



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LANDCOURT AT NAIROBI**

**ELC NO. 620 OF 2013(O.S)**

**MULTI TRACK**

**BABUBHAI M. MISTRY.....PLAINTIFF**

**VERSUS**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**AGNES KANANA CYPRIAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

This suit was brought by way of amended Originating Summons dated 26<sup>th</sup> November 2013 in which the Plaintiff sought the following orders:

1. THAT the Plaintiff be declared to have acquired title by adverse possession to the premises known as Plot No. 281 Thome Farmers No.5 Limited(sic) being a portion of LR No. 13330/34 and a permanent injunction restraining the 2<sup>nd</sup> Defendant from interfering with the Plaintiff's possession and title to the suit property.
2. THAT the registration of the 2<sup>nd</sup> defendant as proprietor of Plot No. 281 in Thome Farmers No.5 Limited(sic) or any other title derived from the said Plot No.281 being a portion of LR No. 13330/34 be cancelled forthwith and the chief land registrar do rectify the register and issue title in the name of the Plaintiff as the registered proprietor of the suit property being plot No. 281 Thome Farmers No. 5 Limited(sic)which is a portion of L.R No. 13330/34 in place of the 2<sup>nd</sup> defendant or any one deriving title from the Defendants.
3. The costs of the proceedings be borne by the defendants.

Together with the Originating Summons, the Plaintiff filed an application by way of amended Notice of Motion dated 26<sup>th</sup> November 2013 seeking a temporary injunction to restrain the 2<sup>nd</sup> defendant from advertising for sale, alienating, using, charging, mortgaging, developing, constructing on, trespassing on, entering upon, or in any manner whatsoever dealing or interfering with the plaintiffs possession of a portion measuring 0.25 acres of L.R No. 13330/34 (also plot No. 281 in Thome Farmers No. 5 Limited) (hereinafter referred to only as "the suit property") pending the hearing and determination of this suit.

The application was supported by the affidavit of the Plaintiff sworn on 26<sup>th</sup> November 2013 and the grounds set out on the face thereof. The application was opposed by the defendants.

### **The Plaintiff case:**

In his affidavit in support of the application, the Plaintiff stated as follows. He is the owner of one (1) share in a company known as Thome Farmers No. 5 Limited (“Thome”). The share was registered in his name on 1<sup>st</sup> January 1980. He acquired the said share which represented Plot No. 281 from one, Francis Njuguna Gikonyo on 21<sup>st</sup> April, 1980. Following the acquisition of the said share, he has had open, continuous and uninterrupted occupation of Plot No. 280 from 1980 to date. After taking possession of the said parcel of land, he fenced the same and deposited building materials thereon. After occupying the said parcel of land for over 30 years, he sought a Deed Plan from the commissioner of lands so that he may process a title for the property. This is when he came to learn that the Deed Plan for the said property had been issued to third parties who were strangers to him although he had earlier been issued with the original Deed Plan for the said property being Deed Plan No. 258839.

The Plaintiff stated further that, Thome had purchased a large parcel of land from the 1<sup>st</sup> defendant which it sub-divided and sold to its shareholders. In his pursuit of the title for plot No. 281, he learnt that following the sub-division of the said parcel of land which the 1<sup>st</sup> defendant had sold to Thome, the portion of land which was hitherto referred to plot No. 281 now formed part of a new sub-division known as LR 13330/34 (“**the suit property**”) which was registered in the name of the 2<sup>nd</sup> defendant. The Plaintiff stated further that when the said parcel of land which was sold to Thome by the 1<sup>st</sup> defendant was sub-divided, the titles for the sub-divisions came out in the name of the 1<sup>st</sup> defendant which sold the suit property to the 2<sup>nd</sup> defendant. The Plaintiff contended that the sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was illegal since the 1<sup>st</sup> defendant had no title in the suit property to pass to the 2<sup>nd</sup> defendant the Plaintiff having acquired the said property by adverse possession. The Plaintiff contended further that after the filing of this suit the 2<sup>nd</sup> defendant moved to the suit property, pulled down the concrete wall that he had erected around the said property and removed the building material that he had assembled therein.

