



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 596 of 2009**

**JOHN IHUGO MUNGAI .....PLAINTIFF  
VERSUS  
PETER KIHUHI NJUGUNA .....DEFENDANT**

**RULING**

Land parcel **L. R. No. KIAMBU/MUNYU/222** is registered in the name of the Respondent since 19<sup>th</sup> June, 2006. Before this, it was registered in the name of his father who has since died. The Applicant claims that in August 1985 he bought 6.5 acres of this land from the deceased and paid KShs. 39,000/= for it. On 13<sup>th</sup> August 1985 the Land Control Board at Thika gave consent for subdivision, but that on 28<sup>th</sup> September, 1991 the deceased died before subdivision. The Applicant's had, however, been put into occupation. He claims that since 1985 he has had open, continuous, uninterrupted and exclusive possession and actual occupation and use of the 6.5 acres. He states that he has substantially developed it. He sought in the originating summons a declaration that he has had adverse possession of the 6.5 acres and is therefore owner of the same. He asked to be registered the owner of the 6.5 acres after it has been excised from the rest of the land.

The Application presently seeks an interlocutory injunction to restrain the Respondent, and all those acting under him, from interfering with his ownership, possession, actual possession and use of the 6.5 acres and/or trespassing onto the land or any part thereof. He alleged that in November, 2009 the Respondent invaded the disputed portion and cut down trees and shrubs and has been digging stones here to make ballast. He has also threatened to evict the Applicant from the land.

The Respondent's response is that this is part of his registered land and that it is not true that the Applicant bought it, or any part of it, from his late father. He alleged he has always been in occupation of the land; that, after his father died, the Applicant requested to graze his animals on the land which was allowed. The Applicant did not indicate, either at that time or during the succession proceedings, that he had bought any land from the deceased. The Respondent allowed him to occupy the house built by his father on the land. The Applicant instead allowed a stranger into the house. The Applicant then begun digging stones for ballast on the land and claiming the land. The Respondent referred the matter to area chief.

The Respondent further claimed that the Applicant has filed Nairobi **HCCC No. 1049/06 (OS)** against him seeking the same 6.5 acres under **Limitations of Actions Act** which suit is still pending.

The Applicant had alleged that he had successfully claimed the 6.5 acres at Thika Land Disputes Tribunal but that the order was stayed by the High Court in **Miscellaneous Application No. 68 of 2009 in Nairobi**.

The application for injunction was argued before me by Mrs. Kinuthia for the Respondent and Mr. Mwaura for the Applicant.

The principles for the grant of an interlocutory injunction were set out in the case of **GIELLA –VS- CASSMAN BROWN LTD [1973] EA 358**. The Applicant must show a *prima facie* case with a probability of success and that if the injunction is not granted he will suffer irreparable injury which cannot be compensated by an award of damages. If the court is in doubt, it should decide the application on balance of convenience.

The Respondent is the registered owner of the whole of the land comprised in **LR No. KIAMBU/MUNYU/222** of which the claimed 6.5 acres are a part. Under **section 27 and 28 of the Registered Land Act (Cap. 300)** such owner has, *prima facie*, and absolute and indefeasible claim to the land. This is the claim that the Applicant will be called upon to avail evidence to defeat. He says he is in possession of the 6.5 acres which he claims. The Respondent disputes this. He also disputes the allegation that the Applicant has had exclusive and uninterrupted possession and use of the land since 1985; that he has therefore acquired claim to it by adverse possession. At this stage, as between a person in possession of land and its registered proprietor the later has a better claim. Mr. Mwaura asked that the occupation of the 6.5 acres be protected by injunction until the suit is heard and finalized. However, it is not usual to issue an injunction against a registered proprietor of land. (See **KENYA COMMERCIAL FINANCE CO. LTD. –VS- AFRAHA EDUCATION SOCIETY & OTHERS [2001] IEA 86**). The rights of an owner of land include the right to enjoy and use it. The present application alleges that the Respondent did in November 2009 trespass on the said 6.5 acres in possession by the Applicant. The Respondent has title to the whole land, including the 6.5 acres, and cannot be held to have trespassed on his own land.

The result is that the Applicant has not demonstrated that he has a *prima facie* case. The court was not addressed on how damages cannot form sufficient compensation in this case, and the balance of convenience would normally tilt in favour of a registered owner of land.

The Respondent raised the issue that there is another suit, **HCCC No. 1049 of 2006 (OS)**, filed by the Applicant against him claiming the same piece of land. This would be an earlier case to the present one. There was no application filed in response to deny the existence of this suit. If the suit exists, the present suit would be an abuse of the process of the court.

In the final analysis, I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI**

**THIS 1<sup>ST</sup> DAY OF MARCH 2010**

**A. O. MUCHELULE**

**JUDGE**