



**NGUMBI KIMALI WAMBUA** (on his own behalf and on behalf of the estate of  
**KIMALI WAMBUA NTHEI**  
**(DECEASED.....PLAINTIFF/APPLICANT**

**VERSUS**  
**PETER MUTEEKE WILLIAM MUSAU.....DEFENDANT/  
RESPONDENT**

**RULING**

1. The Applicant herein, **Ngumbi Kimali Wambua** (“*Applicant*”), first approached the Court by a Notice of Motion dated **23/05/2011** but filed in Court on **18/07/2011** praying for orders:
  - a. **That** [the] application be certified urgent and heard ex parte in the first instance;
  - b. **That** pending the hearing and determination of this application inter partes, there be and is issued an interim injunction restraining the defendant, his employees, servants, agents or assigns from entering into, interfering in, using, exploiting, alienation or in any other way interfering with the plaintiff’s free and quiet use and occupation of property known as Muthetheni/Ngamba/675 and measuring **8.0 hectares** (“*Suit Property*”);
  - c. **That** pending the hearing and determination of [the] suit, there be and is issued an interim injunction restraining the defendant, his employees, servants, agents or assigns from entering into, interfering in, using, exploiting, alienation or in any other way interfering with the plaintiff’s free and quiet use and occupation of property known as Muthetheni/Ngamba/675 and measuring 8.0 hectares (“*Suit Property*”);
  - d. **That** cost of the application be provided for.
2. That Application was placed before *Justice Kihara* on **18/07/2011** when he granted prayer **(a)** and **(b)** above. He also granted leave to the Applicant to amend the Notice of Motion. Pursuant to that leave, the Applicant filed an Amended Notice of Motion dated **27/07/2011** (“*Application*”).
3. The Application is predicated on a *Plaint* filed on **23/05/2011** which has, as its singular substantive prayer, a permanent injunction over the *Suit Property*.
4. The Defendant in the suit and Respondent in this Application is **Peter Muteeke William Musai** (“*Respondent*”). Through his lawyer, he has filed a *Replying Affidavit* in opposition to the Application and a defence to the main suit.
5. The Applicant seeks interim injunctive relief on the ground that the Respondent had, immediately before the Application was filed, entered the *Suit Property* and had began engaging in various acts of waste including cutting down trees and digging trenches thereon. The Applicant believes that unless and until stopped with an order of interim injunction the Respondent shall “*completely waste the property on the pretext of having bought it.*”
6. The Applicant claims the right to own and occupy the *Suit Property* to the exclusion of the

Respondent on two separate if competing theories. First, the Applicant has sued as an administrator *ad litem* to the estate of his deceased father, **Kimali Wambua Nthei**. In that capacity, the Applicant is suing to “*preserve*” the suit against what he sees as intermeddling of the estate perpetrated by the Respondent. The claim under this prong is straightforward: since the death of **Kimali Wambua Nthei**, no letters of administration have been issued and no personal representative or administrator has been appointed in respect of the estate. As such, no one is legally entitled to deal with the property belonging to the estate. The Suit Property is part of the estate. Despite this, the Applicant argues, the Respondent is claiming one half of the Suit Property on the claim that he bought the same from **Mutiso Kimali Wambua** who is a brother to the Applicant. Even if true, such a sale would be ineffective to convey any title to the Suit Property, argues the Applicant.

7. For his second theory of the case, the Applicant claims the Suit Property on his own behalf. His theory in this regard is that he is entitled to the Suit Property “on the basis of occupation and possession.” (See Complaint at paragraph 12).

8. The Respondent has vigorously opposed the Application. In his Replying Affidavit he outlines the following story:

a. **That** the Applicant is the brother to one, Mutiso Kimali Wambua;

b. **That** the two brothers, as the heirs to Kimali Wambua Nthei (“Mutiso”), shared the Suit Property between themselves by subdividing it into two;

c. **That** pursuant to the partition, Mutiso sold his portion of the Suit Property to the Respondent vide a Sale Agreement dated 06/06/2010. That Sale Agreement was, in fact, witnessed by the Applicant who appended his signature. A copy of the Sale Agreement (in Kikamba) and a certified translation is attached to the Replying Affidavit;

d. **That** the Respondent took possession of the one half of the Suit Property which he bought pursuant to the Sale Agreement as he is entitled to do;

e. **That** the Applicant has never been in occupation of that half of the portion since it belonged to Mutiso and has been unutilized and uncultivated until he took possession.

