



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 622 OF 2012**

**JOYCE NJERI KARIUKI (Suing as the Administrator of the  
Estate of Josephat Kariuki Marima (Deceased)).....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**LIVINGSTONE G.MUCHUNGI.....2<sup>ND</sup> DEFENDANT**

**JAMES M. KIMEU.....3<sup>RD</sup> DEFENDANT**

**CHARLES KAMARI.....4<sup>TH</sup> DEFENDANT**

**RULING**

The application before me is one dated 18/9/2012 filed by the Applicant, the administrator of the Estate of **Josephat Kariuki Marima**, seeking an order of injunction restraining the Defendant from accessing, entering, remaining, and trespassing upon and/or in any way interfering with the Plaintiff/Applicants ownership and possession of the property known as L.R. No. 13330/542 pending the hearing and determination of the suit. The application is premised on grounds that the 1<sup>st</sup> Defendant has transferred to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants the suit plot and who intend to take possession and sell it to third parties in total disregard of the interests of the Applicant and to her detriment. The Applicant avers that if the prayers sought in the application are not granted, the proceedings herein shall be rendered nugatory and that she will suffer irreparable loss that cannot be compensated by way of damages.

The application is supported by an affidavit sworn by the Applicant on 18/9/2012. She deposes that her deceased husband was in 1976 allocated adjacent plots No. 322 and 324 Thome Estate from Thome Farmers No. 5 Ltd but however sold off Plot No. 324 and the remainder Plot No. 322 is now surveyed and allocated title number 13330/542. It is her disposition that from 1995 the deceased allowed his daughter and son-in-law to occupy plot No. 322 where they constructed a site building and employed a worker who now resides on the plot and have been planting maize and vegetables. The Applicant deposed that even after the demise of the deceased, they have continued with the same arrangement but with the understanding that the plot belongs to the estate of the deceased. The Applicant deposed that sometime in

2007, she learnt that there was a dispute between Thome Farmers No. 5 Ltd and the 1<sup>st</sup> Defendant over plots that the former had sold to 3<sup>rd</sup> parties including the suit plot. She deposed that she also learnt that plot owners were to pay Kshs. 200,000/- to the 1<sup>st</sup> Defendant as part of the resolution, through their advocates M/s Kahiro & Associates Advocates to whom she paid a sum of Kshs. 50,000/-. The Applicant deposed that it was not until July 2012 that she learnt that the 1<sup>st</sup> Defendant withdrew its instructions from M/s Kahiro & Associates Advocates and appointed the firm of Chege Wainaina & Co. Advocates.

The Applicant deposed that she learnt from the later firm that the 1<sup>st</sup> Defendant had transferred the suit plot to third parties and issued them with a title deed. This, she deposed, was fraudulent, unlawful and without notice of the intention to sell to her as the administrator of the estate of the deceased. The Applicant contends that the deceased and his estate have exercised their rights of ownership and occupation of the plot openly, continuously and to the exclusion of all others with the full knowledge of the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants must have been aware that there were people in occupation of the plot prior to purchasing it. Thus the Applicant seeks a declaration that the deceased's estate acquired a right to ownership of the suit plot by way of adverse possession. The Applicant alleges fraud on the part of the Defendants for reasons that the Official Search shows that the suit plot was sold to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants at a consideration of Kshs. 1.6 Million whereas the plot was valued at over Kshs. 15 Million.

In support of the application, the Applicant annexed a copy of the Limited Grant of Letters of Administration issued by the Court on 10/8/2012; Certificate of Death of the deceased; Share Certificates No. 761 dated 29/7/1979 and 1628 dated 3/9/1999; Sale Agreement in respect of Plot No. 324; Copies of receipts from Thome Farmers No.5 Ltd; Copies of receipts from Kimani Kahiro & Associates; Certificate of Title of the suit plot in the name of the 1<sup>st</sup> Defendant; and photographs to show farming activities on the suit plot.

