



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
ENVIRONMENT AND LAND CASE NO. 62 OF 2010**

**ANNUNCIATA MWONGELA  
ROBERT KYALO  
MARY CONCEPTA NDUKU MUTIE.....PLAINTIFFS**

**VERSUS**

**WILLIAM ABUKA**

**WASHINGTON OMONDI**

**DORCAS TABITHA ADHIAMBO.....DEFENDANTS**

**RULING**

**ANUNCIATA NTHOMBI MWONGELA** together with her co-Plaintiff's filed this suit as Administrators of the estate of the late **Henry Mutie Mwangela**. The suit is against the Defendants who are allegedly occupying a property known as **LR No: 209/12320**. That property is registered in the name of the late Henry Mutie Mwangela. The Plaintiffs also filed a Chamber summons dated 11<sup>th</sup> May, 2010, in which they sought for an interlocutory order of injunction to restrain the Defendants or their agents or invitees from interfering with the property known as LR No: 209/12320 pending the hearing and determination of the suit.

The application is supported by the grounds that the defendants either by themselves or agents, have illegally taken possession of the suit premises or denied the Plaintiffs the right of enjoyment to their detriment. The Defendants have no legal interest or legal estate over the suit premise which is registered in the name of Henry Mutie Mwangela, the late husband of the first Plaintiff and the father of the second and third Plaintiffs. The application is also supported by the affidavit of the first Plaintiff. She has annexed a copy of the title over LR No: 209/12320. The title is in the name of Henry Mutie Mwangela. There are photographs to show that the Defendants have erected some structures on the suit land where they are running a church, a school and other activities.

In opposition to the Plaintiff's application, Bishop William Oracha Abuka, the first Defendant, swore the replying affidavit to this application on 15<sup>th</sup> July, 2010. The first Defendant denied that he is an official of Faith Community Centre. The application by the Plaintiff was faulted for failure to annex consent by the second and third Defendants authorizing the first Plaintiff to file this suit.

It is further contended that the same issues that are raised in the application were raised in **Nairobi HC Succession Cause No: 1795 of 2008**, thus the matter is *res judicata*.

The Defendants claim that in November 2006, a group of small entrepreneurs and community groups had approached the then Minister for Lands through Hon Beth Mugo for consideration of settlement on or near Toi Market within Kibera. The first Defendant claims that that is when his church was allotted this

plot to undertake community work. It was argued that an order of eviction and demolition of the defendant's structures would be tantamount to harassment of groups that are eking a living at the Toi Market. The Defendants also filed a notice of preliminary objection dated 2<sup>nd</sup> July, 2010.

Both counsel for the Plaintiff and Defendant filed detailed submissions in support of their respective positions.

During the hearing of the application, counsel for the Defendants did not attend court despite the fact that the date was fixed by consent. However, since the Defendants' counsel had filed written submissions, I will give due consideration to them.

For the application seeking an order of injunction to succeed, the elements to bring to bear are that 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will deal with the case on the balance of convenience. See the oft' cited case of **GIELLA VS CASSMAN BROWN SHOE LTD [1973] EA 358**.

Going by the applicants affidavit in support of the application, there is no doubt that the suit property is registered in the name of the Plaintiff's husband, the late Henry Mutie Mwangela. The plaintiffs are the administrators of the estate of the Late Mwangela and they have annexed a copy of the grant of letters of administration. On the part of the Defendants', it is alleged that Defendants' group of entrepreneurs applied from the Minister of Lands to be allocated the same plot. Of course, an application letter of allotment which was written in November 2006 cannot at all defeat a title which was issued in the name of the Plaintiff's husband in 1999.

As regards the legal capacity of the Plaintiffs to institute the suit, they are the Administrators of the estate of the late Henry Mutie Mwangela by virtue of the letters of administration issued and confirmed on 28<sup>th</sup> September, 2009. It is trite law that the property of the late Mwangela vest in his personal representatives. Accordingly, I am satisfied the Plaintiffs' case meets the threshold of the principles set out in the case of ***Gielle vs Cassman Brown (Supra)*** for granting an order of injunction and it is hereby ordered that:

*“pending the hearing and determination of the suit, the defendants are restrained by way of an injunction either by themselves, their employees, servants, invitees or agents from alienating or dealing in any manner whatsoever or interfering with the plaintiff's ownership. Possession and enjoyment of the property known as LR NO: 209/12320 until the hearing and determination of this suit.*

The Plaintiffs shall have the costs of this application.

**Ruling read and signed this 17<sup>th</sup> day of February, 2012**

**MARTHA KOOME**  
**JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on 24<sup>th</sup> November, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.*