



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**PETITION NO. 2 OF 2012**

ZIPPORAH NKOYAI HENRY..... PETITIONER

VERSUS

JAMES KABERIA M'ITWAMWARI & 6 OTHERS.....RESPONDENTS

**RULING**

The application herein by way of Chamber Summons is dated 12th March, 2012. It seeks orders:

1. **THAT** the application be certified extremely urgent, service thereof be dispensed with in the first instance and it be heard exparte, on priority basis.
2. **THAT** pending inter-partes hearing of the application, an order of injunction be issued, restraining the 1st and 2nd Respondents and their representatives/successors, agents, servants, employees or anybody else acting at their behest, direction or instruction, from entering into, excising any portion of land from, and/or tampering with, or altering the map sheet and/or adjudication register/records for land parcel Nos. 1458 and 8206 to create another parcel number therefrom, and/or whatsoever interfering with the Petitioner's/Applicant's quiet, peaceful, undisturbed, uninterrupted, exclusive and actual possession, cultivation, user and enjoyment of land parcel Nos.1458, measuring about 3.36 and 8206, measuring about 3.15 acres, both situate in Antuamburi Adjudication Section.
3. **THAT** pending hearing and determination of the petition or until further court orders, an order of injunction be issued, restraining the 1st and 2nd Respondents and their representatives/successors, agents, servants, employees or anybody else acting at their behest, direction or instruction, from entering into, excising any poriton of land from, and/or tampering with, or altering the map sheet and/or adjudication register/records for land parcel Nos.1458 and 8206 to create another parcel number therefrom, and/or whatsoever interfering with the Petitioner's/Applicant's quiet, peaceful, undisturbed, uninterrupted, exclusive and actual possession, cultivation, user and enjoyment of land parcel Nos.1458, measuring about 3.36 and 8206, measuring about 3.15 acres, both situate in Antuamburi Adjudication Section.
4. **THAT** costs of the application be provided for.

An Interim Order of injunction in terms of prayer 2 was granted by the Hon. Justice J. A. Makau, J, on 13.3.12.

The petitioner filed an application for contempt proceedigs on 15.10.2012. The application sought to have the 1st Respondent, James Kaberia M'Itwamwari punished for disobedience of the order of injunction issued, as earlier mentioned, by the Court. The application was heard interpartes on 6.12.2012 and on 20.12.2012 a ruling was delivered by this Court finding the 1st respondent culpable of disobedience of a Court order and the 1st respondent was required to show cause why he should not be punished for disobedience of a Court order. On 11.2.2013, the 1st respondent purged his contempt by

apologizing to the Court and seeking forgiveness

The application was heard interpartes on 9.7.2013. The conspectus of what the parties said is as follows:

1. The petitioner's case was that she was the sole recorded owner of the suit lands, to wit, parcel numbers 1458 and 8206, Antuamburi Adjudication Scheme. She had inherited the suitlands from her father Henry Mugambi who had got the land from his brother M'Elongi Ndegwa who had predeceased him and had no children. She was of the view that the respondents wanted to deprive her of her land unjustly because she was poor and a single woman.
2. She sought the orders prayed for in this application to protect her rights pending the hearing and determination of her petition.
3. The Respondents' case was that the suit lands were family land. They denied that the applicant was the sole registered owner since 1992. They said she had taken away family land fraudulently and rushed to Court to protect what she had stolen. They claimed that they and other members of the family were cultivating the suit land alongside the petitioner. According to them she was seeking eviction through the backdoor.

The respondents were supported by other family members including the petitioner's biological mother. They prayed for the dismissal of the application.

I have carefully considered the pleadings in this petition and the averments and submissions made by the parties. In an interlocutory application a judge must be careful not to determine facts which merit being established during the hearing and determination of the main suit

In **Dorris Kanini Ndunda versus Family Bank Ltd, Civil case no. 90 of 2013**, Hon. Lady Justice Mary Kasango, J, quoted the Court of Appeal in the case of **Mbuthia Vs Jimba Credit Corporation and Another [1998] KLR 1**, as saying:

**“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower Court judge in this case had gone far beyond his proper duties and made final findings of facts on disputed affidavits.”**

In this application, the parties have adopted diametrically opposed positions. The petitioner claims that she inherited the suit lands from her father. The Respondents, supported by other family members, including the plaintiff's biological mother deny the petitioner's claim and insist that the suit lands are family land. They go further and allege fraudulent dealings on the part of the petitioner. The claims made by the parties can only be established during the hearing and determination of the petition. I, however, note that all parties are in agreement that the petitioner's father, who is alleged to have given the parcels of land to her, had not bought them. The parcels of land, indeed, belonged to his deceased brother who had no children.

After weighing the relevant strength of each side's propositions I am inclined to decline to grant the petitioner's prayers in this application. In the circumstances, it is ordered as follows:

1. The petitioner's application is dismissed with costs being in the cause.
2. Status quo should be maintained as at the date when this petition was filed in Court.
3. The petitioner should set the case down for hearing within the next 60 days.

It is so ordered.

Dated and Signed at Meru this 2nd day of September, 2013.

**P. M. NJOROGE**

**JUDGE**

**Delivered in Open Court at Meru this 18th day of February, 2014 in the presence of:**

Cc. Daniel

Zipporah Nkoyai – Plaintiff

Kaume present for the Respondent

**P. M. NJOROGE**

**JUDGE**