### **The 1<sup>st</sup> defendant’s case:**

The 1<sup>st</sup> defendant opposed the Plaintiff’s application through a replying affidavit sworn by Duncan Ndegwa on 5<sup>th</sup> March 2014. In his affidavit, Duncan Ndegwa stated as follows. The suit property was all along registered in the name of the 1<sup>st</sup> defendant before the same was transferred to the 2<sup>nd</sup> defendant. The Plaintiff has never owned the suit property. The 1<sup>st</sup> defendant has no relationship with Thome Farmers No. 5 Limited (“Thome”) from whom the Plaintiff claims to have purchased the suit property which company had also never owned the suit property. He stated further that, the Plaintiff is among persons who had illegally entered LR No. 13330 and against whom a suit was filed in 1992 by the 1<sup>st</sup> defendant which suit was compromised through an agreement that each of the trespassers would pay to the 1<sup>st</sup> defendant a sum of Kshs.200,000/= as a consideration for the parcels of land they were occupying. The Plaintiff did not comply with the terms of the said compromise. He stated that this suit is an attempt by the Plaintiff to set aside the said compromise. He admitted that the 1<sup>st</sup> defendant had sold and transferred the suit property to the 2<sup>nd</sup> defendant. He denied that the plaintiff had acquired title to the suit property by adverse possession. He denied that the plaintiff has had uninterrupted occupation of the suit property for over 15 years as claimed by the plaintiff. He stated that the 1<sup>st</sup> defendant filed a suit against among others the Plaintiff in 1992 which suit was not determined until the year 2002. He contended that 1<sup>st</sup> defendant having transferred its interest in the suit property to 2<sup>nd</sup> defendant, the orders sought against it by plaintiff do not lie.

### **The 2<sup>nd</sup> defendant’s case:**

The 2<sup>nd</sup> defendant opposed the application through grounds of opposition and replying affidavit both dated 14<sup>th</sup> February 2014. In her grounds of opposition and replying affidavit, the 2<sup>nd</sup> defendant contended that the Plaintiff has not established a prima facie case against her with a probability of

success. The 2<sup>nd</sup> defendant contended further that she is an innocent purchaser for value without notice of the Plaintiff's claim over the suit property. The 2<sup>nd</sup> defendant denied that the Plaintiff was in possession of the suit property when she purchased and took possession of the same. The 2<sup>nd</sup> defendant contended that the 1<sup>st</sup> defendant handed to him vacant possession of the suit property upon completion of the sale thereof in the year 2010. In her affidavit, the 2<sup>nd</sup> defendant stated that, upon taking possession of the suit property, she fenced the same, put up a house thereon made of iron sheets and employed a person to take care of the same. She stated further that she has since then been cultivating the property. The 2<sup>nd</sup> defendant denied that the Plaintiff had fenced the suit property using a perimeter wall. She contended that the wall which the Plaintiff has claimed to have put up around the suit property is in the neighbouring parcel of land while the fence made of barbed wire was put up by her. The 2<sup>nd</sup> defendant contended that the Plaintiff has no valid claim against her and that the Plaintiff's claim should be directed at Thome from which he claims to have purchased the suit property.

### **The parties' submissions:**

On 25<sup>th</sup> May 2014, the parties agreed to argue that Plaintiff's application by way of written submissions. The Plaintiff filed his written submissions on 15<sup>th</sup> September 2014 while the defendants filed separate submissions on 22<sup>nd</sup> September 2014. In his submissions, the Plaintiff contended that he has established a prima facie case against the defendants and that he stands to suffer irreparable injury which cannot be compensated by an award of damages if the injunction sought is not granted. The Plaintiff cited a number of authorities in support of his submissions. The 1<sup>st</sup> and 2<sup>nd</sup> defendants on their part submitted that the Plaintiff has failed the threshold for granting the orders sought. The 1<sup>st</sup> defendant submitted that the Plaintiff has not proved on a prima facie basis that he has acquired the suit property by adverse possession and that he will suffer loss which cannot be compensated for in damages if the orders sought are not granted.

