



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCCC NO. 736 OF 2013 (OS)**

**IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION**

**OVER**

**LR NO. 13330/387 (ALSO KNOWN AS PLOT NO. 488 IN THOME FARMERS NO.5 LIMITED)**

**DAVID MATHERI WARUINGE.....PLAINTIFF**

**AND**

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

**GEORGE MWANGI MACHERU.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for this courts consideration is the Notice of Motion dated 24<sup>th</sup> June 2013 brought under **Order 40 Rules 1, 23 and 10(1) of the Civil Procedure Rules, section 1A , 1B and 3A of the Civil Procedure Act** for the orders that the Honourable Court be pleased to issue orders of injunction restraining the Defendants by themselves, their servants, agents, assignees or any person claiming through the Defendants or any of them from alienating ,transferring, selling, disposing, using, developing on or construction on, trespassing on, entering upon, or in any manner whatsoever dealing with the suit property known as LR No. 13330/387 pending the hearing and determining of this suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **David Matheri Waruinge** who stated that he was a registered proprietor of one share in the entity Known as **Thome Farmers No. 5 Limited**, having been so registered in 1989. That his registration was preceded by the acquisition of the share from **Ririi Dancer** for which he paid the full purchase price upon payment of which he was shown the plot and issued with my share certificate. That since 1989 he entered into and took possession of the plot which was allocated to him and planted crops and trees. He stated that he had continued to cultivate and use the plot without interruption from 1989 to date. That the occupation of the suit land has been physically open, uninterrupted and without interference by the defendants or anybody else and he has not heard anybody question his occupation or ownership of the plot adding that he had extensively developed the plot. That a stranger forcefully erected a fence around the property and put up a structure claiming that he was shocked to learn that his property had been sold yet he had not done so. That when he made enquiries on the status of his plot, he established that the 1<sup>st</sup> Defendant had purported to sell his property to the 2<sup>nd</sup> Defendant. He avers that the defendants have threatened to demolish the developments in his plot and now seeks the protection of this court to secure his right to property pending the hearing and determination of this suit. He also averred that now that he is a retiree he would suffer irreparably since he sank all his savings on the suit property.

This application is opposed. The 1<sup>st</sup> defendant through **Duncan Nderitu Ndegwa** the director of the 1<sup>st</sup> defendant stated that the 1<sup>st</sup> defendant was at all times the lawful owner of the suit property which comprised of Four hundred and twenty nine acres ( 429 acres) and that this suit land comprised of two parcels namely **LR No 4920/3/2** and **4921/3/1** which were amalgamated into one parcel presently known as LR No 13330 and the title to the 1<sup>st</sup> defendant was issued in the year 2000. That the 1<sup>st</sup> defendant had caused the said property to be subdivided into six hundred and Forty two plots ( 642). He further averred that they had advertised in the Saturday Nation Newspaper that any individual wishing to take advantage of a consent order in **HCCC No 6206 of 1992 Joreth Limited-vs- Lewis Kibue & others** to contact the firm of **Kimani Kahio & Associates** within **30 days**. The 1<sup>st</sup> Defendant has stated that it has the absolute and indefeasible title over the same and has exercised exclusive and unhindered proprietary rights over the same including mortgaging and selling parts to third parties adding that the plaintiff had not been in possession of the suit land as the same has always been in exclusive possession of **Joreth Limited**. That at no time did the 1<sup>st</sup> defendant sell the suit property to either the Plaintiff, **Thome Farmers No. 5 Limited or Riiri Dancers** as alleged or any other part of the land and **Joreth Limited** has all through retained the exclusive ownership of the land. He also averred that the interest in **Thome Farmers No 5 Limited** did not confer any interest in the suit property and that **Thome Farmers 5 Limited** is a total stranger to **Joreth Limited** and no connection to it. That the plaintiff's Plot No 488 has no nexus with the 2<sup>nd</sup> defendant's **LR No. 13330/387**. That the Plaintiff could not have been in open and continuous possession of the suit property because the 1<sup>st</sup> defendant had filed a suit in **HCCC No 6206 of 1992** against persons who had trespassed on its land which suit was determined in 2002 by a consent order. He averred that if at all the plaintiff bought land or shares from the alleged **Thome Farmers No 5 limited** and from **Riiri Dancer**, then the plaintiff ought to pursue the alleged **Thome Farmers No.5 Limited, and Riiri Dancer** for him to be given land as opposed to pursuing the defendants herein.

