



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 381 of 2012**

MAGABE NYOHERO MAHIRI.....APPLICANT

**VERSUS**

**CHARLES MWITA MBUSIRO(sued in**

**his capacity as the personal representative**

**of the estate of DANIEL MBUSIRO.....RESPONDENT**

**RULING**

1. The Applicant brought this suit by way of Originating Summons dated 12<sup>th</sup> October, 2012 seeking, a declaration that he has acquired by adverse possession part of the parcel of land known as LR.No.Bukira/Bwisaboka/1217(hereinafter referred to as **“the original plot”** where the context so admits) which has been subdivided into three (3) portions namely LR.Nos.Bukira/Bwisaboka/2207,2208 and 2209(hereinafter

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referred to individually as **“Plot No.2207,Plot No.2208 and Plot No. 2209”** where the context so admits), an order that Plot No.2208 be subdivided and a portion thereof measuring 4 ½ acres(hereinafter referred to as **“the disputed portion of Plot No.2208”** where the context so admits) be delineated , given a number and registered in the name of the Applicant and an injunction restraining the Respondent from interfering with the Applicant’s enjoyment of the said disputed portion of Plot No.2208. The Applicant’s suit is brought on the ground that the Applicant has occupied and cultivated a parcel of land measuring 4 ½ acres comprised in Plot No. 2208(disputed portion of Plot No.2208) which is registered in the name of Daniel Mbusiro Mwita(deceased) for uninterrupted period exceeding 12 years and as such the Applicant has acquired ownership thereof by adverse possession. In his affidavit sworn on 18<sup>th</sup> September, 2012 in support of the said Originating

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Summons, the Applicant has claimed that he took possession of and started residing on the said parcel of land now forming the disputed portion of Plot No.2208 on 22<sup>nd</sup> November, 1998 and that his possession

and occupation of the same has been open, continuous and uninterrupted. He claims to have developed the said portion of Plot No.2208 extensively by growing maize, potatoes, cassava, bananas and trees thereon. The Applicant claims that Daniel Mbusiro Mwita died on 6<sup>th</sup> July, 2003 before he could transfer to the Applicant the said portion of Plot No.2208. The Applicant claims that the Respondent has now obtained a grant of letters of administration for the estate of Daniel Mbusiro Mwita(deceased) and has declined to take appropriate steps to have Plot No.2208 subdivided so that the portion thereof in occupation of the Applicant is transferred to him.

2. Together with the Originating Summons, the Applicant filed an

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application by way of Notice of Motion dated 21<sup>st</sup> November, 2012 seeking a temporary injunction to restrain the Respondent from, disposing, selling, alienating, or in any way changing ownership of Plot Nos. 2207, 2208 and 2209 pending the hearing and determination of the originating summons. This is the application which is the subject of this ruling. The Applicant's application for injunction is brought on several grounds most of which were not put forward in support of the originating summons. I must say that some of the grounds and averments in the affidavit in support of the injunction application contradict those in the affidavit in support of the originating summons. The Applicant in his affidavit filed in support of the injunction application has claimed that, in addition to the crops that I have mentioned above which he had claimed to have planted on the disputed portion of Plot No.2208, he has also put up five (5) houses thereon and that

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after the subdivision of the original plot which gave rise to Plot Nos.2207, 2208 and 2209, he is now in occupation of Plot No.2209. This is contrary to his claim in the affidavit in support of the originating summons that he is occupying Plot No.2208. The Applicant has claimed further that the Respondent has destroyed the boundary features on the parcel of land in his possession, cut down trees that were planted by the Applicant, encroached on the said parcel of land and put up a house thereon. The Applicant claims that the Respondent has threatened him with eviction and he is apprehensive that he may be evicted from the parcel of land in his occupation at any time. The Applicant has also claimed that the Respondent intends to sell and transfer to third parties the disputed parcel of land an act that will interfere with the Applicant's interest in the said property. The Applicant contends that the intended transfer of the said property will defeat the ends of justice and

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as such should be restrained by an order of injunction. The Applicant contends that he has established a prima facie case against the Respondent and unless the orders sought are granted, he stands to suffer irreparable injury. The Plaintiff has annexed to his affidavit in support of the injunction application, a copy of the register for Plot No. 2208 which shows that the said property is registered in the name of Daniel Mbusiro Mwita(deceased). The same was registered in the name of the deceased on 12<sup>th</sup> November, 2003. The property measures approximately 3.54 Hectares and it is indicated to be a subdivision of Plot No.1217(the original plot).

