



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 818 OF 2013**

NAHASHON MURIITHI JEREMIAH .....PLAINTIFF

VERSUS

NELSON MWANGI KINGURU (Being sued as the Legal

Representative of the Estate of the late

ESTHER WANJIRU KINUMBI ..... DEFENDANT

**RULING**

The Plaintiff/Applicant filed an Originating Summons on 3<sup>rd</sup> December 2013 seeking orders that he be declared to have acquired the whole of land parcel No. MWERUA/KAGIOINI/687 by way of adverse possession and that he be registered as the sole absolute proprietor of the said parcel (hereinafter the suit land). He then filed a Notice of Motion under **Section 68 of the Land Registered Act** and **Order 40 of the Civil Procedure Rules** seeking orders restraining by inhibition any dealings with the suit land and an injunction to restrain the defendant/respondent with interfering with his exclusive cultivation and occupation of the said suit land.

In his replying affidavit however, the defendant/respondent has deponed, inter alia, that he is the registered proprietor of the suit land the same having been

In his replying affidavit however, the defendant/respondent has deponed, inter alia, that he is the registered proprietor of the suit land the same having been bequeathed to him by his late mother following Succession Cause No. 397 of 2008 at Embu High Court and that the plaintiff/applicant has neither built a house nor does he live on the suit land and infact has his own parcel of land being MWERUA/KAGIOINI/199 adjacent to the suit land. He added that the plaintiff/applicant had earlier placed a caution on the suit land in 1979 but the same was later removed by the Land Registrar after the plaintiff/applicant failed to establish his claim.

The parties appeared before me on 11<sup>th</sup> February 2014 and orally canvassed the said Notice of Motion.

The applicant seeks prohibitory orders and an injunction in respect of the suit land. The onus is on him to satisfy the Court that he is deserving of such prohibitory order. And in so far as the grant of an injunction is concerned, the applicant has to show:

- a. *A prima facie case with a probability of success at the trial*
- b. *That he is likely to suffer an injury which cannot be adequately compensated in damages and*
- c. *If the Court is in doubt, it will decide the application on a balance of convenience.*

The above principles were settled way back in the case of **GIELLA VS CASSMAN BROWN AND CO. LTD (1973) E.A. 358**. OF equal importance however, is that an injunction being an equitable remedy, the Court may decline to grant it if it is shown that the applicant's conduct pertinent to the subject matter does not meet the approval of a Court of equity.

Approaching this application with the above principles in mind, I first ask whether the plaintiff/applicant has shown a prima facie case with a probability of success. It is not in dispute that the suit land is registered in the names of the defendant/respondent. This followed the confirmation of the grant in respect of the Estate of the defendant/respondent's mother in Succession Cause No. 397 of 2008 at Embu High Court on 25<sup>th</sup> November 2010. There is no suggestion that the said registration of the suit land in the names of the defendant/respondent was through fraudulent means. The defendant/respondent is therefore entitled to the rights and privileges that go with the absolute proprietorship of the suit land. As against this, the plaintiff/applicant claims to have been in exclusive occupation of the suit land for over 60 years. As to whether or not the plaintiff/applicant has acquired the suit land by adverse possession is a matter that will be determined at trial. As of now, although the plaintiff/applicant has deposed that he is in exclusive occupation and occupation of the suit land, no evidence has been placed before me to prove that he infact lives on the suit land. If anything, the defendant/respondent has demonstrated by production of a certificate of official search (***annexture NMK 9***) that infact the plaintiff/applicant is the registered proprietor of another parcel of land being MWERUA/KAGIIONI/199. If the plaintiff/applicant was actually living on the suit land, no doubt he would have annexed pictures of the home that he lives in on the suit land. Bearing the above in mind and guided by the fact that the suit land is registered in the names of the defendant/respondent, I am not satisfied that the plaintiff/applicant has shown that he has a prima facie case with a probability of success. He has therefore not surmounted the first hurdle as laid down in the **GIELLA** case (supra).

With regard to the second principle set out in the **GIELLA** case (supra), the most that the applicant has shown is that he has been cultivating it. At least that is proved by the letters written to him by the defendant/respondent asking him to stop cultivating the same or destroying trees planted thereon – see defendant/respondent's ***annexture NMK 8***. There is nothing in the plaintiff/applicant's supporting affidavit to suggest that if the defendant/respondent is not enjoined, he stands to suffer damage or injury that cannot be compensated in monetary terms. In my opinion, any loss that the plaintiff/applicant may suffer is perfectly capable of being compensated in damages and it has not even been suggested that the defendant/respondent is incapable of so compensating him.

It is clear from the above that the plaintiff/applicant has failed to establish the first two principles in the **GIELLA** case (supra) and is therefore un-deserving of the remedy of injunction sought in his application. I need not interrogate the third principle set out in the **GIELLA** case (supra) and it follows that the application for interlocutory injunction must be dismissed.

With regard to the prayer for inhibition, it is clear from the material placed before me that the plaintiff/applicant had on 15<sup>th</sup> August 1979 lodged a caution on the suit land. However, he failed to establish his claim to the suit land and vide a letter addressed to him by the Land Registrar Kirinyaga on 30<sup>th</sup> June 1980, the said caution was removed – see defendant/respondent's ***annexture NMK 1***. Having placed a caution on the suit land previously which he was un-able to justify despite being notified to do so as required in law, it is not now open to the plaintiff/applicant to come to a Court of equity seeking the same orders. I therefore decline to grant the prayer for an order of inhibition.

Ultimately therefore, the plaintiff/applicant's Notice of Motion filed herein on 9<sup>th</sup> December 2013 is hereby dismissed with costs.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> JULY 2014**

11/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Applicant – present

Respondent – absent

COURT:Ruling delivered this 11<sup>th</sup> day of July 2014 in open Court.

Plaintiff/Applicant – present

Defendant/Respondent – absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> JULY, 2014**