



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO.19 OF 2013**

**ABDUL MAJEED.....PLAINTIFF**

**VERSUS**

**ANJUMAN HIMAYAT-EL-ISLAM & 2 OTHERS.....DEFENDANTS**

**RULING**

The plaintiff claims to have been in continuous and uninterrupted physical occupation of the suit land **L.R. No.NYERI/MUNICIPALITY BLOCK 3/121** since 1986 and therefore has acquired adverse possession of the suit land and believes that the title held by the 2nd and 3rd defendants is tainted by fraud.

He prays that this court declares that the suit land belongs to him and ultimately that the court should direct the Deputy Registrar of the court to sign the transfer form and all the other documents necessary on behalf of the defendant to facilitate registration of the suit land in favour of the plaintiff and production of the original title deed for the said land and that the defendants **P.I.N** certificates and any other document be dispensed with while registering the transfer in favour of the plaintiff.

Ultimately, he prays for an order canceling the title held by the 2nd and 3rd defendants.

The amended Originating Summons is supported by the affidavit of **Abdul Majeed** whose import is that he entered into a sale agreement with the defendant way back in the year 1984 for the sale of Nyeri/Municipality Block 3/121. He removed the squatters and fenced off the property in anticipation that the 1st defendant would transfer the property and/or conclude the sale to the plaintiff, however the defendant refused to conclude the sale. He claims to have been in occupation of the said suit property and has been paying the requisite land rent and the rates to the Ministry of Land and the Municipal Council of Nyeri respectively and has therefore enjoyed uninterrupted physical possession and occupation for a period well over 27 years and ultimately has acquired good title to the suit property by adverse possession. He requests this court in the interest of justice to find that he has acquired good title and to order that the relevant Nyeri Land District Register be amended to reflect that he is the truthful owner of the suit property.

In the Originating Summons amended on 8/2/2013 at Nyeri the plaintiff has framed the issues to be determined by the court as follows;

**(i) That the plaintiff has been in continuous and uninterrupted physical occupation of the suit land since 1986.**

**(ii) That the plaintiff by virtue of the said continuous and uninterrupted physical occupation has acquired adverse possession of the suit land.**

**(iii) That the title held by the 2nd and the 3rd defendant is tainted by fraud.**

Accompanying the suit is an application under certificate of urgency dated 11/2/2013 in which the plaintiff prays for an order of temporary injunction against the defendants, their servants and/or agents from moving into and or interfering with the plaintiffs quiet possession of the suit land pending the hearing of the suit. The application is supported by the affidavit of the plaintiff sworn on 11/2/2013 whose import is that he has been in occupation of L.R. NO.NYERI/MUNICIPALITY BLOCK 3/121 since 1986 that was registered in the name of the 1st respondent with whom he had entered in to a sale agreement but the latter refused to conclude the sale. Despite the 1st defendant/respondent refusing to transfer the land to him he continued with occupation and even removed the squatters on the land, fenced off and developed the same and in the meantime, continues paying the requisite land rent and rates to the relevant authorities. That recently however, he discovered that the land was transferred by the 1st defendant to the 2nd and 3rd defendants on the 10th December, 2012. He had instructed his advocates on record to file suit for adverse possession. He claims that the said transfer was fraudulent since he had already placed a caution on the suit property which caution was removed without notice and is apprehensive that the 2nd and 3rd respondents will move into the land and evict him at anytime as a result of which he will suffer irreparable loss.

The application was opposed by the respondents who relied on the affidavit of **Munawar Khan Pathan** who states that he is a trustee of the 1st defendant and also swears the affidavit on behalf of the 2nd and 3rd respondents. The import of the affidavit is that the 1st defendant/respondent was the legal owner of the parcel of land subject herein known as L.R. No.NYERI/MUNICIPALITY BLOCK and did not at any time sell the said parcel of land to the plaintiff/applicant in 1986 as alleged by the plaintiff/applicant. The land was bought by 1st defendant/respondent in 1947 who was registered as the owner and consequently was issued with a certificate of title by the colony of Kenya. The said parcel of land was later in the year 1988 registered under the Registered Lands Act and a certificate of lease was issued to the 1st defendant/respondent. Contrary to the allegations by the plaintiff the said parcel of land is vacant and undeveloped since then and the 1st defendant/respondent has never authorized anyone to carry out any sort of development and that the plaintiff/applicant has never occupied the said land or developed the same. He deposes that in the event he developed the same then it was without consent of the 1st defendant/applicant and his actions amount to trespass. In his view payment of land rent and rates is not proof of ownership of land and there is no proof of authority issued by the 1st defendant/respondent to undertake the said responsibility. He reiterates the allegation that the 1st defendant/respondent transferred the parcel of land subject herein to the 2nd and 3rd defendants/respondents as it was his right to dispose its property at anytime in accordance to the law. On the caution, he states that it was not successfully registered as the same lacked reasonable grounds and the form was also defective since the declaration was not attested to. In his opinion no harm will be suffered by the plaintiff/applicant as he has never been in occupation of the parcel of land and has never developed the same and in conclusion he states that granting the injunction as prayed will deny the 2nd and 3rd defendants/respondents their statutory right of quiet and peaceful enjoyment of their property.