This application was opposed by the Defendants. Duncan Ndegwa, a Director of the 1<sup>st</sup> Defendant Company swore a Replying Affidavit on 26/11/2012. He deposed that L.R. No. 13330 was as a result of an amalgamation of two titles L.R. No. 4920/3 and 4921/3 belonging to the 1<sup>st</sup> Defendant and L.R. No. 13330/542 is a sub-division of L.R. No. 13330 which has never been registered in the name of Thome Farmers No. 5 Limited. He deposed that the 1<sup>st</sup> Defendant is not the same as Thome Farmers No. 5 Limited, neither are the two entities related by partnership or joint venture. Further, that the said Thome Farmers No. 5 Limited does not own shares in the 1<sup>st</sup> Defendant. Consequently, shares bought by the Plaintiffs in the said company have no effect on the 1<sup>st</sup> Defendant and would therefore not entitle the Plaintiffs to any shares, land or property. It was his disposition that the Plaintiffs claim, if any, should be directed to the said company and not the 1<sup>st</sup> Defendant.

The deponent stated that in the year 1992, the 1<sup>st</sup> Defendant filed a suit HCCC No. 6206/1992 against all persons who had trespassed on its property, which suit was determined by way of a consent order in 2002. He deposed further that part of the resolution was that parties to the suit would provide the 1<sup>st</sup> Defendant with genuine documents to establish ownership of a claimed plot and subsequently make a payment of Ksh. 200,000/- after which the plot would be transferred subject to payment of stamp duty and other expenses incidental to registration of a transfer. It was his disposition that a part of the resolution allowed the 1<sup>st</sup> Defendant to dispose off the property to willing third parties should the parties claiming ownership failed to provide genuine documentation of ownership and pay the requisite Kshs. 200,000/-. The deponent stated that the 1<sup>st</sup> Defendant did place several advertisements in the newspapers and the 1<sup>st</sup> Defendants property calling for such parties to comply with the consent order. The deponent deposed that the Plaintiff and her deceased husband never produced any documents to show ownership nor paid the Kshs. 200,000/- in accordance with the consent order. Consequently, the 1<sup>st</sup> Defendant transferred the suit plot to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and no longer has any interest in it.

The deponent stated that the 10<sup>th</sup> Defendant has been in possession of L.R. No. 13330 for the last 30 years, engaged in the consolidation and consequent sub-division and so the Plaintiff could not be in

continued occupation of the suit property which is part of the L.R. No. 13330 during the sub-division exercise, which ended in 2000. The deponent refuted the Plaintiff's claim of adverse possession and deposed that the suit instituted by the 1<sup>st</sup> Defendant in 1992 was only determined in 2002 by way of a consent order hence therefore the Plaintiff could not claim to have been in physical and uninterrupted occupation thereof for over 12 years. The deponent stated that the suit plot having been transferred to third parties, an injunction order could not issue against the 1<sup>st</sup> Defendant. Further that from the foregoing, the Plaintiff had failed to establish a prima facie case with a chance of success hence underserving of the equitable remedies.No Replying Affidavit by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants on File

The Plaintiff swore a Further Affidavit sworn on 12/4/2013 in response to the Replying Affidavits sworn by the Defendants. It was her dispositions that the contents of the 1<sup>st</sup> Defendant's affidavit were misleading as they did not contain full disclosure of facts. The Plaintiff refuted claims made by the 1<sup>st</sup> Defendant that it did not have a connection with Thome Farmers No. 5 Ltd. She deposed that there are numerous pending suits against the 1<sup>st</sup> Defendant in respect plots - sub-divisions of L.R. No. 13330 including HCCC No. 13121/2006 and ELC No. 586/2008 which demonstrates a history and extent of conflicts being addressed in this suit.

The Plaintiff annexed a Replying Affidavit sworn by Joseph Wambaa, a Director of Thome Farmers No.5 Ltd, together with its annexures, in suit HCCC No. 13121/2006 which gave a detailed history of the allocation of plots to members of Thome Farmers Ltd. The Plaintiff refuted the allegation that they did not show documentation to prove ownership of the suit plot and deposed that the 1<sup>st</sup> Defendant through its advocate at the time accepted part payments made for the suit plot. She also refuted the claim that the plot was vacant when the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants purchased it.