3. On 18<sup>th</sup> December, 2012, the parties agreed to dispose of the application by way of written submissions. In the submissions filed in court on 24<sup>th</sup> January, 2013 by the Applicant's advocates in support of the Applicant's application for

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injunction, the Applicant has reiterated the contents of his affidavit in support of the application and the grounds set out in the body thereof. The Applicant has maintained that he has been in occupation of Plot No.2208 since 1998 a fact which he says is either admitted by the Respondent or can be inferred from the Respondent's affidavit in reply to the application. The Applicant has submitted further that most of the issues raised in the Respondent's affidavit in reply to the application which concerns how the Applicant came into possession of Plot No.2208 are irrelevant as the only issue that the court should be concerned with is the duration within which the Applicant has been in occupation of the said Plot No.2208. The Applicant has submitted further that the validity or otherwise of the agreement for sale between him and the deceased's wife **Penina Mbusiro** on which the Respondent has dwelt at length in his replying affidavit is not relevant to his claim which is

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based purely on adverse possession. In conclusion, the Applicant submitted that he has met the threshold set in the case of **Giella-vs-Cassman Brown & Company Ltd.** for granting interlocutory injunction and as such the orders sought should issue. The Applicant relied on two (2) unreported cases in support of the foregoing submissions.

4.The Applicant's application is opposed by the Respondent. The Respondent swore a replying affidavit dated 28<sup>th</sup> November, 2012 in response to the application. In his affidavit, the Respondent raised several issues. The affidavit itself runs into 35 paragraphs. For the purposes of this ruling, I will only summarize the main grounds put forward by the Respondent in opposition to the injunction application. The Respondent has denied all the allegations contained in the Applicant's application and the affidavit filed in support thereof which he has termed as "**false and misleading.**" The Respondent has

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attacked and dwelt at length on the manner in which the Applicant is said to have come to occupy the disputed portion of Plot No.2208. According to the Respondent, the Applicant's claim is not maintainable against the estate of Daniel Mbusiro Mwita (deceased). It is the Respondent's contention that the Applicant's claim should be directed against the estate of the wife of the deceased one, **Penina Mbusiro Mwita** who is also deceased who is said to have sold to the Applicant, the disputed portion of Plot No.2208 during the lifetime of Daniel Mbusiro Mwita. It is the contention of the Respondent that no claim lies against the estate of Daniel Mbusiro Mwita as he did not sell the disputed property to the Applicant. The Respondent has contended further that since the original plot was registered in the name of Daniel Mbusiro Mwita deceased, Penina Mbusiro had no capacity during the lifetime of Daniel Mbusiro Mwita to sell the same to the Applicant. The

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transaction between the Applicant and the said Penina Mbusiro Mwita on the basis of which this suit and the present application is hinged is therefore irregular, unlawful and cannot confer any right upon the Applicant through adverse possession or otherwise. The Respondent has also taken issue with the Applicant's claim over the entire estate of the deceased Daniel Mbusiro Mwita which according to him the deceased had distributed to his beneficiaries before his demise and which is in occupation of the said beneficiaries. The Respondent has denied that the Applicant is in possession of the disputed portion of Plot No.2208 or that he has ever occupied the same. The Applicant's claim based on adverse possession is

therefore misconceived according to the Respondent. The Respondent has also claimed that he is wrongly sued as no grant of letters of administration has been issued to him with respect to the estate of Daniel Mbusiro

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Mwita. The Respondent termed the Applicant's application as lacking in merit and asked the court to dismiss the same with costs.

