



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC. CIVIL SUIT NO. 750 OF 2013**  
**ITA OLE MURE.....PLAINTIFF**  
**VERSUS**  
**JOHN KIOK.....DEFENDANT**  
**RULING**

Coming up before me for determination is the Notice of Motion dated 26<sup>th</sup> June 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from encroaching, trespassing, carrying out any developments, disposing off or in any other manner dealing with the parcel of land identified as KAJIADO/LOODARIAK/87 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit together with costs.

The Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Ita Ole Mure, sworn on 26<sup>th</sup> June 2013 in which he averred that he is the registered owner of the suit property measuring approximately 494.2 acres which is adjacent to land title number KAJIADO/LOODARIAK/949 measuring approximately 49.42 acres owned by the Defendant herein. He annexed a copy of his certificate of title as well as a certificate of official search of KAJIADO/LOODARIAK/949. He further averred that sometimes in the year 2012, the Defendant without any colour of right encroached and trespassed on a portion measuring approximately 7 acres of the suit property and that despite his demand that he moves out, the Defendant refused to comply.

The Application is not contested. Despite being duly served, the Defendant/Respondent did not file a response herein.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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.”***

In determining whether the Plaintiff/Applicant has made out a prima facie case, I must consider the title documents, if any, that he has produced. In this case, the Plaintiff/Applicant has produced a copy of his certificate of title. **Section 26 (1)** of the **Land Registration Act** states as follows:

**“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

In the circumstances and in the absence of the Defendant’s challenge of the Plaintiff’s certificate of title on any of the grounds set out in the legal provisions above, I am duty bound to find that the Plaintiff has established a prima facie case and I do so find.

Does an award of damages suffice to the Plaintiff/Applicant? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiff/Applicant 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**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**