evicting and/or interfering with the plaintiff/applicant's peaceful occupation of the suit land pending the hearing and determination of this suit.

3. That the Land Registrar Mbeere be ordered to issue restriction against any dealing on the suit land pending the hearing and determination of this suit.

4. Spent.

5. That costs of this application be provided for.

The application was premised on the grounds set out therein and supported by the plaintiff/applicant's affidavit.

From the said supporting affidavit, it is deponed, inter alia, that the plaintiff/applicant is in occupation of the suit land which is registered in the names of the defendant as per the annexed certificate of search (annexture NN 2). However, the suit land was previously registered in the names of the plaintiff/applicant's uncle **MATI NJERU** alias **MESHAK MATI NTHIRIMANO** (now deceased) but it had been agreed that the suit land would be given to the plaintiff and that agreement was reduce in writing (annexture NN 3). The plaintiff/applicant and his family have extensively developed the suit land and if it is not preserved, the plaintiff/applicant may suffer irreparably.

According to the affidavit of service filed herein on 9th May 2016 by **JAMES K. THUO** a licensed process server of this Court, the Notice of Motion supporting affidavit and Originating Summons were served upon the defendant/respondent on 11th March 2016 following the directions issued by this Court on 11th December 2015 that service be effected upon the defendant/respondent. When the application came up for hearing on 9th March 2016, there was no appearance by the defendant/respondent and neither had any reply been filed in opposition to the Notice of Motion. This application is therefore not opposed.

The plaintiff/applicant has deponed, and this is not controverted as the defendant/respondent filed no response to the said application, that although the suit land is registered in the names of the defendant/respondent, he has been in occupation thereof for a period in excess of twelve (12) years and is therefore entitled to be declared to have become entitled to the same no doubt by virtue of the doctrine of adverse possession. In the alternative, it is pleaded that the defendant/respondent holds the suit land in trust for the plaintiff/applicant in terms of the annexed agreement – annexture NN3. That agreement is neither in English nor Kiswahili, the language of this Court, and no doubt the plaintiff/applicant will avail a translation before the hearing of the main suit.

Notwithstanding that the application is un-opposed, I have nonetheless considered it in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

(a) The applicant must show a prima facie case with a probability of success at the trial.

(b) The Court will not normally grant an injunctive relief unless it is demonstrated that the applicant will suffer irreparable injury that cannot be compensated by an award of damages and

(c) If in doubt, the Court will determine the application on a balance of convenience.

As to what amounts to a prima facie case, the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD C.A CIVIL APPEAL NO. 39 of 2002 (2003) K.L.R 125** defined it as:-

“... a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation of rebuttal from the latter”

The plaintiff/applicant as I have stated above, is in occupation of the suit land which he says he has developed for a period in excess of twelve years though it is registered in the names of the defendant/respondent whom he also claims to hold it in trust for him. It is trite law that the registration of land in the name of a party does not relieve him of his obligation as a trustee – **KANYI VS MUTHIORA 1984 K.L.R 712.** If infact the defendant/respondent holds the suit land in trust for the plaintiff/applicant, then the fact that the same is registered in the defendant/respondent's names will not in itself defeat the plaintiff/applicant's claim in trust. Similarly, if the plaintiff/applicant can demonstrate that he has been in open, continuous and un-interrupted peaceful occupation of the suit land with the knowledge of the defendant/respondent for a period in excess of twelve (12) years, then he will be entitled to orders that he be registered as owner thereof in place of the defendant/respondent. At this stage, all that is not rebutted and on the basis of those averments, I am satisfied that the plaintiff/applicant has established a prima facie case to warrant the grant of a temporary injunction.

On the issue of irreparable damage that cannot otherwise be compensated in damages, the

plaintiff/applicant has deponed in paragraph 6 of his supporting affidavit that he and his family have extensively developed the suit land and stands to suffer irreparably if it is not preserved. In **MUIRURI VS BANK OF BARODA (KENYA) LTD 2000 K.L.R 183**, the Court of Appeal held the view that:-

“... disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

I am guided accordingly.

From all the above, I am persuaded that the plaintiff/applicant is entitled to an order of temporary injunction as prayed.

The other remedy sought by the plaintiff/applicant is an order restricting any dealing in the suit land pending the hearing and determination of this suit. Though the plaintiff/applicant who is acting in person did not cite the legal provision, such an order is provided for under **Section 68 (1) of the Land Registration Act** which states:-

“The Court may make an order (hereinafter referred to as inhibition) 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”

The purpose of such an order, like a temporary injunction, is to preserve the suit land pending the hearing and determination of the dispute to which it relates. In granting such an order, the Court will consider, among other factors, whether the applicant has any arguable case and that the applicant’s suit might otherwise be rendered nugatory if the order is refused. I have considered all those factors and I am satisfied that on the un-rebutted evidence before me, the plaintiff/applicant is entitled to an order of inhibition.

Ultimately therefore, I find merit in the plaintiff/applicant’s Notice of Motion dated 9th December 2015 which I allow in the following terms:-

- 1. An order of temporary injunction is issued restraining the defendant/respondent by himself, his agents, and/or servants from evicting the plaintiff/applicant or interfering with his peaceful occupation of the land parcel EVURORE/EVURORE/1666 pending the hearing and determination of this suit.***
- 2. An order of inhibition is issued inhibiting registration of any dealings on land parcel EVURORE/EVURORE/1666 pending the hearing and determination of this suit.***
- 3. No order as to costs.***

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling dated, delivered and signed in open Court this 13th day of May 2016.

Plaintiff present in person

Defendant absent.

B.N. OLAO

JUDGE

13TH MAY, 2016