



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MERU

Civil Case No. 1 of 2012

between

ASENATH KARABAI MBURUGU.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
ROSE KINANU MBURUGU.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
STELLA KARAMBU MBURUGU.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
JOY MWARI MBURUGU.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
JOSEPHINE KAGWIRIA MBURUGU.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
CHRISTINE MAITIMBURUGU.....6<sup>TH</sup> PLAINTIFF/APPLICANT  
MERCY KAWIRA MBURUGU.....7<sup>TH</sup> PLAINTIFF/APPLICANT

VERSUS

M'MBURUGU KANAKE.....DEFENDANT/RESPONDENT

**R U L I N G**

The applicant/s plaintiff's filed this action against the defendant/respondent her husband seeking a declaration that L.R. Abogeta/U-Kithangari/529 and Abogeta U-Kithangari/214 are trust and family lands and the plaintiff's rights and occupation of the said suit properties have arisen due to their considerable long time and developments thereon and the land should be transferred to the plaintiffs. That the plaintiffs/applicants brought this application dated 26<sup>th</sup> March, 2012 seeking the following orders:-

- a) *The Hon. Court do issue an interim order for mandatory injunction ordering the respondent/defendant to reinstate the 1<sup>st</sup> plaintiff/applicant in her matrimonial home and in her portion of land being land parcel No.ABOGETA/U-KITHANGARI/1529 pending the hearing and final determination of this suit or until further orders of this court.*
- b) *The Hon. Court do issue an interim order of mandatory injunction ordering the respondent to reinstate 3<sup>rd</sup> and 7<sup>th</sup> plaintiff's/applicants on land parcel No.ABOGETA/U-KITHANGARI/1529 and ABOGETA/U-KITHANGARI/21 pending the hearing and final determination of this suit or until further orders of this court.*

**c) The Hon. Court do issue an order of inhibition restraining any dealings whatsoever with land parcels No.ABOGETA/U-KITHANGARI/1529 and ABOGETA/U-KITHANGARI/214 until this suit is heard and determined or until further orders of this court.**

**d) The Hon. Court do make an interim order of mandatory injunction compelling the respondent to allow the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiff's/applicants to come home pending the hearing and final determination of this suit or until further orders of this court.**

**e) The Hon. Court do make such orders as may meet the ends of justice in this suit.**

**f) Costs of this application be provided for.**

The grounds in support of the application are stated on the face of the application. The application is further supported by annexed supporting affidavit dated 26<sup>th</sup> March, 2012 and the annexures thereto as well as further supporting affidavit dated 21<sup>st</sup> May, 2012. The application on the other hand is opposed. The respondent swore a replying affidavit in opposition of the application dated 10<sup>th</sup> May, 2012 and annexed annexures in support of his averments.

On 5<sup>th</sup> July, 2012 this court heard oral submissions from the learned Advocate for the applicants Miss Mwangi and the learned Counsel for the respondent Mr. Mwirigi.

This court has carefully considered the said submissions. It has also considered the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by court is whether the applicants have met the test for granting mandatory injunction and orders of inhibition.

In the present application, the facts are more or less not in dispute. The 1<sup>st</sup> applicant and the respondent are estranged. Their marriage was blessed with 6 children, the 2<sup>nd</sup>-7<sup>th</sup> applicants in this application. The 1<sup>st</sup> applicant and the respondent got married in 1955 and as the respondent had no land they lived in a camp because of the state of emergency had been declared by the colonial government. That the respondent who was a Police Officer was posted to Kapenguria and on his return the couple were given shelter by a friend called Henry Riria. The 1<sup>st</sup> applicant would be cultivating on her parents parcels of lands to get their food. That when their area became an Adjudication Section in 1960's parcel No. Abogeta/U-Kithangari/665 and Abogeta/U-Kithangari/24 were demarcated for them. The 1<sup>st</sup> applicant and her co-wife put live fences boundaries round the parcels of lands as the respondent was working away from home.

