



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

**AT NAIROBI**

**ELC NO. 1253 OF 2015(OS)**

**STEPHEN NJACI MIRARA.....APPLICANT**

**VERSES**

**JACINTA WAMBUI WARUIMBO.....1<sup>ST</sup> RESPONDENT**

**HAWAJO INVESTMENT LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULINGS**

The Applicant brought this suit by way of Originating Summons dated 8<sup>th</sup> December 2015 seeking among others, a declaration that he is the owner of a portion measuring 0.022 ha. of all that parcel of land known as LR No. Ruiru/Ruiru East Block 2/998 (“the suit property”) through adverse possession of the same for a period of over 12 years and, an order that he be registered as the proprietor thereof and a title be issued to him. Together with the Originating Summons, the Applicant filed an application by way of Notice of Motion dated 8<sup>th</sup> December, 2015 seeking an injunction to restrain the Respondents from transferring, disposing of, alienating and/or dealing with the suit property or otherwise evicting him therefrom or interfering with his quiet possession thereof. The application was supported by the Applicant’s affidavit sworn on 8<sup>th</sup> December 2015 in which he stated that he purchased the suit property from the 2<sup>nd</sup> defendant in the year 2001 and was given vacant possession thereof. He stated that he has since then enjoyed exclusive and uninterrupted possession of the suit property as of right, without secrecy, force or permission. The Applicant stated that he has put up a home on the suit property where he lives with his family. He stated that all was well until the 1<sup>st</sup> Respondent entered the suit property in the company of Police Officers and arrested him on the ground that he is occupying land belonging to the 1<sup>st</sup> Respondent. He stated that on 24<sup>th</sup> November 2015, he was served with a demand letter by the 1<sup>st</sup> Respondent to vacate the suit property. The Applicant stated that he is apprehensive that unless restrained by the court, the 1<sup>st</sup> Respondent is likely to evict him from the suit property which is the only home that he has. The Applicant annexed to his affidavit among others, a certificate which is said to have been issued to him in confirmation of his ownership of the suit property by the 2<sup>nd</sup> defendant in the year 2002, photographs showing the developments that he has carried out on the suit property and a copy of the title deed for the suit property in favour of the 1<sup>st</sup> Respondent dated 24<sup>th</sup> June 1992.

The application was opposed by the Respondents through separate replying affidavits. In her replying affidavit sworn on 16<sup>th</sup> December 2015, the 1<sup>st</sup> Respondent stated that she purchased the suit property from one, WanjiruKaranja who held a share in Nyakinyua Investments Limited (“Nyakinyua”) which entitled her to a parcel of land then owned by Nyakinyua. The 1<sup>st</sup> Respondent stated that the suit property was transferred and registered in her name on 22<sup>nd</sup> June 1992 after which she was issued with a title deed

on 24<sup>th</sup> June 1992. She stated that in the year 2000, she left Kenya to go and work in England and only discovered that the suit property was occupied by the Applicant when she wanted to develop it. When she inquired from the Applicant as to why he was occupying the property, the Applicant claimed that he had purchased the same from the 2<sup>nd</sup> Respondent. She informed the Applicant that he was a trespasser on the property and served him with a notice on 24<sup>th</sup> November 2015 to vacate the property. She stated that the 2<sup>nd</sup> Respondent has never owned the suit property. The 1<sup>st</sup> Respondent attached to her affidavit among others, a copy of her title deed for the suit property.

The 2<sup>nd</sup> Respondent opposed the application through a replying affidavit sworn by one Margaret Njoki on 28<sup>th</sup> December 2015. Margaret Njoki stated that she is one of the directors of the 2<sup>nd</sup> Respondent. She admitted that the 2<sup>nd</sup> Respondent had sold to the Applicant a parcel of land measuring 0.022 ha. and issued him with a share certificate. She stated that when survey was done, it was discovered that the land that they had sold to among others the Applicant belonged to Nyakinyua Investments Limited (Nyakinyua). She stated that upon this discovery, the 2<sup>nd</sup> Respondent moved the persons to whom they had sold land in the area to other parcels of land and that only the Applicant defied their request to move. This request was made in the year 2002 and that by the year 2004, all the other purchasers had moved save for the Applicant. She stated that the alternative plot they offered to the Applicant is still available for his occupation.

The Applicant's application was argued before me on 31<sup>st</sup> December 2015 when Mr. Kago Advocate appeared for the Applicant, Ms. Chelagat Advocate for the 1<sup>st</sup> Respondent and Ms. Muhuhu Advocate for the 2<sup>nd</sup> Respondent. In his submission in support of the application, Mr. Kago reiterated the contents of the Applicant's affidavit in support of the application. He submitted that the Applicant has been in occupation of the suit property for over 12 years and has developed the same. He submitted that the Applicant has established a case for adverse possession against the Respondents. He submitted further that the applicant who is in occupation of the suit property with his family would suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted as he risks being evicted from the property.

In opposing the application Ms. Chelagat submitted that the Applicant has not established the grounds for the grant of the temporary injunction sought. Ms. Chelagat submitted that the applicant has not exhibited in his affidavit in support of the Originating Summons an abstract of title showing that the suit property is registered in the name of the 1<sup>st</sup> Respondent. Ms. Chelagat submitted further that the Applicant has not established that he has occupied the suit property for over 12 years. Counsel cited several authorities in support of her submissions and urged the court to dismiss the application since the Applicant does not deserve the protection sought from the court.

