



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Succession Cause 987 of 2009**

**IN THE MATTER OF THE ESTATE OF MUTISO MALINDA (DECEASED)**

**NYAMAI MUTISO MALINDA.....APPLICANT**

**VERSUS**

**KIMEU KIOKO.....RESPONDENT**

**RULING**

1. The application before the Court is the Chambers Summons Application dated 28<sup>th</sup> March, 2011 (“Application”). It is brought as a ‘Miscellaneous Application’ under Machakos High Court Succession Cause No. 987 of 2009 (In the Matter of the Estate of Mutiso Malinda). It is expressed to be brought under Sections 3A of the Civil Procedure Act and Order 40, rules 1, 2, and 4 the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the Supporting Affidavit of Nyamai Mutiso Malinda (“Applicant”) who styles himself as the Legal Representative of the estate of Mutiso Malinda (Deceased) sworn on the same day and the grounds stated on the face of the Application.

2. In the main, the Application seeks one order:

THAT the respondent be restrained by an order of injunction either by himself, his agents, servants, sons, daughters and anybody claiming under him from entering and occupying, using, subletting or otherwise from interfering with the Appellant (sic) use, renting, occupation, sale of plot No. (4) Katangi market pending the hearing and determination of this application and the suit herein.

3. The Applicant’s case and its theory seems straightforward: He is bringing the application as the legal representative in the estate of Mutiso Malinda. Grant of Letters of Administration with respect to the estate was issued by this Court on 11<sup>th</sup> May, 2010. There is no indication or evidence that the grant has been confirmed. The Applicant complains, however, that the Respondent, Kimeu Kioko is in occupation of Plot(s) No. 4 (A) and (B) Katangi Market (“Suit Premises”) but that he has refused to pay rent or vacate the Suit Premises despite demands that he does so. There is a further claim that the Respondent is committing acts of waste on the property. The legal claim, then, is that the Respondent’s continued occupation of the Suit Premises without paying rent is unlawful. An injunction should then issue to prevent his continued unlawful occupation.

4. The Respondent filed a Replying Affidavit. In it, he refutes the central thrust of the Applicant’s case: that the Suit Premises belong to the estate of the deceased. Instead, he says that the property belongs to his father, Kioko Malinda. He has annexed two documents as proof that his version is the true one. First, he has annexed a letter from the County Council of Masaku which was written on 14<sup>th</sup> July, 2012 to “certify that ... plot No. 4 of size 30” X 100” (sic) in Katangi Market, Katangi location is registered in the

name of Kioko Malinda according to the records held” by the County Council. In addition, the Respondent attached a copy of the form P&A5 filed in the Succession Cause which he says, did not list the Suit Premises as belonging to the Deceased. I should note, at this juncture, that the original form in the Court file has filled out in blue ink under the heading “Assets” “Plot No. 4(a) and (b) Katangi Market.” I note that the rest of the form is filled out on a type-writer which raises questions whether the written part was added after this application was filed. I do not purport to make any conclusive findings on this at this point. I would, however, point out that the photocopied form annexed to the Respondent’s affidavit appears to be a copy of an original which was not tampered with before photocopying. The dotted lines are still quite visible indicating little evidence that the written words were whited-out or rubbed before photocopying. As I indicate below, this poses a problem for the Applicant.

5. For purposes of this Application, and in order to avoid much technical duels, I have elected to overlook possible potential deficiencies in the form and procedures of this Application. There is one, however, which simply cannot be ignored. The Application is seeking an injunction pending the hearing of the present Application and “the suit herein.” It is not clear what suit the Applicant is referring to. I presume it is the Succession Cause. The only problem is that the Respondent is not privy to that suit and therefore it is not clear that the present Application can generate interlocutory orders in the fashion envisaged by the Applicant. There seems to be some serious procedural problems here.

6. The legal principles for granting interlocutory injunctions are now well settled in Kenya. 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.

7. Has the Applicant shown that he is likely to prevail on the merits? I do not think so. First, as I have pointed out, there are some procedural infirmities in the case. Even if I were to overlook those, for the Applicant to succeed in his case, he must demonstrate that he has *prima facie* evidence of ownership of the Suit Premises. Yet, the Applicant presents no evidence whatsoever that the Suit Premises were part of the estate of the Deceased. The only suggestive evidence on record is the P&A5 form which, as I have indicated above, is quite dubious. It cannot form a basis for *prima facie* evidence of ownership of the Suit Premises. In addition, the Respondent has annexed correspondence between the Respondent’s father’s advocates and the Applicant on the subject matter which shows that in a dispute between the Applicant and the Respondent’s father, a demand letter had been written by the latter’s advocates asserting ownership rights of the latter to the Suit Premises eight months before the filing of the present suit. There is no evidence that the Applicant ever responded to that assertion of ownership. And, of course, the greatest demonstration of the *unlikelihood* of success of the application by the Applicant is the likelihood that the Respondent will be able to demonstrate that, in fact, the Suit Premises do not belong to the Deceased; they, instead, belong to Kioko Malinda – the Respondent’s father. That demonstration is provided in affidavit evidence vide a copy of the letter from the County Council of Masaku referred to above.

8. I would be entitled to end the analysis here. A finding that there is no likelihood of succeeding on merit renders an application for interlocutory relief singularly unmeritorious. Still, applying the second prong of *Giella* to the case at hand only confirms the outcome. The Applicant has really demonstrated no imminent or irreparable harm which would occur if the relief is not granted. He has vaguely alluded to “waste” without providing specifics. If that is so, it is not clear why he waited for more than 6.5 years before seeking an injunction. More importantly, the Applicant has quantified the loss he is suffering as a result of what he sees as the injury: rents at Kshs. 2,500/=. It seems, therefore, that the loss is quantifiable. Where, then, is the irreparability of the harm?

9. Were I in doubt, *Giella* would have obligated me to balance the equities of the case. As I have demonstrated, I am not in doubt at all. But if I were, I would still hold that the equities here favor the Respondent. By the Applicant’s own admission, he has not been in possession of the Suit Premises for

more than six years; he can also specifically measure his monetary losses. If the Applicant's theory is upheld, however, it would require an injunction which is more in the mandatory mode: it will require the Respondent or anyone claiming under him to move out of possession.

10. Consequently, I will proceed to dismiss the Application dated 28<sup>th</sup> March, 2012 with costs. Any subsisting orders made pursuant to that Application are hereby lifted.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 17TH day of OCTOBER 2012.**

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