That parcel No. Abogeta/U-Kithangari/665 had been registered in the name of M'Ingingo M'Imanyara, a cousin to the respondent to hold the same in trust for the respondent after the respondent had refused to pay the money for it which his said cousin paid for him. The 1<sup>st</sup> applicant established her home on Abogeta/u-Kithangari/665 and has since been utilizing the same. That following the death of M'Ingingo 1<sup>st</sup> applicant's son pursued administration of the estate of the deceased and it was agreed that he would get 3 acres out of the said land hence the land was subdivided into two portions becoming Abogeta/U-Kithangari/1528 and Abogeta/U-Kithangari/1529. The 1<sup>st</sup> applicant son got Abogeta/U-Kithangari/1528 whereas Abogeta/U-Kithangari/1529 was registered in the name of the respondent for himself, his children and 1<sup>st</sup> applicant. That in April, 2010 the children of the respondent's 1<sup>st</sup> wife who had left in the year 1972 came back and told the respondent that they wanted to cut down all the trees on parcel No. Abogeta/U-Kithangari/1529 and build for him a stone house abroad. That the children also brought to the respondent several gifts. The 1<sup>st</sup> applicant resisted the cutting down of the trees and it is then the respondent chased 1<sup>st</sup> applicant away while armed with bow and arrows. That the 1<sup>st</sup> respondent subsequently blocked all the doors and windows to the 1<sup>st</sup> applicant's house and she could not gain entry. The 1<sup>st</sup> applicant personal effects and those of her daughters who she was living with were also locked inside her house. That the 1<sup>st</sup> applicant's efforts to have the premises opened have been met with force by the respondent. That efforts to involve elders, chief, the District Officers and District

Commissioners have been unsuccessful. The 1<sup>st</sup> applicant has been given shelter by one of her married daughters which is against the Meru customs according to the 1<sup>st</sup> applicant. The 1<sup>st</sup> applicant averred that she has 8 children and apart from the 2 daughters, who are married all other children have been living with her. That they were all chased from home and their belongings locked in her home and all have nowhere to call home.

The respondent in his replying affidavit stated that he is married to two wives. That from his first wife he has 4 children and from 2<sup>nd</sup> wife he has 9 children. That on 20<sup>th</sup> March, 2002 he transferred Abogeta/U-Kithangari/1528 measuring 1.21 hectares to his son Adrian Kinoti Mburugu son of his 2<sup>nd</sup> wife leaving him with Abogeta/U-Kithangari/1529 measuring 1.73 hectares and Abogeta/U-Kithangari/214 measuring 1.82 hectares. That some differences arose on how the properties were to be shared. The matter was arbitrated severally thereafter before Chief but the respondent fell sick leading to delay in how the properties were to be shared. That when the respondent was ready to share the land he was shocked to find that the properties were inhibited by court's order issued on 26<sup>th</sup> May, 2010 which Order the respondent managed to have set aside. The respondent on the other had denied having chased the 1<sup>st</sup> applicant from the matrimonial home. The respondent averred that he is prepared to allow the applicants back to the land in a portion of ½ an acre that he will show them next to the portion of one of her sons, Andriano Kinoti but the inhibition has to be lifted first. The respondent has further deponed that he will not allow the 1<sup>st</sup> applicant to her house, which he had built for her as she is too abusive, violent, disrespectful and as she does not cook for the respondent.

The 1<sup>st</sup> applicant in response to respondent's affidavit she stated that the 1<sup>st</sup> wife and her children left in 1972 for another piece of land at Timau where they live in a permanent stone house. The 1<sup>st</sup> applicant averred that she is the one who has all the time taken care of the respondent. The 1<sup>st</sup> applicant denied that she has been abusive or violent to the respondent. She denied that they have agreed on mode of distribution. The Applicant further averred her house is outside the ½ acre the respondent is offering the 1<sup>st</sup> applicant and she is not agreeable to re-locate as she has all along been utilizing Abogeta/U-Kithangari/1529. The 1<sup>st</sup> applicant stated that she is agreeable to each of her children getting land and the two wives but before then she be allowed to go back to her home where she has her personal belongings. The 1<sup>st</sup> applicant averred that the respondent lives in a separate house which was built for him by 1<sup>st</sup> applicant's son. She also averred that Nkubu case was struck out as it was improperly filed out of ignorance. The 1<sup>st</sup> applicant averred that she has no issue with the children of 1<sup>st</sup> wife and it is within their right and duty to cater for their father, and more so as they are well endowed financially and all she is praying for is for her rights to be recognized.

The respondent in his supplementary affidavit stated that he had decided to share his land amongst his three sons each to get 3 acres and each wife ½ an acre to stay with their daughters. On land at Timau, the respondent stated that the same was bought by his daughter Faith Tirindi Mburugu, who settled her mother there.

In an application for mandatory injunction of an interlocutory nature the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy it is granted on the basis of evidence and sound legal principles. In dealing with an application of this nature care must be exercised to obviate infringing the jurisdiction of the trial Judge.

