



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

CIVIL CASE 95 OF 2012

**JOHN KABERIA
LICHORO.....APPLICANT/PLAINTIFF**

VERSUS

M'MWERERIA M'ITHIRIA1ST RESPONDENT

GERVASIO KABERIA2ND RESPONDENT

**DIVISIONAL LAND ADJUDICATION OFFICER
TIGANIA EAST DISTRICT.....3RD
RESPONDENT**

**THE ATTORNEY GENERAL.....4TH
RESPONDENT**

R U L I N G

The applicant filed this suit on 18th May, 2012 contemporaneous with the filing of the suit, the applicant filed a notice of motion pursuant to the provisions of Order 40 Rule 1 and 2 of Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act seeking to be granted orders of injunction to restrain the 1st, 2nd and 3rd defendants, their agents, servants and anyone claiming under them from interfering in any way with land parcel No.3418 later changed to read parcel No.819 Akaiga Land Adjudication Section.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed affidavit of the applicant. The application is opposed. The respondent swore replying affidavit in opposition and filed grounds of opposition.

When the application came up for hearing this court heard oral submissions made by Mr. Mburugu, learned Advocate for the applicant and Mr. Karuti, learned Advocate for the 1st and 2nd respondents. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the applicant has met the test for granting an interlocutory injunction.

Under Order 40 Rule 1 and 2 of Civil Procedure Rules this court is required, in exercise of its powers to consider whether property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit before granting interlocutory injunction orders.

This court is further required to take into considerations the principles set out for granting an injunction as

set out in the often cited case of **GIELLA –V-CASSMAN BROWN & CO.(1973) E.A 258** which are as follows:-

- 1. Firstly an applicant must show he has a prima facie case with a reasonable probability of ultimately succeeding upon trial.***
- 2. Secondly, that in the event that the injunction be refused he stands to suffer loss and damage of such a nature and magnitude that damage will not adequately compensate him.***
- 3. Thirdly, the comparative mischief likely to result to him should injunction be refused outweighs that which result to opposite party should it be granted.***

In the present application, the facts are more or less not in dispute. The applicant was issued with consent of the Land Adjudication to file this suit on 26th April, 2012. That the Divisional Land Adjudication Officer, Tigania Central through a letter dated 10/2/2010 confirmed Plot No.3418 comprising of 1.5 acres at A.Kaiga Adjudication Section is recorded in the name of JOHN KABERIA LICHORO, the applicant. That the applicant was in 1997 shown the said plot No.3418 and has since then been in occupation and has developed the same by planting miraa, bananas and other varieties of trees. That in October, 2011 the applicant learnt from his brother Cypriano Mugambi Lichoro that the respondents had lodged complaint with Land Adjudication Officer over his land. The applicant and the respondents were summoned by the Land Adjudication Officer twice but the respondents did not attend. The applicant meanwhile had instructed his brother to replace his boundary hedge with barbed wire fence. That as applicant's brother was replacing the boundary hedge with posts and barbed wire the respondents showed up and enquired from him why he was replacing hedge with barbed wire fence.

The respondents subsequently laid a complaint with police leading to the arrest of the applicant's brother. The applicant's brother was thereafter charged with malicious damage to property in Tigania PMCCR. NO.1245 of 2011. That during the hearing of the Criminal Case the applicant learnt that the Divisional Land Adjudication Officer had unilaterally asked the Demarcation Officer Akaiga Adjudication Section through a letter dated 27th Oct/2011 to show 1st respondent his land on the site where the applicant's shamba lay and instructed him to take applicant's land elsewhere.

On the other hand the respondent averred that plot 819 Akaiga Adjudication Section was demarcated in 1960's and was never at any one time number 3418 as alleged by the applicant. That parcel No.3418 was never changed to Number 819. The 1st respondent averred that since 1967 he has been in sole and exclusive occupation and possession of Plot No.819. That all developments on the suit land are his and he has been harvesting the bananas and miraa on the said land all the time. The 1st respondent further stated that he is not aware of existence of the applicant's parcel Number 3418 in Akaiga Adjudication Section.

In the instant application, the Divisional Land Adjudication Officer, Tigania Central Division through his letter dated 10th February, 2010 confirmed that Plot No.3418 of 1.50 acres Akaiga Adjudication Section is recorded in the name of the applicant. This has not been controverted by the respondents. The respondents do not claim the said plot. The applicant claimed to have been shown the plot No.3418 in 1997 and has since been in occupation. That on 15/10/2011 the applicant was replacing his boundary when the respondents interfered with the applicant's replacement of the boundary leading to applicant's brother being charged with malicious damage to property. Applicant averred that during the hearing of that criminal case he discovered that the demarcation Officer, Akaiga Adjudication Section by a letter dated 27th October, 2011 had been directed to show 1st respondent his land on the site where the applicant's land lay and take applicant's land to another place. This has not been controverted by the respondents. Instead the respondents have stated that their land was demarcated in 1960's as number 819 Akaiga Adjudication Section and that it was never number 3418. The respondents denied that there was change of numbers from 3418 to 819. The respondents' Counsel in his submissions stated that plot No.3418 and 819 are separate and distinct parcels of lands.

In view of the above I find that the applicant has demonstrated that he has a prima facie case with a

reasonable probability of ultimately succeeding upon trial.

The applicant has been on suit property since 1997. He has developed the same. He has bananas and miraa on the land. The disputed land is what the applicant calls his home and if injunction is refused he would be rendered landless and lose a lot in terms of sentimental attachment and his developments. I find if injunction is refused he would suffer loss or damage of such a nature and magnitude that damage will not adequately compensate him.

Further if injunction is refused the comparative mischief likely to result to the applicant outweighs that which will result to the respondents. The respondents have stated that parcel 3418 and 819 are distinct and different parcels of lands. The court therefore takes it that each of the parties is on his own parcel of land which is different from that of the other party.

In the circumstances the application is allowed and I proceed to make the following orders:-

- 1. An order of temporary injunction be and is hereby issued restraining the 1st and 2nd defendants, their agents, servants and anyone claiming under them from entering or in any way interfering with land parcel No.3418 Akaiga Land Adjudication Section.***
- 2. Costs of this application to the applicant.***

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF SEPTEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court presence of:

- 1. Mr. Mburugu for the applicant**
- 2. Mr. Karuti for the respondent**

J. A. MAKAU
JUDGE