Ms. Muhuhu supported Ms. Chelagat's submission that the Applicant has not established a prima facie case against the Respondents. Ms. Muhuhu submitted that the Applicant's Originating Summons is defective for failing to comply with Order 37 Rule 7(2) of the Civil Procedure Rules which requires an applicant seeking registration as an owner of land by adverse possession to exhibit an extract of title of the property in respect of which an adverse possession claim is made.

I have considered the Applicant's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the Respondents in opposition to the application. In the case of **Giellavs. Cassman Brown Co. Limited (1993) EA 358**, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and that a temporary injunction will not normally be granted unless an irreparable injury which cannot be compensated in damages would be occasioned to the applicant. In the event that the court is in doubt as to the above, the application would be determined on a balance of convenience.

From the material before me, I am satisfied that the Applicant has satisfied the conditions for granting the temporary injunction sought. The Applicant's claim over the suit property is on account of adverse possession. In the case of **Wambugu vs. Njuguna (1983) KLR 173**, it was held among others that "In

**order to acquire by the statute of Limitations title to land which has a known owner that 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.”**

It is not in dispute that the suit property is registered in the name of the 1<sup>st</sup> Respondent who acquired the same on or about 22<sup>nd</sup> June, 1992. The suit property measures 0.400ha. It is also not disputed that the Applicant entered onto the portion of the suit property measuring 0.022 ha. in the year 2002. The Applicant was put in possession of the said portion of the suit property (“**the disputed land**”) by the 2<sup>nd</sup> Respondent which mistakenly thought that the land belonged to it. In the same year (2002), the 2<sup>nd</sup> Respondent realized that the disputed land among others did not belong to it and requested the persons to whom it had sold and allocated land in the area who included the Applicant to relocate to an alternative land which had been made available for them. While the other allottees/purchasers moved, the Applicant who had already put up a house on the disputed land refused to vacate and continued to occupy the said parcel of land. From the material on record, as at the time the 2<sup>nd</sup> Respondent purported to allocate the disputed land to the Applicant, the same was already registered in the name of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was however not in occupation of the same. It is clear from the evidence on record that the Applicant occupied the disputed land openly and continuously without the permission of the 1<sup>st</sup> Respondent from the year 2002 until sometimes in the year 2015 when the 1<sup>st</sup> Respondent who was all along resident in England came back to Kenya and attempted to take possession of the same from the Applicant. It is not disputed that the Applicant has put up a permanent residential house on the suit property which he is occupying with members of his family. Without deciding the matter with finality this being an interlocutory application, I am satisfied that the Applicant has on a prima facie basis established that he has acquired a portion of the suit property measuring 0.022 ha. by adverse possession. The Applicant has established that he entered the disputed land without the 1<sup>st</sup> Respondent’s permission in the year 2002 and that he occupied the same openly for a continuous uninterrupted period of over 13 years before the 1<sup>st</sup> Respondent sought to recover the land from him. The Applicant has also demonstrated that while in occupation of the disputed land, he committed acts thereon which were inconsistent with the 1<sup>st</sup> Respondent’s rights over the same. I am persuaded that the Applicant has dispossessed the 1<sup>st</sup> Respondent of the disputed land.

I am also persuaded that the Applicant would suffer irreparable harm which cannot be compensated in damages if orders sought are not granted. As I have stated above, the applicant has put up a residential house on the disputed land which he is occupying with his family. If the injunction sought is not granted, the Applicant will be evicted from the said house by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has admitted that she has served the Applicant with a notice to vacate the disputed land.

For the foregoing reasons, I am satisfied that the Applicant’s Notice of Motion dated 8<sup>th</sup> December 2015 has merit. I have considered the objection that had been raised by the Respondents on the competency of the Originating Summons which they contended is bad in law for failure to comply with Order 37 rule 7 (2) the Civil Procedure Rules which provides that:-

**“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”**

I find no merit in this objection. In his affidavit in support of the Originating Summons, the Applicant has annexed as annexure “SN3” a copy of the title deed for the suit property which shows that the same is registered in the name of the 1<sup>st</sup> Respondent. This fully complies with the provisions of Order 37 rule 7(2) of the Civil Procedure Rules above. Even if I had found that the Applicant had failed to comply with the said provisions of the Civil Procedure Rules, that would not have been a sufficient ground to deny the Applicant the reliefs sought herein there being no dispute that the suit property is owned by the 1<sup>st</sup> Respondent. I would have treated the objection as a procedural technicality and would have overruled the same pursuant to the provisions of Article 159(2) (d) of the Constitution for the sake of doing substantive

justice.

In the final analysis and for the reasons given above, the Notice Motion dated 8<sup>th</sup> December 2015 is allowed in terms of prayer 3 thereof. The order shall be limited only to the portion of the suit property measuring 0.022 ha. which is occupied by the Applicant. The costs of the application shall be in the cause.

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

**S. OKONG'O**

**JUDGE**

**In the presence of**

N/A for the Applicant

N/A for the Respondents

Kajuju Court Assistant