5. In his advocate's submission filed on 18<sup>th</sup> February, 2013 in opposition to the application, the Respondent analyzed at length the Applicant's Originating Summons application, the affidavit in support thereof and the reliefs sought and compared the same with the Notice of Motion application for injunction, the affidavit filed in support thereof and the reliefs sought. As I had observed at the beginning of this ruling, the Respondent has also pointed out several discrepancies, confusing statements and inconsistencies in the two applications which according to the Respondent should disentitle the Applicant to the orders sought. According to the Respondent, the burden of proof of the Applicant's claim rested with the Applicant and it was the Respondent's submission

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that the Applicant failed to discharge that burden. The Respondent cited the provisions of sections 107, 109 and 112 of the Evidence Act, Cap. 80 Laws of Kenya in support of this submission. The Respondent submitted further that the Applicant had failed to lay a basis for the orders sought in that the Applicant failed to demonstrate that he had been in open, continuous and uninterrupted possession of the disputed portion of Plot No. 2208 or any other plot for that matter registered in the name of the deceased for a period of or exceeding 12 years. The Respondent submitted that Plot No. 1217 (original plot) is non-existent its title having been closed on 12<sup>th</sup> November, 2003 when the same was sub-divided and gave rise to Plot Nos. 2207, 2208 and 2209. According to the Respondent, these three plots also came into being on 12<sup>th</sup> November, 2003 and as such if the Applicant claims to be occupying any of them, such occupation could

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have commenced only from 12<sup>th</sup> November, 2003 and not earlier. It is the Respondent's further submission that if the Applicant claims to have occupied Plot No. 1217 in the year 1998, such occupation was interrupted by the deceased when he caused the said original plot to be subdivided in the year 2003. According to the Respondent therefore, the time for the purposes of limitation of actions could only have started running again on 12<sup>th</sup> November, 2003 with regard to the subdivided plots. It follows therefore that, as at the time of filing this suit on 15<sup>th</sup> October, 2012, the 12 year period had not lapsed with regard to the Applicant's alleged occupation of any of the subdivided plots so as to entitle the Applicant to claim the same by adverse possession. The Applicant's claim according to the Respondent is in the circumstances premature. It is also the Respondent's submission that the Applicant having entered the suit property purportedly

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pursuant to an agreement for sale between the Applicant and Penina Mbusiro Mwita, time could not run

against the deceased Daniel Mbusiro Mwita who was not aware of such transaction and could not have known even of the Applicant's existence on his land. The Respondent has also submitted that the Applicant's application for injunction is legally flawed on account of departure in that some of the reliefs sought in the Notice of Motion application are not prayed for in the Originating Summons contrary to the provisions of **Order 2 Rule 6 of the Civil Procedure Rules, 2010**. The Respondent submitted that the Applicant has failed to demonstrate that he is entitled to the reliefs sought. The Respondent relied on a number of decided cases to buttress his submissions. In conclusion, the Respondent prayed that the application for temporary injunction be dismissed with costs.

6.I have considered the Applicant's case for a temporary

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injunction and the response to it by the Respondent. In the case of **Salim –vs- Boyd & another [1971] E.A. 550**, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the subject land for a period of 12 years or more. A similar decision was reached by Kneller J. in the case of **Kimani Ruchine & Another –vs-Swift Rutherford Co. Ltd. & Another[1977]KLR10** where he stated as follows at page 16, **“The Plaintiffs’ have to prove that they have used this land which they claim as of right; Nec vi, nec clam, nec plecario(no force, no secrecy, no evasion). So the Plaintiff must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession and occupation. The Possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration; see Wanyoike Gathure-vs-**