## **Submissions**

### **Plaintiff's Submission**

This application was canvassed by way of written submissions. Counsel for the Plaintiff filed submissions dated 28/5/2013 wherein counsel reiterated the claim for adverse possession. He submitted that the Plaintiff had a right to the property, her deceased having purchased the same from Thome Farmers Ltd by virtue of being a shareholder and have been in continuous occupation since 1976. Counsel while referring to the annexed affidavit of Joseph Wambaa in HCCC No. 13121/2006 submitted that Thome Farmers Ltd purchased entered into a mutual agreement with the 1<sup>st</sup> Defendant herein for the purchase of the two parcels of land making LR. No. 13330 at a purchase price of Kshs. 2,000,000/- which subsequently sub-divided the parcel and allocated plots to its shareholders.

It was counsel's submission that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants failed to carry out proper due diligence which would have confirmed to them that the 1<sup>st</sup> Defendant was not the owner of the suit plot. Counsel submitted further that by virtue of the 1<sup>st</sup> Defendant accepting the purchase price from Thome Farmers Ltd, it was estopped from claiming that it was unaware of any such transaction.

Counsel submitted that the Plaintiff stood to suffer irreparable loss for she and her family had been in occupation since 1976 and that the plot formed part of the estate of the deceased. Counsel submitted further that the Plaintiff's family had used the plot to cultivate for food. It was also his submission that the value of the plot continues to rise and therefore it is going to be a huge economic loss to the Plaintiff due to the rate of appreciation.

### **1<sup>st</sup> Defendant's Submissions**

Counsel for the 1<sup>st</sup> Defendant filed submissions dated 1/7/2013 wherein he reiterated the 1<sup>st</sup> Defendant's case. Counsel submitted that a party who holds a certificate of title issued by the Registrar shall be taken to be the indefeasible owner of that parcel of land. It was his submission that the 1<sup>st</sup> Defendant was the owner of the indefeasible interest to the suit plot which it transferred to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants for

valuable consideration.

Therefore an order of injunction against the Defendant would be inconceivable as the Plaintiff is not the registered owner and thus cannot have more rights over the suit property than the registered owner(s). On that ground alone, counsel submitted that the Plaintiff failed to show a prima facie case with a probability of success as set out in the case of **Giella Vs Cassman Brown Case**.

Counsel submitted that the 1<sup>st</sup> Defendant cannot be bound by the agreement sought to be relied upon by the Plaintiff as the same does not meet the requirements of Section 3(3) of the Contract Act. Counsel submitted further that the 1<sup>st</sup> Defendant did not issue an allotment to the Plaintiff and therefore the property party that the Plaintiff should sue is Thome Farmers No. 5 Limited. In respect to the claim of acquisition of title by adverse possession, counsel submitted that where an owner asserts its right by taking legal action against the person in possession, then time ceases to run under the Limitation of Actions Act. He submitted that the 1<sup>st</sup> Defendant asserted its right by institution of suit HCCC No. 6206/1992 and thus until the year 2002 when the matter was concluded, the Plaintiff could not claim to in exclusive uninterrupted possession of the suit premises.

Counsel further submitted that the Plaintiff has not demonstrated the irreparable injury likely to be incurred save for the part payment of the purchase price Kshs. 50,000/- paid to the 1<sup>st</sup> Defendant's former advocates in an attempt to comply with the consent order which was rescinded by her non-compliance.

### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Submissions**

Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed submissions dated 3/6/2013 wherein he submitted that the Plaintiff had failed to establish a prima facie case with a probability of success as the Plaintiff had never acquired proprietary interest over the suit plot. It was his submission that the due diligence carried out by the Defendants revealed that the 1<sup>st</sup> Defendant was at all times registered as the proprietor of the suit premises. Therefore, having legally acquired the suit plot, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' title is indefeasibly by dint of Section 23(1) of the Registration of Titles Act. Further, Counsel submitted that the Plaintiffs had failed to furnish the court with any proof of fraud on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in acquisition of the suit plot.

