



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 12 OF 2019 (O.S)**

**FRANCIS KARANI GATEI.....PLAINTIFF/APPLICANT**

**VERSUS**

**PERIS MUTHONI GATEI.....DEFENDANT/RESPONDENT**

**RULING**

**BACKGROUND**

The Plaintiff/Applicant filed the instant suit contemporaneously with the Notice of Motion dated 19<sup>th</sup> February, 2019 under **Order 40 Rule 1 Civil Procedure Rules and Sections 1A, 1B and 3A Civil Procedure Act**. The Applicant is seeking an equitable relief of an injunction restraining the Respondent from evicting him, transferring, selling or otherwise dealing with the suit property registration No. INOI/KAITHERI/396 pending hearing of this application and the suit herein. That application is premised on grounds shown on the face of that application and his supporting affidavit sworn the same date. In his supporting affidavit, the Applicant contends that the Respondent is his aunt who is also the

registered proprietor of the suit property No. INOI/KAITHERI/396.

He further argued that on 24<sup>th</sup> May 2002, the Respondent's husband one John Coma Gatei (now deceased) invited him to his homestead and later showed him where he should construct his house. He proceeded to construct his house where he has been living with his wife and children.

The Applicant further states that the suit property initially belonged to his grandfather Comba Kunga (deceased) and that the Respondent's husband who is his uncle inherited his grandfather's land but his mother Lucy Wanjiru Comba did not inherit any portion of land.

On 24/1/2019, the Respondent obtained a judgment in a Succession, Cause No. 61/2010 succeeding his grandfather's property (Comba Kunga) and now intends to evict him. In conclusion, the Applicant avers that he has become entitled to the said parcel of land by way of adverse possession having lived there for over 17 years without interruption.

In her replying affidavit on 14<sup>th</sup> March, 2019, the Respondent opposed the application stating that she is the widow of the late John Coma Gatei who was the registered owner of the suit property and the parcel of land which he inherited from his father Comba Kunga (deceased). She attached a copy of certificate of confirmation of grant in Succession Cause No. 61 of 2010 (Kerugoya). The Respondent further deponed that upon confirmation of the grant, her late husband transferred to her the suit property registration No. INOI/KAITHERI/396, and avers that the Applicant together with his aunt Muthoni Mbui sought revocation of grant issued vide Kerugoya S.P.M Succession Cause No. 61 of 2010 vide Kerugoya High Court Cause No. 350 of 2012 which was dismissed on 24<sup>th</sup> January, 2019.

The Respondent further avers that the Applicant is her nephew who was invited by her late husband to live with them and allow him to build a temporary shelter in their family homestead situated on L.R INOI/KAITHERI/396. She states that the Applicant has been a licensee on the subject parcel of land, where they together with her uncles and cousins have been residing and therefore she is surprised that the Applicant is seeking to take over the subject parcel of land.

In sum, the Respondent avers that the Applicant is a licensee who is abusing their hospitality, and has been living in the land peacefully until the year 2011 when he was misled by third parties, which necessitated her intention of evicting him. She urges the Court to find that the application lacks merit and ought to be dismissed.

**SUBMISSIONS**

The Applicant filed their written submission dated 28<sup>th</sup> March, 2019 and filed on 29<sup>th</sup> March, 2019 in support of their application. The applicant is relying in the case of **Giella Vs Cassman Brown & Co Ltd (1973) E.A 358** where the Court stated the principles upon which

one must establish for grant of a temporary injunction. These are that one must demonstrate a prima facie case with a reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated by way of damages; and that a balance of convenience tilts in their favour.

The Applicant has submitted that the application establishes a prima facie case as the Applicant has been living on the subject parcel of land for a period of over 17 years and thus he is entitled to the land by way of adverse possession, and that she has built a permanent home, and he has nowhere else to call home and thus he has an arguable case.

On the second principle under the ***Giella Vs Cassman Brown*** case, the Applicant submitted that if this Court does not allow this application, he will suffer irreparable harm which cannot be compensated by way of damages. He alleges that if the Respondent alienates the suit land and his house demolished, he together with his wife and children will be rendered destitute.

Finally, the Applicant submitted that the balance of convenience lies in his favour in the circumstances.

#### ANALYSIS AND DETERMINATION

The most pertinent issue which is up for determination at this stage is the question whether the Applicant has established the grounds for grant of a temporary injunction.

Indeed as submitted by the Applicant the conditions for grant of temporary injunction were set out in the case of ***Giella Vs Cassman Brown (1973) EA 358*** where it were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

On whether the Applicant has made out a prima facie case with a probability of success, In the case of ***Mrao Vs First American Bank of Kenya Limited & 2 others (2003) KLR 125***, a prima facie case was described as follows:-

***“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Considering the facts of this case, the Applicant has argued that he has lived in the suit land for a period of 17 years and therefore he has filed this suit vide an Originating Summons seeking a declaration that he has acquired the suit land vide adverse possession.

The Respondent on the other has averred that the Applicant is a licensee having been invited into the subject land by her deceased husband and therefore the Applicant attempt to acquire the subject suit land is an abuse of the said hospitality and thus the necessity to evict him from the suit land. It is her averment that her late husband inherited the suit land from his father the late Comba Kunga.

In my view, the Applicant has demonstrated an arguable case, he is claiming the suit land on the basis that he has lived on the same for a period 17 years and thus claims adverse possession, further he has submitted that he is in occupation of the suit land, where he is staying with his family and therefore evicting him would render him destitute.

Further, it is my opinion that the balance of convenience tilts in favour of the Applicant who is in possession of the suit property and not to the Respondent, who is attempting to take over the suit land and evict the Applicant.

Therefore, the appropriate orders on this application are that the current status quo be maintained until the case is heard and finalized. In the final analysis, the application dated 19<sup>th</sup> February 2019 is allowed in terms of prayer (3) pending hearing and determination of this suit. On costs, the same shall be in the cause.

*READ and SIGNED in open Court at Kerugoya this 28<sup>th</sup> day of June, 2019.*

**E.C. CHERONO**

**ELC JUDGE**

**28<sup>TH</sup> JUNE, 2019**

*In the presence of:*

- 1. Ms Kimotho for Applicant*
- 2. Ms Muthoni holding brief for Mr. Kahiga for Respondent*