



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 692 OF 2014**

**BENJAMIN OMANWA MOKUA.....PLAINTIFF**

**VERSUS**

**BISHENDASS BERI.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 4<sup>th</sup> June 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction to issue against the Defendant/Respondent restraining him from evicting, harassing or in any other way interfering with the Plaintiff/Applicant's peaceful possession of all that parcel of land known as L.R. No. 209/3630 registered under Grant No. I.R. 9417 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit and that the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Benjamin Omanwa Mokua, sworn on 4<sup>th</sup> June 2014 in which he averred that he has been residing on the suit property since March 1998 after taking possession thereof from one Ken Omanwa, his son, who relocated to the United States of America. He averred further that since he took possession of the suit property, he has always lived in peace. He further indicated that on or about 14<sup>th</sup> February 2014, he received a phone call from an unknown person who claimed to be the owner of the suit property giving him one month notice to vacate the suit property or be thrown out. He further averred that thereafter he received various phone calls from various individuals asking him whether he was interested in selling the suit property as the same was on the market. He further stated that on or about 22<sup>nd</sup> April 2014, he received a letter dated 31<sup>st</sup> March 2014 drawn by M.A. Khan Advocate indicating that Ken Omanwa had 2 months to vacate the suit property. He confirmed that the suit property is registered in the name of the Defendant who was the landlord of his son, Ken Omanwa. He stated that ever since that letter was delivered, he has been living in fear and anxiety as he is apprehensive that he may be evicted anytime. He further stated that on or about 4<sup>th</sup> April 2014, Domicile Auctioneers dropped a Proclamation Notice at the suit property claiming that Ken Omanwa owed one Usha Pruthi rent arrears of Kshs. 108,000/-. He added that on 24<sup>th</sup> April 2014, the Auctioneers filed Miscellaneous Application No. 399 of 2014 I court seeking orders that the police assist them to attach the goods at the suit property, which prayer was declined. He further averred that on 13<sup>th</sup> May 2014, the same Auctioneers mischievously filed another application seeking similar orders as the previous application and succeeded to obtain the orders from a different magistrate which they proceeded to effect. He stated that on 27<sup>th</sup> May 2014, the said Auctioneers accompanied by rowdy youth and armed police men scaled the walls of the

suit property, broke padlocks in order to gain access to the house and took away the furniture and other household items. In the circumstances, he sought the courts protection from eviction out of the suit property.

The Application is unopposed. The Defendant was served by way of substituted service through an advertisement in a local daily newspaper but never filed any response.

The issue I am called upon to determine is whether or not to grant the Plaintiff/Applicant orders of temporary injunction restraining the Defendant/Respondent from evicting him out of the suit property pending the hearing and determination of this suit. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction 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.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus 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.”**

The Plaintiff/Applicant claims to be entitled to be registered as the proprietor of the suit property in place of the Defendant under the principle of adverse possession on the ground that he has peacefully occupied the suit property from March 1998 to date, a period well exceeding the statutory minimum of 12 years stipulated in the Limitation of Actions Act. In the absence of any controverting evidence, I am inclined to believe the Plaintiff/Applicant, albeit on a prima facie basis. In the circumstances, I find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

In whose favour does the balance of convenience tilt? On this point, I take note that the Plaintiff/Applicant has asserted that he has lived and continues to live on the suit property together with his family from the year 1998 to date. In light of this, I consider that the balance of convenience tilts in favour of the Plaintiff/Applicant to continue to occupy the suit property pending the hearing and determination of this suit.

The upshot of the above findings is that I do allow the Application. Costs shall be in the cause.

It is so ordered.

**SIGNED AND DELIVERED IN NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2015.**

**MARY M. GITUMBI**

**JUDGE**