



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 162 OF 2014**

**JAMES NJUE**  
**NJOKA.....PLAINTIFF**

***VERSUS***

**ZECHARIA NYAGA CIATHATHI.....DEFENDANT**

**RULING**

**Introduction**

Mr James Njue Njoka, has sought a temporary injunction to restrain the respondent/defendant from ploughing, interfering, trespassing and/or dealing in any manner with the suit land parcel number Evurore/Nguthi/1252.

Additionally, he urges the court to extend the temporary injunction to cover the respondent/defendant, his agents and/or servants from evicting the applicant from the suit land. His application which is made by way of notice of motion dated 14<sup>th</sup> November, 2010 is supported by an affidavit and on the grounds which appear on the face of the said notice of motion.

The application is opposed by the respondent/defendant. In his opposition to application, the defendant has filed a replying affidavit dated 8<sup>th</sup> December, 2014. He has stated in the replying affidavit that he is no longer the owner of the suit land, amongst other reasons.

**The Case for the Plaintiff/Applicant**

As I have already mentioned, the applicant is seeking a temporary injunction to restrain the respondent/defendant from ploughing, trespassing and from evicting the applicant/plaintiff from the suit land parcel reference number Evurore/Nguthi/1252.

The temporary injunction sought is to preserve the status quo pending the hearing and determination of the application, which has been brought under sections 1A, 1B, 3A of the Civil Procedure Act as read together with Orders 40 and 51 and Rule 10 of the 2010 Civil Procedure Rules. In support of the application, the applicant/plaintiff has stated in his grounds that he has been in occupation of the suit land since 1985. In terms of computation, he has been in occupation for over 12 years, which occupation has been open and uninterrupted. This is the basis for his claim of ownership through adverse possession.

Furthermore, he has stated that the respondent has recently threatened him. The plaintiff also says that even the son of the respondent/defendant had written to him threatening him with eviction from the suit land.

In his supporting affidavit, the applicant/plaintiff has stated that the suit land comprises 11.8 hectares and is registered in the name of the respondent. He has annexed a green card to his affidavit. According to him, he has learnt that the respondent is selling the land without his knowledge and that there are subdivisions on the suit land which are being carried out by the respondent.

Finally, he states in his affidavit that he lives with his entire family on the suit land and that if he is evicted, he will be highly prejudiced. The reason he gives is that he does not have any piece of land to which he will move with his family of 14 children. It is for this reason that he seeks a temporary injunction.

### **The Case for the Respondent/Defendant**

The respondent has filed a replying affidavit dated 8<sup>th</sup> December, 2014. In that affidavit, he has stated that he has subdivided the suit land. As a result, the title to the suit land was closed, giving rise to new parcel nos. 3287 to 3296, according to the green card (the title deed). According to entry No. 6 in the green card the following appears therein: ***“mutation . Title closed on subdiv. No .New 3287 – 3296 (10) sgd, Evurore/Nguthi/ 1252.”*** Furthermore, he has stated that he is no longer the owner of the suit land and has challenged the applicant by stating that he has never been in quiet possession of the suit land.

According to him, the applicant erected some structures on the suit land notwithstanding resistance from the respondent. The respondent further alleges that there are many court cases concerning this suit land. Finally, he says that the applicant has another land in Kibugu within Embu County.

### **The Applicable Law:**

The law that governs the grant of a temporary injunction is found in Order 40 of the 2010 Civil Procedure Rules. The provisions of Order 40 have been interpreted and judicially approved in the case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358***. According to that case, an applicant for a temporary injunction has to meet the following criteria:

***“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”***

Furthermore, according to the case of ***R. v Director General of East African Railways Corporation, Ex-parte Kaggwa ( 1977) 654 KLR***, a court is not allowed to issue orders in vain, because court orders must be effective and executable(implementable).

### **Issues for Determination:**

In the light of the affidavit evidence, the submissions of both counsel and the applicable law, the following are the issues for determination:

1. Whether or not the applicant has met the criteria for the grant of a temporary injunction.
2. Whether or not a court will grant orders in vain.
3. Who should pay for the costs of this application.

### **Evaluation of the Affidavit Evidence, Findings and the Law:**

I have carefully considered the affidavit evidence, the written submissions of both counsel and the applicable law. I find that the applicant is in occupation of the suit land. He is claiming ownership of the suit land by virtue of adverse possession, having been in continuous occupation for over 12 years. This issue is still pending in this court for trial. I also find that the suit land was originally registered in the name of the respondent. Following the subdivision of the suit land, there is now in existence new parcel

Nos. 3287 – 3296, which were created out of the original parcel No. Evurori/Nguthi/1252. It is therefore clear the the original suit land is no longer in existence. I have also considered the evidence of the respondent and his counsel's submission that a court is forbidden from issuing an order in vain. I accept this principle of law as good law. In the circumstances it is not proper to grant the orders sought, because they will be in vain.

If an order was issued, it will not be effective and is not capable of being implemented. As a result it will not be proper to issue orders in respect of the suit land, because it does not exist.

It also appears that there are court cases concerning this suit land. The relevance of these cases is a matter for trial, which is yet to be conducted.

In the circumstances of this case, I find that the applicant has not met the criteria for the grant of a temporary injunction pending the hearing and determination of this suit, which has been filed through the originating summons procedure.

**Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. An order for a temporary injunction is refused.
2. Costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 11<sup>th</sup> day of FEBRUARY,2015**

In the presence of the Mr Andande for plaintiff and Mr Ithiga holding brief for Ms Ndorongo for defendant.

Court clerk Mr. Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**