9. At the outset, let us deal with two technical objections raised by the Respondent’s counsel in their Written Submissions. First, the Respondent argues that the Applicant lacks *locus standi* to bring the instant suit because the Limited Grant of Letters of Administration Ad Litem, by its very terms stated on its face is “*limited to filing suit for damages in respect to the death of the deceased, Kimali Wambua Nthei.*” It is noteworthy that the Respondent did not raise this objection until he put in his Written Submissions. Hence, the only opportunity the Applicant had to respond was in his Supplementary Submissions since the whole Application was canvassed by way of Written Submission. I have easily concluded, upon reading the petition and the order of the judge for the Limited Grant of Letters of Administration Ad Litem that this objection is without merit. It is obvious that the inclusion of the phrase “*damages in respect of the death of the deceased...*” was a scrivener’s error perpetrated at the Court registry.

10. The Respondent also raises the argument that the Application is incompetent because it is unsupported by affidavit evidence. The Respondent gets to this result by arguing that the Supporting Affidavit filed together with the initial Notice of Motion must be considered to have expired when the Applicant filed the Amended Notice of Motion. Since the Applicant did not re-file the Supporting Affidavit with his Amended Notice of Motion, the Respondent argues, the Application is not supported by any affidavit evidence and is therefore incompetent. I am unmoved by the technical nature of this argument.

11. First, the Application clearly states that it is supported by the Supporting Affidavit of the Applicant sworn on **23/05/2011**. Second, I do not think it proper to conclude that that Affidavit lapsed with a leave

to file an Amended Notice of Motion.

12. Third, even if that were technically true, the Court would invoke its inherent jurisdiction to consider the Supporting Affidavit as properly before the Court. The upshot is that, in light of the no-longer-so-new **sections 1A and 1B** of the **Civil Procedure Act**, the Courts are not impressed by overly technical and rigidly construed objections even while taking into consideration that rules of procedure serve a useful purpose of ensuring orderly disposition of cases and ensuring fairness among the litigants.

13. With the technical objections out of the way, I will now consider the Application on its merits. The legal principles applicable here are well settled. They are set out in the celebrated case of *Giella vs Cassman Brown* in the words of Spry V.P.:

*First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*

14. The law, therefore, requires that I satisfy myself that the conditions for grant of interlocutory injunction are met. A party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating that:

- a. *He is likely to prevail on the merits;*
- b. *He will suffer imminent irreparable harm if the injunction is not granted; and*
- c. *The harm the Applicants are likely to suffer absent the injunction outweighs the harm the injunction would cause to the adverse party.*

15. The first *Giella* factor requires me to determine if the Applicant has established a *prima facie* case and is likely to prevail on the merits. To do this, the Court has to provisionally come to tentative conclusions about the Applicant's theory of the case. I can easily dispose of the Applicant's second theory of the case. He claims the whole of the Suit Property on account of occupation and possession. He states that he has lived on the Suit Property since his childhood and has raised his whole family there. It is not clear whether the Applicant is making a claim for adverse possession. If so, it is not specifically pleaded or demonstrated. In any event, I am not sure it would lie in these circumstances. It seems that he occupied the land with the express permission of his father who is the registered owner. Thereafter, it appears that he continued to occupy the Suit Property as a beneficiary to the estate of the deceased. I am not aware of any other theory of "*occupation and possession*" under which the Applicant can claim the Suit Property. I am therefore, not persuaded that the Applicant has raised any *prima facie* case on this theory.

16. That will bring us to the second theory of his case. It is simply that the Respondent has not acquired any rights to the Suit Property at all. First, the Applicant denies that there is any valid Sale Agreement and raises a number of arguments to urge its invalidity. He urges the extremely rare plea of *non est factum*. He says the signature on the Agreement is not his or at least it was fraudulently obtained. On this score, I simply disbelieve him on the facts. The context shows that he at the very least understood that the transaction respecting which he appended his signature involved the Suit Property.