The test for granting interlocutory injunctions are set out in the celebrated case of **GIELLA –VS- CASSMAN BROWN & CO.(1973) E.A. 358** in case the court of Appeal for Eastern Africa set the conditions as follows:-

***1. Firstly, the applicant must show he has a prima facie case with reasonable probability of ultimately succeeding upon trial.***

***2. Secondly, that in the event that the injunction be refused he stands to suffer loss or damage of such a nature and magnitude that damage will not adequately compensate him.***

**3. Thirdly, that the comparative mischief likely to result to him should the injunction be refused outweighs that which result to the opposite party should it be granted.**

From the evidence on record, there is no dispute that the applicants were in occupation of the house on the suit premises by the time she and her children were chased away by the respondent. The 1<sup>st</sup> applicants averments that she was occupying the house only with her co-applicants and that the respondent has his own separate house built for him by his son, of 2<sup>nd</sup> wife has not been controverted. Further the averment by the 1<sup>st</sup> applicant that the land was acquired by the couple during the time of their marriage has not been controverted also.

Equally it has not been controverted that the personal effects of the applicants are locked in the 1<sup>st</sup> applicant's house by the respondent and that the respondent has denied the applicants access to their house. Further there is no dispute the 1<sup>st</sup> applicants have no other place they can call home I find therefore the applicants have demonstrated that they have interest in the suit land, even if it is right to occupy and use the suit land.

Under Article 40(2),(a), of the Constitution of Kenya 2010, it is provided:-

***“(2) Parliament shall not enact a law that permits the State or any person—***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;”***

Further the Court of Appeal in the case of HELLEN NJERI MUREITHI –VS-ANGELA NYAWIRA NDIUNI & ANOTHER Civil Application No.NAI 150 of 2008(UR) 96/2008 granted an injunction to a party when she was not a registered owner but where the court found that she had an interest in the land.

In this case, it involves husband and wife and it is alleged the land was acquired during the marriage, as when the couple got married the respondent had no land and they had to live in a camp because of the state of emergency which had been declared by the colonial government. The suit lands were acquired during the marriage of the parties.

Under Article 45(3) of the Constitution of Kenya,2010 it is provided:-

***“(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

In this case there is no denial that the suit properties were acquired during the marriage of the 1<sup>st</sup> applicant and respondent, consequently as per the above-mentioned Article the couple herein are entitled to equal rights at the time of the marriage, during the marriage and the dissolution of the marriage. The respondent has no better claim than the 1<sup>st</sup> applicant and as such he did not have right to chase the 1<sup>st</sup> applicant and her children. Further he did not have any right to deny the 1<sup>st</sup> applicant and her children the right to occupy and use the suit premises. The respondent was wrong in chasing the applicant and her children on grounds that she was violent and does not cook for him, a fact which was challenged by the 1<sup>st</sup> applicant.

I therefore find that the applicants have established that they have a prima facie case with a reasonable probability of ultimate succeeding upon the trial.

The 1<sup>st</sup> applicant averred that she has been forced to seek refuge from her son-in-law which is against Meru customs. That she is undergoing a lot of mental anguish by living with her son-in-law which cannot be adequately compensated by way of damages if the injunction orders are not granted. I find that it is against the Meru customs for mother-in-law to be living at her son-in-law, and the mental anguish the applicant has undergone cannot be adequately compensated by damages and the application ought to be granted. I also find the balance of convenience tilts in favour of the applicants as the respondent has his

own separate house and does not live in the 1<sup>st</sup> applicant's house. The 2<sup>nd</sup> 7<sup>th</sup> applicants have nowhere to call home other than the home of 1<sup>st</sup> applicant. The respondents reason that he would not like the application granted as he intends to distribute the land is not an issue before me nor can it be a basis to allow him chase his wife and his children from their home. This is an application for reinstatement of the applicant back to their home and not for distribution of the respondent's land.

I am therefore satisfied that the applicants have met the conditions for granting the orders sought in this application. I therefore grant the following orders:-

- a) *An order of mandatory injunction be and is hereby issued ordering the respondent/defendant to reinstate the 1<sup>st</sup> plaintiff/applicant in her matrimonial home and in her portion of land being parcel No.Abogeta/U-Kithangari/1529 pending the hearing and final determination of this suit.*
- b) *An order of mandatory injunction be and is hereby issued ordering the respondent to reinstate 3<sup>rd</sup> to 7<sup>th</sup> plaintiffs/applicants on land parcel No.Abogeta/U-Kithangari/1529 and Abogeta U-Kithangari/214 pending the hearing and determination of this suit.*
- c) *An order of inhibition be and is hereby issued compelling the respondent to allow 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs/applicants to go home pending hearing and final determination of this suit.*
- d) *An order of mandatory injunction be and is hereby issued compelling the respondent to allow 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiff's/applicants to go home pending hearing and final determination of this suit.*
- e) *Costs of the application to the applicants.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2012.**

**J. A. MAKAU**

**JUDGE**

**Delivered in open court presence of:**

- 1. Miss Mwangi Advocate for applicants**
- 2. Mr. Mwirigi Advocate for the respondent**

**J. A. MAKAU**

**JUDGE**