



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**SUCCESSION CAUSE NO. 321 OF 2011**  
**IN THE MATTER OF ESTATE OF**  
**MUNGANIA KIURA alias KURA KAGUNDU.....DECEASED**  
**AND**  
**ALICE MIIRU KOBUTHI.....APPLICANT/RESPONDENT**  
**VERSUS**  
**FRANCIS GIKUNDA MARETE.....RESPONDENT/APPLICANT**  
**R U L I N G**

This is the Notice of Motion dated 16<sup>th</sup> May 2012 by the Respondent/Applicant (Francis Gikundi Marete). The application is brought under Order 40 Civil Procedure Rules seeking a temporary injunction to restrain the Applicant/Respondent from planting trees, cultivating and committing other acts of waste in land parcel No.Gaturi/Nembure/708. The same is supported by the grounds on the face of the application, supporting affidavit of the Applicant and one John Kariuki Njeru. They aver that the Respondent is a trespasser on the said land as the Applicant is the registered owner having inherited the land from Mungania Kagundu alias Kiura Kagundu upon a successful succession cause No.92/2010 (Runyenjes Court).

The Respondent filed a replying affidavit sworn on 14/6/2012 and filed on the same date. She states that her late husband bought the said land from the late Mungania Kagundu and her family has lived on the land since 1967. The land was not transferred by the deceased to her husband prior to his death. She states that prohibiting her from cultivating the land would heavily prejudice her as she lives and works on the land. She therefore opposed the application.

Both Counsels agreed and filed written submissions. The Applicant's Counsel (Now Mr. Murango Mwenda) though the submissions were filed by the late Utuku contends that his client is the registered proprietor of the suit property and the Respondent has no right of cultivating it as she is a trespasser. He has referred to a Ruling in relation to HCCC NO. 68/11 which he alleges dismissed similar arguments by the Respondent. The said copy of Ruling and Orders were not attached as stated by the Applicant's Counsel. He further submits that the Respondent has not produced anything to show that the land was sold.

Mr. Njeru Ithiga for the Respondent submits that the Respondent is the one who lives on the land since 1967. She also cultivates it. And further more she says the land is already preserved.

The Respondent filed an application challenging the grant issued to the Applicant herein vide Runyenjes Succession Cause No.92/2010. This was on 2/8/2011. Over two years down the line no steps have been taken to have this application for revocation prosecuted. Instead there have been two applications filed. One by the Applicant and the other by the Respondent. In respect of the Respondent's application dated 2/8/2010 a prohibitory order preserving the suit property was issued by consent on 3/10/2011. Soon thereafter the present application was filed. Is it true that the Respondent has been in possession since 1967 or she moved onto the land in 2012? The Applicant in paragraph 4 of his affidavit sworn on 16/5/2012 states;

***“That the Defendant has started planting trees on the land without my consent”.***

If it's true that the Respondent has been in possession for all these years it would be important to know the reason for the possession and if the said reason is sustainable in law. All this can clearly come out through a full hearing. Right now it is the Applicant's word against that of the Respondent. It is also at the full hearing that the Court will establish how the purchase if any was made. It is also clear that the Applicant does not live on the suit land. Was the late Mungania Kagundu living and working on this land? This also is a matter of evidence. I can see the copy of the death certificate in respect of Mungania Kagundu showing he died on 30/8/1988 at age 65 years. The succession cause in respect of his estate was filed at Runyenjes Court in the year 2010 i.e 22 years after the death. The land in question measures 1.21 hectares. All these are issues this Court will want to interrogate during the hearing of the application for revocation.

Though the Applicant is the registered proprietor the manner through which he got the land is being challenged by a person who has been in possession for years. I do find that whatever loss he may suffer may not be as much as that of the Respondent who has been occupying and cultivating the land for years. To the contrary his loss may be quantified unlike that of the Respondent. Secondly there is a conservatory order in place to preserve the land, until the main application herein is heard and determined. There is therefore no danger of anything being done to the suit land. I therefore find that the application lacks merit, and I dismiss it.

The applicant Alice Miiru Kobuthi is directed to take the necessary steps in having the matter set down for hearing.

Costs to the Applicant/Respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 19<sup>TH</sup> DAY OF FEBRUARY 2014.**

**H.I. ONG'UDI**

**J U D G E**

In the presence of;

Mr. Mulango Mwenda for Respondent

Mr. Ithiga for Applicant

Applicant

Njue – C/c