17. Next, the Applicant argues that the Sale Agreement is invalid because it offends the provisions of the **Land Control Act** and the **Law of Contract Act**. However, I believe both defenses are not his to raise: The Applicant is not privy to the contract between Mutiso and the Respondent, and as a stranger to that contract, he cannot raise the defenses to the alleged contract that belong to Mutiso.

18. The next salvo and the most potent one the Applicant fires is that Mutiso had no capacity to enter into the Sale Agreement since he had no Letters of Administration. Since Mutiso had no title to the Suit Property, it follows that he could convey none. It will then follow that the Respondent's attempt to enter the Suit Property is irregular and unlawful at least until distribution of the estate has been effected.

19. I have considered this argument by the Applicant very anxiously. It causes the Court anxiety because it seems, in context, that it is obvious that the Respondent entered into an agreement for the sale of half portion of the Suit Property with Mutiso. It also seems that the Applicant was aware of that “sale,” witnessed it, and even appended his signature as a witness. Finally, given the Court’s provisional impressions on the Applicant’s first theory (of occupation and possession), it also seems very likely that Mutiso will, at the conclusion of an appropriate succession cause, be entitled to one half of the Suit Property. Yet, the unshakeable fact is that the Respondent purchased land from one who did not have title and therefore had none to convey. It seems that without having Mutiso take out appropriate Petition for Letters of Administration or an Objection to such proceedings as filed by the Applicant, the Respondent’s ownership and possession of the Suit Property is tenuous at best.

20. Yet, this is the Applicant’s Application. He must not only persuade the Court that he has a *prima facie* case with a probability of success but also that he is entitled to benefit from the discretion of the Court. I am of the view that an Applicant does not deserve the discretion of the Court if he seeks to perpetrate an injustice. Granting him an injunction in such circumstances would come close to validating fraud. An injunction is an equitable remedy especially at the interlocutory stage. The Court is entitled to refuse to issue it under such circumstances notwithstanding the possibility that the Applicant might succeed on technical legal grounds in the substantive suit.

21. Yet, here, another value seems to be at stake. It is the need to preserve peace until the underlying dispute is heard and determined. By the Respondent’s own pleadings, he has not been in possession of the Suit Property. It seems that he is attempting to gain possession now. Such conduct will only deepen the tensions and make the underlying dispute more complex. For that reason, the Court is inclined to grant the injunction sought so as to preserve both the Suit Property and peace. In doing so, I have noted that the Respondent has not claimed or demonstrated that they would suffer any irreparable harm if the injunction is granted. If the Respondent succeeds in getting the one-half portion of the Suit Property at the conclusion of this case or any subsequent succession cause, he will be given vacant possession at that time. However, I will grant the injunction on the very strict terms that the Applicant, also, should not engage in any acts of waste on the Suit Property. The Suit Property should remain under the same use as immediately before the filing of this suit.

22. This should be a cautionary tale. The practice of entering into transactions with would-be beneficiaries to estates of deceased persons before grant of Letters of Administration is quite widespread. This suit shows the difficulties that arise from these kinds of transactions. Parties are well advised to first insist on appropriate distribution of the estate after a successful petition for letters of administration before dealing with would-be beneficiaries to such estates.

23. In the present case, it seems this matter would ultimately be parallel to any succession cause filed respecting the estate of **Kimali Wambua Nthei**. I would hope that **Mutiso** would file or co-file with the Applicant herein a petition for letters of administration and have the present dispute determined in the context of that succession cause.

24. The upshot is that I will grant injunctive relief in the following terms:

a. ***That pending the hearing and determination of this suit, there be and is hereby issued an interim injunction restraining the defendant, his employees, servants, agents or assigns from entering into, interfering in, using, exploiting, alienation or in any other way interfering with the plaintiff’s free and quiet use and occupation of property known as Muthetheni/Ngamba/675 and measuring 8.0 hectares.***

b. ***That pending the hearing and determination of this suit, the Applicant whether by himself or his employees, servants, agents or assigns is hereby restrained from engaging in any acts of wanton waste over the property known as Muthetheni/Ngamba/675 and measuring 8.0. The Plaintiff shall not engage in any other use of the land other than that which is consistent with the use to which the land was put immediately before the filing of the present suit.***

25. **That** cost of this Application will be in the cause.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.**

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**J.M. NGUGI**  
**JUDGE**