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**Beverly[1965]E.A.514,518,519, per Miles J.”** The Applicant's claim on the basis of which the present application for injunction has been brought being one for adverse possession of land, the Applicant was duty bound to demonstrate to the court on a prima facie basis the existence of the ingredients of adverse possession highlighted in the above two cases. I am in agreement with the Respondent's submission that the Applicant has not placed before the court any form of evidence to support his claim that he has been in open, continuous and uninterrupted possession of the disputed portion of Plot No.2208 since the year 1998. The Applicant had to start by explaining to the court how he came to possess the suit property and then proceed to show to the court by some form of evidence that he has remained in such possession openly, continuously and without any interruption ever since he took possession. The Applicant has not explained either in the

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Originating Summons or in the injunction application how he came to occupy the disputed portion of Plot No.2208 that he is claiming by adverse possession. It is the Respondent who came up with the allegation that the Applicant is claiming the disputed property through some agreement for sale that the Applicant had entered into with one, **Penina Mbusiro Mwita** deceased in 1998. The evidence of this agreement is found not on any of the Applicant's affidavits but as one of the documents in the Applicant's list of documents. The Respondent's reference and submission on the validity of the said agreement was dismissed by the Applicant in his submission as inconsequential. Since possession is central to any claim to land through adverse possession, the circumstances under which such possession came to being is very important for the determination of the existence of such possession and whether the nature of the possession is such that it can support a claim

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based on adverse possession. For the Applicant's claim that he took possession of the disputed portion of Plot No.2208 in 1998 and that he is still in possession thereof to be believed, it was incumbent upon him to explain how he came into such possession. The Applicant also failed to place before the court any form of evidence to prove his alleged possession of the disputed property and the fact that the deceased, Daniel Mbusiro Mwita had knowledge of such possession actual or constructive. Nothing was placed before the court to show the alleged cultivation that the Applicant is alleged to have been carrying out on the suit property since 1998. Neither was any evidence placed before the court to prove the existence of the alleged five (5) houses that the Applicant claims to have put up on the disputed portion of Plot No.2208. As I have observed above, possession was central to the Applicant's case and was the basis on which the injunction was sought. It is that

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possession that is to be protected by a temporary injunction. The Applicant ought therefore to have demonstrated to the court that he has been and he still is in possession of the disputed portion of Plot No. 2208 and that such possession has been for a period of or exceeding 12 years. A copy of the register for Plot No.2208 attached to the Applicant's affidavit in support of the injunction application shows that the said register was opened on 12<sup>th</sup> November, 2003. I am in agreement with the submission of the Respondent that the Applicant could only have been in occupation or possession of a portion of the said parcel of land from 12<sup>th</sup> November, 2003 and not earlier. If this be the case, then the Applicant's claim to a portion of this plot by adverse possession is premature as 12 years had not lapsed from 12<sup>th</sup> November, 2003 as at the time this suit was filed in the year 2012. Even if it is assumed that the Applicant took possession of the disputed portion of Plot

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No.2208 in 1998 while it was still part of the original plot (Plot No.1217) that was subdivided into Plot Nos. 2207,2208 and 2209 on 12<sup>th</sup> November, 2003, it has been contended by the Respondent and rightly so that, since the Applicant had not acquired prescriptive rights over the original plot as at the time it was subdivided by the deceased, the said act of subdivision amounted to an interruption of the Applicant's possession thereof if at all he was in such possession and as such time could only start running again on 12<sup>th</sup> November, 2003 with respect to the Applicant's possession of any of the subdivided plots. It follows therefore that the Applicant's claim whether based on occupation of the original plot whose title was closed on subdivision or on Plot No.2208 which is a subdivision of the said plot seems to be premature. I am in agreement with the submission of the Respondent that the burden of proof in relation to the facts in support of the

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Applicant's claim rested with the applicant. I am not satisfied that the Applicant discharged this burden on a prima facie basis. Another point connected to this issue of a prima facie case is the fact that the Applicant is seeking an order of injunction to restrain the Respondent from dealing with all the parcels of land which came from the original Plot No.1217 namely, Plot Nos. 2207, 2208 and 2209 although the Applicant in his submission has indicated that he is occupying only a portion of Plot No. 2208 which he is also seeking to be registered in his name in the Originating Summons. I am of the view that there is no

basis upon which this court can grant an injunction as regards Plot Nos. 2207 and 2209. The Applicant has not placed any proof before the court that he has any claim over them. Furthermore, for Plot No. 2209, there is no evidence put forward by the Applicant as to the person in whose name the same is registered. The Respondent has claimed that the

