



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

**CIVIL CASE NO. 71 OF 2014**

**DANIEL MUGALA MUDAVADI ..... PLAINTIFF**

**VERSUS**

**1. MOSES LANOGWA KAVAGI**

**2. EDWARD AKWESA DONALD ASENA ..... DEFENDANTS**

**RULING**

1. This is a Notice of Motion dated 12/3/2014, brought under **Order 40 rules 1 and 4 (1)** of the **Civil Procedure Rules, (2010)**, and **Sections 1A and 3A** of the **Civil Procedure Act (Cap. 21)** Laws of Kenya and **Section 68** of the **Land Registration Act (No.3 of 2013)**. By this application, **Daniel Mugala Mudavadi**, (the applicant) prays that;

***“A Temporary Order of injunction be issued against the respondents restraining them either by themselves and/or through their agents, relatives, employees and or servants or any other person claiming under or through them from alienating, selling or offering for sale, transferring, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on, demolishing any of the applicant’s structure(s) and or interfering with the plaintiff’s peaceful occupation and use of the suit land and or in any other manner dealing with land parcel No. NORTH/MARAGOLI/KISATIRU/1925 pending the hearing and determination of this suit.”***

2. The applicant also prays that an inhibition and/or prohibitory order be placed on Title Number NORTH MARAGOLI/KISATIRU/1925 to preserve the suit property pending the hearing and determination of this suit.

3. The Motion is based on the grounds on the face of the application and is also supported by the affidavit of the applicant, sworn on 12/3/2014. The application is opposed and **Moses Lanogwa Kavagi** and **Edward Akwesa Donald Asena**, (the respondents), have filed responses to the Motion. I have only traced Grounds of Opposition and replying affidavit by the 2<sup>nd</sup> respondent. I have not seen a replying affidavit by the 1<sup>st</sup> respondent.

4. An interim order was granted on 13/3/2014 when the matter first came to court under a certificate of urgency, and that order was extended from time to time. On 1/7/2014, parties agreed to file written submissions to the application. This was done and on 16/10/2014, I reserved a date for ruling.

5. The applicant’s position in this application is that he purchased a portion of land in 2000 from the 1<sup>st</sup> respondent, and took immediate possession and that he has since then lived and worked on the

land. According to the applicant, the portion he purchased was part of Parcel No. NORTH MARAGOLI/KISATIRU/630. This parcel was later sub-divided and is now NORTH MARAGOLI/KISATIRU/1925. The applicant deposes that he entered the land in 2000 and started developing it claiming that he purchased a portion of 0.12 hectares. He deposes that the 1<sup>st</sup> respondent has, in a fraudulent manner, transferred the land into the 2<sup>nd</sup> respondent's name despite the fact that he has been on the land for a period of more than 12 years, during which his occupation was open, exclusive and uninterrupted. The applicant says that the respondents are intent on demolishing the applicant's structures and evict him and his family from the suit land, prompting the filing of this application.

6. The respondents on the other hand, have denied the applicant's allegations. The grounds raised in opposition to the Motion, are that the application is misconceived and that there are no good grounds to warrant granting the orders sought. The respondents also say, that the application is brought in bad faith and that it is deceitful. In the replying affidavit, the 2<sup>nd</sup> respondent deposes that the 1<sup>st</sup> respondent could not have sold land to the applicant in 2000, since he did not have capacity to do so. According to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent was not a legal representative of the deceased owner of the land in dispute, and therefore he could not have entered into a valid agreement to dispose of land of a deceased person.

7. Counsel for the parties filed written submissions which are on record. Mr. Akwala, counsel for the applicant, submitted that by virtue of the fact that the applicant has been in occupation for a period of more than twelve years, (since 2000), the applicant has acquired rights in law that are capable of being protected by way of injunction. He submitted that the subsequent transfer of the land by the 1<sup>st</sup> respondent into the 2<sup>nd</sup> respondent's name, was fraudulent and did not defeat the applicant's claim. He further submitted that the applicant has a prima facie case with a probability of success, and pleaded with the court to allow the application. He relied on the decision of **Githo –vs- Ndeete [1984] KLR 776.**

8. On behalf of the 1<sup>st</sup> respondent, it was submitted that neither the applicant nor the applicant's wife signed the purported agreement for sale and therefore such an agreement's validity is doubtful. Counsel for 1<sup>st</sup> respondent submitted, that the applicant does not even know where the suit land is, and that the applicant has never taken possession of the land in dispute. It was further submitted on behalf of the 1<sup>st</sup> respondent, that the applicant has never constructed a house on the land and that the house that was on the land was constructed by the 1<sup>st</sup> respondent, who demolished it on 7/3/2014 to allow the 2<sup>nd</sup> respondent occupy the land after purchasing it for valuable consideration, and that the land is now registered in the name of the 2<sup>nd</sup> respondent.