Counsel submitted that the Plaintiff's case is straightforward and clear where loss occasioned is quantifiable and can be atoned by damages. He also submitted that the balance of convenience did tilt in favour of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants being bonafide purchasers for value and who are keen on developing it. Hence injunction orders against them will amount to denying them their right of enjoying economic benefit from utilizing the property. In support of this submission counsel cited various decisions of the Court of Appeal including **Wreck Motor Enterprises v The Commissioner of Lands & 3 Others Civil Appeal No. 71/1997** where the Court held,

***“The Pleadings do not disclose any fraud on the part of the 2<sup>nd</sup> Respondent. In such an event therefore, the 2<sup>nd</sup> Respondent is the bonafide purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of Title. The Act is very specific on this protection and sanctifies title...”***

In response to the Plaintiff's claim of contract between the 1<sup>st</sup> Defendant herein and Thome Farmers Ltd, Counsel referred the Court to the provisions of Section 3(3) of the Contract Act which stipulates that no suit can be brought for the disposition of an interest in land unless the contract is be in writing, signed and each signature attested to by a witness. Counsel stated that there being no contract between 1<sup>st</sup> Defendant herein and Thome Farmers Ltd and the latter with the

Plaintiff's deceased husband, then the Plaintiff had failed to demonstrate a prima facie case and therefore her prayer for injunction must fail. In respect to the claim for adverse possession, counsel submitted that the Plaintiff's claim was self-defeating for she had claimed for title by way of adverse possession

simultaneously with breach of contract and fraud on the part of the Defendants in the transfer of the suit plot. Further, by virtue of her deceased husband having come into the property by way of purchase, it cannot be said that his entry thereon was adverse.

### **Plaintiff's Reply to the Defendants' Submissions**

Counsel for the Plaintiff filed response submissions dated 28/6/2013 and 8/7/2013 whereby they reiterated the contents of the Plaintiff's pleadings and previous submissions.

### **Determination**

The undisputed fact is that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the registered proprietors of the suit property. It is their averment that they conducted due diligence by carrying out a search which revealed that the 1<sup>st</sup> Defendant was the registered proprietor of L.R No. 13330 from which the suit property is derived. However, the Plaintiff claims title of the suit property through adverse possession, which is the acquisition of the suit land by operation of the law. It is trite that *the burden of proving title by adverse possession rests upon the person asserting it. He proves it on the usual standard of proof in civil cases namely, on a balance of probability.* See **Salim - Vs – Boyd & Another (1971) EA 550.** The effect of adverse possession is that the proprietary rights and interest of a registered owner is extinguished in favour of the adverse possessor. Secondly, the Plaintiff has made an allegation of fraud on the part of the Defendants for reasons that the Official Search shows that the suit plot was sold to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants at a consideration of Kshs. 1.6 Million whereas the plot was valued at over Kshs. 15 Million. Fraud is a serious allegation which not only requires a party to make an allegation but to strictly prove the same. These allegations can only be proved at the trial when the Plaintiff shall be afforded an opportunity to give evidence, the veracity of which will be tested upon cross-examination.

From the foregoing, it is my view that the suit property be preserved pending the outcome of the suit, and I therefore confirm the status quo order granted by this Court, Kimondo J. on 20/9/2012 pending the hearing and determination of the case. The purpose of a status quo is to preserve the subject matter of the suit pending determination, in order for the Court not to make a finding in futility.

I am alive to the fact this order curtails the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' right to economic benefit from utilizing the suit property. Therefore, in the interest of justice, I direct the Plaintiff to set down this suit for hearing without undue delay within the next 12 months from date of this Ruling, failure to do so, the injunction Order issued will lapse automatically.

Dated, signed and delivered this **6<sup>th</sup>** day of **March, 2014**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff

M/s Mugo holding brief Mrs. Koech for the 1<sup>st</sup> Defendant

M/s Mugo holding brief Issa for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Anne: Court Clerk

**L.N. GACHERU**

**JUDGE**