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same is registered in the name of a third party who is not a party to this suit and which allegation has not been refuted. Since a claim based on adverse possession can only be lodged against a registered proprietor of land, a claim over Plot No. 2209 is misconceived in the circumstances. The respondent had also raised the issue of departure in the Applicant's pleadings. I believe that I have dealt with this issue while considering whether the injunction sought should issue against Plot Nos. 2207 and 2209 with respect to which the Applicant has not sought a permanent injunction in the originating summons. My conclusion from the totality of the foregoing is that, I am not convinced that the Applicant has established a prima facie case against the Respondent.

7. A part from establishing a prima facie case with a probability of success, the Applicant was also supposed to prove that unless the orders sought are granted, the Applicant would

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suffer irreparable harm in accordance with the principles that were pronounced in the case of **Giella –vs- Cassman Brown [1973] KLR 358**. I am not persuaded that the Applicant will suffer irreparable harm unless the orders sought are granted. The Applicant has not shown the nature of the activity if any that he is carrying out on the portion of Plot No.2208 which he claims to possess neither has he demonstrated that he is residing on the said property. The Applicant has also not placed any evidence before the court to show the alleged destruction of boundary and trees belonging to the Applicant by the Respondent or the alleged encroachment by the Respondent into the disputed portion of Plot No.2208 claimed to be occupied by the Applicant. I have also noted that Plot Nos.2207 and 2208 have been registered in the names of the deceased, Daniel Mbusiro Mwita since 12<sup>th</sup> November, 2003. The Applicant has not placed any evidence to show the

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alleged attempt to sell or alienate the same. There is completely nothing to show that the Applicant's alleged occupation of the disputed property is threatened.

8. I have said enough to show that the Applicant is not entitled to the orders sought. The application dated 21<sup>st</sup> November, 2012 is dismissed with costs to the Respondent. I will however invoke the powers conferred upon this court under **Section 13(7) (a) of the Environment and Land Court Act, No. 19 of 2011** as read with **Section 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya** and order that pending the hearing and determination of this suit, the Applicant shall not be evicted without an order of the court from the portion of Plot No.2208 which he claims to possess if at all he is in such possession and further, registration of any dealing with the said Plot if at all it is in possession of the Applicant is inhibited. In making this order, I have relied on the

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persuasive decision of Justice G.B.M.Kariuki( as he then was) in the case of **Julius Uswekha Shitakhwa-vs-Saul Masavila Shtakhwa & Another [2007]eKLR** cited by the Respondent in which after dismissing an application for injunction, he observed that it was in the interest of justice that the title to the land that was in dispute should not transferred to a third party while the suit was pending hearing and he issued an order of inhibition to maintain the status quo pending the hearing and determination of the suit. I have also relied on the Court of Appeal case of **Peter Wekesa-vs-Peter Wangusi Wasike, Court of Appeal at Eldoret, Civil Appeal No.62 of 2003,(unreported)**, where the court **(Tunoi,O’Kubasu and Waki JJA)** stated as follows, “ **where the dispute relates to land, special caution must be exercised to avoid determination of the dispute on pure technicalities**”. This order is made therefore to ensure that the ends of justice are met and to see to it that no

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injustice is occasioned to the Applicant due to improper pleading or oversight on the part of his advocate to place relevant material before the court which may otherwise be available at the trial. This order is given due to the peculiar circumstances of this case.

**Signed, dated and delivered at KISII this 3<sup>rd</sup> day of May, 2013**

**S. OKONG’O,  
JUDGE.**

**In the presence of:-**

Mr. Okemwa holding brief for Abisai for the Applicant

No appearance for the Respondent  
Mobisa Court Clerk.

**S. OKONG’O,  
JUDGE.**

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