The plaintiff relies heavily on documents indicating that he was paying land rent in the year 2011, 2012 and 2013. The defendants on the other hand has showed the court documents indicating that he was granted all that piece of land situated in Nyeri township being land reference No.1108/12XXII being the suit land in consideration of the sum of Kshs.300. A certificate of lease indicates that the lessor is the G.O.K, the rent is Kshs.72 and the term is 99 years from 1/10/1929. The lessee is Anjuman Himayat -El-Islam. The land was cautioned by the plaintiff on the grounds that he had occupied the plot since the year 1986 and had fenced it and had continuously paid rates to the Municipal Council and had paid a sum of Kshs.30,000 per annum until the 15/3/2012.

The defendant appears to contradict himself by stating that a Gazette Notice dated 23/11/2012 was published to invite any objection for the removal of the caution but no objection was received hence caution was removed and yet he stated earlier that that the caution was not successfully registered. The

2nd and 3rd defendants are purchasers for value without Notice of any irregularity and have attached a copy of the registered transfer between the 1st respondent and the 2nd and 3rd respondent.

**Mr. Ng'ang'a** for the applicant contended that the applicant and 1st respondent entered into a sale agreement in respect of the suit property and moved into the property and has been paying land rent and rates. The 1st respondent declined to conclude the sale and to transfer the property. He has been in occupation of the property and farming on it at one time cautioned the land.

The **gravamen** of the respondents submission is that the property is registered in the names of the 2nd and 3rd respondents in common whilst the 1st respondent is the 1st respondent owner who transferred the property to the 2nd and 3rd respondents.

It is not in doubt that the 2nd and 3rd respondents are the registered owners of the property. It is also not in doubt that the plaintiff has been paying rates and rent in respect of the property and appear to be in possession of the property.

It is common knowledge that this matter cannot be determined at this stage and the parties are not asking the court to do so, but the court is being asked to grant an order of temporary injunction.

**In Giella -VS- Cassman Brown & Co. Ltd (1993) E.A 358.** the court set the test for granting temporary orders of injunction thus that the applicant to establish a prima facie case with a probability of success and to show that he is likely to suffer irreparable loss, which would not be compensated by an amount of damages or the court to decide on a balance of convenience. This court will not attempt to reinvent the will as the principles are now settled by the Court of Appeal

Having considered the evidence on record and heard the rival oral submissions and having read written submissions of parties, this court finds that the plaintiff has established a prima facie case that he has been in occupation of the parcel of land and paying the rent and rates to the Municipal Council of Nyeri as it then was as paragraphs 10 and 11 of the replying affidavit of Munawar suggest that there is a probability that the plaintiff is in occupation without the consent of the defendants and has been paying rent and rates , despite the fact that the property is registered in the names of the 2nd and 3rd respondents in common and therefore this court believes that the claim herein is meritorious and not frivolous.

On the second principle, this court also finds to the plaintiffs favor as the land in issue is prime and that if the plaintiff is disposed he is likely to suffer irreparable loss.

The upshot of the above is that the application dated 11/2/2013 is granted in terms of prayer 2, thus an order of temporary injunction is hereby given against the defendants, their servants and/or agents from moving into and/or interfering with the plaintiff's quiet possession of all that piece of land known as **L.R. NO.NYERI/MUNICIPALITY/BLOCK 3/121** in any manner whatsoever pending the hearing of the suit.

***Dated, signed and delivered at Nyeri this 14th day of March 2014.***

**A. OMBWAYO**

**JUDGE**