The 2<sup>nd</sup> Defendant filed his replying affidavit stating that he is the registered owner of the suit premises **LR No 13330/387** after purchasing the property from the 1<sup>st</sup> defendant in September 2012 for a sum of **Ksh 7,000,000/=** which was partly financed by Kenya Commercial Bank. That subsequently a transfer of the suit property in his favour was signed by the 1<sup>st</sup> defendant and a Certificate of title issued in his name and charge to Kenya Commercial Bank. He also added that by the time he was purchasing the suit property there was nobody in occupation of the suit property which explains the reason why the bank financed him in the payment of the purchase price.

Parties filed their written submissions which I have considered together with the authorities relied upon by the parties. The issues arising herein are whether the Plaintiff has met the requirements stated in Giella vs Cassman Brown & Co Ltd, (1973) EA 358 to be granted a temporary injunction, and if so whether the Plaintiff has also met the requirements for the mandatory injunction sought. The requirement for the grant of a temporary injunction are that the applicant must establish a prima facie case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a prima facie case. The Plaintiff's Originating Summons dated 24th June 2013 is to the effect that the plaintiff wants this court makes a declaration that he had acquired title by adverse possession to the suit premises known as Plot No. 488 in Thome Estate Farmers No. 5 Limited and also **LR No 13330/387** and that the registration of the defendants as proprietors of **LR No 13330/387** be cancelled and the Chief Land Registrar of Titles do rectify the register to enter the name of the plaintiff as the registered proprietor of LR No 13330/387 in place of the defendants. The Plaintiff relies on a sale agreement of 22nd December 1989, the shareholder certificate No. 1283 issued to him by Thome Farmers No.5 Ltd and Court pleadings in the High Court case No 1321 of 2006 showing that there was a sale by the Directors of **Joreth Ltd to Thome Famers Ltd of L.R No. 4920/3/1/ R and LR 4920/3/2/R** which were later amalgamated to be L.R. No. 13330. He however did not bring any evidence of certificate of title to the suit property **LR 13330/387 by Thome Farmers No 5 Ltd**.

The 1st and 2nd Defendants have on the other hand brought evidence of title to **LR 13330 and LR**

*No.13330/387* to the suit property respectively. I find that in these circumstances, the Plaintiff has not established a prima facie case since he has not brought any evidence of a title to the suit property acquired by *Thome Farmers No 5 Ltd* from whom he claims to derive his interest in the suit property, or of any agreement entered into with the 1st Defendant who were the registered owner of the suit property at the time he took possession of the same.

As the suit property is now registered in the name of the 2nd Defendant, this court is guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title. Nevertheless, the issue of whether the title issued to the 2nd Defendant with respect to the suit property is good title will have to be determined after full trial and not at this stage. Similarly, the question as to whether the agreement entered into between the Plaintiff and *Rurii Dancers* who had previously bought the suit from *Thome Farmers No 5 Ltd* is valid and if so what is the effect thereof needs to be determined after all the parties have been given a chance to present their evidence in court during the main hearing.

Consequently, the Court finds that the Plaintiff's Notice of Motion dated 24th June 2013 is accordingly without merit for the abovementioned reasons and the same is dismissed. Costs shall be in the cause.

Dated, Signed and Delivered this **13<sup>th</sup>** day of **October** 2014

**L.GACHERU**

**JUDGE**

In the Presence of:-

.....For the Applicant

.....For the Respondent

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**