9. According to the 2<sup>nd</sup> respondent, the applicant does not reside on the land and the land is being occupied and utilized by the 2<sup>nd</sup> respondent. Counsel submitted that the applicant has not satisfied the conditions for granting an injunction, and asked the court to disallow the application. He relied on the principles in **Giella –vs- Cassman Brown & Co. Ltd.** and the decisions in **Cultivate Technologies Ltd. –vs- Siaya District Cotton Farmers Co-operative Union** and **Kenya Hotels Ltd. –vs- Kenya Commercial Bank Ltd. – Civil suit No. 8 of 2004.**

10. Mr. Amendi, Counsel for the 2<sup>nd</sup> respondent, has submitted that the suit land changed hands from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent and a title Deed issued in the 2<sup>nd</sup> respondent's name on 26/7/2013. Counsel for the 2<sup>nd</sup> respondent, just like counsel for the 1<sup>st</sup> respondent, has maintained that at the time the 2<sup>nd</sup> respondent purchased the land and took possession, the applicant was not in occupation. Mr. Amendi, has further submitted that the applicant's allegation that he entered the land when the owner of the land was deceased, that act could not entitle the applicant a right under adverse possession. The owner of the land was deceased and could not be aware of this trespass. This, I understand counsel to be saying, would be intermeddling with a deceased persons estate. He further submitted that the applicant's claim against the 1<sup>st</sup> respondent could only start

running after the 1<sup>st</sup> respondent obtained a grant of Letter of administration.

11. He further submitted, that the applicant was aware of the process leading to grant of letters of administration in favour of the 1<sup>st</sup> respondent and had the perfect opportunity to stake his claim against the estate of the deceased. He concluded that the applicant is not entitled to the orders he seeks, and that the interim order granted was not merited as the applicant was not in occupation. He asked that the applicant's application be dismissed with costs.

12. I have carefully considered this application, the affidavits filed in support and those in opposition, the documents filed herein and written submissions filed by counsel for the parties and the authorities cited. The applicant has come to this court seeking an order of injunction to restrain the respondents from disturbing what, according to the applicant, is his peaceful occupation and use of the parcel of land known as Title No. North Maragoli/Kisatiru/1925, until his Originating Summons is heard and determined.

13. In the Originating Summons filed in court simultaneously with this Motion, the applicant seeks a declaration that he has acquired title over the suit land by operation of the law, and that he should be declared the owner of the land. The applicant says that he has been in peaceful and exclusive occupation of the suit land for a period in excess of twelve years which has given foundation to his claim for an equitable relief of injunction against the respondents.

14. This being an application for injunction, the applicant must satisfy the court that he has a prima facie case with a probability of success, and that unless the order of injunction is granted, he (the applicant) will suffer irreparable loss which cannot be adequately compensated by way of damages – **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358.**

15. The applicant has said that he occupies the suit land and has been there for more than 12 years now. The respondents on their part have denied that the applicant has been on the land. These are contested facts which cannot be decided by way of affidavits. Both the applicant and the respondents' positions are so diametrically different as to what the position on the ground really is which has not been easy for the court to ascertain who is telling the truth.

16. The respondents have said that this applicant does not know where the suit land is. The applicant on the other hand says that he has been on the land and even sunk a bore hole on the land, which the 1<sup>st</sup> respondent says was done by the 2<sup>nd</sup> respondent. From the material before court and submissions by counsel, it cannot be said that prima facie, the applicant has shown that he is the one on the land. A prima facie case with a probability of success does not mean that the case will eventually succeed, but one where a reasonable tribunal considering the circumstances of the case and materials before it, may form a considered opinion that the applicant has a chance of probably succeeding.

17. Looking at the application before me, the owner of the land was deceased and the applicant was aware of the Succession Proceedings in respect of the deceased's estate but said nothing about it. He knew, if I were to believe him, that he was in occupation and that he had a claim against the estate of the deceased, but never asserted this claim. The 1<sup>st</sup> respondent says that the applicant said he was not a beneficiary to the estate but the applicant has not denied that. The 2<sup>nd</sup> respondent says that when he went to the land, there was nobody on the land. So where was the applicant? These are questions that do not aid the applicant's cause.

18. In the case of **Nsubuga and Another -vs- Mutawe [1974] EA 487** the Court of Appeal for Eastern Africa (**Mustafa, JA.**) had this to say;

***“As regards the conditions for the grant of an interlocutory injunction, I think they are now well settled in East Africa. I would refer to the decision of this court, Giella -vs- Cassman Brown [1973] EA 358,...***

***Briefly two of the main ones are (1) the applicant must show that he has a probability of success and (2) that unless the injunction is granted, the applicant would suffer irreparable damage which cannot be adequately compensated for by an award of damages. As regards the first point, that of probability of success, the plaintiff had not, on the evidence, adduced, shown how he could succeed, let alone probably succeed...***

19. The holding in ***Giella –vs- Cassman Brown & Co. Ltd.*** as echoed by ***Mustafa, JA*** in ***Nsubuga and Another –vs- Mutawe***, were reiterated by ***Ibrahim, J.*** (as he then was) in the case of ***Kenya Hotels Ltd. –vs- Kenya Commercial Bank Ltd. & Another [2004] KLR 80.***

20. For my part, I will adopt the words of Mustafa, JA and add that the applicant before me has not shown that he has established a prima facie case with probability of succeeding given the contradictions between his averments and those of the respondents.

21. The applicant claims to have entered the land in 2000 when the owner was deceased and at a time when the land was not registered in the 1<sup>st</sup> respondent's name. This entry was apparently with permission since it was based on an alleged sale agreement between the applicant and the 1<sup>st</sup> respondent. Whether this constitutes adverse possession is a matter that will have to be decided in the main suit.

22. From the foregoing, I am not satisfied that the applicant has persuaded me that he deserves the order of injunction he seeks.

23. The upshot of all this is that the applicant's application dated 12/3/2014 is dismissed with costs to the respondents.

***Dated and delivered at Kakamega this 5<sup>th</sup> day of November, 2014***

**E. C. MWITA**

**J U D G E**