### **Consideration of the parties' respective cases:-**

I have at the beginning of this ruling set out the reliefs sought by the Plaintiff in the amended Originating Summons dated 26<sup>th</sup> November 2013. The application before me seeks a temporary injunction to restrain the defendants from having any dealing of whatsoever nature with the suit property pending the hearing and determination of the Originating Summons. The principles upon which this court exercises its discretion on applications for temporary injunction are now well settled and I need not reinvent the wheel. In their submissions, the parties are in agreement with regard to these principles. What is disputed is whether the Plaintiff has met the threshold set out in the said principles for granting the orders sought. As was held in the famous case of **Giellavs. Cassman Brown & Co. Ltd. (1973) EA 358**, an applicant for a temporary injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. If the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of, **Mrao Ltd. vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR1215** that was cited by the Plaintiff, it was held that:

**“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.”**

The Plaintiff is claiming the suit property by adverse possession. What I need to determine is whether the plaintiff has established on a prima facie basis that he has acquired title to the suit property by adverse possession and that the defendants have interfered with or are threatening to interfere with the rights which have accrued to him by virtue of that title. I also need to determine whether the Plaintiff will suffer injury or harm which cannot be compensated in damages unless the orders sought are granted. In the case of **Wambugu Vs. Njuguna (1983) KLR 172** that was relied on by the 1<sup>st</sup> defendant, it was held among others that:-

**“In order to acquire by the statute of Limitations title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.....”**

As I have stated herein earlier, the plaintiff has claimed that he purchased the suit property from Thome Farmers No. 5 Limited (“Thome”) in 1980 and that he occupied the same until the year 2013 when he learnt that the same had been transferred by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. From the material before me, there is no evidence that Thome had at any time owned the suit property or any part of it. It is not clear to the court therefore on what basis Thome purported to sell the suit property to the Plaintiff. Thome having not owned the suit property as aforesaid, the Plaintiff’s adverse possession claim cannot be based on his relationship with Thome. An adverse possession claim cannot be raised against a person who is not the owner of the property the subject of the claim. There is no dispute that the suit property was at all material times owned by the 1<sup>st</sup> defendant before it was sold and transferred to the 2<sup>nd</sup> defendant. It is against the two defendants that the Plaintiff’s adverse possession claim must be established. The plaintiff has not come out clearly in his pleadings on his relationship with the 1<sup>st</sup> defendant as concerns the suit property. There is no prima facie evidence that the Plaintiff dispossessed the 1<sup>st</sup> defendant of the suit or that the 1<sup>st</sup> defendant had discontinued its possession of the suit property after which the Plaintiff took possession thereof. The suit property from the material before the court is not developed. Apart from a temporary structure on the property which is said to have been put up there on by the 2<sup>nd</sup> defendant and a small maize garden which has also been claimed by the 2<sup>nd</sup> Defendant, there is nothing else on the suit property. The Plaintiff has not placed any evidence of his occupation of the suit property before the court. The Plaintiff has claimed that he had put up a perimeter wall around the suit property. I am in agreement with the contention by the 2<sup>nd</sup> defendant that the wall referred to by the Plaintiff is for the neighbouring parcel of land. This fact is very clear from annexures “BMM5” to the Plaintiff’s supporting affidavit and annexure “AK6” to the 2<sup>nd</sup> defendant’s replying affidavit. The plaintiff has claimed that the 2<sup>nd</sup> defendant forcefully demolished his concrete fence and replaced the same with barbed wire fence. This does not make sense to me at all. I wonder why anyone would demolish a concrete fence just to replace it with a barbed wire fence.

In the absence of clear evidence as to how the Plaintiff entered the suit property and of his occupation or possession of the property for the period necessary to acquire title to land by adverse possession, I am not satisfied that the Plaintiff has established a prima facie case against the defendants with a probability of success. In view of this finding, it is not necessary for me to consider whether the other conditions for granting a temporary injunction have been met.

For the foregoing reasons, I am not inclined to grant the prayers sought in the amended Notice of Motion dated 26<sup>th</sup> November 2013. The application is accordingly dismissed. However, in the interest of justice and with a view to preserve the suit property pending the hearing of the suit, I would make a further order that the status quo relating to the title, possession and use of the suit property shall be maintained pending the hearing and determination of this suit. The costs of the application shall be in the cause.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of May, 2016**

**S. OKONG’O**

**JUDGE**

**In the presence of**

Mr. Chenge holding brief for Akhuha                      for the Plaintiff

Ms. Nyarindo                      for the 1<sup>st</sup> Defendant

Ms. Mbaabu holding brief for Gakum for the 2<sup>nd</sup> Defendant