



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 1028 OF 2016**

**MERCELA OMWENGA.....PLAINTIFF**

**=VERSUS=**

**JOSEPH KAMAU NGIRIA.....DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion dated 24<sup>th</sup> August 2016 in which she sought for the following orders:-

***1. Spent***

***2. Spent***

***3. That pending the hearing and determination of this suit a temporary injunction be and is hereby issued restraining the defendant/respondent from trespassing, interfering and or encroaching into plot number LR 3589/53 which is owed by the plaintiff.***

***4. That the officer commanding station (OCS) Karen hardy Police Station do ensure compliance of this Order.***

***5. Costs of this application be in the cause.***

2. The applicant purchased two plots namely LR No. 3589/51 and 53 from one Jason Atinda Ouko. She paid the requisite charges and the vendor who is now deceased signed transfers in her favour but those transfers could not be registered because there were disputes regarding the mother title. After being in occupation of **LR No.3589/53** for over 10 years, the respondent trespassed into that particular plot LR 3589/53 (suit property) and cut down crops on it and uprooted the fence. The respondent is owner of a neighbouring plot being **LR No. 3589/52**.

3. The respondent opposed the applicant's application based on a replying affidavit sworn on 2<sup>nd</sup> May 2017. The respondent contends that he bought the suit property through one Martin Waithaka . When the said Waithaka declined to give him the land, he sued him in Nairobi HCCC No. 673 of 1985. The case was fully heard and the court ruled that Waithaka was holding one acre in trust for the respondent. The respondent was given his one acre which is now LR No. 3589/52. The respondent further contends that he continued cultivating the remaining 1 ½ acres which he considered as his land and that he has since filed a suit against the late Jason Atinda Ouko seeking to be declared as having acquired plot 3589/53 by way

of adverse possession.

4. The respondent further states that the applicant only invaded the suit property and fenced off a huge chunk of his plot 3589/52 . That he went and uprooted the fence which led the applicant to cause the arrest of his two sons who were charged at Kibera Law Courts with criminal offences. The respondent denies that the applicant purchased the suit property as she alleges and that he is the one who has been paying rates to the City County of Nairobi in the name of the deceased Jason Atinda Ouko.

5. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein which I must with respect to counsel are of little assistance to the Court. This is an application for injunction. The only issue for determination in this case is whether the applicant has met the threshold set out in the case of **Giella Vs Cassman Brown & Co.Ltd ( 1973) EA 358.**

6. First and foremost, an applicant has to demonstrate that he has a prima facie case with probability of success. A prima facie was stated in the case of **Mrao Vs First American Bank of Kenya Ltd & 2 Others** as 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.

7. In the instant case, the applicant is contending that she purchased the suit property from the late Jason Atinda Ouko. That the deceased signed transfer in her favour and that the transfer would have been registered were it not for caveats and other orders which were obtained blocking the mother title. That the lawyer who was dealing with the property of the deceased swore an affidavit indicating that the suit property had been sold to the applicant. That even the subdivision plan shows that the suit property was earmarked for the applicant and her husband.

8. The respondent on the other hand is basing his claim on adverse possession. That after he was given one acre from the suit property, he considered the remaining 1 ½ acres to be his and that he has filed a suit seeking to be declared as having acquired the 1 ½ acres by adverse possession. The applicant in her further affidavit has stated that even Martin T Waithaka from whom one acre was removed to be given to the respondent has also filed a case in which he is seeking the suit property by way of adverse possession as well. The applicant and her husband have filed an application seeking to be enjoined in that suit.

9. In the case of **Nguruman Limited Vs Jan Bonde Nelson & 2 others Civil Appeal No 77 of 2012 ,** the Court of Appeal had this to say regarding a prima facie case;-

***“ We reiterate that in considering whether or not a prima facie case has been established , the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or threatened with violation. Positions of the parties are not to be proved in such a manner to give a final decision in discharging a prima facie case”.***

10. Having considered the applicant's case and the respondent's case, I find that she has a prima facie case with probability of success. I therefore allow the applicants application dated 24<sup>th</sup> August 2016 in terms of prayer (3). The costs of this application shall be costs in the cause.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 17<sup>th</sup> day of January,2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Gaturu for Defendant/Respondent

Mr Achoki for Plaintiff/Applicant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**